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Lords of the Manor: Fighting California Slumlords with Private Multi-Plaintiff Implied Warranty of Habitability Litigation.

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LORDS OF THE MANOR:[1] FIGHTING CALIFORNIA SLUMLORDS WITH PRIVATE MULTI-PLAINTIFF IMPLIED WARRANTY OF HABITABILITY LITIGATION

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1. Attorney Benjamin Ramm of BASTA, Inc. (BASTA), an organization that advocates for tenants' rights, used the term "landlords of the manor" to describe a certain class of landlords he encounters who treat their tenants as if they are servants there at the landlords' sufferance. Telephone Interview with Benjamin Ramm, Attorney, BASTA (Nov. 11, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

* California Western School of Law, Candidate for Juris Doctorate, April 2011. I would like to thank Benjamin Ramm, Eric Castelblanco, and Diane Silva-Martinez for being so generous with their time, and my advisor, Dr. Donald Smythe, for his advice, support, and encouragement. I would also like to thank all of my friends for their patience over the last two years, especially Barakat Alao, for all of her help through both the writing process and law school generally. Finally, I'd like to thank my mom and brother for their love and support through all of the ups and downs of law school. I hope my Note will encourage practitioners to file large-scale implied warranty of habitability suits, because everyone deserves a clean, safe place to live.

I. INTRODUCTION

It started when the police went out to a home to find out why a thirteen-year-old girl had not gone to school in a few days.[2] A short time later, the inspectors paid a visit. Though the home was located in a generally temperate climate, it was cold that early morning before Thanksgiving, too cold for an eight-year-old boy to be standing outside under the running water of a hose, but that is exactly what the inspectors found.[3] The reason for girl's regular truancy soon became clear. "They didn't have any shower or bathing facilities or plumbing where she lived," said Diane Silva-Martinez, Chief Code Enforcement Deputy for San Diego City Attorney's Office.[4] "During the time of the month when she had her period, she wouldn't go to school."[5] The bottom of the two-story duplex had been gutted for renovations, and the single mother and three children had been without plumbing for months.[6] They were cooking with a propane tank outside. The landlord, who lived in La Jolla, one of the nicest areas of San Diego, charged the family rent through the entire renovation.[7]

When a single family lives in unhealthy conditions, those conditions affect the family members' productivity and success at work and school and greatly increase the likelihood they will develop an illness ranging

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2. Interview with Diane Silva-Martinez, Chief Code Enforcement Deputy, San Diego City Attorney's Office, in San Diego, Cal. (Sept. 23, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (providing insight on some of the fact patterns that the City Attorney's Office sees in housing violation cases). According to Silva-Martinez, it is common for the San Diego City Attorney's Office to receive initial notice of the housing violation from the police during their routine investigations, but the City Attorney's Office also works with non-profit groups who do outreach to find violators and educate tenants on how to approach the violation. *Id.*

3. *Id.* (detailing the housing inspector's discovery of violations after receiving notification of the violation from the San Diego police).

4. *Id.*

5. *Id.* (explaining the reasoning behind the police's initial investigation).

6. *Id.* Like many people living in substandard conditions, this family had not contacted city officials about the violations. *Id.* Silva-Martinez said there are many reasons tenants abstain from complaining, and chief among the reasons is that the tenants are often in the country illegally and fear deportation and retaliation. *Id.*

7. Interview with Diane Silva-Martinez, Chief Code Enforcement Deputy, San Diego City Attorney's Office, in San Diego, Cal. (Sept. 23, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (contrasting the level of income of the tenant against that of the landlord). The city may pursue civil or criminal remedies against this type of violator. *Id.* To make the determination, Silva-Martinez considers many factors, including how much money the violator has because the punishment for the violation must be high enough to properly punish the violator and deter future violations. *Id.*

from asthma to depression.[8] A single family living in unhealthy conditions can have a small but real impact on the health of the community. When dozens or possibly hundreds of people are living in unhealthy conditions, the impact on the community can be devastating. Large-scale slums are breeding grounds for disease and crime, and the children who live there will face obstacles, sometimes insurmountable, to their academic success, increasing the likelihood that they will not be able to break out of the cycle of poverty. Additionally, the destructive effects of slum housing reach beyond the unfortunate tenants to the community at large. "[R]ats, hantavirus, staph infections, and other infectious diseases do not respect the boundaries of an apartment building . . . ."[9] Because these tenants are poor, the cost of the healthcare that is necessary as a direct result of their living conditions is usually passed on to taxpayers.[10] The economic ripples are felt even in the education system, where schools lose about $25 each day a child is absent.[11]

This Note will begin by briefly addressing the common law origins of the implied warranty of habitability, focusing on the case law in California, and then examine the parallel development of the health and safety housing code. The second part of this Note will discuss the successes and challenges of public enforcement of housing code violations as a means of ensuring healthy living environments. Municipal civil remedies, including both administrative fines and litigation, will be evaluated. This Note will also examine the use of criminal litigation to deter large-scale and repeat violators. While these various methods of municipal code enforcement are absolutely essential in maintaining habitable housing for the poor, they are insufficient. The third part of this Note will look at private enforcement of the implied warranty of habitability and will evaluate the pros and cons of using both class action lawsuits and mass tort suits to

8. THE SHAME OF THE CITY: SLUM HOUSING AND THE CRITICAL THREAT TO THE HEALTH OF L.A. CHILDREN AND FAMILIES 10 (Albert Lowe & Gilda Hass eds., April 2007) (illustrating the potential long-term impact that slum housing can have on a tenant's health). The slum housing conditions that can lead to asthma and respiratory problems include dust mites found in old and unkempt carpets, mildew and mold from inadequate weatherproofing, leaking pipes, inadequate ventilation, and holes in the walls or the roof. *Id.* In addition to asthma, these violations can cause eye problems, chronic bronchitis, chronic sinusitis, chronic pneumonia, and allergic rhinitis. *Id.* Depression can stem from the chronic health problems that arise as a result of uncorrected housing conditions. *Id.* Other health maladies that parallel living in slum housing include lead poisoning, viruses, infections, fungal infections and skin rashes, chronic colds, and staph infections. *Id.*

9. *Id.* at 21 (Albert Lowe & Gilda Hass eds., April 2007) (illustrating the ill effects of living in slum housing).

10. *Id.* (showing how the cost of slum housing is distributed among taxpayers).

11. *Id.* Additionally, it costs parents of ill children an average of $75 for each day that they miss work to tend to their sick children. *Id.*

deter large-scale, repeat-offending landlords and to compensate the victim tenants. Habitable housing is critical to the health of a community, but government agencies lack the resources necessary for complete enforcement. Large-scale private prosecution in any form is viable, necessary, and often the only alternative that approaches proactive enforcement.

II. HISTORICAL DEVELOPMENT

When the implied warranty of habitability is invoked today, it is most often shielding the poor. However, it began its life as a protection for the middle and upper classes.

A. *Common Law History*

In the summer of 1890, when Warren Hobbs rented a house in Swampscott, Massachusetts from Sarah Ingalls for $500, it was well established law that a lease for an unfurnished building included no implied agreement that the dwelling would be habitable.[12] But Hobbs, possibly in the area vacationing, as Swampscott was a resort town and destination for the wealthy in the late 1800s,[13] had rented a furnished home, which he expected to be appointed with beds, curtains, and other items, all in good repair.[14] Instead, Hobbs found a dwelling so infested with bugs that he refused to pay, so Ingalls sued.[15] The only issue on appeal was whether habitability was implied in the lease; the trial court's determination that it was implied was affirmed.[16] The appellate court found that "[a]n impor-

12. Ingalls v. Hobbs, 31 N.E. 286, 286 (Mass. 1892) (providing the relevant housing law of Massachusetts in 1890). While the law states there was no implied agreement that an unfurnished dwelling house is fit for habitation at the time, the issue the court was to address was whether there was an implied agreement that a furnished home being leased for immediate use had an implied agreement for fitness. *Id.* According to the court, unless there exists an element of fraud or a covenant, a lessee or a purchaser of a home takes the home as it is. *Id.* The court recognized that each lessee or purchaser must determine whether the building will meet their specific needs, and that often the lessee or purchaser makes repairs or changes to the property to make the property suitable for their purposes. *Id.* The court, however, distinguished that scenario from the facts of this case, and held that "a different rule should apply to one who [rents] a furnished room, or a furnished house, for a few days, or a few weeks or months." *Id.*

13. Town of Swampscott Massachusetts, http://www.town.swampscott.ma.us/Public_Documents/SwampscottMA_WebDocs/about (last visited June 16, 2010) (describing the history of Swampsott, Mssachusetts).

14. *Ingalls*, 31 N.E. at 286 (Mass. 1892) (providing the facts that led Hobbs to believe that he would be renting a habitable furnished home).

15. *Id.*

16. *Id.* (holding that there is an implied warranty of habitability when one leases a furnished home for a specific period of time). The court emphasized that the defendant

tant part of what the hirer pays for is the opportunity to enjoy [a furnished dwelling] without delay . . . [T]he doctrine caveat emptor, which is ordinarily applicable to a lessee of real estate, would often work injustice if applied to cases of this kind."[17]

It was nearly seventy years later, when four young University of Wisconsin students rented a home for the school year from Leon Perssion, that the implied warranty of habitability was expanded to include unfurnished dwellings.[18] Though the home was filthy when the students entered the agreement, Perssion agreed to clean, fix, paint, and furnish the home before the start of the next school year.[19] When the four young men arrived at the beginning of September, the house was still filthy and unfurnished, so they had a city building inspector inspect the house.[20] The building code violations that were found included problems with the electrical wiring, the kitchen and bathroom plumbing, the furnace, and the handrail on the stairs.[21] Pines and his friends moved out of the house only five days after moving in and sued to get their $700 deposit back.[22] Forsaking the ancient doctrine of independent covenants,[23] the Wisconsin

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did not enter into the contract to merely lease any piece of property, but was looking to lease a property for an "immediate use of a particular kind." *Id.*

17. *Id.* The court recognized that even the law of England acknowledged the distinction between leasing a furnished home and an unfurnished home. *Id.* at 287. In fact, English law held that when a furnished home is leased for a short period of time, there is an implied warranty that the house will be "in proper condition for immediate occupation as a dwelling." *Id.*

18. Pines v. Perssion, 111 N.W.2d 409, 410 (Wis. 1961).

19. *Id.* (providing the factual background that led the students to believe that they were going to move into a clean house). There was contradictory testimony regarding whether the defendant promised to begin working on the house before or after he received the deposit and signed lease. *Id.* However, both parties stipulated that the lease period was to begin on September 1, 1959. *Id.*

20. *Id.* at 411. It is noteworthy that in *Pines*, considered the first common law application of the implied warranty of habitability to an unfurnished dwelling, the violation of statutory building codes was already relevant enough to be mentioned in the decision. *Id.* at 412. This is an early example of the very close relationship between housing code enforcement and the implied warranty of habitability.

21. *Id.* (listing the various housing code violations that were found at the residence that Perssion leased).

22. *Id.* at (describing the nature of the suit). Pines also sued to be reimbursed $137.76 for the labor that he and the other students did in an attempt to make the house habitable. *Id.* at 410.

23. In the Middle Ages at the origin of the leasehold, the tenant's promise to pay rent was considered independent of the landlord's promise to make repairs. Green v. Superior Court, 517 P.2d 1168, 1172 (Cal. 1974). Because the primary consideration for the rent was the furnishing of the land, the landlord's breach of a promise to repair was incidental and "was reasonably considered insufficient to justify the tenant's refusal to pay rent, the tenant's main obligation under the lease." *Id.* at 1180. In the Middle Ages, "the land itself was by far the most important element of a lease transaction." *Id.* at 1172.

