

Second Supplement to Memorandum 88-64

Subject: Study H-111 - Commercial Lease Law (Assignment and Sublease--
tenant remedies)

Attached to this memorandum is a copy of Professor Coskran's background study of "Tenant Remedies for Wrongful Enforcement of Assignment and Sublease Restrictions." This study examines the remedies a tenant has if the landlord improperly withholds consent to the tenant's assignment or sublease.

According to the study, the tenant has quite an array of possible remedies, some more effective than others. These include:

Breach of contract damages. The tenant may be able to obtain breach of contract damages if the requirement of the landlord's consent is construed to be a "covenant" by the landlord. If the consent requirement is construed to be a "condition," the tenant may be allowed to make the transfer without the landlord's consent, but may not be allowed breach of contract damages. Professor Coskran believes the covenant approach yields a more fair, practical, and realistic result.

Self help. The tenant can always proceed without the necessary consent, but self-help remedies have limited use since the assignee or subtenant will probably be unwilling to buy a lawsuit.

Declaratory relief and injunction. These court remedies are available to the tenant.

Right to terminate lease. There is a conflict of opinion whether the tenant may terminate the lease if the landlord wrongfully withholds consent. Professor Coskran believes the better view is that the tenant may terminate, consistent with the "covenant" interpretation of the consent requirement.

Unlawful detainer. The tenant may use the landlord's wrongful refusal to consent as a defense in the landlord's unlawful detainer action.

Tort damages. There may be a variety of tort damages available to the tenant, including interference with contract, interference with prospective economic advantage, and punitive damages in the case of oppression, fraud, or malice. There may also be both statutory and common law damages where the landlord wrongfully dispossesses the tenant or transferee.

If we are to follow Professor Coskran's suggestions, we would at least make clear the tenant's right to obtain contract damages and to terminate the lease in the case of the landlord's wrongful refusal to consent. Whether it would be helpful to codify the tenant's right to other remedies is more problematical. It may be sufficient simply to statutorily state the rule that a landlord's consent requirement in a lease is a covenant, breach of which entitles the tenant to all appropriate damages for breach of covenant, and then in the Comment indicate the range of available damages.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

TENANT REMEDIES FOR WRONGFUL ENFORCEMENT OF
ASSIGNMENT AND SUBLEASE RESTRICTIONS*

by

William G. Coskran
Professor of Law
Loyola of Los Angeles
School of Law

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CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

CLRC/2T

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Revision Commission by
William G. Coskran

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TABLE OF CONTENTS

I.	SCOPE OF STUDY.	3
II.	COVENANT vs. CONDITION.	5
	A. Distinction & Effect.	5
	B. Implied Reasonableness Standard.	8
III.	SELF HELP.	10
IV.	CONTRACT REMEDIES.	12
	A. Excuse or Compel Consent.	12
	B. Excuse Performance & Terminate Lease.	14
	C. Damages.	17
	D. Unlawful Detainer Defense.	18
V.	TORT REMEDIES.	19
	A. Economic Interference.	19
	B. Bad Faith Breach of Contract.	25
	C. Other.	30
	D. Punitive Damages.	31
VI.	STATUTORY REMEDIES.	34
VII.	SUMMARY OF CONCLUSIONS.	35
	A. Covenant vs. Condition.	35
	B. Self Help.	36
	C. Contract Remedies.	36
	D. Tort Remedies.	37
	E. Statutory Remedies.	38

I. SCOPE OF STUDY.

This study is related to, and supplements, the principal study of restrictions on commercial lease assignments and subleases entitled "Restrictions on Lease Transfers: Validity and Related Remedies Issues" (#H-111).¹ That study deals with the validity of, and consent standard applied to, various types of leasehold transfer restrictions. The principal study also deals with the relationship between transfer restrictions and the "lock-in" remedy² which allows the lessor to continue enforcement of the lease after the tenant's breach and abandonment.

This study examines the remedies available to a tenant when, pursuant to a transfer restriction in a commercial lease of real property, a lessor wrongfully refuses consent to an assignment or sublease by a tenant.

Assume that a lessor and tenant enter into a commercial lease of real property. A clause in the lease restricts the tenant's ability to transfer to a third party without the lessor's consent.³ The lessor is subject to an express or implied reasonableness consent standard.⁴ Later, the tenant proposes to transfer all or part of the leasehold to a third party. The transfer will be in the form of either an assignment to an assignee, or a sublease to a subtenant. The lessor wrongfully refuses to consent to the transfer. The wrongfulness of the

refusal is based on the assumption that the lessor is subject to a reasonableness consent standard, and withholds consent unreasonably. As an alternative, the wrongful enforcement of a transfer restriction could involve the lessor's objection to a proposed transfer which is not within the scope of the restriction. In this variation, the lessor does not have the right to require consent to the proposed transaction.⁵

What are the tenant's remedies in California? Should the remedies be clarified or modified?

The same issues are involved when the transfer restriction is contained in a sublease from the tenant/sublessor to a subtenant, and the subtenant seeks remedies against the tenant/sublessor.

