

ALTERNATIVE DISPUTE RESOLUTION, SUBSTANTIVE DOCTRINE, AND POWER

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A belief that the difficult issues of our society can best be resolved by adherence to some defined process drives much of contemporary western intellectual thought. The consequence is a pronounced preference for focusing on 'means' and not on 'ends.' When we find the system failing to attain a desired objective, the primary inquiry into the failure revolves around the correct structure and alignment of the means.¹

INTRODUCTION

The judiciary repeatedly reexamines and reforms procedures in order to reduce litigation cost and delay.² Would these objectives be more effectively realized if procedural changes informed the revision of substantive law?³ Our legal system currently operates as if substance and procedure were unrelated in the disposition of cases. As a result, the judicial system sabotages itself in the examination and reform process. Although reducing caseload numbers through procedural changes, reformers of the system nonetheless increase the number of cases by continuing to apply substantive doctrines requiring evidence likely to intensify conflict. This article addresses the manner in which process-fixation ignores the potential benefit of examining substantive law for complementary remedies, and thus irrationally contributes to systemic sabotage.

Both the bench and the bar normally revise procedure to accommodate substantive changes that have increased caseload. Revising and developing substantive legal doctrine to facilitate dispute resolution procedures is the

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1. Maxwell O. Chibundu, *Delinking Disproportionality from Discrimination: Procedural Burdens as Proxy for Substantive Visions*, 23 N.M. L. Rev. 87 (1993).

2. See, e.g., Civil Justice Reform Act, 28 U.S.C. §§ 471-82 (1990). The ongoing process of tinkering with the system by amending rules of civil procedure reflects the idea that procedural reforms will improve the litigation process. The nature of the problem facing the courts is reflected in a headline from the National Law Journal: "Judges Foresee Federal Courts Caseload Crush." NAT'L L.J., Jan. 9, 1995, at 1; see also Edward F. Sherman, *A Process Model and Agenda for Civil Justice Reforms in the States*, 46 STAN. L. REV. 1553, 1554 (1994) ("Lawyers and judges in overburdened state systems face the same outcry of dissatisfaction with litigation delay and cost that led Congress to enact the CJRA.").

3. See generally Sherman, *supra* note 2.

mirror image of procedural revision but is not a familiar, and therefore comfortable, image. Conceptual illegitimacy is often the threshold reaction to tenets born of an unfamiliar pattern of change.⁴ Litigators may view changes in substantive law intended to reduce caseload as a disservice to litigants who would rather rely on a trial with evidentiary complexities. Litigators rightfully use available evidentiary questions as stock-in-trade to create legal labyrinths favorable to themselves.⁵ Therefore, displacing substantive doctrine for systemic rather than individual benefit is subject to both critical analysis and visceral attack. A visceral reaction is more probable when displacing substantive doctrine that is familiar and has worked, if not well, with certainty.

The idea of improving process by revising substantive law, if not illegitimate, answers to iconoclasm. Procedural reform historically arises from a desire to reduce or eliminate the delay in the court process caused by a numbers-nightmare in trial dockets.⁶ Increased docket numbers often occur because of additions and revisions to substantive law. Accordingly, in a familiar pattern of reform, judges, lawyers, and academicians revise procedures to more quickly dispose of increased caseloads caused by

4. "For law to be perceived as 'legitimate' and 'objective', it must be coherent with the pre-existing stock of cultural categories and concepts, but . . . these categories and concepts 'are cultural artifacts encoding particular and contingent normative conceptions.'" Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881, 1885 n.13 (1991) (summarizing his own position in *The Cognitive Dimension of the Agony Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2255-71 (1989)). Winter argues:

That process of legal legitimation that I have described requires three conditions for its success. First, for law to cover the wide variety of fact situations to which it is to be applied, it must be easily generalizable. Second, for law to appear as legitimate in the absence of objective justification, it must evoke the kind of automatic sense of validity—should we call it a "natural law response"—that is only provided by automatic, unreflexive cultural knowledge. Third, for law to function effectively and equitably, it must be communicated with as high a degree of relative reliability as possible.

Id. at 2259-60. Concerning Winter's second requirement—which addresses the alteration of proof requirements in order to facilitate process—the question then becomes: if changes in the substantive law do not reform the process or provide an objective justification for further change, then is there an automatic agreement in our culture that validates the equal distribution of proof requirements?

5. This article features two cases that qualify as legal labyrinths: *SunAmerica Financial v. 260 Peachtree Street, Inc.*, 415 S.E.2d 677, 681 (Ga. 1992), and *Penzoil v. Texaco*, 481 U.S. 1 (1986). See also generally Stephen M. Bundy, *Commentary on "Understanding Penzoil v. Texaco": Rational Bargaining and Agency Problems*, 75 VA. L. REV. 335 (1989).

6. Less delay—interpreted as "faster"—would alleviate the nightmarish neglect of case files that often occurs when docket settings are so far in the future as to be irrelevant to the "get ready for trial" preparation of lawyer litigators. Witnesses die. Lawyers lose interest. Cases stagnate on pending dockets. "Try-or-dismiss" dockets result in a flurry of activity that often ill-prepares for courtroom battle. Judges bemoan their inability to give thoughtful consideration to all cases. "Hurry up and wait" and "Getting nowhere fast" are buzz words for the delay that is too often ruinous for parties. Neglect damages the judicial system as a whole because either the system's public users become personally familiar with the maxim "justice delayed is justice denied" and lose faith in the system or those who can afford to "rent a judge" or voluntarily arbitrate or mediate, considering the system worthless, to actually resolve a dispute in a timely manner when time is money.

substantive law.⁷ This article proposes the reverse: revising substantive law principally to help dispute resolution and end judicial self-sabotage.

A more effective model focuses not only on procedures⁸ but also on the effect of substantive doctrine on reform. Exploring the intersection between procedure and substance in order to remove substantive obstructions⁹ to disposing of cases on the procedural fast track¹⁰ will benefit the system holistically. This article provides intersectional analysis to further this holistic-approach argument.

I will demonstrate that a search for doctrinal remedies that complement dispute resolution supports the judicial objective of efficient and fair case disposition. Fair case disposition is crucial to my model proposal: the notion of fairness is intrinsic to the American legal system. Substantive law should only be revised when fairness, defined as "meeting the reasonable expectations of both parties,"¹¹ can be demonstrated in a proposed revision.

Litigators attempt to accelerate an end to disputes by using summary judgment or some form of bargained-for alternative dispute resolution (ADR) as a means of avoiding trial. I argue that evidentiary requirements of substantive doctrine both help and hinder the acceleration of disputes at the summary judgment stage¹² and encourage or discourage self-determined resolution outside the courtroom. Using the example of two remedies in *commercial* real estate law as a demonstrative model to illustrate the effect of

7. See *supra* note 2.

8. See, e.g., Civil Justice Reform Act, 28 U.S.C. §§ 477-79 (requires federal district courts to devise "expense and delay reduction plans.").

9. Preoccupation with process may reflect an unspoken agenda of providing a counterweight for the Machiavellian focus on ends. The source of the focus on process is not, however, an operative paradigm in terms of the substantive law. See Evelyn Alecia Lewis, *Struggling With Quicksand: The Ins and Outs of Cotenant Possession Value Liability and a Call for Default Rule Reform*, 1994 WIS. L. REV. 334, 346 (1994). "Judges and lawyers depend on articulations describing rule designs to scout the legal territories of their focus. This 'rhetoric of design' is a primary guide. Generally, judges follow the scouted route. For this reason, design rhetoric also has a self-fulfilling impact on rule design, keeping the two relatively in sync." *Id.*

10. It has become the vogue in court management to design tracks for cases early in their lives; e.g., the potentially simple, routine tort or contract cases; the more complex cases; the clearly complex cases; and above all else, those cases that are likely to settle early. Cases likely to be disposed of sooner rather than later are sent to the fast track. The states of Connecticut and New Jersey were early pioneers in court administration systemic tracking. See generally Joan T. White, *Intermediate Punishment Options, Briefing Papers for the Conference of Chief Justices*, NATIONAL CENTER FOR STATE COURTS (1992).

11. Lewis, *supra* note 9, at 339 (examines co-tenancy and whether contextual circumstances are relevant to distributing rental proceeds when one of the co-tenants occupies a jointly owned property); see also Gerald G. Greenfield & Michael Z. Margolies, *An Implied Warranty of Fitness in Nonresidential Leases*, 45 ALB. L. REV. 855 (1981).

12. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In eliminating good faith as a necessary element of proof for government officials seeking to retain immunity from personal liability Justice Powell, writing for the court, focuses on the subjective nature of motivation: "Reliance on the objective . . . should . . . permit the resolution of many insubstantial claims on summary judgment." *Id.* at 818.

evidence on the very reforms the judiciary otherwise advances, I compare the routinely rejected implied warranty of fitness for purpose¹³ with the court favored remedy of constructive eviction.¹⁴ Commercial tenancies particularly illustrate my thesis because one of the doctrines that controls entitlement of the parties contains an equality of power assumption.

This article builds on the work of previous commentators who have urged the adoption of the fitness warranty in commercial tenancies,¹⁵ but have focused primarily on the substantive benefits the warranty bestows on tenants, and have ignored comparisons between the warranty and constructive eviction.¹⁶ The comparisons in this article address the benefits and duties bestowed by each remedy, and offer a hypothesis of benefits and duties that will result if the objectives of reform are caseload reduction as well as fair distribution of justice.

The argument proceeds in four parts. Part I sketches the doctrinal elements of constructive eviction and implied warranty. This part argues that the equal bargaining power assumption underlying the constructive eviction doctrine is flawed, and consequently an unequal burden of proof results. Part II compares the use of these two remedies in the context of summary judgment and explores the effect of their evidentiary requirements. This part structures a fundamental proposition of the article: evidentiary inquiries of a subjective nature, such as intent, are costly to litigate and are counterproductive to

13. "This warranty means that at the *inception of the lease* there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose and *that these essential facilities will remain in a suitable condition.*" *Davidow v. Inwood N. Prof'l Group—Phase I*, 747 S.W.2d 373, 377 (Tex. 1988) (emphasis added).

In this article, the implied warranty of fitness for purpose is usually referred to as the "fitness warranty." In some court decisions and commentary, the warranty is referred to as the "warranty of habitability." However, because the implied warranty of habitability has a specific meaning within residential real estate doctrine, and because habitation usually infers residential shelter, it seems inappropriate to use the term when commercial tenancies are at issue. Therefore, this article does not use the term "warranty of habitability" as a synonym for the warranty of fitness.

14. See, e.g., *SunAmerica Fin. v. 260 Peachtree St., Inc.*, 415 S.E.2d 677 (Ga. 1992).

In a classic constructive eviction situation, concerning commercial leases, the landlord as a consequence of his failure to keep the rented premises repaired, allows the premises to become an unfit place for the tenant, who is physically occupying the premises, to carry on the business (or purpose) for which the premises was rented, and the premises cannot be restored to a fit condition by ordinary repairs which can be made without unreasonable interruption of the tenant's business.

Id. at 681.

15. See generally Greenfield, *supra* note 11; John M. Marley, *Landlord-Tenant; Should a Warranty of Fitness be Implied in Commercial Leases?*, 13 RUTGERS L.J. 91 (1981).

16. See generally Paula C. Murray, *The Evolution of Implied Warranties in Commercial Real Estate Leases*, 28 U. RICH. L. REV. 145 (1994). Murray discusses the evolution of constructive eviction in the context of landlord-tenant law, but moves on to argue in favor of the implied warranty without comparing the two remedies.

quicken disposition in some factual patterns.¹⁷ Part III compares the remedies in the context of negotiation and mediation. This part argues that the absence of subjective evidentiary questions in proving the implied warranty increases the likelihood of ending disputes by either negotiation or mediation in ways unlikely available as options when a tenant moves out of the premises and proffers the litigious constructive eviction defense¹⁸ as justification. Part IV calls for the policy shift necessary to adopt the fitness warranty in commercial tenancies as a model for shifting policy in other areas of substantive law where the same principles of efficiency and a fair distribution of justice can be applied.