Supreme Court held that the "[r]espondents' covenant to pay rent and appellant's covenant to provide habitable housing were mutually dependant, and thus a breach of the latter by appellant relieved respondents of any liability under the former."[24] The students were freed from their lease not based on any explicit terms of the contract, but based on the expansion of a decades-old implied warranty of habitability.[25] *Pines* set off a legal trend that would sweep the country in the following two decades.

California courts first examined the implied warranty of habitability in 1972 in the Court of Appeal case *Hinson v. Delis*,[26] but it is *Green v. Superior Court* that is generally cited as the origin of California's implied warranty of habitability law.[27] Jack Sumski sued his tenant, Roger Green, in an unlawful detainer action because Green owed Sumski $300 in back rent, and Green invoked the implied warranty of habitability.[28] Green's San Francisco apartment was in such ill-repair, the city's public works department had scheduled a condemnation hearing.[29] The bath-

24. *Pines*, 111 N.W.2d at 413.

25. *Id.* Of course, Pines and his fellow plaintiffs had argued that the condition of the house was in violation of an explicit term of their lease. *Id.* A clause in the lease called for Perssion to include "furniture to furnish said house suitable for student housing." *Id.* at 411. The court summarily dismissed this argument. *Id.* at 412. "The phrase 'suitable for student housing' refers to the 'furniture' to be furnished and not to the general condition of the house." *Id.* It is not entirely clear why the court did not resolve the case simply by applying the well-accepted implied warranty of habitability of a furnished dwelling, except perhaps because the house, though contracted as a furnished dwelling, was unfurnished when the students moved in. *See id.* at 411.

26. Hinson v. Delis, 102 Cal. Rptr. 661 (Ct. App. 1972) (holding that while an implied warranty of habitability existed in the lease agreement, the tenant must give the landlord notice of defects in the property and must allow the landlord a reasonable time to repair the defects). *Hinson* was overruled on a single point by *Knight v. Hallsthammar*. *See* Knight v. Hallsthammar, 623 P.2d 268, 273 (1981). *Hallsthammar* held, contrary to *Hinson*, that a landlord does not need to be allowed reasonable time to make the necessary repairs. *Hallsthammer*, 623 P.2d at 273 n.7; Mark S. Dennison, *Cause of Action for Breach of Implied Warranty of Habitability in Residential Lease*, 25 CAUSES OF ACTION 2d 493, § 10 (2009). In so holding, *Hallstammar* placed California squarely in the minority, as most U.S. jurisdictions do grant landlords some period of time to make repairs. Mark S. Dennison, *Cause of Action for Breach of Implied Warranty of Habitability in Residential Lease*, 25 CAUSES OF ACTION 2d 493, § 10 (2009). Furthermore, the majority of jurisdictions hold that before a tenant can demand indemnification for the cost of making repairs he makes himself, he must have previously notified the landlord of the defect and have allowed the landlord an opportunity to make the repair. *Id.*

27. Green v. Superior Court, 517 P.2d 1168 (Cal. 1974). The court expressly considered the *Hinson* court's decision to determine whether a tenant may assert the defense of breach of an implied warranty in an action for unlawful detainer. *Id.* at 1170.

28. *Id.* at 1170 (describing the factual background of the lawsuit).

29. *Id.* (outlining a portion of the evidence that the defendants proffered to prove a breach of an implied warranty of habitability).

room ceiling was collapsing, the dwelling was infested with rats and cockroaches, several rooms were without heat, and there was an illegally installed stove.[30] Despite the fact that Green had already moved out of the dilapidated apartment by the time the case made its way to the state supreme court,[31] the court agreed to hear the case. The court officially adopted the implied warranty of habitability and held that the landlord's breach of the warranty could be argued as a defense to an unlawful detainer action.[32] By the time the *Green* decision was written, at least five other jurisdictions had adopted the implied warranty of habitability.[33] Today, nearly all states provide some legal assurance a rented dwelling will be habitable.

> Only a small percentage of states have failed to recognize the implied warranty of habitability as a common-law doctrine. . . . Even in states where the courts have failed to recognize the implied warranty, several do have statutory protections for residential tenants in the event that the landlord fails to maintain the premises in a fit and habitable condition.[34]

B. *Statutory History*

Parallel to the common law development of the implied warranty of habitability were a variety of statutory schemes designed to accomplish essentially the same goal—ensuring a minimum standard of housing offered to the public. Comprehensive housing codes started developing in the mid-1800s in the United States, but proliferated rapidly in the 1960s, around the same time numerous jurisdictions started adopting the implied warranty of habitability.[35]

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30. *Id.* (delineating the various violations of the house).

31. *Id.* at 1171 (outlining the prior history of the case).

32. *Green*, 517 P.2d at 1182 (Cal. 1974). Since the implied warranty of habitability is often invoked as a defense by the tenant who has not paid his rent, this was a crucial decision in the effectiveness of the warranty.

33. *Id.* at 1169.

34. Mark S. Dennison, *Cause of Action for Breach of Implied Warranty of Habitability in Residential Lease*, 25 CAUSES OF ACTION 2d 493, § 3 (2009) (providing the background for the judicial recognition of the implied warranty of habitability). For example, in the Indiana case of *Johnson v. Scandia Assoc.s*, 717 N.E.2d 24 (Ind. 1999), the court held that "the existence of a warranty of habitability may be express or implied, depending on the particular language of the lease agreement and the course of dealing between the parties which might include expectations related to state and local housing code requirements." *Id.*

35. Edward H. Rabin, *The Revolution In Residential Landlord-Tenant Law: Causes and Consequences,* 69 CORNELL L. REV. 517, 551 (1984). "The first influential American housing code was passed in New York in 1867. By 1956, approximately fifty-six communities had housing codes, but by 1968 the number had grown to 4,904 communities, not in-

The existence of housing regulations has often been an integral part of the argument to imply or expand a warranty of habitability. As far back as 1922, Justice Benjamin Cardozo pointed to the housing code to find a landlord duty to repair.[36] Citing to the housing code, Cardozo held the statute had created a duty where there was none before and also held that tenants themselves have the right to invoke the statute, as the right was "not limited to the city or its officers" but that "[t]he right extends to all whom there was a purpose to protect."[37] Cardozo emphasized that while the housing code protected everyone equally, it would be of special importance to the poor. He wrote, "[t]he Legislature must have known that unless repairs in the rooms of the poor were made by the landlord, they would not be made by any one."[38]

Several decades after *Altz v. Leiberson*, in 1968, a Washington, D.C. court looked to housing regulations to invalidate an entire lease agreement. In *Brown v. Southall Realty Co.*, the court held that because the housing code violations existed prior to the execution of the lease, the lease was illegal and invalid.[39] Two years later, when the implied warranty of habitability was adopted by the federal courts for the first time, the U.S. Court of Appeals D.C. Circuit, relying on *Brown*, assumed that "the basic validity of every housing contract depends on substantial compliance with the housing code at the beginning of the lease term."[40] The

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cluding statewide housing codes." *Id.* The sudden increase in the number of communities that implemented housing codes can be traced to the federal Housing Act of 1954, which conditioned a community's ability to qualify for federal financial aid on whether that community enforced housing codes. *Id.* at 551–52.

36. Altz v. Leiberson, 134 N.E. 703, 703 (N.Y. 1922). In *Altz*, the plaintiff-tenant sued her landlord when she was injured by a falling piece of ceiling. *Id.* The landlord knew the ceiling was a danger before the tenant's injury but did not repair it. *Id.*

37. *Id.* at 703–04 (rejecting a narrow construction of the housing code).

38. *Id.* at 704. Only five years later, however, a lower New York court severely limited the potential expansion of Cardozo's interpretation of the housing code into the implied warranty of habitability. Gray v. Capital Constr. Corp., 225 N.Y.S. 446, 448 (1927). In a nearly identical situation, the New York Municipal Court in Manhattan held that a man who was injured when a portion of his bedroom ceiling collapsed on him could not recover because he knew of the danger yet failed to vacate the apartment or at least move his bed, making him guilty of contributory negligence. *See id* at 447–48. The court in *Gray* held the tenant did not fall within the provisions and protections of the statute cited by Cardozo because he exceeded the maximum rent allowable under the statute by $7 for an $87 apartment. *Id.* at 448.

39. 237 A.2d 834, 837 (D.C. App. Ct. 1968). The tenant's basement apartment had a broken railing, an obstructed toilet, and a ceiling so low it violated the city's housing code. *Id.* at 836. The Southall Realty Company and Sinkler Penn, the owner of the property, were both aware of the defects when Brown signed her lease, and this became the fatal flaw. *Id.*

40. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1081 (D.C. Cir. 1970) (holding that there exists an implied warranty of habitability in all leases, whether written or oral).

court in *Javins v. First National Reality Corp.* clarified that the landlord's duty to provide a habitable dwelling does not end after the contract is signed.[41] The D.C. circuit noted that while the code provided for criminal penalties, "official enforcement of the housing code has been far from uniformly effective."[42] The court reasoned that consistency with the housing code dictated the existence of an implied warranty of habitability,[43] but noted that tenants seeking to invoke the warranty do not need an official inspection or finding of violation of housing code to do so.[44]

Though an official finding of violation is often not necessary, housing code regulations have provided a convenient set of parameters for the type of defects that are likely to be a violation of the implied warranty of habitability.

> In most cases substantial compliance with those applicable building and housing code standards which materially affect health and safety will suffice to meet the landlord's obligations under the common law implied warranty of habitability we now recognize. As the *Hinson* court observed: "[m]inor housing code violations standing alone which do not affect habitability must be considered [d]e minimis and will not entitle the tenant to reduction in rent. . . ."[45]

Despite a frequent reliance on housing code to provide guidance when the implied warranty of habitability is breached, the housing code does not limit the remedies available to tenants, at least in California. In *Green*, the court held that though the statutory equivalent of the warranty[46] authorizes the tenant to repair the defects and deduct the cost from his rent, "the statutory remedies . . . have traditionally been viewed as additional to, and complementary of, the tenant's common law rights."[47] As the *Green* court noted, while housing code and the implied warranty of habitability are closely linked legal doctrines, they are not

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The *Javins* court recognized that a lease contains a combination of goods and services, including the shelter itself, as well as adequate ventilation, heat, plumbing, light, secure doors and windows, and proper sanitation and maintenance. *Id.* at 1074.

41. *Id.* (recognizing that after leases are signed the landlord has a continuing obligation to maintain the property according to the applicable law).

42. *Id.* at 1082.

43. *Id.* The court held that the Housing Regulations set an implied warranty of habitability that covered all leases, whether oral or written. *Id.*

44. *Id.* (supporting the idea that a tenant's private rights are not dependent on whether the property has been subjected to an official inspection).

45. Green v. Superior Court, 517 P.2d 1168, 1183 (Cal. 1974) (footnote omitted) (delineating the guidelines to be used when determining whether a housing code violation affects the implied warranty of habitability).

46. The implied warranty of habitability in California is codified in CAL. CIV. CODE §§ 1941-1941.4 (West 2009).

47. Green v. Superior Court, 517 P.2d 1168, 1177 (Cal. 1974).

one and the same, and the enforcement of each invokes different processes, involves different parties, and carries its own advantages and disadvantages.

