

#50

5/24/67

First Supplement to Memorandum 67-32

Subject: Study 50 - Leases

The attached draft seems to me to accomplish all (or almost all) we set out to do. Section 1951 gives a lessor an immediate right to recover damages, including liquidated damages. Section 1952 gives a lessor a right to recover the rent as it falls due. The section gives him this right whether the lessee's possessory rights are terminated by abandonment or by justifiable eviction. The lessee is given a right to have any income from reletting set off--and this right exists under any kind of lease. A lessee is also given a right of set off to the extent the lessor could have mitigated his damages by reletting. But this latter right of the lessee is inapplicable to the big leases (unless the lease otherwise provides) where the lessee has abandoned. If the lessee is evicted, even under a big lease, the lessor must use diligence to relet.

Section 1953 gives the lessee the right to recover prepayments to the extent that they exceed what the lessor is entitled to keep under Sections 1951 and 1952. Section 1953.5 prohibits waiver of a lessee's rights under Sections 1951-1953 prior to accrual of those rights. And, finally, Section 1954 provides that a breach is an excuse for counterperformance.

Section 3308 and amended Code of Civil Procedure Section 1174 are as in the latest version of Senate Bill No. 252.

Respectfully submitted,

Joseph B. Harvey  
Consultant

1951. (a) When the lessee under a lease of real property has abandoned the property before the end of the term of the lease, or when the lessee's right of possession under a lease of real property is terminated by the lessor by reason of the breach thereof by the lessee, the lessor is entitled to recover from the lessee the sum of the following:

(1) The amount by which the present worth of the unpaid rent and charges equivalent to rent provided in the lease exceeds the amount of rental loss that the lessee proves could have been or could be avoided through the exercise of reasonable diligence without undue risk of other substantial detriment.

(2) Any other damages necessary to compensate the lessor for all the detriment proximately caused by the lessee's breach or which in the ordinary course of things would be likely to result therefrom.

(b) In lieu of the damages provided in subdivision (a), a lessor may recover liquidated damages for the breach or abandonment of a lease of real property if the lease so provides and such damages meet the requirements of Sections 1670 and 1671.

(c) An action to recover under this section must be commenced within four years after the abandonment or breach in the case of a written lease and within two years after the abandonment or breach in the case of an oral lease.

1952. (a) Subject to subdivisions (b) and (c), when the lessee under a lease of real property has abandoned the property before the end of the term, or when the lessee's right to possession of real property is terminated by the lessor by reason of the lessee's breach, the lessor may recover from the lessee, in lieu of the damages provided in Section 1951, the amount of the rent and charges equivalent to rent as they become due under the terms of the lease.

(b) If the lessor relets the property during the term of the original lease, he is not accountable to the lessee for any rent or charges equivalent to rent received on the reletting, but any such rent and charges shall be set off against any amount to which the lessor is otherwise entitled under subdivision (a).

(c) A lessor may not recover from a lessee under subdivision (a) for any detriment that the lessee proves could have been avoided through the exercise of reasonable diligence without undue risk of other substantial detriment. Unless the lease so provides, this subdivision does not limit the lessor's right to recover the full amount specified under subdivision (a) when the lessee has abandoned the property before the end of the term and:

(1) The rent and other charges equivalent to rent provided in the lease amount to \$500 or more per month; or

(2) The term stated in the lease is five years or longer.

1953. If a lessee's right of possession under a lease of real property is terminated because of the breach of the lease by the lessee, or if the lessee has abandoned the property prior to the end of the term of the lease, the lessee may recover from the lessor any amount paid to the lessor in consideration for the possession of the property (whether designated rental, bonus, consideration for the execution thereof, or by any other term) that is in excess of the sum of:

(a) The portion of the total amount required to be paid to or for the benefit of the lessor pursuant to the lease that is fairly allocable to the portion of the term prior to the abandonment or termination of the lessee's right of possession; and

(b) Any sum which the lessor is entitled to recover under Sections 1951 and 1952.

1953.5. The rights of a lessee provided in Sections 1951, 1952, and 1953 may not be waived prior to the accrual of such rights.

1954. When a party to a lease of real property is in substantial default in the performance of his obligations under the lease, the obligation of the aggrieved party to perform his obligations under the lease is excused, but without prejudice to the right of the aggrieved party to seek relief for the default in performance or to enforce any other provisions of the lease.

3308. (a) If a lease of personal property is terminated by the lessor by reason of any breach thereof by the lessee, the lessor shall thereupon be entitled to recover from the lessee the sum of the following:

(1) The present worth of the excess, if any, of the amount of rent and charges equivalent to rent reserved in the lease for the balance of the stated term over the reasonable rental value of the property for the same period.

(2) Any other damages necessary to compensate the lessor for all the detriment proximately caused by the lessee's breach or which in the ordinary course of things would be likely to result therefrom.

(b) Nothing in this section precludes the lessor from resorting to any other rights or remedies now or hereafter given to him by law or by the terms of the lease.

1174. If upon the trial, the verdict of the jury, or, if the case be tried without a jury, the findings of the court be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and if the proceedings be for an unlawful detainer after neglect, or failure to perform the conditions or covenants of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of such lease or agreement.

The jury or the court, if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent. Judgment against the defendant guilty of the forcible entry, or the forcible or unlawful detainer may be entered in the discretion of the court either for the amount of the damages and the rent found due, or for three times the amount so found.

When the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, and the notice required by Section 1161 has not stated the election of the landlord to declare the forfeiture thereof, the court may, and, if the lease or agreement is in writing, is for a term of more than one year, and does not contain a forfeiture clause, shall order that execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant, or any subtenant, or any mortgagee of the term, or any other party interested in its continuance, may pay into the court, for the landlord, the amount found due as rent, with interest thereon, and the amount of the damages found by the jury or the court for the unlawful detainer, and the costs of the proceedings, and thereupon the judgment shall be satisfied and the tenant be restored to his estate.

But if payment as here provided be not made within five days, the judgment may be enforced for its full amount, and for the possession of the premises. In all other cases the judgment may be enforced immediately.