I. A FLAWED EQUAL BARGAINING POWER ASSUMPTION

A. *The Remedies as a Frame of Reference*

There is a relationship between procedure and substance that forms a litigation intersection. Viewing the two as an integrated whole that functions as one unit is critical to meaningful reform for lasting caseload reduction. As a concrete example of procedure and substance coming together to either reduce or increase the probability of settlement without a trial, I use the commercial real estate remedies of implied warranty and constructive eviction. These substantive doctrines have different evidentiary requirements, and thus lead to different resolutions of identical factual situations.

1. A Comparison of the Remedies

The differing evidentiary requirements of the constructive eviction and implied warranty remedies provides a frame of reference for understanding their consequences on summary judgment and alternative dispute resolution (ADR). Constructive eviction requires evidence focused in time at the moment the leased space becomes unfit because of the landlord's inaction after leasing.¹⁹ The implied warranty remedy requires evidence focused in time at the lease's inception. Substantively, the implied warranty protects the tenant during the lease term against latent defects or defects which arise because of

17. Clearly, not all factual patterns lend themselves to disposition prior to a full-scale jury trial.

18. "Constructive eviction is, in our opinion, merely a specialized defense in rent cases grounded on principles of general contract law respecting failure of consideration." *Wellbaum v. Murphy*, 178 S.E.2d 690, 691 (Ga. 1970).

19. See *SunAmerica Fin. v. 260 Peachtree St., Inc.*, 415 S.E.2d 677, 681 (Ga. 1992).

the landlord's inaction.²⁰ Breach of the implied warranty is proved by evidence of the inadequacy of the leased space.

Constructive eviction dates from 1826, when *Dyett v. Pendleton* gave it life.²¹ The implied warranty grew out of three significant cases: *Reste Realty Corp. v. Cooper*,²² *Vermes v. American Distributors Telephone Co.*,²³ and *Davidow v. Inwood North Professional Group—Phase I*.²⁴ The threads of connection uniting *Reste*, *Vermes*, and *Davidow* become the whole cloth of the implied fitness for purpose warranty. *Reste* contributes the mutual dependence of the tenant's obligation to pay rent and the landlord's obligation to maintain the premises. *Vermes'* contribution is consideration of the tenant's point of view. *Davidow's* analysis results in the expression of the implied warranty.

To claim the constructive eviction remedy enunciated in *Dyett*, a prevailing tenant must prove: (1) the leased space became unfit for the tenant's continued use; (2) the landlord intentionally allowed the unfit condition to occur; (3) the unfit condition was permanent and not temporary since the condition could not be repaired without undue disruption of the tenant's business; and (4) the tenant promptly moved from the premises because of the condition.²⁵

To prevail when claiming *Davidow's* breach of the implied warranty of fitness for commercial purpose (the warranty), the tenant must prove: (1) the landlord knew of the tenant's specific commercial purpose; and (2) space defects exist which thwart, disrupt or frustrate the tenant's purpose.²⁶

Most importantly, the two remedies differ in the warranty's requirement that landlords notify prospective tenants of any features making the space unsuitable for the tenant's specific intended purpose. This notice must occur since the landlord is in a better position to know about defects in the lease space than the prospective tenant. The assumption of the warranty favors potential and actual knowledge about the prospective leased space as determinative of entitlements and clearly dumps the caveat emptor doctrine as

20. See *Davidow v. Inwood N. Prof'l Group—Phase I*, 747 S.W.2d 373 (Tex. 1988).

21. *Dyett v. Pendleton*, 4 Cow. 581 (N.Y. 1825), *on writ of error*, 8 Cow. 727 (N.Y. 1826).

22. *Reste Realty Corp. v. Cooper*, 251 A.2d 268 (N.J. 1969).

23. *Vermes v. American Dist. Tel. Co.*, 251 N.W.2d 101 (Minn. 1977). A remedy sounding in negligence rather than in an implied warranty is not as efficient for summary judgment purposes. See *infra* Part III for the benefits to, and fairness inherent in, a remedy that facilitates summary judgment.

24. See *Davidow*, 747 S.W.2d 373; see also *Sun Ins. Servs., Inc. v. 260 Peachtree St., Inc.*, 385 S.E.2d 127 (Ga. 1989) (holding that in commercial tenancies, disruption of quiet enjoyment thwarts commercial purpose).

25. See *Downtown Realty, Inc. v. 509 Tremont Bldg., Inc.*, 748 S.W.2d 309, 322 (Tex. App. 1988).

26. See generally *Davidow*, 747 S.W.2d 373.

outdated in a "fax-it-to-me world."²⁷ With its assumption favoring knowledge about the space, the warranty clearly labels the equal bargaining power assumption as invalid. For example, the court in *Davidow* cast aside the equality of bargaining power assumption by saying: "in most instances the landlord is in a much better bargaining position than the tenant."²⁸ With different underlying premises, each remedy impacts the parties' evidentiary burden in ways that either facilitate or hinder the amelioration of caseload disposition delay.²⁹

B. The Evidence Tilt of Assumptions

Residential tenants bargain from a weaker power position than the landlords.³⁰ Therefore, an implied warranty of habitability exists for residential properties.³¹ The language of the Kansas Supreme Court in *Service Oil Co. v. White* is typical of decisions that distinguish residential from commercial leases and use the equal bargaining power assumption to reject the warranty.³² In holding that the lower court erred in basing liability of the landlord on the existence of an implied covenant of suitability in the commercial lease of premises for a service station, the court allowed the lessee to base an action in fraud for latent defects that prevented the use of the premises for the service station.³³ The court, relying on the equality of bargaining power assumption to reject the warranty, explained:

These reasons do not apply in the case of business and commercial property for the lessee does not generally occupy an inferior bargaining

27. JOHN NAISBITT & PATRICIA ABURDENE, MEGA-TRENDS 2000, 121 (1990).

28. *Davidow*, 747 S.W.2d at 376 (emphasis added).

29. Using the word "ameliorate" rather than "eradicate" rests on the assumption that caseload disposition delay will never go away entirely. For example, a litigator may always use delay as a trial tactic.

30. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); see also, e.g., Susan Etta Keller, *Does the Roof Have to Cave in? The Landlord/Tenant Power Relationship and the Intentional Infliction of Emotional Distress*, 9 CARDOZO L. REV. 1663 (1988).

31. See *Javins*, 428 F.2d at 1080.

32. See *Service Oil Co. v. White*, 542 P.2d 652, 659 (Kan. 1975); see also *B.W.S. Inv. v. Mid-Am Restaurants, Inc.*, 459 N.W.2d 759, 763 (N.D. 1990) (after examining explicit language of contract referring to liability, court held no implied warranty of habitability existed in commercial leases); *Fireman's Fund Ins. Co. v. B.P.S. Co.*, 491 N.E.2d 365, 370-71 (Ohio Ct. App. 1985) (although a great disparity of bargaining power might lead to a different conclusion, court held no implied warranty existed when both parties were of equal bargaining power and simple language of contract waived any liability); but see *id.* at 370 ("In the absence of Ohio case law specifically rejecting the doctrine of caveat emptor in regard to commercial leases, we cannot conclude that in light of a trend toward change in residential leases such a modification in the landlord-tenant law requires a reevaluation of the relationship of the parties to a commercial lease.").

33. See *Service Oil*, 542 P.2d at 659.

position. The higher standards of personal facilities vital to public health and welfare required for residential property are not generally required for business or commercial property. We decline to engraft an implied warranty of suitability under the facts of this case upon the parties to a business or commercial lease.³⁴

The court's assumption that all commercial tenants have bargaining power³⁵ equal to the landlord's caused the court to reject the warranty and the subsequent "routine processing"³⁶ of commercial landlord-tenant disputes through the rule of constructive eviction. The evidentiary scales are then tilted—in the sense of "not in conformity with accepted principles of right and wrong"³⁷—in favor of the landlord such that no authentic claim of outcome neutrality can be made in favor of the assumption. Relying on safety in numbers and known rhetoric, courts reject the warranty simply by saying that

34. *Id.*

35. Bargaining power, whether at the time a lease is negotiated or within the dispute resolution process, means the ability to act in a way that "favorably changes the bargaining set" in furtherance of one's interests. See DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 249-58 (1986).

36. See Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1, 27 (1992) ("Routine processing is usually faster and less contentious than more substantive and individualized methods of settling disputes, and that may account for its popularity, but whatever its efficiencies, it is not always a model of distributive justice. It favors status quo distributions of wealth and power, gives repeat players an advantage, and encourages stereotypical settlements in which bargainers smooth over or ignore the idiosyncratic features of individual claims.")

37. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 862 (2d ed. 1983) (definition of "immorality"). I do not claim the assumption to be immoral because, for me, the term requires some level of consciousness that, by its very nature, an assumption does not have. However, I use the definition of immorality to convey: "out of conformity with a normative conception."

Basic principles of fairness—in the sense of parties' expectations—are violated when one party is faced with substantive law so clearly favoring the other party who is likely already privileged in terms of social status.

it is not the majority rule.³⁸ A court relying on safety in numbers may categorically reject the fitness warranty.³⁹

Other courts, and some legal commentators, support the implied warranty of fitness for purpose and argue for its adoption.⁴⁰ Even so, since its 1826 introduction into landlord-tenant relationships⁴¹ constructive eviction continues in most jurisdictions⁴² as the court-preferred⁴³ remedy for commercial tenants when fitness of space is at issue. Comments and decisions which reject the warranty because of the assumption of equal bargaining power reason that tenants can negotiate whatever lease provisions they require and that the parties should have to rely on express lease provisions.⁴⁴ These arguments lead to the conclusion that constructive eviction works well enough. However, it only works well enough if the courts' goal is to continue support for a doctrinal construct that favors the landlord in its evidence requirements.

The court in *Davidow* deconstructed the equality-of-bargaining-power assumption and exposed the deficiencies in the inferences on which courts base the equal power assumption.⁴⁵ Although both parties to a lease are primarily concerned with profit, it is important to move past this concern for financial

38. See *Chausse v. Coz*, 540 N.E.2d 667, 669 n.4 (Mass. 1989) ("Only two State Supreme Courts have recognized such a warranty in a commercial context. Several other courts have explicitly rejected such an implied warranty in a commercial context."); see also, e.g., *B.W.S. Inv. v. Mid-Am Restaurants, Inc.*, 459 N.W.2d 759 (N.D. 1990); *Golub v. Colby*, 419 A.2d 397 (N.H. 1980); *Kootman v. Kaye*, 744 S.W.2d 898 (Mo. 1988); *Randall Co. v. Alan Lobel Photography, Inc.* 465 N.Y.S.2d 489 (N.Y. Civ. Ct. 1983) (where statute expressly included residential leases and did not include commercial leases, a commercial tenant could not interpose a counterclaim for breach of an implied warranty in a summary proceeding); *40 Assocs. v. Curtis Katz*, 446 N.Y.S.2d 844, 845 (N.Y. Civ. Ct. 1981) (despite absence of statute, tenant is entitled to his "rent money's worth" in services and maintenance; as a result, an implied warranty of fitness for use exists in commercial premises); *Glen 6 Assoc. v. Dedaj*, 770 F. Supp. 225, 228-29 (S.D.N.Y. 1991) (given that landlord-tenant law is continually evolving and is, to a certain extent, unsettled, court willing to extend warranty of fitness for habitability to commercial properties on basis that the modern commercial tenant has right to expect more than the delivery of possession).