III. Public Enforcement

Statute-based code enforcement generally falls to the city, or the county in unincorporated areas, where the property is located. The means of enforcement available to a city usually include civil remedies, including purely administrative actions, and criminal enforcement. "The profile of the violator dictates the strategy in the case," said Diane Silva-Martinez, Chief Code Enforcement Deputy at the San Diego City Attorney's Office.[48]

A. *Civil Remedies*

San Diego authorized administrative penalties in the mid-1990s as a way to manage workload.[49] Because the various departments involved in code enforcement will simply issue citations much in the same way a parking ticket is issued, the city attorney's office never has to be involved in the transaction.[50] The smaller the city, the more likely a substantial portion of its code enforcement is done via administrative remedies, ac-

48. Interview with Diane Silva-Martinez, Chief Code Enforcement Deputy, San Diego City Attorney's Office, in San Diego, Cal. (Sept. 23, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (describing the process for deciding whether to pursue a criminal or civil case against the Health and Safety Code violator). Silva-Martinez explained that some of the factors that she evaluates in determining the profile of the violator include how long the violation has been allowed to exist under that person, the facts of the case, and the amount of income that the violator has at his or her disposal. *Id.* In looking to the length of the violation, Silva-Martinez stated that she would more aggressively prosecute a person who had been violating the code for twelve to fifteen years than a person who had violated the code for a short period of time. *Id.* Furthermore, if the violator is a corporation instead of a person, she would not be inclined to pursue criminal prosecution because a small municipal fine will not do much to deter the violator. *Id.* Silva-Martinez explained that in California, a violation of the municipal code is classified as a misdemeanor, and that civil and administrative remedies are usually the best vehicles for receiving a higher fiscal retribution. *Id.*

49. *Id.* (shedding light on the origin of administrative remedies as a method of handling housing violations). Silva-Martinez explained that the California Health and Safety Code can be used purely administratively, if need be. *Id.* Administrative remedies were used as a common method of settling neighborhood disputes, *de minimus* disputes, and the like; as long as the dispute did not warrant civil or criminal prosecution, the proper administrative agency could effectively handle the dispute, and thus lighten the work load of the City Attorney's Office. *Id.*

50. *Id.* (explaining the process between choosing whether to pursue administrative, civil, or criminal remedies).

cording to Silva-Martinez.[51] While administrative citations are cheaper for a city to manage, they are often less effective, particularly on a landlord who is allowing his building to fall into disrepair as his mode of doing business. "In many states, the fines levied for housing code violations are so small that they may properly be considered as establishing a system of licensing rather than as constituting an effective deterrent."[52]

However, there are ways cities can put the squeeze on a landlord's wallet to encourage compliance, according to Silva-Martinez. "[I]mposition of civil penalties has, increasingly in modern times, become a means by which legislatures implement statutory policy."[53] The exact type of filing is determined by city code. In San Diego, the city can request a judge issue an injunction for a variety of violations. Failure to adhere to the injunction can result in fines up to $2,500 a day, or $250,000 total, though the actual bill rarely, if ever, reaches those heights.[54] The most Silva-Martinez has ever seen a landlord fined is about $30,000.[55]

Though unusual, municipal fines can grow to be significantly more than $30,000. For example, San Francisco-area landlords Remberto and Lourdes Sainez owed the city and county of San Francisco more than $660,000 after they violated several housing code requirements over the course of a two-year period.[56] The Sainezes allowed numerous code violations, ranging from lack of smoke detectors to remodeling without a permit to lack of heating, to exist in a six-unit dwelling for 663 days, excluding at least two thirty-day grace periods they had been granted to

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51. *Id.* According to Silva-Martinez, many smaller cities often choose administrative remedies to housing violations because they lack the resources of larger cities, which can pursue more costly suits. *Id.*

52. Julian H. Levi, *Focal Leverage Points in Problems Relating to Real Property*, 66 COLUM. L. REV. 275, 278 (1966). Another example of the inconsistency between the purported punishment and the actual punishment manifests in the process of remuneration for landlords whose buildings are torn down and redeveloped. *Id.* Because of these compensations, landlords are able to profit from their illegal operations, despite common-law authority stating the contrary. *Id.* at 278–79.

53. San Francisco v. Sainez, 92 Cal. Rptr. 2d 418, 423 (Ct. App. 2000) (citing *Hale v. Morgan*, 584 P.2d 512, 518 (Cal. 1978)). A state may use its police power to impose penalties on landlords to prompt landlords to obey the regulatory requirements of the state statutes. *Id.*

54. Interview with Diane Silva-Martinez, Chief Code Enforcement Deputy, San Diego City Attorney's Office, in San Diego, Cal. (Sept. 23, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (describing the process for settling civil disputes for housing violations through the use of an injunction, or alternatively, settlement).

55. *Id.* One possible explanation is that San Diego's rental market is made up primarily of single-family homes, and Silva-Martinez rarely prosecutes multi-dwelling landlords. *Id.*

56. San Francisco v. Sainez, 92 Cal. Rptr. 2d 418, 421 (Ct. App. 2000).

bring their property into compliance.[57] The local municipal housing code imposed a minimum fine of $1,000 for each day the property was in violation.[58] The landlords challenged the fine, arguing that it violated their due process rights.[59] The California Court of Appeal held that the fine, though large, did not violate due process[60] and was appropriate, given the Sainezes' net worth[61] and their pattern of disregard for city housing code.[62]

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57. *Id.* at 421–22 (describing the code violations that existed in the property owned by the defendant). Additionally, the Notice of Violation from April 26, 1995 stated that the Sainezes had failed to include an adequate number of fire extinguishers, had rented out spaces on illegal floors, had allowed walls and ceilings to fall into disrepair, and had failed to install safe plumbing and electrical wiring in the building. *Id.* at 421.

58. *Id.* at 421 (providing the penalty listed under former California Housing Code § 204(d)(2)). At the time the case arose, the former Housing Code provided in § 204(d)(2) that "[a]ny person or entity violating this Code shall be liable for a civil penalty of not less than $1,000 for each day such violation is committed or permitted to continue, which penalty shall be assessed and recovered in a civil action'" *Id.* at 422. The revisions to the Code did not affect this portion of the statute. *Id.* at 423.

59. *Id.* at 420 (discussing one of the three arguments that the defendant made on appeal). The defendants supported their due process challenge to the constitutionality of the penalty under the housing statute by citing *Hale v. Morgan*, 584 P.2d 512 (Cal. 1978), which held that a penalty for utilities disruption under former California Civil Code § 789.3 was unconstitutional when applied to impose a penalty of over $17,000 on the owner of a trailer park who attempted to evict a tenant by severing his electrical and water services. *Id.* at 423. This penalty was held to be potentially unconstitutional because it imposed a fine that was mandatory in amount and could also be imposed for an unlimited duration. The defendants in *Sainez*, here argued that "the penalty provision here suffers from the same vices as the one in *Hale* . . . [which are a] lack of discretion, a mandatory base amount, and a potentially unlimited duration." *Id.* at 425. They further argued that the penalty amount of $1,000 would lead to overly harsh and draconian results. *Id.*

60. *Id.* at 431 (rejecting the argument that the penalty under former Housing Code § 204(d)(2) was unconstitutional). The court in *Sainez* rejected the defendant's argument that since the penalty from the *Hale* decision was found to be unconstitutional, the one in this case should also be found to be unconstitutional. *Id.* at 425. The court clarified the *Hale* opinion by stating that the penalty was only found to be unconstitutional *as applied* to the facts of the case, rather than unconstitutional as a whole. *Id.*

61. San Francisco v. Sainez, 92 Cal. Rptr. 2d 418, 428 (Ct. App. 2000). Though claiming to be nothing more than uneducated Mexican immigrants, Remberto and Lourdes Sainez had amassed real estate holdings worth about $4.35 million in their fifteen years of investing. *Id.* After factoring in their debt of $2,015,317, the defendants held equity in the amount of $2,334,683. *Id.*

62. *Id.* (emphasizing the calculated efforts of the defendants to take advantage of their tenants). The Sainezes were no strangers to code enforcement, and the court noted that the evidence revealed a pattern of purchasing property, neglecting to do maintenance until compelled to do so, and then adding illegal units to the property. *Id.* At least three of their other properties had been the subject of injunctions and resulted in cases that were on the court's contempt calendar for up to three years. *Id.* at 421

Statutorily mandated fines are not the only way a landlord may end up paying. For example, the city of San Diego will front the tenants' relocation costs and sue the landlord to get those costs back.[63] Some cities choose to invoke general police power and rehabilitate the property itself. The landlord is then charged with the cost of repairs, and if he fails to pay, the government can foreclose on the property.[64] Alternatively, a city may utilize its eminent domain power, condemning the property.[65]

B. *Criminal Prosecution*

While the civil fines are generally higher than criminal fines, there are some occasions when a city may choose to pursue criminal prosecution as a means of code enforcement. "If you look at that particular person and they already have a criminal record, putting them back in criminal court is going to have more of an impact," said Silva-Martinez.[66] The remedy is

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63. Interview with Diane Silva-Martinez, Chief Code Enforcement Deputy, San Diego City Attorney's Office, in San Diego, Cal. (Sept. 23, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (providing the methods for keeping the safety and health of the tenant at the forefront of the interests involved in housing disputes). Sometimes relocation of the tenants is the only way to ensure their health and safety. *Id.* In these cases, a notice and order will go out to the landlord, and the landlord will have to pay for the relocation, unless they are financially unable to provide those finances up front. *Id.*

64. Stefan H. Krieger, *A Clash of Cultures: Immigration and Housing Code Enforcement on Long Island*, 36 HOFSTRA L. REV. 1227, 1235–36 (2008). Krieger's article is primarily concerned with biased and racially motivated enforcement of housing code, in which cities focus their efforts on enforcing codes that target the behavior of mostly Hispanic tenants and ignore the landlord based violations. *Id.* at 1229.

65. *Id.* at 1236. Though eminent domain may seem like an extreme result the landlord would fear, it may actually play directly into his business plan. *Id.* at 1237. Because landlords know that eminent domain proceedings will result their indemnification for the confiscated property, thus compensating them for their neglect, there is no incentive for landlords to invest in repairing the property. *Id.* at 1237; *see generally* Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence,* 15 FLA. ST. U. L. REV 485 (1987), *available at* http://duncankennedy.net/housing/essays.html (follow link for *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*). Kennedy's article addresses the practice of "milking," or a landlord's decision to watch his property deteriorate to the point of being utterly uninhabitable by any standards, putting the landlord out of business. Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence,* 15 FLA. ST. U. L. REV 485 (1987). According to Kennedy, "[e]ither tenants will no longer pay [the milking landlord] anything, or the authorities will close the building. At that point, he expects the building will have no market value. He will walk away from it, give it away, or lose it to tax foreclosure." *Id.* at 489. Contrary to the predictions of many economists of the time, Kennedy suggested that selectively enforcing the warranty of habitability against these "milkers" could increase housing supply and lower rent for the poor. *Id.* at 486.

66. Interview with Diane Silva-Martinez, Chief Code Enforcement Deputy, San Diego City Attorney's Office, in San Diego, Cal. (Sept. 23, 2009) (on file with *The Scholar: St.*

of limited usefulness because few landlords have prior felony convictions, and the monetary impact is usually limited to the misdemeanor fine of $1,000.[67] However, landlords are occasionally sentenced to jail time, though rarely ever more than a year, and time served will almost certainly be far less than the sentence.[68]

The possibility of a life behind bars, however brief, is frightening to some landlords. In late 1987, Fijian-born landlord Vijaynand Sharma was facing up to fifty-six years in jail for over one hundred misdemeanor charges stemming from the slum conditions of five of his buildings.[69] Defects included rat infestations, broken windows, and inoperable plumbing.[70] After his conviction, but before sentencing, one of Sharma's buildings burned in an arson fire, displacing over 150 people.[71] Days before his sentencing hearing, Sharma told *The Los Angeles Times* he was selling his properties because, "I don't want to face jail time. I would just like to be free."[72]

Sharma apparently meant his statement quite literally. Despite being sentenced to only about twenty months, instead of the threatened fifty-six years, Sharma opted for the life of a fugitive, spending eight years on the lam.[73] After popping up in New Jersey in 1988, only to escape again, and in Scotland in 1991, where there was no extradition treaty for misdemeanors, Sharma was finally taken back into custody in 1996 in New

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Mary's Law Review on Minority Issues) (providing insight on the reasoning behind choosing to pursue criminal charges instead of civil or administrative remedies).

67. *Id.* The California statute outlining the monetary and imprisonment punishments available for misdemeanor violations of building codes is CAL. HEALTH & SAFETY CODE §§ 17995-17995.5 (West 2009).

68. *Id.*

69. Penelope McMillan, *Tackling the Slumlords: Strong Prosecution Nets Gains as Some Owners Get Jail Time*, L.A. TIMES, Dec. 20, 1987, at Metro 1, *available at* 1987 WLNR 1532773.

70. *Id.* (providing background information on the number of properties that Sharma owned, along with the various code violations that existed in his properties). At the time of this news article, Sharma owned eighteen properties in Los Angeles, most of which contained units that could be rented out for less than $400 per month. *Id.* Sharma defended his practices by claiming that he was merely an unfair target who, in reality, was burdened by destructive tenants, high mortgage payments, large utility bills, and massive repair bills. *Id.*

71. *Id.* (portraying the ultimate destruction of one of Sharma's properties by arson).

72. *Id.* (quoting Sharma's decision to sell his properties in an attempt to avoid jail time). According to this news article, the shift in prosecutorial strategy from filing civil cases to filing criminal complaints may have resulted in Sharma's willingness to sell his properties. *Id.*

73. Alan Abrahamson, *Slumlord is Caught After 8 Years as Fugitive*, L.A. TIMES, May 11, 1996, at Metro 1, *available at* 1996 WLNR 5084909 (describing the capture of Sharma in Liberty, New York).

York.[74] Once back in California, Sharma was sentenced to seven years in jail; he had received more than twice the amount of time for running than he did for the original misdemeanor code violations.[75] Sharma's behavior is illustrative of another problem with criminal court—it is not usually a good way to get compliance from the landlord or improved conditions for the tenants, according to Silva-Martinez.[76] When prosecutors start pursuing these property owners, they may sell off their property before they can be brought to court, or in extreme cases, the landlord may resort to arson.[77] Perhaps Sharma did both.

In an effort to impress upon the landlords the serious consequences of their apathy toward their tenants, courts will occasionally resort to poetic justice. Silva-Martinez has seen a few landlords sentenced to live in their own substandard buildings.[78] It is a tactic that has been attempted in large cities across the country. Perhaps the earliest example of this type of sentence was handed down in Los Angeles in 1985, when a Beverly Hills neurosurgeon named Milton Avol was ordered to wear an electronic anklet and spend thirty days living in his own slum.[79] Far from being a dramatic wake-up call, the sentence seemed to have little effect on Avol and little benefit for his tenants.

In fact, nothing seemed to get through to Avol. In addition to his ground-breaking sentence, he served fifty-five days in jail and agreed to a

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74. *Id.*

75. Nora Zamichow, *Fugitive Slumlord Sentenced to 7 Years in County Jail*, L.A. TIMES, June 15, 1996, at Metro 3, *available at* 1996 WLNR 5093842 (describing the punishment imposed on Sharma after his capture). The sentencing judge also barred Sharma from work furlough or early release programs. *Id.* Additionally, Sharma was ordered "to pay $153,000 in fines and costs, and more than $284,000 in delinquent bills to the city Department of Water and Power." *Id.*

76. Interview with Diane Silva-Martinez, Chief Code Enforcement Deputy, San Diego City Attorney's Office, in San Diego, Cal. (Sept. 23, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). According to Silva-Martinez, one option for tenants is to file a "parallel" lawsuit against the landlord, which would not affect the city attorney's case and would also give the tenant the ability to receive restitution. *Id.*

77. Penelope McMillan, *Tackling the Slumlords: Strong Prosecution Nets Gains as Some Owners Get Jail Time*, L.A. TIMES, Dec. 20, 1987, at Metro 1, *available at* 1987 WLNR 1532773.

78. Interview with Diane Silva-Martinez, Chief Code Enforcement Deputy, San Diego City Attorney's Office, in San Diego, Cal. (Sept. 23, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

79. Eric Malnic, *New Owner Gets Same Term in Slum*, L.A. TIMES, Mar. 25, 1988, at Metro 3, *available at* 1988 WLNR 1837469. A later *Los Angeles Times* story, written over a year after Avol's death, touts him as the first landlord in the nation to be sentenced to live in his own blighted building, though no source is provided for this statement. *See* Bob Pool, *Slum Gives Way to New Apartments*, L.A. TIMES, Oct. 27, 2000, at Metro 1, *available at* 2000 WLNR 8356569 (describing the replacement of a slum owned by Avol with new rental units for low-income families).

$2.5 million settlement in a suit his tenants filed against him.[80] After this, Avol continued to have run-ins with Los Angeles city code enforcers, until he finally moved his operation to Antelope Valley, a more remote area of Los Angeles County, where the code enforcement is done not by city but by county government.[81] Once there, he was again accused of owning several rental homes he kept in a dilapidated condition, with defects including sewage problems, roach infestations, and broken windows.[82] Avol's tenants also did not seem to find any relief after their landlord was sentenced to live in his own slum. Avol sold his buildings, but in some cases, the conditions continued. In 1988, a little under three years after Avol was sentenced to house arrest, the new owner of some of his old buildings was sentenced to the exact same punishment.[83] The apartment building that Avol served his time in was finally completely renovated, but it took fifteen years and $11 million to complete.[84] With the backing of the City of Hollywood, a brand-new, rent-controlled apartment replaced Avol's infamous apartments.[85] While the new building was an enormous improvement over what Avol had offered, its reception was a stark illustration of the immense need for appropriate housing in Los Angeles. Over two thousand families competed for sixty-one units.[86]

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80. Penelope McMillan, *$2.5 Million Settlement in Tenants' Suit Against Avol*, L.A. Times, Aug. 30, 1988, at Metro 1, *available at* 1988 WLNR 1868189.

81. N. Chandler, *Slumlord Accused in Palmdale*, L.A. Times, Jan. 27, 1992, at Metro 1, *available at* 1992 WLNR 3980632.

82. *Id.* (revealing the tactic of changing cities in order for landlords to continue exploiting poor tenants). Indeed, Avol had an incredibly long career as a slumlord reaching at least as far back as 1979, when he was fined $3,000 for fire safety violations. *Id.*; *see also* Karima A. Haynes, *Patience Pays Off With a Big Raze*, L.A. TIMES, Mar. 22, 1999, at Metro 1, *available at* 1999 WLNR 6629900. In 1999, the year that he died, Avol was still in court, this time fighting the City of Palmdale, which tore down over fifty of his dilapidated and neglected single-family dwellings that had become "a haven for transients, drug dealers, taggers, stray animals and rodents." Karima A. Haynes, *Patience Pays Off With a Big Raze*, L.A. TIMES, Mar. 22, 1999, at Metro 1, *available at* 1999 WLNR 6629900. As of 1999, Avol owned seventy-two houses in Palmdale, fifty-seven of which had been slated for demolition and fifteen that were occupied. *Id.*

83. Eric Malnic, *New Owner Gets Same Term in Slum*, L.A. TIMES, Mar. 25, 1988, at Metro 3, *available at* 1988 WLNR 1837469. This building had been sold by the time Avol served his sentence, so this was not the same building he actually lived in for thirty days. *Id.*

84. Bob Pool, *Slum Gives Way to New Apartments*, L.A. TIMES, Oct. 27, 2000, at Metro 1, *available at* 2000 WLNR 8356569 (illustrating the transformation of a slum owned by Avol into new housing).

85. *Id.*

86. *Id.* (showing the continued lack of affordable housing for low-income families in Los Angeles). Ultimately, 250 applicants were chosen out of the pool of 2,300 through the use of a lottery after a screening to confirm eligibility. *Id.*

C. *Obstacles to Public Enforcement*

The extreme cases of Sharma and Avol aside, cities and counties face real obstacles in even the most mundane code enforcement. There is a serious lack of resources available to fight code violators, and cases can simply fall into a black hole, according to Silva-Martinez.[87] Without resources, government officials can rarely seek out code violators. According to Silva-Martinez, "few code enforcement programs are proactive. They're reactive."[88] These code enforcement programs respond when someone complains—but the problem, Silva-Martinez explained, is "tenants don't complain."[89] The reasons are varied. Tenants are often in the country illegally, unable to speak sufficient English to maneuver through the system, afraid of their landlords' retaliation, and simply too poor to move or afford higher rent.[90] Many of the city's cases begin with a police referral from officers who contacted the residents for other complaints and found the code violations in the process.[91]

Not all programs are reactive. Unlike San Diego, Los Angeles has many multi-unit dwellings that require code enforcement. To handle these properties, in 1998 the city implemented the proactive Systematic Code Enforcement Program[92] in an effort to "routinely inspect all residential rental properties with two or more housing units on a four-year cycle and to respond to reports of property violations."[93] The cost of this

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87. Interview with Diane Silva-Martinez, Chief Code Enforcement Deputy, San Diego City Attorney's Office, in San Diego, Cal. (Sept. 23, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). Silva-Martinez explained that smaller cities and towns are particularly plagued with insufficient resources to address the problem of housing violations, which is why many use the Health and Safety Code purely administratively. *Id.*

88. *Id*

89. *Id.*

90. *Id.*

91. *Id.* It is also common for the City Attorney's Office to get complaints or notice of violations from non-profit groups, who work to find violations and educate tenants. *Id.*

92. LOS ANGELES HOUSING DEPARTMENT, Billing FAQ, http://lahd.lacity.org/lahdinternet/BillingFAQ/tabid/121/Default.aspx (last visited June 16, 2010) (providing information on the Systematic Code Enforcement Program). In 1998 the Los Angeles City Council established the Systematic Code Enforcement Program to ensure the safety and habitability of "all residential rental properties with two . . . or more units on [the] parcels." *Id.* Through the program, all qualifying properties are subjected to thorough inspections every three years, landlords are cited for any violations of the California and Los Angeles housing code, and follow-up inspections are conducted to ensure that the violations have been corrected. *Id.*

93. LOS ANGELES HOUSING DEPARTMENT, Systematic Code Enforcement Program: About Us http://lahd.lacity.org/lahdinternet/CodeEnforcement/tabid/327/Default.aspx (last visited June 16, 2010) (informing landlords and tenants about the process of inspections and reporting violations through the Systematic Code Enforcement Program). According

program is off-set by rental property owners who each pay about $35 per unit per year to the program, though the landlords are allowed to pass this fee on to the tenant.[94] However, should the city need to prosecute a non-compliant landlord, the cost is large. "The public costs to prosecute one typical slumlord building took 149 Los Angeles City, Los Angeles County[,] and non-profit staff at a cost of $232,000."[95]

The financial cost of code enforcement, always problematic, is now threatening to become prohibitive. Due to drastic state budget cuts, virtually all state-funded programs, offices, and services around California have had to tighten their belts.[96] The cuts almost cannot be overstated. "At no point in modern history has the state dealt with its fiscal issues by retreating so deeply in its services . . . in total, some $30 billion in cuts over two fiscal years to schools, colleges, health care, welfare, corrections, recreation and more."[97] In a state releasing inmates it cannot afford to house and laying off teachers it cannot afford to pay, aggressive, publicly-funded housing code enforcement simply cannot be a high priority.

IV. PRIVATE ENFORCEMENT

A city, county, or state with a strong and active code enforcement department can make filing private lawsuits against violating landlords much easier for private tenants, according to Los Angeles attorney Eric Castelblanco.[98] Los Angeles has a strong housing department, and the

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to the Los Angeles Housing Department, tenants do not have to wait for the inspectors to investigate the property to report violations. *Id.* As long as the violation exists "within a residential rental unit or the surrounding common area," any person may file a complaint with the Housing Department. *Id.*

94. LOS ANGELES HOUSING DEPARTMENT, Billing FAQ, http://lahd.lacity.org/lahdinternet/BillingFAQ/tabid/121/Default.aspx, (last visited June 16, 2010) (outlining the source of funding for the Systematic Code Enforcement Program).