39. See generally *Golub*, 419 A.2d 397 (implied warranty of habitability does not extend to commercial leases because majority of courts reject such warranty); see also *J.B. Stein & Co. v. Sandberg*, 419 N.E.2d 652 (1981) (implied warranty of habitability should not be extended to commercial leases in order to enable a plaintiff to bring action in damages caused by fire). The *Golub* decision is frustrating because the court is summary in its disposition and misleadingly interprets the body of New Jersey law on the topic. See John A. Marley, Note, *Landlord-Tenant: Should a Warranty of Fitness be Implied in Commercial Leases?*, 13 RUTGERS L.J. 91 (1981) (presenting an in-depth analysis of the New Jersey cases).

40. See, e.g., *Davidow v. Inwood N. Prof'l Group—Phase I*, 747 S.W.2d. 373, 373 (Tex. 1988); *Greenfield & Marolies*, *supra* note 11, at 855; see also generally *Marley*, *supra* note 15.

41. See *Dyett v. Pendleton*, 4 Cow. 581 (N.Y. 1825), *on writ of error*, 8 Cow. 727 (N.Y. 1826).

42. See *Chausse*, 540 N.E.2d at 669.

43. The statement that courts prefer to invoke constructive eviction on behalf of tenants to remedy defects in the premises raises the question of whether the court is really obeying a preference or is merely stuck in the "design and rule" rhetoric described by Lewis. See *Lewis*, *supra* note 9, at 346.

44. See, e.g., *Cho Mark Oriental Food, Ltd. v. K & K Int'l*, 836 P.2d 1057 (Haw. 1992) (reasoning that express lease provisions should prevail in commercial tenancies).

45. See *Davidow*, 747 S.W.2d at 376-77.

gain when formulating doctrine and policy pertaining to commercial tenancies. These reasons preferably include the likely knowledge, expertise, and premises control of the universal tenant in relation to that of the universal landlord.⁴⁶ Courts particularly punish fledgling entrepreneurial enterprises by reasoning that the profit motive alone justifies the continuation of the "caveat lessee" doctrine when commercial tenants seek redress from alleged landlord wrongs. Courts which reason that the money motive is paramount to all other considerations⁴⁷ reject concerns more likely held by the universal tenant than by the comparatively few multinational tenants.⁴⁸

This point can be illustrated by a hypothetical. Assume a tenant who operates a one-person potter's shop which sells its wares straight from the kiln to the walk-in consumer in a shopping mall or strip. It is probably unreasonable, if not irrational, to expect that such a tenant would have the expertise or incentive to make the premises suitable for the increased energy supply required by the kiln. The tenant should be required to inform the landlord of his or her intent to use a kiln that may require extra energy supply⁴⁹ and the landlord, upon agreement to lease the space, should be said to impliedly warrant that the wiring necessary for the kiln exists on the premises. If, upon purchasing the necessary equipment, moving into the space, and opening for business, there is a power failure each time the tenant fires the kiln, the space thwarts the commercial purpose of the tenant.⁵⁰ If the landlord does not remedy the situation, to prove landlord liability, why must the tenant prove facts other than: (1) leasing with notice of purpose and (2) the continuing failure of power? Other than historical leasehold reasoning from the agrarian age protecting the land owner, no clear reason exists.

Once the assumptions move from an inception of lease focus to a time of dispute and litigation focus, the requirement of intent is the primary and major evidence skew of the constructive eviction doctrine. Proving the subjective intent of the landlord in allowing the leased space to deteriorate and the unfit

46. *See id.*

47. *See, e.g., Service Oil*, 542 P.2d at 658.

48. *See* ALVIN TOFLER, *THE THIRD WAVE* 303, 305 (1980). According to Tofler, a multinational corporation . . . may do research in one country, manufacture components in another, assemble them in a third, sell the manufactured goods in a fourth, deposit its surplus funds in a fifth, and so on . . . [W]ith their ability to shunt billions back and forth instantly across national boundaries, [and with] their power to deploy technology and to move relatively quickly, they have often outflanked and outrun national governments.

Id.

49. It is important for the implied warranty for a specific purpose remedy that the tenant inform the landlord of the tenant's specific purpose in sufficient detail.

50. *See Sun Ins. Servs., Inc. v. 260 Peachtree St. Inc.*, 385 S.E.2d 127, 127 (Ga. 1989).

condition to continue establishes a more onerous burden of proof for the tenant—that is more costly than that to be borne by the landlord. Proving a subjective intent issue is more time consuming and does not lead to quicker case disposition. The burden of proving a subjective intent also subjects a tenant, more so than in a usual contract dispute, to the reality of never meeting the burden of persuasion on other issues. In these ways, the intent issue tilts the evidentiary requirements in favor of the landlord. Despite continuing judicial reluctance to adopt it,⁵¹ the fitness warranty's evidentiary requirements bestow systemic benefits. By allowing an action grounded in fraud rather than in implied warranty, the Kansas Supreme Court in *Service Oil* actually captured the concept of a landlord's superior position to know of likely space defects.⁵² The court was simply not willing, absent the landlord's fraudulent

51. For reluctance but not outright rejection, see *Cho Mark Oriental Food, Ltd. v. K & K Int'l*, 836 P.2d 1057 (Haw. 1992). While noting that Hawaii was one of the first jurisdictions to extend the theories of implied warranty of habitability and fitness for intended use to residential leases, the *Cho Mark* court stated: "While dictum in *Lemle* arguably supports the extension of the theory of implied warranty of habitability and fitness for intended use to commercial leases, the circumstances of this case do not present an appropriate vehicle for addressing this issue, and we decline to do so at this time." *Id.* at 1061. Had the court not further discussed implied warranty in commercial leases, certainty about the Hawaii position might be stronger.

Hawaiian law is uncertain in great measure because of the *Cho Mark* court's discussion of cases that have extended implied warranty beyond the residential to the commercial. "In the few cases that have extended such an implied warranty to a commercial lease, the subject lease has expressly provided that the lessor would furnish the disputed service." *Id.* at 1061. The court cites *Davidow* for the express-provision proposition and then states: "In [the instant] case, the lease did not expressly provide that the lessor . . . would furnish electricity for the lessee's . . . intended use." *Id.* at 1061 n.1. At this point in its reasoning, the *Cho Mark* court held that the facts of the case did not provide an appropriate vehicle for extending the implied warranty concept to commercial tenancies.

For those advocating for such an extension, the *Cho Mark* court's reasoning is disquieting. *Davidow*'s lease expressly required the landlord to provide air conditioning, electricity, hot water, janitor and maintenance services, light fixtures and security services. See *Davidow*, 747 S.W.2d at 374. However, the *Davidow* court's discovery of an implied warranty did not rest on the express provision. Rather, the court held that, if a lease expressly provides that the tenant will repair certain defects, then the provisions of the lease will control. See *id.* at 377. Stated differently, *Davidow* holds that: (1) in leased premises there will be facilities that are vital to a particular commercial usage; (2) at the outset of the lease there could be defects that are latent (and, one could easily extrapolate, which are not addressed by the lease where the design of the structure was held to be defective for intended use); (3) the landlord impliedly warrants that no such defects exist and, should the same appear, the landlord has an obligation to remedy the defect or be held under controlling law to have breached an implied warranty; and (4) such a breach then allows for appropriate tenant remedies which may or may not involve quitting the premises. See *id.* at 376-77.

The *Davidow* court's holding does not mandate that a lease expressly provide for landlord repair of a defect claimed by the tenant as a breach of the implied warranty of fitness for intended use. To burden the implied warranty doctrine with an express lease provision rule is merely to rely on a basic breach of contract remedy and to not utilize the warranty for to cover latent, unbargained-for defects or situations that arise which are under the control of the landlord and are not remedied by the landlord. The landlord's control is pivotal and should not be confused with an express lease provision of responsibility. The *Cho Mark* court's confusion of these two concepts is disquieting. Nevertheless, there is reason for optimism among advocates for a commercial lease implied warranty of fitness for purpose: courts, including Hawaii, are slowly moving in that direction.

52. See *Service Oil*, 542 P.2d at 658.

intent, to base a remedy on the potential or actual knowledge of the landlord that resulted in damage to the tenant.

II. UTILITY OF THE TWO REMEDIES IN A SUMMARY JUDGMENT CONTEXT

A. Summary Judgment and the Two Doctrines

Paradoxically, it is the fact-sensitive commercial purpose of the fitness warranty that makes it preferable to constructive eviction, even within the context of summary judgment. Standing alone, constructive eviction might not signal obstruction of summary judgment. However, comparing constructive eviction to another remedy through an evidentiary lens clearly manifests its obstructionist nature.

Harlow v. Fitzgerald clearly demonstrates that doctrinal evidence requirements can intensify litigation in an undesirable way.⁵³ In *Harlow*, the court renounced the doctrinal requirement of intent because it obstructed summary judgment in a way the court sought to avoid.⁵⁴ Although the court's stated purpose was to benefit a party (the government) and not the system, the court discussed the subjective nature of intent and the costliness and uncertainty of litigating subjective proof requirements.⁵⁵

The fitness warranty changes the proof requirements of the remedy formula in commercial tenancies. The dispositive issue becomes whether the conditions of the premises thwart a specific commercial purpose, not whether the landlord intended to do so or agreed generally to maintain the premises. The specificity of purpose and its disruption thus removes a subjective proof question from the litigation issues. Both parties look to commercial purpose, and to disruption measured by the standard of whether space defects thwart commercial purpose.

Intentional allowance of premises' deterioration, and timeliness of a tenant's move from the premises are no longer at issue. Proof of the warranty and its breach requires proof of the agreed upon lease,⁵⁶ proof that the tenant informed the landlord at the lease's inception of the intended use of the

53. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

54. *See id.*

55. *See id.* at 815-17.

56. *See Davidow*, 747 S.W.2d at 376.

premises,⁵⁷ and proof of the conditions claimed to thwart,⁵⁸ disrupt,⁵⁹ or frustrate⁶⁰ commercial purpose. With an implied warranty, duration of the tenant's occupancy after the premises allegedly became unsuitable in order to show permanency of the disruption and the remedial measures taken by the tenant would be relevant to proof of damages, rather than proof of liability. Intentional disruption by the landlord would also become an evidentiary formula on damages where intent in civil litigation is usually found.⁶¹

Litigators wishing to negotiate a settlement or file a motion for partial summary judgment⁶² could more easily answer the liability question⁶³ with less expense than a trial on the issue. If documentation, deposition, or other pretrial discovery support a determination that there are no questions presented

57. See *id.*; see also *Ontiveros v. Mbank Houston*, 751 F. Supp. 128 (S.D. Tex. 1990) (landlord's failure to reimburse tenant for renovation costs in accordance with lease provisions constituted functional failure of commercial transaction, because it prevented tenant from using property as intended).

58. See generally *Sun Ins. Servs.*, 385 S.E.2d 127.

59. See generally *Dyecraftsman, Inc. v. Feinberg*, 269 N.E.2d 693 (Mass. 1971).

60. See *Tucker v. Charter Medical Corp.*, 299 S.E.2d 800, 804 (N.C. 1983).

61. Proof of intent is more often found in cases involving punitive damages. See *Moradzadeh v. Antonio*, 7 Cal. Rptr. 2d 475, 480-81 (1992); see also generally *Smith v. Wade*, 461 U.S. 30 (1983) (Rhenquist, C.J., dissenting) (discussing punitive damages and the role of intent in assessing damages beyond basic liability). According to Justice Rhenquist, "[t]he former typically demands inquiry into the actor's subjective motive and purpose." *Id.* at 64.