95. THE SHAME OF THE CITY: SLUM HOUSING AND THE CRITICAL THREAT TO THE HEALTH OF L.A. CHILDREN AND FAMILIES 4 (Albert Lowe & Gilda Hass eds., April 2007) (bemoaning the high public cost of prosecuting a landlord of slum housing). Due to the high cost of prosecuting the landlord of slum housing, many slumlords are left un-prosecuted. *Id.* In order to effectively prosecute all of the known slumlords in Los Angeles, it would cost an estimated $344 to $462 million. *Id.*

96. *California Budget Crisis*, N.Y. TIMES, Jan. 7, 2010, http://topics.nytimes.com/topics/news/national/usstatesterritoriesandpossessions/california/budget_crisis_2008_09/index.html (last visited June 16, 2010). This is the opening page of a multimedia presentation prepared by *The New York Times* that includes over 100 articles, photos, slideshows, graphics, and links to local media statewide extensively covering California's ongoing and severe financial crisis.

97. *Id.*

98. Interview with Eric Castelblanco, Attorney, Law Offices of Eric E. Castelblanco, in L.A., Cal. (Oct. 12, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (explaining the helpfulness of having a strong housing authority to help resolve

inspectors' reports are almost always favorable for the tenants' case.[99] But because of the characteristics of both the landlords who typically own slums and the tenants who live there, private suits can sometimes be the best or only enforcement option.

A. *Typical Landlords and Tenants*

"It is in some ways as much of a sociological problem as a legal problem," said Benjamin Ramm.[100] In their respective practices, both Ramm and Castelblanco have many clients who are undocumented Central and South American, and particularly Mexican, immigrants.[101] Landlords will use the tenants' illegal status to intimidate them by threatening to make a call to immigration if they complain about their living conditions.[102] Even the tenants who are in the country legally are afraid to complain because it is too expensive to move.[103] "They're basically living week to week. These are very poor people. These are the working poor. These are the nannies and the cooks and the valet people that help us in

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landlord-tenant issues). Castelblanco has been filing mass tort implied warranty cases for nearly a decade. *Id.*

99. *Id.* (providing insight into the role that the Los Angeles Housing Department plays in the formation of lawsuits that Castelblanco either has filed or will file). Castelblanco estimates that approximately nine times out of ten, the Los Angeles Housing Department's report will show that the landlord, instead of the tenant, is at fault for the code violations. *Id.*

100. Telephone Interview with Benjamin Ramm, Attorney, BASTA (Nov. 11, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (explaining the difficulties of working to gain the trust of tenants in order to file a class action suit). Ramm said that the social difficulty stems from the fact that many class action attorneys cannot relate to this class of tenants. *Id.* The support staff at BASTA is equipped with personnel who are fluent in Spanish and may actually come from the clients' neighborhoods. *Id.* This helps to bridge the gap between the attorneys and the clients. *Id.*

101. Interview with Eric Castelblanco, Attorney, Law Offices of Eric E. Castelblanco, in L.A., Cal. (Oct. 12, 2009) (describing the client base that Castelblanco works with). However, Castelblanco emphasized that most of his clients are legal immigrants who are simply too poor to afford the cost of moving from an unsafe and unsanitary apartment to a different one. *Id.* He noted that many tenants are deterred by the deposit most rentals require. *Id.*

102. *Id.* (criticizing the use of intimidation tactics by landlords to deter tenants from filing complaints or seeking legal advice). Castelblanco made clear that one of his top priorities is to ensure that the tenant is not harassed. *Id.* Castelblanco also mentioned that after a suit is filed, the intimidation tactics do not stop at the tenants; Castelblanco has been on site to visit clients and collect information and has had the landlords call the police to have him removed from the property. *Id.* Additionally, Castelblanco has been assaulted by landlords and has had people follow him around the property in an attempt to scare him away. *Id.*

103. *Id.*

every aspect of our lives, but they're poor," Castelblanco said.[104] "They're very fearful of losing their apartment, even though their apartment is a dump and is rat-infested and cockroach-infested; they don't want to lose it."[105] Ramm said the first step is instilling some faith in the legal system itself.

> It is about getting a group of people who have often times felt that the system will not take care of them, that they have no hope, that they are entitled to nothing more than the ill-treatment that they have seen and that they know, getting them to see that equal protection under the law for everyone actually can work.[106]

In addition to seeing the same type of tenant over and over again, Ramm and Castelblanco see patterns in the landlords as well. There are two basic types of landlords who are "extremely vulnerable to lawsuits."[107] The first type of landlord that often finds himself managing a dilapidated property, though possibly well-meaning, simply is not physically capable or sufficiently knowledgeable to maintain a residential building. Ramm said he has seen landlords who were able to maintain the buildings when they were younger, but are now too old to make all

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104. *Id.*

105. *Id.* (explaining the complicated undertaking of moving an exploited tenant out of the violating apartment).

106. Telephone Interview with Benjamin Ramm, Attorney, BASTA (Nov. 11, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (explaining the process of persuading tenants to come forward to the staff at BASTA). Ramm recognizes that since most of his clients are not literate in English, they are not typically integrated into mainstream society. *Id.* Because of this, many of his clients find out about BASTA through word of mouth. *Id.* The housing violation that turns into a class action suit typically starts out as single tenant facing eviction. *Id.* BASTA represents the tenant in the eviction proceeding, and the tenant in turn tells a friend about BASTA's work. *Id.*

107. The authors of *Shame of the City: Slum Housing and the Critical Threat to the Health of L.A. Children and Families* placed slumlords in three categories—two categories where the landlord intentionally breaches the implied warranty of habitability as a business model, and one where the landlord simply lacks the skill and knowledge to maintain a property appropriately. THE SHAME OF THE CITY: SLUM HOUSING AND THE CRITICAL THREAT TO THE HEALTH OF L.A. CHILDREN AND FAMILIES 29 (Albert Lowe & Gilda Hass eds., April 2007). The first category that slumlords could fall into is flippers, who can take advantage of low-income tenants by collecting rent money while they are in the process of renovating the house before putting it on the market. *Id.* Slumlords can also be categorized as hoarders, who typically "acquire a building, collect rents, defer maintenance and use the rents instead to make down-payments on additional buildings." *Id.* at 30. The last category that slumlords can fall into is that of incompetents, who are characterized by acquiring buildings for investment properties or through inheritance, and neither have the ability to do a professional job nor hire professional contractors. *Id.* Both Ramm and Castelblanco separated landlords into two categories. For this Note, I have adopted the two-category approach offered by Ramm and Castelblanco.

the repairs.[108] "The other thing is the heirs. The kids or the wife, who have no idea. They weren't there when the man was swinging the shovel. They don't know how much sweat that guy had to put into the building," Ramm said.[109]

Sometimes the landlords are just inexperienced at managing residential buildings and get in over their heads, but Castelblanco said often that is not the case. "There are the landlords that own two hundred properties and fully know what they're doing. It's just a business model that they've adopted that works for them in terms of providing cash flow but doesn't work for the community because it gets people sick," Castelblanco said.[110] Landlords will choose to collect rent without putting any money back into the property. In the short term, they get a greater return on their investment and may not care that they have a building worth no more than the land it sits on within a few short years.[111]

It is not uncommon for landlords to rationalize their neglect of their property and tenants by either arguing that they are really helping the tenants, or taking the stance that they are a better class of people than

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108. Telephone Interview with Benjamin Ramm, Attorney, BASTA (Nov. 11, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). Ramm categorizes these types of landlords as the ones who do not realize that being a landlord is like any other job. *Id.* It is typical for the landlords in this category to think they have an entitlement to the money because they hold title to the building. *Id.* These types of landlords simply do not understand that the law imposes upon them a responsibility for the health and safety of their tenants. *Id.*

109. *Id.*

110. Interview with Eric Castelblanco, Attorney, Law Offices of Eric E. Castelblanco, in L.A., Cal. (Oct. 12, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). When tenants get sick from the conditions that they are living in, it creates a domino effect in the community. *Id.* Poor tenants may choose to go to the doctor, even though they lack insurance, which forces them to front the cost of medical treatment. *Id.* In the alternative, they may choose to stay sick, which often makes others sick. *Id.* Castelblanco emphasizes that this problem could be solved by the landlord simply keeping the property in compliance with code requirements. *Id.*

111. Interview with Eric Castelblanco, Attorney, Law Offices of Eric E. Castelblanco, in L.A., Cal. (Oct. 12, 2009) (criticizing the business practice of landlords who use their properties solely as a means to create profit). According to Castelblanco, a lot of these landlords do not follow the rules because it would detract from their profit, and they count on the fear that pervades the community to avoid getting caught. *Id.*; *see also* Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence,* 15 FLA. ST. U.L. REV 485 (1987), *available at* http://duncankennedy.net/housing/essays.html (follow link for *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*) (arguing that it may be rational for landlords to start to "milk" a building prior to the rent roll decreasing so far that it no longer covers the cost of maintenance).

their tenants.[112] "Sometimes you see people say, 'Well, I think I'm helping the homeless. They'd otherwise be homeless,'" Silva-Martinez said. "That argument only goes so far when you charge them rent. Isn't [it] ironic that everything you're charging them equals your mortgage? You're not really helping them. They'd be better off somewhere else."[113] Ramm said there is a sociological element to the landlords' behavior.[114] "I see landlords of all ethnicities express a kind of racism. It's not just a calculating business model to extract as much money at the lowest cost possible," Ramm said.[115] Ramm said he has seen landlords who act like their tenants are lesser forms of humans who are there only to serve them,[116] and this attitude may even come from landlords who are immigrants themselves. "[R]elatively assimilated immigrants, whether Asian or Hispanic and Latino, use their citizenship and ability to speak English as the basis for dehumanizing their less assimilated tenants. The landlords' condescension is so deep that they do not bother to offer credible explanations for their behavior," Ramm said.[117]

While landlords often try to blame the tenants for the condition of the buildings—they accuse the tenants of being dirty and attracting cockroaches or cramming too many people into a small apartment—Castleblanco said the problems are almost always the landlords' fault.[118] Cockroaches are often the result of poor plumbing that gives the pests a

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112. *See* Interview with Diane Silva-Martinez, Chief Code Enforcement Deputy, San Diego City Attorney's Office, in San Diego, Cal. (Sept. 23, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*); Telephone Interview with Benjamin Ramm, Attorney, BASTA (Nov. 11, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

113. Interview with Diane Silva-Martinez, Chief Code Enforcement Deputy, San Diego City Attorney's Office, in San Diego, Cal. (Sept. 23, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (illustrating how the purported motives of the landlords can be less than philanthropic).

114. Telephone Interview with Benjamin Ramm, Attorney, BASTA (Nov. 11, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (explaining the second category of landlords that Ramm believes are vulnerable to lawsuits). According to Ramm, the second category that a landlord can fall into is that of people who are conscious of their neglect. *Id.* Under this category, there are two subcategories of landlords: (1) the "lords of the manor," and (2) the calculating slumlord. *Id.*

115. E-mail from Benjamin Ramm, Attorney, BASTA, to author (Nov. 24, 2009, 09:11:09 PST) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (explaining that racism can be an element that causes "landlords to mistreat their tenants").

116. Telephone Interview with Benjamin Ramm, Attorney, BASTA (Nov. 11, 2009) (stressing that racism plays a role in landlords who believe they are lords of their manor).