62. See generally FED. R. CIV. P. 56(c) (summary judgment).

63. See Roger W. Kirst, *Judicial Control of Punitive Damage Verdicts: A Seventh Amendment Perspective* 48 SMU L. REV. 63 (1994). According to Kirst:

In *Harlow* the Court concluded that its previous opinions had not given officials enough protection. The subjective element of the official's intent created a difficult fact issue. A defendant could assert the absence of evil intent in an affidavit in support of a motion for summary judgment, but a plaintiff could still demand discovery in order to uncover evidence on the factual issue of intent. A plaintiff could also avoid summary judgment with circumstantial evidence of intent. The Court therefore changed the substantive law by eliminating intent as a part of the defense, leaving only the objective element. An official who could show that the alleged conduct was not clearly unconstitutional at the time of the conduct would have a defense that would allow summary judgment. The subjective element of intent created a possible role for the jury when a certain facts were in dispute, but that role disappeared when the substantive law changed.

Id. at 93; see also Evan J. Mandery, *Qualified Immunity or Absolute Impunity? The Moral Hazards of Extending Qualified Immunity to Lower-Level Public Officials*, 17 HARV. J.L. & PUB. POL'Y 479 (1994).

Mandary states:

The Court based this conclusion on two related aspects of the costly nature of conducting subjective inquiries. First, the Court noted that the inquiries into intent themselves were unjustifiably expensive because there is so much information that is relevant to ascertaining the state of mind of a person exercising discretionary authority. Second, because inquiries into state of mind are questions of fact, the effect of requiring a showing of good faith was to preclude summary judgment motions by public officials. This effect countered the Court's desire, expressed in *Butz v. Economy* and later emphasized in *Mitchell v. Forsyth*, to reduce the number of unsustainable claims that proceeded to trial.

Id. at 489 (citations omitted).

for a fact finder,⁶⁴ the party establishes a cause of action that justifies a partial summary judgment.⁶⁵ Allowing for a more obvious answer to the liability question through a focus on structural fitness for specific purpose produces a neutral evidentiary burden for each party:⁶⁶ neither landlord nor tenant are privileged or disadvantaged. In this way, the fitness warranty is of greater utilitarian benefit to the trial and appellate courts.⁶⁷ The litigants are presented, in the context of trial, with the opportunity for early disposal of the case on the liability issue. If none is found, the case is over. If liability exists, the parties are presented with the opportunity to attempt a settlement on the damage issue.

B. An Example of Landlord Intent

*SunAmerica Financial, Inc. v. 260 Peachtree Street, Inc.*⁶⁸ represents a classic study in the use of constructive eviction. Interestingly, the case also vividly proves the merits of the *Davidow* rationale for an implied fitness warranty.⁶⁹ A warranty would have facilitated disposition through mediation or summary judgment, instead of *SunAmerica's* four years of reported courtroom history.⁷⁰

SunAmerica was twice before a Georgia appellate court. It first came before the court as *Sun Insurance Services, Inc. v. 260 Peachtree Street, Inc.*⁷¹

Sun Insurance (Sun), needing renovations to leased space, sought a declaratory judgment that its lease obligated the lessor to pay for required asbestos removal.⁷² After finding a requirement in the lease that the landlord give its consent to changes in the premises that would be of equal or greater quality than the original condition of the premises, the court held the removal

64. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) ("The moving party is entitled to a judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.").

65. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("[S]ubstantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.").

66. Although the *Harlow* court construed the substantive law in favor of the government, the substantive law can also be construed to achieve equality in terms of the allocation of the burden of proof; under such a construction, both parties may benefit or suffer.

67. See *Mandery*, *supra* note 63, at 479.

68. *SunAmerica Fin. v. 260 Peachtree St., Inc.*, 415 S.E.2d 677 (Ga. 1992).

69. See generally *Davidow v. Inwood N. Prof'l Group—Phase I*, 747 S.W.2d 373 (Tex. 1988).

70. The case has no reported history after its second appellate hearing.

71. *Sun Ins. Servs., Inc. v. 260 Peachtree St., Inc.*, 385 S.E.2d 127 (Ga. 1989).

72. See *id.*

of the asbestos to be the landlord's responsibility.⁷³ Reasoning that the changes sought by the lessee were *necessary to increase the efficiency of its business*, the court considered asbestos sprayed directly onto structural beams and decking as obstacles to making the changes.⁷⁴ The court agreed with the lessee that the issue was "not whether the building was 'safe' if no renovation occurred; but, whether the building was in a 'safe condition' for purposes of allowing [the lessee] to make improvements as contemplated by the lease."⁷⁵ This set the stage for the second case, *SunAmerica Financial*.⁷⁶

The first case was decided in 1989. Sun reorganized and moved from the premises before *SunAmerica Financial* was decided in 1992.⁷⁷ The landlord, Peachtree, sued in the second case asserting that SunAmerica Financial (SunAmerica) breached the lease by quitting the premises and refusing to pay rent.⁷⁸ SunAmerica defended with constructive eviction, claiming no rents were due because Peachtree refused to approve renovation for purposes of subleasing, refused to remove asbestos from the rented floors to allow safe renovation, and deprived the lessee "of the beneficial use and enjoyment of the premises for a purpose for which it was rented."⁷⁹

Although its lease term extended to April 1996, SunAmerica notified Peachtree of the lessee's intent to vacate all leased space by October 1, 1990.⁸⁰ SunAmerica completed its move in 1990 but continued rent payments and attempted to sublet the premises.⁸¹ The lessee's attempts to sublet the 12½ floors failed.⁸² The record at trial bore witness to SunAmerica's efforts to sublet, and the declination of a commercial real estate broker to represent SunAmerica because there was "virtually no chance of subleasing commercial premises containing asbestos when the lessor refuses to remove the same."⁸³ From mid-April to mid-July, negotiations and discussions between the parties went back and forth as the lessee attempted to obtain Peachtree's consent to abate the asbestos from all 12½ floors as the tenant vacated each floor.⁸⁴

73. *See id.* at 129.

74. *See id.*

75. *See id.*

76. *SunAmerica Fin. v. 260 Peachtree St., Inc.*, 415 S.E.2d 677 (Ga. 1992).

77. *See id.* at 677.

78. *See id.* at 679.

79. *See id.*

80. *See id.*

81. *See id.*

82. *See id.*

83. *See id.*

84. *See id.*

Ultimately, having been advised by certain agents that to do so would help space subleasing, SunAmerica requested permission to renovate each floor by returning it to completely open space.⁸⁵ Relying on the earlier case, SunAmerica insisted that Peachtree was required to abate the asbestos in all requested renovation areas to make renovation safe.⁸⁶

Hoping to overcome all objections of the landlord to renovations, SunAmerica reduced a prior oral-guarantee proposal to writing.⁸⁷ In the written guarantee, SunAmerica gave assurances that: (1) any improvements by any subtenant would equal or exceed the quality of the original condition of the premises; or (2) in the event Sun was unable to sublease the space, it would improve the space to a condition equal to the original condition of the leased space before the end of Sun's lease.⁸⁸ Further "if the landlord [was] unwilling to accept Sun's assurances that it [would] meet the standard provided by the lease, Sun [was] prepared to give a bond, letter of credit, or some similar financial assurance in support of this obligation to the landlord as a condition of the landlord approving the plans."⁸⁹ Peachtree continued to refuse approval of renovation and refused to consider the question of asbestos abatement without an existing subtenant who presented a formal renovation plan of its own.⁹⁰

SunAmerica could have been disposed of initially on the warranty rationale. However, as in *Harlow*,⁹¹ the issue of intent prevented a judicious use of court resources⁹² at the summary judgment stage. A telling argument by SunAmerica could have easily been: changes sought by SunAmerica were held by the court in case-one to be "necessary to increase the efficiency of its business."⁹³ The court also held that the building was not in a "safe" condition for purposes of allowing the lessees to make improvements as contemplated in the lease.⁹⁴ In the second case, the court found (and could have just as easily found in the initial case) that "in addition to the right of renting the subject *commercial* premises, the right of subleasing such premises also was one of

85. *See id.*

86. *See id.*

87. *See id.*

88. *See id.*

89. *See id.* at 680.

90. *See id.* at 679.

91. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

92. *See Mandery*, *supra* note 63, at 489.

93. *Sun Ins. Servs.*, 385 S.E.2d at 129.

94. *See id.*

the significant purposes for which the lease was entered by [SunAmerica].”⁹⁵ Given the landlord’s obligation to remove the asbestos for renovation and the necessity of renovation to further business purposes, the liability issue was ripe for concluding in SunAmerica’s favor.

With SunAmerica’s “could have been” argument, the warranty resolves any dispute about liability. It would not have been necessary to produce evidence on the intent question in order to establish liability, thereby enabling a partial summary judgment to end the question.

At this stage of the proceedings, in view of the court’s holdings in the two cases, any further remand should have limited proceedings at the trial court level to a hearing on damages incurred by the tenant. However, the court in the second case remanded the case for a factual finding on whether Peachtree acted with the *intention* of depriving the lessee of its right of use and enjoyment of the premises for purposes of subleasing.⁹⁶ The court in *SunAmerica* further held that there must be a finding on whether the landlord’s conduct merely rendered the tenant’s use of the premises (for purposes of subleasing) “uncomfortable” rather than unfit for use and enjoyment for such purposes.⁹⁷ Stated differently, having held that the premises were not “safe” for their intended commercial purpose, the court then held that the trial court had to make a factual finding on whether the tenant proved the criteria of constructive eviction. Specifically, there had to be findings on: (1) the intent of the landlord as it arose after the signing of the lease, and (2) the permanency of the disruption caused by asbestos on structural beams and decking.⁹⁸

Thus, an irrelevancy entered this courtroom saga. Given the court’s existing findings on the right to sublease as necessary to the commercial purpose of the tenant, the necessity, as a safety factor, of removing the asbestos to renovate, and the obligation and continued refusal by the landlord to remove the asbestos, of what possible relevance, other than for determining damages, is the landlord’s intent to deprive the tenant of beneficial use and enjoyment? When the structure itself, and not a deteriorated condition, is the issue—as it was in *SunAmerica* and *Vermes*—proof of intent, permanency of disruption, and duration of occupancy after the claimed disruption arose, are irrelevant to the harm question.

95. *SunAmerica Fin.*, 415 S.E.2d at 682.

96. *See id.*

97. *See id.*

98. *See id.* at 682-83.

In the lessor's best case, asbestos on structural beams and decking present latent structural defects. An analysis of whether commercial purpose has been thwarted⁹⁹ by structural defects is an impersonal inquiry.¹⁰⁰ Whether commercial purpose has been impaired and/or disrupted by latent structural defects such as design or asbestos is an even more impersonal inquiry. Each of these inquiries is amenable to summary judgment.

All cases, even with the implied warranty, do not favor disposition by summary judgment. But, the analysis of *Sun* shows that the summary disposition of "most" of these types of cases would be of major benefit to the system. Conserving time, energy, and costs similar to that invested by the judges and litigators at the trial and appellate level in both *Sun* cases (and others like it) calls for insistent advocacy of the fitness warranty. In the larger sphere of systemic improvement, this article is a call for insistent advocacy of substantive law reform that benefits fast track dispositive procedures and benefits the parties with evenly balanced (fair) distribution of justice.

III. DISPUTE BARGAINING AND THE LEVERAGE OF THE LAW AND NONLEGAL FACTORS

"The 1990's present a new world view. . . ."¹⁰¹

"In a 'fax-it-to-me' world, it is as easy to do business with a supplier in Taipei as in Chicago."¹⁰²

In the world of commerce, it may be true that in the 1990s, it is as easy to do business in Taipei as in Chicago.¹⁰³ Yet, to the extent that doing business includes the sale, purchase, and return of leased premises, it is not as easy for a commercial tenant in Kansas,¹⁰⁴ California,¹⁰⁵ or New Hampshire¹⁰⁶ as it is in Texas¹⁰⁷ or even New Jersey¹⁰⁸ to obtain relief from lease obligations

99. See generally *Sun Ins. Servs.*, 385 S.E.2d 127.

100. "Impersonal inquiry" in the sense that it does not involve an examination of the landlord's state of mind, including his or her motive or intent.

101. NAISBITT & ABURDENE, *supra* note 27, at 14.

102. *Id.* at 121.

103. See *id.*

104. See *Service Oil Co. v. White*, 542 P.2d 652 (Kan. 1975).

105. See *Moradzadeh v. Antonio*, 7 Cal. Rptr. 2d 475 (Cal. Ct. App. 1992).

106. See *Golub v. Colby*, 419 A.2d 397 (N.H. 1980).

107. See *Davidow v. Inwood N. Prof'l Group—Phase I*, 747 S.W.2d 373 (Tex. 1988).

108. See *Reste Realty Corp. v. Cooper*, 251 A.2d 268 (N.J. 1969).

when situations "chargeable to the landlord"¹⁰⁹ disrupt quiet enjoyment. The judicial view, remaining unpersuaded by the fitness warranty,¹¹⁰ myopically retains its fixation on constructive eviction and its underlying assumption of equality of bargaining power. This fixation causes the unpersuaded to be oblivious to the manner in which judicial self-sabotage sustains itself through doctrine with evidentiary requirements that hinder ADR.

The judiciary loyally reaffirms the equality-of-power assumption while negotiators and mediators in the world of ADR philosophically march on with a vision of *Getting to Yes*,¹¹¹ advocating trust between negotiators and sustaining relationships.¹¹² Court-annexed, i.e., involuntary, mediation is heralded as the new horizon of management for those court systems using mediation to reduce cost and delay.¹¹³

In a world where "relationship preservation" is a primary goal,¹¹⁴ which of the remedies under discussion is more likely to propel the parties toward conflict resolution through mediation or negotiation and support the judicial goal of reducing cost and delay? In other words, which remedy provides disputants with the flexibility needed to fashion a resolution at the bargaining table,¹¹⁵ allowing disputants to search within the law for sufficient motivation to agree?¹¹⁶

A. Legal Disputes

"The process that determines whether and when a legal dispute will settle has two elements: evaluation and bargaining."¹¹⁷

109. *Id.*

110. *See supra* notes 34, 40.

111. *See generally* ROGER FISHER & WILLIAM URY, *GETTING TO YES* (2d ed. 1990).

112. For discussion of cooperative bargaining strategy, see DONALD G. GIFFORD, *LEGAL NEGOTIATIONS THEORY AND APPLICATIONS* 8, 15-22 (1989).

113. *See supra* note 2.

114. FISHER & URY, *supra* note 111, at 20.

115. *See infra* Part III.C.

116. The parties' motives and incentives to obtain a resolution outside of the courtroom will change depending on whether their participation in dispute resolution is voluntary or involuntary and on how much they stand to gain or lose. For a discussion of the responsibilities of the parties and their attorneys to participate in an ADR proceeding once a court has issued a mandatory ADR order, see generally Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?*, 46 SMU L. REV. 2079 (1993).

117. Stephen M. Bundy, *Commentary on "Understanding Penzoil v. Texaco": Rational Bargaining and Agency Problems*, 75 VA. L. REV. 335, 337 (1989).

Standing alone, constructive eviction's rule design does not obviously constrict ADR procedures. However, when compared to the warranty, constructive eviction emerges as an obstruction to the evaluation component of ADR. Constructive eviction's evidentiary requirement of intent enables the obstruction. The potential for constructive eviction to encourage protracted litigation is discernible in a hypothetical negotiation between a landlord and a potter tenant to resolve differences about the need for additional power to fire a kiln. Because it allows the landlord to refuse compromise at will, constructive eviction stacks the bargaining chips in favor of most landlords at an ADR bargaining table, forcing the tenant to despairingly "bargain in the shadow"¹¹⁸ of a caveat lessee¹¹⁹ law.

A summary judgment occurs within a hierarchical dispute resolution system and is based on the rulings of the trial judge. Negotiation and mediation provide forums for party/disputant self-determined resolutions.¹²⁰ Since these two alternative processes are disputant controlled,¹²¹ the parties' desire to resolve a dispute either gets them to the bargaining table in the first instance or keeps them there if the bargaining is court-mandated.¹²²

In the work *Bargaining in the Shadow of the Law*,¹²³ Professors Mnookin and Kornhauser discuss the impact substantive law will have on the bargaining chips of the parties to litigation and the power dynamics that will be present because of the shadow cast by the substantive law over the bargaining table. They use the example of a divorce fact situation where existing law gives no hope to a father of having custody of a child, thereby creating the likelihood that the mother will never agree to joint custody.¹²⁴ For evaluative purposes, in dispute resolution the "law" will be a major factor.¹²⁵ In its reference back to status quo norms, the law casts a shadow that can become the single

118. For the position that the substantive law casts a hegemonic shadow over all dispute bargaining, see generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

119. Max P. Rapacz, *Origin and Evolution of Constructive Eviction in the United States*, 1 Depaul L. Rev. 69, 70.

120. Arbitration is not included because it is a third party, authority-based type of resolution similar to the court process.

121. There are many hybrids to the basic three of negotiation, mediation, and arbitration. A full discussion of the hybrids in conjunction with the basics is beyond the scope of this article.

122. See generally Sherman, *supra* note 2; see also generally Sherman, *supra* note 116.

123. See generally Mnookin & Kornhauser, *supra* note 118.

124. See *id.* at 968-69.

125. See *infra* Part III.C. for a discussion of the factors, other than the law, that will influence bargaining outcomes.

standard of legitimation for settlement and compromise.¹²⁶ However, in “nuts and bolts” trading, the law’s penumbra¹²⁷ is likely to be but one factor in “a complex social process consisting of distinctive political, moral, and strategic

126. In discussing the resolution of political questions by principled bargaining as outlined by FISHER & URY, *see supra* note 111, Robert J. Condlin argues that principled bargaining resolves political questions by recourse to status quo conservative norms. *See Condlin, supra* note 36, at 40–41.

Condlin’s term “conservative norms” indicates a legitimation that is obtained through a reference back to existing normative behavior, encapsulated in the substantive law, that does not permit creative usage. *See id.* To the extent that legitimation is an aspect of dispute bargaining, it is also an aspect of bargaining at the inception of the lease and is another term for the ability of negotiators to express their will through existing normative criteria within the industry. Further, to the extent the same can be utilized by either party to work its will and change the bargaining set in the party’s favor, that party can be said, at that moment, to be more powerful. Absent an intervening force—legal or economic—the same power that operates at the front end of the lease will operate at the time of any dispute resolution effort.

127. “Penumbra” is used here rather than “shadow” to indicate some lighted area around the law rather than total overcast.

dimensions."¹²⁸ Unless the law's shadow is so intransigent¹²⁹ as to totally eclipse any prospects of bargaining compromise, the "complex social process"¹³⁰ produces practical factors that interact with legal rights in deciding bargaining outcome.¹³¹

B. *The Landlord/Potter Dispute and the Law's Shadow*

In an attempt to resolve the dispute over the electrical deficiency without protracted litigation—against the backdrop of the doctrines of constructive eviction and implied warranty of fitness for purpose—enters the potter who experiences power failure each time the kiln fires. The potter wants to remain

128. Condlin, *supra* note 36, at 3. Says Condlin:

Dispute bargaining is also a complex social process consisting of distinctive political, moral, and strategic dimensions. It is political in the sense that it resolves questions of legal entitlement as an adjunct to formal adjudication by making binding determinations about the identification and compensation of legal wrongs. It is moral in the sense that it proceeds through a series of truth claims made by individuals in face-two-face interactions, which are grounded in determinations about the limits of deception, the proper use of power, and the obligation of personal fair dealing. And it is strategic in the sense that it involves the bilateral presentation, evaluation and selection of conflicting claims to real world goods and opportunities, shaped by a strategic plan for advancing such claims successfully.

Id. It is the strategic dimension that gives dispute bargaining its distinctive nature and form. Condlin adds: Dispute bargaining is almost created by strategy, undertaken in the first instance not because it is intrinsically worthwhile, aesthetically pleasing, important to personal development, or the naturally best way for people to interact, but because it is an instrumentally effective method for settling conflicting claims to limited resources, opportunities, and the like. It is not an essential human activity, and it probably would not exist, at least pervasively, in a world without scarcity. Instead, it is a socially constructed process in which participants manipulate a complex web of interpretive, advocative, and trading practices in order to put individual objectives in their best possible light and increase the likelihood that they will be realized. It takes its form in the first instance from a process of reasoning backwards instrumentally from such objectives. Strategy is not all bargaining, of course, but it is an inescapable, irreducible part, the core out of which the process's moral, political, and social issues emerge, and from which they take their own special character and shape.

Id. at 7; see also, e.g., THOMAS R. COLOSI, ON AND OFF THE RECORD XI (1993) ("[T]he maze of the complicated process of negotiation."); Eleanor Holmes Norton, *Bargaining and the Ethic of Process* 64 N.Y.U. L. REV. 493 (1989). According to Norton,

[b]argaining is a self-regulated process in which parties with different goals engage in strategic dealings until they agree upon an outcome, or until one or more of them decides that agreement cannot be reached. However, this process has no prescribed form or rules. It is what the parties agree it is and may be conducted in any way that they decide. Bargaining, a self-directed market process, assumes that the parties will monitor the truthfulness and fairness of that process.

Id. at 526. Norton adds that "[t]he private world in which most bargaining occurs creates its own set of conditions and often its own rules." *Id.* at 574.

129. Mnookin and Kornhauser reference, as an example, a custody law that does not allow for joint custody. In that sort of situation, the law is such a formidable force that custody itself is non-negotiable. Thus, only when countervailing non-legal factors are sufficiently forceful will the party favored by the law consider negotiating the custody issue. See generally Mnookin & Kornhauser, *supra* note 118.

130. See Condlin, *supra* note 36, at 3.

131. See Gifford, [], at 29.

on the premises until the expiration of the lease and to renew the lease if the landlord remedies the electrical deficiency. The walk-in clientele is steady and the expenses of moving and reestablishing the business in a desirable location are formidable, if not prohibitive. Because the building meets basic electrical code requirements, the landlord would rather not do any additional wiring and prefers to have the potter pay all rent that is due and also bear the expense of all additional wiring. Because the potter intended to add the wiring necessary for connecting the kiln, before signing the lease the tenant informed the landlord of the intended expanded electrical usage.¹³² The lease provides that the tenant must pay all additional wiring costs for connecting the kiln to the existing supply, but does not specify who should pay for any additional wiring demanded because of an insufficiency in the basic power supply to carry the heavy power usage of the kiln.

It seems clear that the differences between the two doctrines under discussion can affect the parties' bargaining in important ways, leading either to conflict intensification or a resolution. In the hypothetical, the landlord has not allowed the premises to deteriorate, the building meets code provisions, and the tenant has not quit the premises.

Within this factual context, there are four standards against which this article measures the two remedies for encouraging dispute resolution. Of the two, which most: (1) allows the parties to literally remain in place; (2) keeps the relationship intact; (3) encourages the parties to settle because of overarching interests¹³³ rather than normative¹³⁴ positions;¹³⁵ and, (4) doctrinally addresses defects that are more likely to concern parties who are attempting self-determined resolution?

1. Evaluation of bargaining position within the parameters of constructive eviction

Constructive eviction requires the tenant to move out to satisfy the proof inquiry about the gravity of the commercial purpose disruption. Where stability of location and relationship preservation are desired, constructive

132. Absent knowledge of the property defect before discovery or the tenant's use, one can argue that there could be no intent on the part of the landlord—even intent to be inferred from the circumstances. See, e.g., *Sun America Fin. v. 260 Peachtree St., Inc.* 415 S.E.2d 127 (Ga. 1992).