117. E-mail from Benjamin Ramm, Attorney, BASTA, to author (Nov. 24, 2009, 09:11:09 PST) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

118. Interview with Eric Castelblanco, Attorney, Law Offices of Eric E. Castelblanco, in L.A., Cal. (Oct. 12, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

ready source of water, and the landlords allow the overcrowding in order to collect the rent.[119] Ramm agreed that cockroaches are more attracted to defective plumbing systems than messy tenants, and added that unexpected health problems can result.[120] "Leaks [bring] cockroaches, cockroaches then contaminate food, the cockroach urine aspirates, then the kids breathe in aspirated cockroach urine, which causes them to develop asthma," Ramm said.[121]

B. *Mass Tort Suits*

Castelblanco believes that the filing of mass torts can have a greater effect on the quality of housing available than single plaintiff claims are usually able to accomplish. "That's one of the things that I've seen over the last ten years, since I've been doing this type of work, is that, in my opinion, these type[s] of lawsuits have a positive effect on the community," Castelblanco said. "I think that the landlords have gotten the message that tenants know their rights and are not afraid to come forward and demand fair treatment, demand that the landlords live up to their side of the bargain."[122]

Castelblanco got into housing law almost accidentally. A client he worked with as an immigration attorney was upset because she was being harassed by her landlord. Castelblanco wanted to help her and quickly learned she wasn't the only unhappy tenant in her complex. Soon Castel-

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119. *Id.* (showing how a landlord's claim of overcrowding as a defense to property violations is misguided). Castelblanco suggested that cockroaches can go for prolonged periods of time without food, but need water to survive. *Id.* He also said the problem of overcrowding is mostly a management issue, arguing that the property manager should know how many people are living in each unit. *Id.*

120. Telephone Interview with Benjamin Ramm, Attorney, BASTA (Nov. 11, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (showing how one problem can directly lead to a seemingly unrelated heath problem).

121. Telephone Interview with Benjamin Ramm, Attorney, BASTA (Nov. 11, 2009). BASTA consults a public health expert, who outlined for Ramm the various possible health ramifications of a cockroach infestation, Ramm said. *Id.*; *see also* THE SHAME OF THE CITY: SLUM HOUSING AND THE CRITICAL THREAT TO THE HEALTH OF L.A. CHILDREN AND FAMILIES 15 (Albert Lowe & Gilda Hass eds., April 2007)

122. Interview with Eric Castelblanco, Attorney, Law Offices of Eric E. Castelblanco, in L.A., Cal. (Oct. 12, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (illustrating the positive effects on communities of empowering the tenants to come forward and report complaints). For example, in Pico Union, a neighborhood west of downtown Los Angeles, a drastic change has taken place over the course of the past decade. *Id.* According to Castelblanco, ten years ago you could drive through Pico Union and see a substantial number of slums, just by looking at the outside of the building. *Id.* Now, when driving through this neighborhood, the number of slums has been decreased because of the increased number of tenants who are aware of their rights as parties in a contractual lease agreement to the implied warranty of habitability. *Id.*

blanco had ninety-one plaintiffs, both adults and children, living in twenty units.[123] Today implied warranty cases are a large part of his practice. He cannot remember filing a case with less than ten plaintiffs, and has handled cases with as many as 140 plaintiffs.[124]

Tenants come to Castelblanco with a variety of complaints, and each case is a little different, but the concerns he hears are common to implied warranty of habitability causes of action. "There are some cases where there are a lot of structural problems. There are some cases where they have a lot of plumbing problems, there are some cases that have a lot of bug problems. They run the gamut," Castelblanco said.[125] "What really gets tenants riled up are the bugs. It's really hard to live in a heavy cockroach or bedbug infestation."[126]

Castelblanco's clients have usually tolerated terrible conditions for a long time before they come to see him. Any number of things can trigger a reaction, but often a new and aggressive manager is what sends the tenant to a lawyer's office.[127] While the implied warranty of habitability is often invoked as a defense to an unlawful detainer action, Castelblanco prefers his clients to be current on their rent.[128] He does not advocate rent strikes because the real goal is to get the landlord to make the repairs and treat the tenants with respect.[129] There is also a tactical advan-

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123. *Id.* (describing Castelblanco's first case in the area of implied warranty litigation). Castelblanco further explained that the apartment complex was owned by a landlord who had a lot of experience with commercial properties, but little with residential properties, which made him ignorant of the residents' needs. *Id.* In fact, the Housing Department and Health Department had previously cited problems that had been present for two to three years. *Id.* However, despite these citations, the violations had not been fixed. *Id.*

124. *Id.* (showing the range in the number of clients that Castelblanco will represent in one case). Castelblanco explained that the living conditions would have to be particularly horrendous for him to take on a case with less than ten clients. *Id.*

125. *Id.* (describing the range of problems experienced by Castelblanco's clients).

126. *Id.* (depicting the types of code violations that often lead to litigation). Castelblanco was particularly critical of the fact that these violations continue to exist despite the fact that they can be corrected by simply contracting with a professional pest control company, which has an organized plan of attack. *Id.*

127. Interview with Eric Castelblanco, Attorney, Law Offices of Eric E. Castelblanco, in L.A., Cal. (Oct. 12, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (discussing how implied warranty cases can arise from situations other than unlawful detainer actions). Having previously explained that tenants are particularly unwilling to compromise with landlords who use harassment techniques to control their tenants, Castelblanco further explained when a new manager takes over the property and treats the complex like a prison, the manager is simply inviting litigation. *Id.*

128. *Id.* (listing the criteria that must be met for Castelblanco to file a suit for violation of the implied warranty of habitability). Castelblanco also looks for "ongoing issues of habitability that have not been abated." *Id.*

129. *Id.* (justifying the requirement that the tenants pay rent in order for Castelblanco to represent them).

tage to the tenant who invokes the implied warranty of habitability offensively instead of defensively. "[I]f the tenant does not wait until he is forced into court as a defendant in the 'usual' situation . . . judges will be more inclined to accept the challenge to devise new ways of grappling with old problems."[130]

While Castelblanco has taken one of these cases to trial, he has never gotten a verdict because he has always been able to settle. Part of the settlement agreement almost always includes a confidentiality provision.[131] The larger settlement agreements range from $300,000 to over $2 million.[132] Castelblanco may have such high odds of settling because of the way he pursues the case. Because he is filing a mass tort, not a class action,[133] the cost of litigation is high, particularly during the discovery process for the defendant-landlord. Castelblanco has completed most of his research before he even files the suit and will probably only have a handful of people he wants to depose.[134] But the defense may have their

130. Julian H. Levi, *Focal Leverage Points in Problems Relating to Real Property*, 66 COLUM. L. REV. 275, 284 (1966) (suggesting that tenants should take proactive approaches to dealing with abusive landlords). Levi notes that a judge may be inclined to view proactive tenants in a more favorable light, seeing them as responsible citizens instead of the paradigmatic tenant who is being sued for not paying rent. *Id.*

131. Interview with Eric Castelblanco, Attorney, Law Offices of Eric E. Castelblanco, in L.A., Cal. (Oct. 12, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

132. *See* Law Offices of Eric E. Castelblanco, Cases, http://www.castelblanco.com/cases.html (last visited June 16, 2010) (portraying the facts and contentions of cases that have resulted in seven-figure settlements). In one case that Castelblanco's office handled, there were 90 plaintiffs consisting of 30 children and 60 adults, who alleged the property had been in violation for four consecutive years. *Id.* Violations included cockroach and vermin infestation, mold and mildew, destroyed and dirty sheetrock, and sewage spills, along with other problems with individual units and common areas. *Id.* Although the Los Angeles Housing Department issued annual citations, the landlord neglected to abate the violations by sloppily repairing the building. *Id.* Among the physical injuries to the plaintiffs were rashes, allergies, and rodent and insect bites. *Id.* The plaintiffs also suffered from the emotional distress resulting from harassment by management and the unlivable conditions of the building. *Id.* After settling the suit through three mediations, the defendant landlord owed the plaintiffs $1.675 million. *Id.*

133. *See* Interview with Eric Castelblanco, Attorney, Law Offices of Eric E. Castelblanco, in L.A., Cal. (Oct. 12, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). In a class action, there will be one to a few named plaintiffs who represent a group of unnamed, similarly situated people, while in a mass tort, every single tenant involved will be a named plaintiff. *Id.* Additionally, mass tort actions differ from class actions because in mass tort actions, each plaintiff has to allege and prove their own damages, while in class actions the issue of damages can be sorted out after certifying the class action. *Id.*

134. *Id.* Interviewing every client prior to filing his lawsuit gives him the tactical advantage of establishing the foundation of each individual case, which makes it more difficult for the defendant-landlords to overcome the claims against them. *Id.*

work cut out for them. Depending on the attorney, the landlords may want to depose every plaintiff, which can be dozens of people, most of whom do not speak English. The need for a translator increases the time and the cost of both discovery and the trial.

Castelblanco has considered filing a class action instead of a mass tort, but said he does not believe there has been enough commonality and typicality in the type of injuries his clients have suffered to meet the class action burden. "The damages or the injuries from my client base just vary. Some people have rashes, some people have cockroaches in the ear, some people have bedbug bites, some people have mold, fungus on their feet, asthma. Just a wide range of injuries,"[135] Castelblanco said. Though he has decided against it in the past, he is not ruling out a future class action suit, and sees a possible advantage in that route. Handling large-scale cases as mass torts is an enormous amount of work.

> It takes a lot of organization. Because doing a class action you have one client, a representative, a class rep. Doing a larger building [as a mass tort], where you have at least twenty people, you have twenty clients that you have to respond to. You have twenty clients that you have to get information from and answer discoveries for . . . . It's quite an undertaking. Maybe class action would be . . . an easier route to go. I just haven't done them that way.[136]

C. *Class Actions Suits*

While landlord-tenant issues are rarely resolved in class action lawsuits, it is not unheard of in California. Class action lawsuits are authorized in California when "the question is one of common or general interest, of many persons, or when the parties are numerous and it is impractical to bring them all before the court."[137] Class certification is granted when there is "an ascertainable class and a well-defined community of interest among the class members."[138] The community of interest is determined by establishing that there are common questions of law or fact, that there are class representatives who have claims typical of the class, and that

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135. *Id.* (explaining why Castelblanco tends to avoid class action suits for implied warranty litigation because of the lack of typicality and uniformity among his clients' injuries).

136. *Id.*

137. CAL. CIV. PROC. § 382 (West 2004) (outlining when plaintiffs and defendants may be joined together to form a class action suit).

138. Linder v. Thrifty Oil Co., 2 P.3d 27, 31 (Cal. 2000) (citing *Richmond v. Dart Indus. Inc.*, 29 Cal.3d 462, 470 (1981)).

there exists a class representative who is able to adequately represent the class.[139]

There are currently no published cases from a California court either granting or denying class certification to a group of tenants for a claim of a breach of the implied warranty of habitability. However, the court has long granted tenants class status for other complaints.[140] In 1978, the Court of Appeal granted class status to a group of Sacramento area tenants of a building in a redevelopment area.[141] The property involved in the dispute was owned by the state, which had decided to demolish the building.[142] The tenants wanted to be labeled displaced and be given relocation expenses.[143] The court granted the certification, noting that "the fact that separate transactions may be involved does not preclude a finding of the requisite community of interest."[144] The court also recognized that while there may be more than one level of recovery should the plain-

139. *Id.* (listing the three factors that are determinative of whether a claim for class certification meets the community of interest requirement). According to the *Linder* court, "[o]ther relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." *Id.*

140. *But see* Bauman v. Islay Investments, 119 Cal. Rptr. 681 (1975) (denying an individual tenant's request for class certification for non-refunded cleaning deposits on the grounds she did not provide enough evidence to prove the existence of the class, but indicating a class action was theoretically possible); Hamwi v. Citinational-Buckeye Inv. Co., 140 Cal. Rptr. 215 (1977) (denying class certification to office space tenants who alleged the landlord inaccurately calculated the rentable area when computing cost of taxes and building services because the individual nature of the factual inquiry negated the required community of interest).