133. See FISHER & URY, *supra* note 111, at 40-55; see also LAX & SEBENIUS, *supra* note 35, at 63-87.

134. See Winter, *supra* note 4, at 1885 n.13; see also Condlin, *supra* note 36, at 40-41.

135. See FISHER & URY, *supra* note 111, at 1-14; see also LAX & SEBENIUS, *supra* note 35, at 68-70.

eviction is out of place. In its requirement that the tenant quit the premises, constructive eviction promotes relationship severance.¹³⁶

Likely to be the most severe block to party resolution, the remedy forces the tenant to gather evidence that impugns the "good faith" intention¹³⁷ of the landlord. That is, for the tenant to succeed with a constructive eviction defense, the tenant must charge the landlord with personal knowledge of disruption that the landlord purposely allowed so as to evict the tenant from the premises. This evidentiary requirement shifts the focus from structure to person, and opens the bargaining set to personal attack and acrimony. The issues are no longer objectified in the framework of a structure; rather, the issue has become the people at the table.¹³⁸ Once personal animosity¹³⁹ takes a seat at the table, settlement potential either wanes or abruptly departs.¹⁴⁰

136. For a discussion of relationship value in the bargaining, see LAX & SEBENIUS, *supra* note 35, at 72-73.

137. Harlow v. Fitzgerald, 457 U.S. 800, 815-17 (1982). As a matter of evidence, the most obvious answer to the subjective, highly personal, nature of proving intent is found in the Federal Rules of Evidence. See, e.g., FED. R. EVID. 803(3). In the plain language of Rule 803(3), the state of mind exception to hearsay, there is recognition that state of mind includes intent. See *id.*; see also Glen Weissenberger, *Hearsay Puzzles: An Essay on Federal Evidence Rule 803(3)*, 64 TEMP. L. REV. 145, 155 (1991) (state of mind described as internal to the person whose statement is sought to be introduced). In addition to oral statements, intent can be inferred from circumstantial evidence; even so, the object of focus is in the action (or inaction) of the landlord. See Adam H. Kurland, *Prosecuting Ol' Man River: The Fifth Amendment, the Good Faith Defense, and the Non-Testifying Defendant*, 51 U. PITT. L. REV. 841, 908 ("A statement expressing good faith . . . is an assertion that no (bad) intent exists.").

138. "The relationship between the parties is the most critical variable in determining the climate and the ultimate outcome of a negotiation." THOMAS R. COLOSI, ON AND OFF THE RECORD: COLOSI ON NEGOTIATION 16 (1993).

139. Fisher and Ury admonish: "[S]eparate the people from the problem. Attack the problem without blaming the people." FISHER & URY, *supra* note 111, at 56. However, Menkel-Meadow argues that "people cannot be separated from the problem because as long as negotiators are people, they will be part of the problem to be solved." Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 U.C.L.A. L. REV. 754, 841 (1984).

The more that negotiations can be depersonalized and objectified, the more likely that parties can reach a resolution that best satisfies their reasonable commercial expectations. Although personalities may be part of the problem, the personalities themselves can be examined against an objective standard, thereby furthering the depersonalization of the process. See, e.g., Renelle Rae, *Styles of Persuasion*, in COLOSI, *supra* note 138, app. C, at 93-104 (discussing objective standards, personality types, and styles of persuasion in the resolution process).

140. Recognizing that personal animosity is a deal breaker and not a deal maker, texts and treatises on negotiation include extensive recommendations for building relationships, even in one-time dispute bargaining situations.

Personal attacks that block the development of dispute bargaining trust¹⁴¹ between the parties protract litigation.¹⁴²

The defense does not facilitate bargaining with nonlegal considerations and blocks bargained for resolutions because disputants can easily “dig in” around landlord intent to disrupt commercial purpose. This “digging in” around the intent issue was exactly what occurred in *SunAmerica*.¹⁴³ The landlord adeptly used a subjective proof requirement of constructive eviction to create a legal labyrinth that forestalled the tenant and the courts in efforts to end the dispute. Once the “digging in” occurs, the bargaining is positional,¹⁴⁴ and the goal of winning the dispute against the other party subjugates overarching interests. The *Pennzoil v. Texaco* litigation is another sterling example of parties “dug in” and determined to win at all costs.¹⁴⁵

The concepts of interests¹⁴⁶ or positions¹⁴⁷ and relationships as a value¹⁴⁸ show how constructive eviction is closer to intransigence for settlement purposes because it has severed the relationship and brought personal attack to the bargaining table. It is litigious because it is a defense¹⁴⁹ usually resorted to only after the landlord sues alleging some tenant default of lease provisions.

Doctrinally, constructive eviction applies only to defects that the landlord intentionally allows to arise after the tenant assumes occupancy. The reasoning of *SunAmerica* suggests that the doctrine does not apply to defects that exist when the tenant signs the lease but of which the landlord and tenant are unaware. According to *SunAmerica*, the landlord’s subjective intent in an unaware state of mind is open to question.¹⁵⁰ In bargaining to settle this

141. “Dispute bargaining trust” is distinguishable from the trust established between the parties to negotiate a lease. In dispute bargaining, each negotiator knows, when taking a seat at the bargaining table that the situation will be somewhat, if not substantially, adversarial and contentious, unlike the seemingly more cooperative situation found when negotiating a lease. In a dispute bargaining environment, trust translates into reliance on statements made but not into reliance that all the information known by the other party has been shared.

142. See Bundy, *supra* note 117, at 360-62 (arguing that personal distrust and animosity were important factors in protracting the litigation).

143. See *SunAmerica Fin., Inc. v. 260 Peachtree St., Inc.*, 415 S.E.2d 677 (Ga. Ct. App. 1992).

144. FISHER & URY, *supra* note 111, at 13.

145. See generally Bundy, *supra* note 117; see also Robert H. Mnookin & Robert B. Wilson, *Rational Bargaining and Market Efficiency: Understanding Pennzoil v. Texaco*, 75 VA. L. REV. 295 (1989) (describing the positional bargaining of the parties).

146. See FISHER & URY, *supra* note 111, at 40-55; see also LAX & SEBENIUS, *supra* note 35, at 68-73.

147. See FISHER & URY, *supra* note 111, at 3-14.

148. See LAX & SEBENIUS, *supra* note 35, at 72-73.

149. See *Wellbaum v. Murphy*, 178 S.E.2d 690, 691 (Ga. 1970).

150. See *SunAmerica*, 415 S.E.2d at 682.

landlord-potter dispute, an assumed equality of bargaining power at the inception of the lease in tandem with reliance on express lease provisions supplies strength to the landlord's bargaining position. As with *SunAmerica*, all facts garnered by the potter can demonstrate that a tenant is struggling to obtain relief from a lease binding it to premises with a discovered defect. Even so, the landlord is likely to bargain competitively.¹⁵¹ That is, the landlord will insist that the tenant is in default on the rent because: (1) it is the potter's kiln that requires additional wiring and, (2) a potter for a tenant is so sufficiently unique that additional wiring does not qualify as a necessary capital improvement.¹⁵² The potter's evaluation sheet forecasts an uncompromising landlord unless the practical factors of nonlegal shadows influence the landlord to a cooperative strategy.

2. Evaluation of bargaining within the parameters of the fitness warranty

In ADR, that the potter is not required to quit the premises before the law provides a remedy is perhaps the single, greatest benefit of moving beyond constructive eviction into implied warranty doctrine. This absence of a requirement to move promotes location stability. Additionally, promoting a continuing relationship by allowing the tenant to remain in place while the parties negotiate a resolution advances the ADR goal of keeping the relationship intact.

The focus of the warranty is on the structure and commercial purpose. The remedy does not force the parties into personal attacks to protect their legal cause of action. Therefore, the bargaining climate engenders the use of options for resolution.¹⁵³ It is here that nonlegal factors have an opportunity to influence outcome, and that overarching commercial interests rather than positional bargaining are likely to produce a resolution. The parties become the makers of a customized doctrine that meets both of their needs.

151. See DONALD G. GIFFORD, *LEGAL NEGOTIATIONS THEORY AND APPLICATIONS* 15-18 (1989). For a description of competitive argument, see Conklin, *supra* note 36, at 73-74.

152. See, e.g., *Mobile Oil Credit Corp. v. DST Realty, Inc.*, 689 S.W.2d 658 (Mo. Ct. App. 1985) (holding that a tenant cannot be held liable for substantial structural repairs unless specifically agreed to in the lease and can normally only be held liable for repairs that are the result of ordinary wear and tear on the leased property; if the court finds the repairs to be structural and substantial, it would be unreasonable to expect the tenant to make the repairs especially when the benefit of the repairs would be the landlords).

153. See FISHER & URY, *supra* note 111, at 65-70; see also generally LAX & SEBENIUS, *supra* note 35, at 88-153 (chapters on creating and claiming value).

Doctrinally, the remedy considers defects that: (1) the landlord allows to arise after leasing;¹⁵⁴ and (2) were latent and about which neither the landlord nor the tenant had actual knowledge at the outset and which the tenant could not reasonably have discovered.¹⁵⁵ An implied warranty, requiring that the parties look beyond routine processing¹⁵⁶ and consider the idiosyncrasies of the tenant's commercial purpose, provides more flexibility at the bargaining table and includes factors the parties are likely to see as relevant besides the law.¹⁵⁷ Here, the tenant's evaluation sheet forecasts a landlord cooperative strategy that allows for negotiation, and where there is room for negotiation, there is room for resolution.

While the landlord may well argue that the premises are suitable for the tenant's commercial purpose and that additional wiring should be at the tenant's expense, the landlord must bargain with less potential for "landlord take all." The tenant goes to the table with an argument that the premises thwart the specific commercial purpose of the pottery and that the additional wiring makes a capital improvement for which the landlord should be responsible.

The absence and necessity of the wiring are not in dispute. Who should pay for the wiring is a question of law on which a summary judgment could be

154. See, e.g., *SunAmerica Fin., Inc. v. 260 Peachtree St., Inc.*, 415 S.E.2d 677, 681 (Ga. Ct. App. 1992).

155. See *Vermes v. American Dist. Tel. Co.*, 251 N.W.2d 101 (Minn. 1977).

156. See *Condlin*, *supra* note 36, at 27.

157. *But see Mnookin & Wilson*, *supra* note 145, at 315-23. Because *Texaco* and *Pennzoil* were two publicly traded companies, the litigation and ultimate settlement were dictated by the *Texaco* Board of Directors' concern for potential liability to shareholders. See *id.*; *but see Bundy*, *supra* note 117, at 341-42 (presenting different opinion that in this case there was a genuine settlement gap in a close case of great complexity with crucial differences in the information held by both parties that caused the parties to expect different outcomes). Bundy reasons that expectations of different outcomes and huge stakes, in addition to *mutual distrust, misunderstanding, bias, anger, and mutual antagonism that "poisoned the bargaining climate,"* became a confluence of factors that caused the parties to not reach a settlement until compelled to do so by the bankruptcy judge. See *id.* at 360-62 (emphasis added).

In *Pennzoil v. Texaco*, the litigation included complex multi-jurisdictional factors; the outcome of the litigation could have bankrupted a publicly-held corporation. See *Pennzoil v. Texaco*, 481 U.S. 1, 5 (1986). In that type of case: (1) many laws impacting the negotiations, rather than other non-legal considerations, become leverage for use at different times in the bargaining process rather than other non-legal considerations; although in actuality the parties may never get outside the shadow of one law or the other; and (2) parties cannot choose to treat the shadows of the impacting laws as unseen and satisfy subjective and non-legal demands because of the public nature of the bargaining. Bundy notes:

The limited available information does not permit a confident determination of whether agency problems impeded settlement. If they did not, then *Pennzoil v. Texaco* is an important example of a neglected class of cases—those in which prodigiously expensive litigation is in the interest of both parties and perhaps in the interest of the legal system as well. On this view the intervention of the bankruptcy judge to force settlement may well have been misguided.

Bundy, *supra* note 117, at 336.

granted if the dispute is litigated.¹⁵⁸ It is important that factual proof requirements already predisposed to favor the landlord are not present. The absence of predisposition to favor either party over the other leaves negotiation room for both parties to compromise and resolve the conflict. For trial and appellate court caseload reduction, the self-determined resolution represents one less case to draw upon judicial resources.

C. *The Landlord/Potter Dispute and Nonlegal Factors*

Beyond the substantive law as a factor,¹⁵⁹ parties may choose strategies for reasons other than the law.¹⁶⁰ This is especially relevant when the parties bargain for interests that satisfy their overarching commercial purpose. Professor Condlin, in discussing the entitlement of litigating parties to "presume that their disputes will be resolved according to law"¹⁶¹ suggests the following as potential nonlegal considerations:

They may choose to waive this entitlement for nonlegal considerations such as fear of publicity, an immediate need for cash, personal feelings for the adversary, intolerance for conflict, moral sensibilities, and the like, and this decision is not troublesome if it represents the free choice of one value over another, when both choices are known.¹⁶²

Condlin then notes:

Not everyone believes that a settlement must be based, in part, on a consideration of existing law in order to be just. For some (libertarians are the most obvious example), the relevant moral standards for private ordering are those freely chosen by the negotiating parties, and those choices are the ones implicit in the specific agreement reached. All affected interests must be represented and there must be an absence of

158. See *Mobile Oil Credit Corp. v. DST Realty, Inc.*, 689 S.W.2d 658 (Mo. Ct. App. 1985).

159. Considering the various laws at play in *Pennzoil v. Texaco*, it is reasonable to conclude that all bargaining in the dispute was done based on evaluations that only included substantive law and adjustment of expectation based on the shadow cast at that moment by the then-dominant legal ruling. If so, the efficiency component of bargaining discussed by Mnookin and Wilson never operated to create value in the face of the distributive impact of the legal rulings. See Mnookin & Wilson, *supra* note 145, at 311-14.

160. See *infra* Part III.D.

161. Robert J. Condlin, "Cases on Both Sides": *Patterns of Argument in Legal Dispute-Negotiation*, 44 MD. L. REV. 65, 82 (1985).

162. *Id.*

force and fraud; but if these conditions are met, a settlement is just when the parties agree to accept it.¹⁶³

The discussions by Professors Mnookin and Wilson¹⁶⁴ and Professor Bundy¹⁶⁵ point to the tension that can result between the law's shadow and nonlegal factors in legal bargaining. The two discussions also contribute to a debate in legal dispute bargaining literature regarding which factors, law or human factors, drove the *Pennzoil v. Texaco* litigation without consideration of settlement negotiations. Whether one factor or a combination of both drove the litigation, one conclusion is resoundingly clear: the case secured its place for demonstrating parties who assumed positional postures and incurred monumental financial losses.¹⁶⁶

How do the two doctrines compare with respect to allowing parties to fashion a resolution based on nonlegal factors? Because it is tenant purpose-specific, allowing even for uniqueness, an implied warranty of fitness for purpose more readily allows a human penumbra at the bargaining table, softening and opening the law's boundaries for possible solutions that might in fact transform the law into an unseen shadow. Naming the nonlegal factors created by the complexity of the human dynamic¹⁶⁷ and observing their interaction in the evaluative component of bargaining help illustrate the relative merit of using the two remedies in an ADR setting. Most readily observant in resolution interaction are nonlegal factors including: available information, the context of culture dynamics, staging power, power distribution and economic parity, and motivation, including both voluntary and involuntary incentives.¹⁶⁸

In the hypothetical of the landlord and the potter, once the law makes space for nonlegal factors at the table, the human dynamic influences outcome in different ways important to resolution and the commercial purpose of both parties.

163. *Id.*

164. See generally Mnookin & Wilson, *supra* note 145.

165. See generally Bundy, *supra* note 117.

166. See *id.* at 361 ("The liability issue was close, the stakes were gargantuan, the initial costs of further litigation were moderate, and the parties had reason to distrust each other.").

167. The aforementioned legal factors are not intended to be all-inclusive.

168. See Gifford, *supra* note 131, at 28-29.

D. Possible Situations

If the market heightens the motivation of either party, that party will move closer to a cooperative tactic.¹⁶⁹ With both remedies, market economics will definitely effect the landlord's motivation to compromise. The market has little space at the table for the potter in the constructive eviction evaluation. Unless the investment yield for the potter is tremendous because of location,¹⁷⁰ in a constructive eviction shadow the potter will either accept what the landlord offers or quit the premises and, perhaps, litigate.

Although an economically powerful tenant or landlord may have economic power at a level greater than the other, intense motivation to compromise because of a desire for continuance in the market at a specific location can override all others. Subsequently, the human shadow of an historically profitable relationship drives the bargaining.

Low motivation to compromise (landlord bargaining with the protection of constructive eviction) heightens the power of the recalcitrant party. The low power party (A) negotiating or having a conflict mediated with a high power party (B) who also has low motivation to compromise will likely see B assume a highly competitive stance and make a compromised resolution out of the realm of probability. B can be moved closer to compromise, however, if there are factors present in B's secretive factual domain that lower risk tolerance and heighten risk aversion. Here a public relations factor that is market driven can cause B to evaluate its case as weak and seek a compromise because of heightened risk aversion.¹⁷¹

Claimed, acknowledged, or inferred expertise by the landlord¹⁷² strengthens the power of the tenant where the background legal doctrine is that of implied warranty rather than constructive eviction. Because of the same implied warranty shadow, knowledge had by the tenant equal to that of the landlord will cause the potter to look for other factors to increase the probability of a negotiated resolution.

169. See *id.* at 15-17.

170. An adage in real estate buying is: "Location, location, location. Location is everything."

171. For example, if the landlord, Peachtree, had owned other buildings in the vicinity of the building SunAmerica leased; had tenants in those buildings been observing the negotiations to determine the "tenant friendliness" of the landlord, the public relations factor might have heightened Peachtree's risk aversion and brought the landlord to compromise.

172. See *Vermes v. American Dist. Tel. Co.*, 251 N.W.2d 101 (Minn. 1977); see also *Davidow v. Inwood N. Prof'l Group—Phase I*, 747 S.W.2d 373 (Tex. 1988).

In both *Vermes* and *Davidow*, the court relied strongly on information in possession of the landlord to impose a duty on the landlord.¹⁷³ The substantive law requiring disclosure adds to the power of the tenant. More power at the ADR table in the hands of the tenant adds to the motivation of the landlord. Add the common spin in commercial leasing of a tenant relying on landlord leasing agent representations of structural readiness (implying fitness), and the landlord's motivation and risk aversion will intensify on the evaluation sheet. If the substantive law available to the potter is from either *Vermes* or *Davidow*, since the law will impose a duty to inform, the landlord is likely to change its negotiating strategy altogether and become much more cooperative in tactic¹⁷⁴ and much more participatory in exploring options and satisfying the interests¹⁷⁵ of the tenant, regardless of available economic power. The law will then have created a combination of factors that encourage resolution without trial.

For purposes of an in-court remedy, the court's reasoning in *Reste* that the doctrinal foundation is of no consequence, accurately assesses the ultimate outcome if the court is willing to allow for any of the three—failure of consideration, disruption of quiet enjoyment, or implied warranty of habitability against latent defects.¹⁷⁶ For an out-of-court remedy through ADR, the doctrinal foundation is of significant consequence. If the action is grounded totally in a breach of the express contractual covenants, power distribution inequities that existed at the inception of the lease, and dictated lease terms, will play a major role in the strategy the parties take to the ADR table. The law is thus not at all neutral in its impact on resolution attempts.

The interaction of the legal and nonlegal factors changes as the pivotal importance of each intensifies or decreases. The examples of the possible situations show how nonlegal factors can shape evaluation and bargaining. If nonlegal factors are at the bargaining table because the law allows for them, the strategy of disputants shifts in response to the factors by changing to intensify (read: competitive)¹⁷⁷ or resolve conflict (read: cooperative).¹⁷⁸

173. See *Vermes*, 251 N.W.2d at 105; see also *Davidow*, 747 S.W.2d at 373.

174. See Gifford, *supra* note 131, at 815-21.

175. See FISHER & URY, *supra* note 111, at 65-75; see also, LAX & SEBENIUS, *supra* note 35, at 63-153.

176. See *Reste Realty Corp. v. Cooper*, 252 A.2d 268, 276-77 (N.J. 1969).

177. See Gifford, *supra* note 131, at 10-11; see also Conklin, *supra* note 161, at 72-74.

178. See *id.*

E. Real World Economic and Political Focus of the Warranty

Importantly, the focus on the fitness of the leased premises at the inception of the lease rather than on the deterioration of the property or its quiet enjoyment at the back-end also changes the economic and political dynamic of the commercial lease industry.¹⁷⁹ For example, in the economic dimension, cost information on remedying space deficiencies or customizing space at the front end of the lease to make it suitable for a specific use better allows both the landlord and the tenant to make informed decisions on spending the money to make the space suitable. Here, by putting the premises in the desired condition at the lease's inception, the landlord offsets the increased economic risks of the warranty's requirements by decreasing the chances that a problem requiring litigation will arise later.¹⁸⁰ The warranty requires both parties to intensify their focus on structural suitability at a time in the relationship that both or either can choose to forego the lease without cost if projected investment is too great for the expected return. The fitness warranty encourages full disclosure of information at a point in the relationship when information benefits both parties the most. The warranty also requires both parties to be knowledgeable about the space requirements for a specific commercial purpose. In this way, the warranty redistributes the cost burden of hired expertise. Not only the tenant, but the landlord as well, must look closely at the commercial purpose of the tenant and decide if the potential space satisfies all requirements before leasing.

In the political dimension, requiring information sharing at the front end of the lease instead of requiring litigious evidence at the back end also encourages cooperation between the parties early in the relationship. This cooperation is a human dynamic investment¹⁸¹ if a property defect later arises and the parties are in a bargaining set seeking resolution.

In making the warranty such a "hard sell" and holding fast to constructive eviction, landlords may actually be rejecting the legal solution that is, overall, the most supportive of the two possible remedies for investment protection and

179. One could argue that the role of substantive law is not to change the cultural dynamic within an industry, but rather to apply the agreed upon cultural norm (read: law) to disputes arising within the industry. The counter argument is that the cultural dynamics within an industry, and in this context within the commercial landlord and tenant industry, are not static and a change in the law to remedy defects reflects an existing change in the industry's cultural dynamics that has nullified, as a practical matter, the law's value.

180. Specific inspections, rather than a routine inspection for general purpose use, offer the landlord a greater probability of discovering purpose-specific defects. The landlord cannot offset structurally latent defects, like asbestos, with front end information.

181. See FISHER & URY, *supra* note 111, at 37; see also LAX & SEBENIUS, *supra* note 35, at 30-32.

support long term. Even in a worst case scenario, where the space has a latent defect that thwarts the tenant's purpose, the warranty imposes no greater duty on the landlord to remedy than does constructive eviction.¹⁸² Both remedies allow the landlord to remove the space from the rental market to avoid repairs too costly in ratio to expected investment return.