141. Cavanaugh v. State, 149 Cal. Rptr. 453, 456–57 (Ct. App. 1978) (providing a summary of the factual background that gave rise to litigation). With the exception of one plaintiff, Vella Turner, all of the plaintiffs in this case began their tenancies after the property had been acquired by the state for condemnation. *Id.* at 454. Because Vella Turner was found to be a pre-acquisition tenant, she was granted summary judgment in her favor. *Id.* at 454 n.1.

142. *Id.* at 454.

143. *Id.* (elucidating the target goals that the plaintiffs sought through litigation). The *Cavanaugh* court was called upon to decide whether under California Government Code § 7262, the plaintiffs were considered "displaced persons," despite having commenced their tenancies after the state had acquired the property for condemnation proceedings. *Id.* The court held that as long as the "post-acquisition tenants . . . entered their tenancy without knowledge of the acquisition," they would qualify as "displaced persons" and therefore be entitled to relocation benefits under the California Government Code. *Id.*

144. *Id.* at 456. The court emphasized that as long as individual members of the class would not have to litigate substantial or numerous questions to establish that individual's right to recover in the event of a class judgment for the plaintiffs, the issue of separate transaction would not prevent the finding of a community interest, as is required to maintain a class action suit. *Id.*

tiff-tenants be successful, any difference could be easily computed and was not fatal to class certification.[145] In 1984, the Court of Appeal found that a group of nearly five hundred mobile home park lessees were certifiable as a class.[146] The residents of the Rancho Carlsbad Mobile Home Park sued over an $80 rent increase they felt was retaliation for lobbying the city to pass a rent-control ordinance.[147] Finding the class ascertainable and common questions of law and fact present because each tenant suffered from the same rate hike, the court said the tenants' suit was a "paradigmatic class action."[148]

In *Hicks v. Kaufman*, the California Court of Appeal granted class certification to home owners for the breach of an implied warranty, but the alleged breach was of the implied warranty that goods will be fit for the ordinary purposes which they are used.[149] Several homeowners sued the company that built and sold them their homes because they claimed the material used in the foundation would create large cracks over time that would lead to dirt and bugs invading their homes and cause bumps in their flooring.[150] The Court of Appeal reversed the trial court's order

145. *Id.*

146. Rich v. Schwab, 209 Cal. Rptr. 417, 420–21 (Ct. App. 1984) (reiterating that the requirements for a class action are a community of interest in the factual and legal issues of the case, and an ascertainable class).

147. *Id.* at 418–19 (illustrating the background facts that gave rise to litigation). The ordinance that was adopted by the City of Carlsbad on December 16, 1980 provided that landlords could not increase the amount due for rent in mobile home parks until February 28, 1981. *Id.* at 418. The day after this ordinance was promulgated, the landlord notified the tenants of the mobile home park that a thirteen percent increase in rent was still due, alleging the illegality of the ordinance. *Id.*

148. *Id.* at 420 (holding that the plaintiff tenants in the case had established the minimum requirements for the certification of a class action).

149. Hicks v. Kaufman, 107 Cal. Rptr. 2d 761, 775 (Ct. App. 2001) (outlining the directions to the lower court on remand). The Court of Appeal qualified its holding that a class action could be maintained on the breach of implied warranty cause of action by directing the lower court to determine whether there existed adequate "typicality between the claims of the plaintiffs and those they seek to represent." *Id.* The lower court was further instructed to determine whether other class members could be identified in a manner that did not involve digging up the foundations of thousands of homes. *Id.*

150. *Id.* at 764 (illustrating the allegations of the plaintiffs to show a breach of the implied warranty of fitness for ordinary use). The foundations of the plaintiffs' homes were built without the reinforcement of mesh or Fibermesh, which they alleged led to predominantly wider cracks in the foundation than the homes built using the mesh reinforcement in the foundation. *Id.*

denying class certification[151] to the approximately ten thousand class members.[152]

A little over a year later, the Court of Appeal, Second District, the same district but a different division that decided *Hicks*, upheld the trial court's decision to deny class certification to Sharon Wheeler and all other tenants of a large Burbank apartment complex who claimed the complex owner had breached the implied warranty of habitability.[153] In *Wheeler v. Avalonbay Communities*, the court held that "the trial court acted well within its discretion in concluding that appellants failed to satisfy the community of interest requirement for prosecuting their lawsuit as a class action."[154] The appellate court pointed to the fact that each apartment had different defects, ranging from water intrusion to lack of heat to excessive construction noise, to support its conclusion.[155]

The *Wheeler* decision should be viewed with caution. To begin with, it is an unpublished decision so it has no precedential value in California because it may not be cited to or relied upon.[156] Second, some segments of the opinion portray a weak understanding of the doctrine of the implied warranty of habitability. The implied warranty of habitability seems to be described as a negligence-based cause of action,[157] which would

151. *Id.* at 775 (remanding the case to the lower court to resolve issues regarding the adequacy of representation issue and the ability to identify other class members).

152. *Id.* at 764. The court held that because the class was ascertainable and because there were predominately common questions of fact and law, a class action for breach of an implied warranty could be maintained. *Id.* The court noted that the only issue subject to individualized proof was the issue of damages. *Id.*

153. Wheeler v. Avalonbay Cmtys, No. B153535, 2002 WL 31630704, slip op. at *5 (Cal. App. 2002) (providing the holding of the opinion).

154. *Id.* (supporting the decision of the lower court to deny class certification). The *Wheeler* court reasoned that because the plaintiffs did not allege a common defect in the units inhabited by other class members that would, if proved, establish that the apartments were uninhabitable, the trial court had acted within its discretion when refusing to certify the class. *Id.* The court explained that the plaintiffs failed to show that there was a way to exhibit which defects existed in which apartments without needing to elicit the testimony of each tenant involved in the suit. *Id.*

155. *Id.* The court also emphasized that each of the defects could exist without either being noticeable to the tenant or interfering with his use and enjoyment of the property. *Id.*

156. CAL. RULES OF COURT CODE § 8.1115(a) (West 2007) (stating "an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.").

157. *Wheeler*, 2002 WL 31630704, at *3. The court quoted the lower court's reasoning that "[h]ere for each of the negligence based causes of action [including also the breach of implied warranty and nuisance causes of actions], each purported class member would have to prove exposure to a particular toxic substance, the timing of such exposure, and the effect of such exposure." *Id.*

make its breach more akin to a tort. However, as the name would suggest, the law of the implied warranty of habitability, and its breach, finds its root more in contract law than in torts.[158] The *Wheeler* court also erroneously points to variations in defects as fatal to class certification, ignoring a crucial section of the very case it cites to support its proposition.[159] The *Hicks* court found that though there were variations in the damages each class member suffered—some suffered only economic damages and some suffered both economic and property damages—those variations were not fatal to certification.[160]

The large scale breach of the implied warranty of habitability was not the legal question addressed by the Court of Appeal in the 1985 class action case of *Little v. Sanchez*, but it was the factual heart of the matter.[161] In 1982, Raymundo Sanchez and some of his neighbors decided to stop paying the $114.50 they owed in rent each month.[162] He had complained about the lack of hot water and gas, the holes in the walls, the mice and the cockroaches, and the broken windows many times, but landlord William Little would not listen.[163] Little was hardly an amateur property manager. He owned many properties and had filed over 250 unlawful detainers against his Los Angeles area tenants in a two-year period.[164] Little had his own way of resolving these disputes. He would

158. *See* Green v. Superior Court, 517 P.2d 1168, 1174–75 (Cal. 1974) (comparing the need for an implied warranty of habitability to an implied warranty in the fitness and merchantability of goods).

159. *Wheeler*, 2002 WL 31630704, at *4 (citing *Hicks v. Kaufman* as authority for its decision that the trial court did not abuse its discretion when failing to certify the class for litigation). The court noted that in *Hicks* liability was surmised on the finding that the inherently defective product was used in the building of the property, and was not premised on the condition of each home. *Id.*

160. Hicks v. Kaufman, 107 Cal. Rptr. 2d 761, 775 (Ct. App. 2001) (clarifying the remand instructions to the lower court). In the court's instructions to the lower court on remand, the *Hicks* court noted that in drafting a definition for the class or any subclass, the court should not require a showing of "manifest damage" to a foundation slab as a precondition of class membership. *Id.*

161. *See* Little v. Sanchez, 213 Cal. Rptr. 297 (Ct. App. 1985).

162. *Id.* at 302 (summarizing the declaration of Raymundo Sanchez, as set forth in Appendix B of the opinion).

163. *Id.* (further detailing the declaration of Raymundo Sanchez, as set forth in Appendix B of the opinion).

164. *Id.* at 298. Little created documents entitled "Stipulation for Judgment Unlawful Detainer," which resembled official court forms in such a manner that ninety-one were successfully filed with the court, whereupon judgments were entered in accordance with the stipulation. *Id.* Within these documents, tenants "purported to agree that [Little] was entitled to immediate possession of their homes and to the aid of the court in executing that right. In fact in most instances this execution was to be 'stayed' only after the tenants . . . had made full payment of all their arrearages." *Id.* Furthermore, "this stay was . . . to remain contingent upon the tenants paying to the respondent 'on the 1st day of each . . .

draw up papers that appeared to be official court documents, in English, and have his Spanish-speaking tenants sign them while telling the tenants that failure to sign would mean immediate eviction.[165]

Unbeknownst to the tenants, the paper they were signing was an agreement that Little was entitled to immediate possession of the dwelling and an obligation to pay their arrearages and an *increased* monthly rent or face immediate eviction at any point in the future.[166] The tenants filed a class action claim to set aside the judgments entered against them as a result of these misleading documents, but did not file a claim as to the living conditions that started the rent strike to begin with. The court held that to uphold the documents would "utterly destroy all known rights of landlord and tenant," including the landlord's duty to repair,[167] but the court stopped short of holding the lower court had erred in denying class certification. The court eliminated the landlord's arguments against class certification, but also allowed that the lower court may have unstated reasons for denying the certification and left the issue open on remand.[168]

In 1966, before California or most of the nation had adopted the implied warranty of habitability, Professor Julian Levi included class action suits as one possible method of enforcing this (then) new area of law.

> We may even make use of a descendant of the old Bill of Peace of the seventeenth century, and permit a tenant to institute a class action, on behalf of himself and all other tenants similarly situated, against a lessor who fails or refuses to maintain his property in a condition that would meet minimum standards of health and sanitation.[169]

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month [an amount that often far exceeded their scheduled rent] as consideration for the stay . . . [with] no new tenancy being created by said payment." *Id.*

165. *Id.* at 302–03 (describing the sworn statement of Sanchez). Also, according to Sanchez, representatives of the landlord told Sanchez that if he signed the form, the eviction case would be dropped and his problems would go away. *Id.*

166. *Little*, 213 Cal. Rptr. at 303. The form that Sanchez signed set out a term that raised his rent from $114.50 to $195.00 each month. *Id.*

167. *Id.* at 299 (holding that the defendant successfully proved that he signed a fraudulent record, which thus rendered the waiver of the defendant's rights void).

168. *Id.* at 300 (directing the lower court to reconsider its denial of class certification on remand).