In the economic and political dimensions, the warranty's benefit to the landlord lies in the economic and political advantage of keeping a stable, familiar, consumer traffic-producing tenant. Also, both parties enjoy the benefit of an historically profitable relationship without incurring the economic and political costs of creating a new tenancy relationship and readying space to satisfy tenancy needs.¹⁸³

V. POLICY WITHIN CONTEXT

The question of changing substantive law to better support ADR and the judicial process of encouraging summary judgment raises policy issues in addition to the ones of how substantive law influences and affects ADR and the summary judgment process. Are the policy considerations attached to the entrenched doctrine so forceful as to overwhelm policy considerations supportive of the warranty? Despite the loyalist, reflexive "Yes" of most courts,¹⁸⁴ the better answer is "No." What policy undergirding commercial tenancies must change if the substantive law changes to facilitate process? As the policy changes, are there benefits that make policy upheaval worthwhile?

The policy undergirding commercial tenancies expresses a "hands-off" posture.¹⁸⁵ The formal policy reads: because all concerned parties bargain for profit, they can fend for themselves. The informal policy reads: in the commercial world, it is survival of the fittest. At a deeper level, the unwritten policy is: landlords own property; property ownership carries privilege; property owners are the most fit; tenant overboard.

A change to the fitness warranty shifts the formal policy to: all who bargain for profit fend for themselves, but not equally. Tenants are consumers of space who, like many consumers, require the protection of full disclosure

182. If the remedy requires substantial additional capital which is not feasible in terms of the landlord's long-term investment goals, the landlord may choose to take the property off of the rental market altogether. This type of activity is not prohibited by either constructive eviction or the fitness warranty.

183. See, e.g., *Vermes v. American Dist. Tel. Co.*, 251 A.2d 101 (Minn. 1977).

184. See *supra* note 32 and accompanying text.

185. See, e.g., *Service Oil Co. v. White*, 542 P.2d 652, 659 (Kan. 1975) ("We decline to engraft an implied warranty of suitability under the facts of this case upon the parties to a business or commercial lease.").

before entering contracts of purchase. The informal policy reads: empowering the lesser privileged to truly bargain is not new to an always evolving law. Therefore, we will help the tenant by leveling the bargaining playing field. At a deeper level, the policy is: property use is valued equally to property ownership. When the law privileges, it does so only to make equal. Tenants deserve a better bargaining position than the law has bestowed thus far.

A fundamental question in advocating the subject policy change asks whether the benefits are worth the policy upheaval that injects consumer protection into an industry where consumer protection previously did not exist. The social value arguments for fitness of commercial space are different from habitability arguments for residential space where human shelter is the product.¹⁸⁶ Besides fairness, as defined by expectation of the parties entering the lease,¹⁸⁷ the social value¹⁸⁸ argument for the policy upheaval that includes the "political, moral, and strategic dimension"¹⁸⁹ turns more on the interdependence of commercial space economics. The argument that tenants are humans who inhabit working space during working hours does not

186. In this instance, I agree with the *Service Oil* reasoning that the policy reasons for implying a residential warranty do not automatically translate into commercial doctrine. See *Service Oil*, 542 P.2d at 659; see also *Lemle v. Breeden*, 462 P.2d 470 (Haw. 1969). *Lemle* was the first case in the United States to hold that an implied warranty of habitability existed for residential shelter. See *id.* at 475-76. The residence in *Lemle* was infested with rats and their presence prevented occupation free of apprehension especially, when sleeping. See *id.* at 428.

The most frequently cited case for an implied warranty of habitability in residential properties is *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970). In *Javins*, while noting that the landlord sees shelter as a product, the court considered the tenant's housing expectations and held: "When American city dwellers, both rich and poor, seek 'shelter' today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance." *Id.* at 1071.

187. See Evelyn Alecia Lewis, *Struggling with Quicksand: The Ins and Outs of Cotenant Possession Value Liability and a Call for Default Rule Reform*, 1994 WIS. L. REV. 334, 339 (1994) ("Fairness relates to the reasonable expectation of parties."). Greenfield and Margolies, discussing *Marcos v. Texas*, 251 P.2d 647 (1952), explain how rigid rules may be used "to absolve the landlord of the need to provide suitable premises in the residential setting," and maintain:

the real issue in the case was not as the court claimed 'whether or not the appellant and appellee by their contract, agreed to classify the gasoline tanks as personalty' but rather whether the expectation of the parties at the outset of the lease was that the defendant was obliged to provide a storage tank that was suitable for its intended use.

Greenfield & Margolies, *supra* note 11, at 874.

188. See ROBERT NOZICK, *THE EXAMINED LIFE* 166 (1989) ("To value something is to stand in a particular close, positive psychological and attitudinal relation to it, a relation itself marked by high organic unity.").

189. See Condlin, *supra* note 36, at 3.

adequately counter the argument regarding what is common to both tenant and landlord—the profit motive.¹⁹⁰

The political and strategic dimensions are in the interdependency of needs. Anchor tenants require feeder tenants.¹⁹¹ The commercial real estate industry can be likened to an ocean. There are sharks, whales, barracudas, dolphins, coral beds, scallops, and ordinary fish of many varieties. Oceanic ecological balance requires them all. Similarly shopping malls and office buildings require small and large tenants for balance. In the United States, the number of small businesses continues to increase.¹⁹² These feeder tenants add jobs to the economy, and in turn, provide income to the market consumers of the anchor giants.¹⁹³ Encouraging tenancies to continue instead of encouraging relationship severance helps maintain stability in the market. The court in *Dyett* labeled uncritical adherence to existing doctrine “arbitrary and fictitious,” and reasoned that blindly following rules will “grow upon” professionals.¹⁹⁴ Continuing to affirm the power assumption policy in the face of obvious tenant and landlord type and size differences¹⁹⁵ masks blind adherence to fictitious rules. Contemporary leasing transactions include the sale, purchase, and return of leased space. These transactions occur within a commercial culture where ignoring the economic and political interdependency of landlord-tenant relationships with a “lessee beware” attitude is imprudent and foolhardy.

Affirming the benefits small businesses bring to the marketplace economy is “morally correct” because this affirmation recognizes the necessity of having the smaller businesses operate alongside the giants and accords the smaller business tenant a more intrinsically fair playing field. Because commercial space economics are interdependent, the tenants, on whom the landlords rely as consumers of product, deserve the law’s genuine equality. The constructive eviction doctrine locks the tenant in a position of power disparity with the

190. Contrary to Murray’s argument that humans “inhabit” work space while at work, *see* Murray, *supra* note 16, at 175, it is too easy for opponents of the warranty to argue that commercial tenants made ill by work environment can simply go work elsewhere.

191. “Feeder tenants” are those who occupy smaller shops in a shopping mall and strip. Consumers shop in the smaller or more convenient stores while also intending to buy from the anchor; the specialty feeder shops draw consumers.

192. *See generally* NON-FARM PRIVATE FIRMS, EMPLOYMENT AND ANNUAL PAYROLL BY MAJOR INDUSTRIAL SECTOR AND FIRM SIZE FOR THE UNITED STATES 1991, Table A.4, U.S. DEPT OF LABOR, BUREAU OF LABOR STATISTICS (Oct. 1994).

193. *See generally id.*

194. *Dyett v. Pendleton*, 8 Cow. 727, 734 (N.Y. 1826).

195. *See generally* NON-FARM PRIVATE FIRMS, *supra* note 192.

tenant on the lower end of the scale. An equal distribution of the law's power would maintain the integrity of the system.

The cumulative benefits of these reasons make the case for engrafting on commercial leases a full disclosure duty related to the commercial purpose of the tenant with a landlord's duty to remedy latent defects of which all were unaware, or take the property off the rental market.¹⁹⁶ A policy shift to the warranty is an economically, politically, and morally justified move benefitting the system and favoring neither the landlord nor the tenant.

In the hierarchy of the court trial process, the party that began the bargaining with greater power at the inception of the lease has greater power and ability to cause a desired end, even if its accomplishment entails the full-blown courtroom drama. The doctrines and policies that value power above all else in homage to the equality of power assumption deny validity to a remedy that would allow compensation for a disempowered party who has demonstrably suffered damage.

CONCLUSION

Landlords have developed an expected bundle of rights in commercial tenancies that includes the favorable scripting of evidentiary requirements when disputes arise over the adequacy of the space. There are at least two reasons to advocate the diminution of the bundle by changing the tenant's burden for proving entitlement to a remedy when damage occurs. One reason is that landlords as well as tenants save court costs, litigation expense, and protracted conflict through ADR. The second reason is fairness. Fairness advocates the diminution of the landlord's expected bundle of rights in exchange for the intrinsic fairness of a level playing field between commercial landlords and tenants when disputes arise. As this article demonstrates, the level playing field argument insists on casting aside the illusory equality maintained by the bargaining power assumption and replacing it with a remedy providing balanced evidence requirements. Parts II and III demonstrate how, in turn, the level playing field of balanced evidentiary requirements facilitates fast-track dispositive procedures.

The facilitation of process by changing the substantive law addresses the fundamental issue of court purpose. Courts exist to end disputes. An

196. The landlord can always avoid litigation by paying damages to the moving tenant and lease to a new one whose purpose is satisfied. Although an inconvenience to the tenant, the paying of damages satisfies the landlord's legal obligations; it is also moral.

argument that resolving disputes through jury trial better serves the court system also serves the normative value of "trial by jury." This article argues differently.¹⁹⁷ The argument is especially worth considering when value to the system plus even-handed distribution of the substantive law's power justify a shift in policy.

"Caveat lessee" is a policy of "business as usual" that values power above all else. It bespeaks policy that honors the party in the tenancy relationship whose bargaining power "favorably changes the bargaining set in furtherance of their own interests."¹⁹⁸ Continuing to affirm power and protect landlord ownership, while denying equality in doctrine for the tenant, rejects the public's expectation that the law's justice will be distributed equally.

A "so what, it happens every day" attitude states the case for not bothering. However, when the law is ignored and becomes worthless in the practical real-world routine of the system users, the integrity of the judicial system as one of equal justice diminishes. Wherever and whenever the judicial system, for demonstrably beneficial reasons, can shore up its damaged integrity emanating from the public's perceiving justice as for only the powerful, the social value is immeasurable.

Robert Nozick has formulated a table showing the unity of relationship between what he terms the "four evaluative dimensions of reality."¹⁹⁹ Nozick's formula for evaluating dimensions of reality shows that the concept of social value in the sense of public perception is a tight weave between the four dimensions. When weighing value in a group as amorphous as the "public," we must simply know that value increases but the degree of the increase defies precise measurement.

Because courts exist to resolve disputes otherwise unresolvable, a policy shift that demonstrably supports dispute resolution short of fact-finding trials and also meets the expectations of all parties translates into benefits for the system. Therefore, to fashion a remedy that resolves disputes at a juncture of

197. Jury trials are, rightfully and necessarily, a mainstay of the American judicial system. Even so, this article demonstrates that there are legal disputes based on claims that are either legally infirm in some way and subject to summary judgment or resolvable by the parties before trial through negotiation. This article is directed at facilitating the disposition of cases that, realistically speaking, are not going to trial.

198. LAX & SEBENIUS, *supra* note 35, at 250-52.

199. See NOZICK, *supra* note 188, at 179, 180. According to Nozick:

Importance involves external connections or relationships, as does meaning. Weight involves internal organization, as does value. Weight stands to value as importance stands to meaning. Importance is external or relational strength or power, while weight is internal, inherent strength. Value is the inherent integration of something, while meaning is its relation and integration with external things.

Id. at 180.

the proceedings that does not require the full cast of characters in a jury trial is: (1) a fashioning that resolves disputes at the very juncture looked to when courts fashion procedural reforms and (2) what is most important, fashions a remedy that is completely in keeping with the basic purpose of a court system. There is no conceptual illegitimacy here. The policy of resolving disputes is the thrust behind court administrative tools that reduce docket numbers and simultaneously provide increased availability of the courtroom and juries for those disputes that require full-blown courtroom drama for resolution.