169. Julian H. Levi, *Focal Leverage Points in Problems Relating to Real Property*, 66 COLUM. L. REV. 275, 283 (1966) (footnote omitted) (arguing that there exists a need for the adaptation of legal and equitable doctrines so that tenants can exercise their rights on an individual level). According to Levi, proceedings arising under Federal Rule 23 may also create case law forming a basis for additional private remedies for injured tenants. *Id.* Under these proceedings, the doctrine regarding abatement of nuisance can compel the landlord to repair the property so that the tenant is no longer injured. *Id.*

Four decades later, a small Los Angeles-based law firm has made implied warranty of habitability class action suits a large focus of their practice, though it is a focus attorneys Daniel Bramzon and Benjamin Ramm say is exceedingly rare.[170]

Established in 2004, BASTA is a tax-exempt, non-profit organization specializing in tenants' rights and operating without the aid of federal funds.[171] The practice consists mainly of eviction defense cases,[172] and the organization, led by Bramzon, has filed about a half dozen implied warranty of habitability class action suits.[173] In their class action and multi-party litigation, BASTA typically settles for amounts between $130,000 and $415,000,[174] but recently settled their largest case ever for $3.05 million.[175] There were 137 apartments and over four hundred tenants involved in that case, but the typical class action suit involves between twenty and thirty apartments, according to Ramm.[176]

Ramm said class actions are rarely utilized in this area of law because most landlord-tenant law practitioners do not have a background in class action litigation.[177] "I just have a background in class actions. I looked at this problem and said this is a class action problem," Ramm said.[178] "You see a problem and you think, 'Well, I have this tool for solving this kind of problem. Let me see if this tool works,' and it seems to do ok."[179]

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170. Telephone Interview with Benjamin Ramm, Attorney, BASTA (Nov. 11, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). BASTA is the only organization Ramm knows of that regularly files implied warranty of habitability class actions suits, but he pointed out that other firms and attorneys have occasionally filed these types of suits. *Id.*

171. BASTA, Overview, http://www.bastaforjustice.org (last visited June 17, 2010). BASTA provides aid to tenants living in substandard housing by providing general and legal assistance, educating tenants on their rights, engaging in tenant outreach programs, and conducting building inspections. *Id.*

172. *Id.*

173. Telephone Interview with Benjamin Ramm, Attorney, BASTA (Nov. 11, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

174. BASTA, Class Action/Multi-Party Litigation, http://www.bastaforjustice.org (follow "News" hyperlink; then follow "CLASS ACTION/ MULTI-PARTY LITIGATION" hyperlink) (last visited June 17, 2010) (providing information regarding recent cases that BASTA has settled).

175. Telephone Interview with Benjamin Ramm, Attorney, BASTA (Nov. 11, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). The case is captioned *Valdivia v. 3049 8th Street L.P. Id.* According to Ramm, often times lawsuits against landlords result in settlement because damages can be so catastrophic that they would bankrupt the landlord. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

Ramm said it seemed like a class action suit to him because the tenants are the same group of people being treated the same way.[180]

The hard part about filing an implied warranty case as a class action suit is picking the clients.[181] "We pick these cases because they're going to be certifiable. We have rejected several buildings because they haven't had certifiable claims," Ramm said.[182] "Once we pick the building, it's easy, but it's hard to know how to pick the building."[183] The suits usually must be focused around the building itself, and there usually has to be a defect in a major system of the building, like the gas, water, or electricity.[184] And do not overreach. "The trick here is to keep your claims limited. You don't try to solve the whole problems of the world, and you don't try to go after every building," Ramm said.[185]

Before they can be selective about which buildings to pursue as class actions, the attorneys of BASTA have to make contact with a group of clients sometimes disinclined to walk into a lawyer's office. Because of this, traditional advertising is not always the most effective way to reach clients. "Our client base is not integrated into mainstream society. They're often times not literate. To the extent that they're literate, they're not literate in English. As a result, the way that information gets passed around is word of mouth," Ramm said.[186] It is not unusual for BASTA to defend an eviction for one client, who then talks to his friends, and then that leads to the consultation that eventually becomes a class action suit.[187] "It's having those connections through the evictions and then letting those concentric circles puddle out to other people," Ramm said.[188]

Once the clients are chosen, defining the class for the court in the motion for certification is essential. In *Hicks*, the trial court denied class

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180. Telephone Interview with Benjamin Ramm, Attorney, BASTA (Nov. 11, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (explaining what makes a class certifiable). While many landlords try to argue that each apartment needs its own lawsuit, BASTA focuses on the landlord's behavior and failure to maintain the building as the basic source of liability. *Id.* The degree of damage each tenant suffers may vary, but that variation is not fatal to class certification. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* According to Ramm, it is also difficult for a case to qualify for class certification if the violations are not observable. *Id.*

185. Telephone Interview with Benjamin Ramm, Attorney, BASTA (Nov. 11, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

186. *Id.* Ramm noted that BASTA combats the issue of clients feeling marginalized by society, and therefore not coming forward to report violations, by being a presence in the community so that tenants can feel safe when seeking legal representation. *Id.*

187. *Id.*

188. *Id.*

certification in part because it held the class was not sufficiently ascertainable.[189] The plaintiffs had defined the class as:

> "All persons or entities who own one or more homes [in specified Kaufman developments] which were constructed and marketed by [Kaufman] in which 'Fibermesh,' a polypropylene product, was utilized in the concrete foundation slabs as a substitute for 6x6, 10x10 welded wire mesh with *manifested damage or defect* due to the Fibermesh substitution."[190]

It was the phrase "manifested damage or defect" that the trial court was concerned about. The only way to make this determination was to inspect each home's foundation, which would create an individualized analysis that is contrary to certification of a class action.[191] The Court of Appeal agreed the class definition was flawed, and noted that "ascertainability can be better achieved by defining the class in terms of objective characteristics and common transactional facts."[192] In short, the plaintiffs in *Hicks* would have been better served by leaving out the fact of injury and simply including all homeowners stuck with that particular kind of foundation.[193] For example, proving that less is often more, in BASTA's largest case to date, *Valdivia v. 3049 8th Street L.P.*, the class definition in the motion for certification is simply "individuals who have rented dwelling units in the property located at 3049 8th Street, Los Angeles, during the two years prior to the filing of the complaint."[194]

BASTA's approach has been successful. They have always been able to get class certification, though sometimes the judge will certify some

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189. Hicks v. Kaufman, 107 Cal. Rptr. 2d 761, 764 (Ct. App. 2001) (recounting the denial of the plaintiff's class action for negligence and strict liability causes of action). The court emphasized that the existence of individual fact questions regarding causation and damages precluded a class action for negligence and strict liability. *Id.*

190. *Id.* (emphasis added) (quoting from the complaint filed by the plaintiffs in *Hicks*).

191. *Id.* at 765. The court noted that the California Supreme Court has held "courts may not consider the merits of the claim at the certification stage." *Id.* Furthermore, the court stated that a showing of damage to a slab of foundation is merely an element of proof to show Kaufman's liability, which only relates to requirement for common questions of fact and law, instead of the requirement for ascertainability. *Id.*

192. *Id.* at 766 (citing a treatise on class actions by Herbert B. Newberg).

193. *See id.* at 764. Fortunately for the *Hicks* plaintiffs, the appellate court held their flawed definition was not fatal to class certification, and added that a court should actually help plaintiffs determine their class. *Id.* at 766. "[I]f necessary to preserve the case as a class action, the court itself can and should redefine the class where the evidence before it shows such a redefined class would be ascertainable." *Id.* at 767.

194. Notice of Motion and Motion for Certification of Class at 3, Valdivia v. 3049 8th Street L.P., No. BC 361404 (Cal. Super. Ct. May 16, 2007).

claims but not others, Ramm said.[195] "Generally they'll keep our main claims intact. We just point out this is one building, this is one landlord, this is one pattern of behavior which had caused the building to run down," Ramm said.[196] "It's not simple. We really do have to figure out what the story of the building is. But legally, it just becomes very mundane. The judges don't really question us. They just grant us the motion."[197] The biggest resistance comes, naturally, from the landlords' defense attorneys, who often insist each tenant's injuries are so unique, they deserve their own trial.[198] "That's just not the way the law works. You can sort of put the landlord's behavior on trial and the landlord's business practices on trial."[199]

Ramm compared the variation in injuries suffered by tenants to the variations in injuries suffered by passengers in an airplane crash.[200] "The airplane crashed. Everybody was in the same cabin," Ramm said. "The basic source of liability is the same."[201] The issue of whether varying degrees of damages is per se fatal to class certification was settled in 2004 in *Sav-On Drug Stores Inc. v. Superior Court*.[202] There, the California Supreme Court held that "a class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages."[203] The court added that pattern and practice evidence is available "in order to evaluate whether common behavior toward similarly situated plaintiffs makes class certification appropriate."[204] Ramm, citing *Sav-On Drug Stores*, said that while tenants do have variations in actual injuries suffered, those variations do not overwhelm the fundamental question of the landlord's neglect and instead just speak to damages that can be sorted out after certification.[205]

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195. Telephone Interview with Benjamin Ramm, Attorney, BASTA (Nov. 11, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. Telephone Interview with Benjamin Ramm, Attorney, BASTA (Nov. 11, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

201. *Id.*

202. 96 P.3d 194, 199 (Cal. 2004). Sav-On employees sued the company, alleging they were improperly classified as exempt from receiving overtime wages. *Id.* at 198. The court rejected Sav-On's argument that class certification was improper because an analysis of each individual's actual tasks performed was required. *Id.*

203. *Id.* at 204 (citing *Emp't Dev. Corp v. Superior Court*, 636 P.2d 575 (Cal. 1981)).

204. *Id.*

205. Telephone Interview with Benjamin Ramm, Attorney, BASTA (Nov. 11, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

Once the class is certified, managing an implied warranty case as a class action is different than your average class action suit, according to Ramm.[206] "You really do have to get to know not just your class reps, but really have to get to know all the class members. There's a lot more client management than in a usual class action, but they're also smaller classes so you can afford to meet with people," Ramm said.[207] Presence in the community is important from the beginning to the end of these cases, and this can create the opportunity for intangible rewards class action attorneys do not often get to experience. "I get to watch the kids grow up. One of the little girls who I chased around the porch two years ago is now up and walking and talking to me," Ramm said.[208]

Most implied warranty cases will have to be certified as a class by a judge, because the landlords and their attorneys often are not sophisticated enough to know how to respond when faced with the prospect of a class action suit.[209] "If they were smart, they'd stipulate to class certification because it extinguishes all claims. It buys out all liability for a particular time period, but they don't usually do that," Ramm said.[210] Once the class is certified, the landlord will probably settle. "The cases settle because the damages could be so catastrophic. If we took one of these cases to trial, [with the right jury] we'd get what would amount to annihilation damages. It would put the landlords in bankruptcy. They have to settle. We have to settle," Ramm said.[211] Settlement is so essential, the attorneys of BASTA have sometimes taken less than they think they ought to in order to make sure the clients end up with a check at the end of the case.[212] "It ultimately ends up being much better for our clients because to get the money that they do, it changes their lives, or it has the ability to," Ramm said.[213]

V. Conclusion

In difficult economic times, cities and states need to make difficult economic decisions. Today, California cities have to choose between spending limited funds to put cops on the street or inspectors in buildings. Counties must choose between prosecuting slumlords or drug lords. Unfortunately, just as enforcement is cut back, need rises. The recent drastic

206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. Telephone Interview with Benjamin Ramm, Attorney, BASTA (Nov. 11, 2009) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).
211. *Id.*
212. *Id.*
213. *Id.*

reduction in property values has made both landlords and tenants more desperate, resulting in an even greater inventory of unsafe and unhealthy rental units. The ripples flow from there, upsetting the health of the entire community.

Private lawsuits are a viable means of fighting these problems. Though the case law is sparse, class action and mass tort suits are available to prosecute landlords who breach the implied warranty of habitability. They have the potential to be rewarding, both monetarily and emotionally, for the tenants as well as the attorney who chooses to pursue them. For the tenant-plaintiffs, municipal code enforcement and even an individual private lawsuit will not drastically change their living conditions, and these remedies certainly will do nothing to help the tenant down the road living in an identical slum. Participating in a class action or mass tort suit, on the other hand, is more likely to truly change the tenant-plaintiff's living environment. Ideally, if enough of these lawsuits are filed and won by tenants, landlords will eventually decide that operating a slum is just an unprofitable business model.