II. COVENANT vs. CONDITION.

A. Distinction & Effect.

This study assumes a factual situation where the lessor is subject to a reasonableness consent standard and that he has unreasonably refused to consent. Occasionally, an express consent standard is clearly worded as a covenant by the lessor that he will be reasonable in withholding consent, or that he will not unreasonably refuse consent. For example, the clause requiring the lessor's consent for a leasehold transfer might say: "Lessor promises that he will not unreasonably withhold consent." More commonly, the consent clause contains a phrase that "consent is not to be unreasonably withheld" or that "consent will not be unreasonably withheld" or that "consent shall not be unreasonably withheld." Absent express covenant language, the language imposing a reasonableness standard is subject to two different views. One view considers it to be a covenant by the lessor.⁶ The other view considers it to be a qualification or condition of the tenant's duty to get the lessor's consent.⁷

There is a dramatic difference between the two when the tenant seeks a remedy. If the reasonableness standard is a covenant by the lessor, an unreasonable refusal to consent is a breach of contract. The tenant has the normal breach of contract

remedies, including an action for damages. If, however, the reasonableness standard merely qualifies the requirement to get the lessor's consent, an unreasonable refusal just eliminates the need for consent. The tenant can proceed to transfer without the lessor's consent.

In theory, the tenant may seem to have solid remedies in either case. In practice, the remedy for a reasonableness qualification or condition may be akin to the tenant having contractual permission to levitate without artificial assistance. The practical problems with this remedy are discussed below in the Section III dealing with "Self Help."

Negotiating positions of the lessor and tenant can be strongly affected by the choice of a reasonableness covenant or condition. A wrongful withholding of consent in violation of a covenant can lead to an expensive breach of contract. It is easier to the lessor to say "no" if the tenant is unable to point out the contractual liability for damages that will be suffered. However, if the tenant is able to show potential tort liability, discussed below, the lessor will realize there is an expensive risk attached even to a reasonableness condition.

California has not taken a definitive position on the issue of covenant vs. condition. There is dictum by a court of appeal in the 1928 case of Kendis v. Cohn that supports the view that reasonableness is a qualification of the tenant's obligation to obtain consent, not a covenant by the lessor.⁸ The matter has not

been an issue of consequence in subsequent decisions. Subsequent to Kendis, there has been an increasing emphasis on a lease as a contract and on the covenant of good faith and fair dealing in every contract.⁹ These developments are consistent with treating the reasonableness standard as a covenant.

The view that the reasonableness standard is merely a qualification or condition seems to place a premium on semantic gamesmanship. It is at variance with the modern emphasis on good faith performance and reasonable expectations. It has been criticized as subjugating intent to "technical syntax, nicety of expression, or semantics" and as being contrary to the modern concept of contract law."¹⁰ The Restatement apparently recognizes this problem, and adopts the view that the provision for a reasonableness standard is a covenant. The tenant is "entitled to all the remedies available for a breach of a promise."¹¹ Apparently, the majority view treats the express reasonableness standard as a covenant.¹² Naturally, the lessor wishes to reduce exposure to damages for failure to comply with a reasonableness standard. Interpretation of the provision as a qualification or condition, rather than as a covenant, seems to put a premium on obscurity. It would be more appropriate to require that a limitation on the tenant's remedies be express.¹³ In this way, it will provide notice and an opportunity to bargain.

B. Implied Reasonableness Standard.

The reasonableness consent standard can be imposed upon the lessor in two ways. It can be expressly provided for in the lease, or it can be implied.¹⁴ The Restatement makes a curious distinction. If the lease expressly provides for the reasonableness standard, it is treated as a covenant, and breach of contract remedies are available. If the reasonableness standard is implied, damages are not available.¹⁵ The soundness of this result has been questioned.¹⁶

This distinction is probably based on the belief that if the standard is implied, the lessor does not reasonably anticipate liability for damages. If the lessor does not have reason to believe that he will be subjected to a court imposed reasonableness standard, this belief makes sense. The surprise liability problem could arise due to a retroactive imposition of a reasonableness requirement on a clause which is silent about the consent standard.¹⁷ It could also arise if a court were to invalidate a clause expressly giving the lessor sole discretion and mandate a reasonableness standard. If the lessor has reason to expect a reasonableness standard, he should expect breach of contract ramifications for unreasonableness.

In California, the implied reasonableness standard is the product, at least in substantial part, of the covenant of good faith and fair dealing.¹⁸ The covenant of good faith and fair

dealing is based on the reasonable expectations of the parties. The reasonableness obligation is imposed because of a covenant not to injure the reasonable expectations of the tenant. It would be incongruous if the tenant did not have contract remedies for the lessor's unreasonable refusal to consent, as long as the lessor has reason to know that he is subject to a reasonableness standard.

III. SELF HELP.

The tenant has requested consent to a proposed transfer. The lessor is subject to a reasonableness consent standard and has unreasonably refused consent. The tenant may legally go ahead with the transfer, without judicial intervention. However, this is not likely to be a practical remedy.

The tenant faces termination of the lease and liability for damages to the lessor if he is incorrect about the lessor's unreasonableness. There is also potential liability to the third party. In addition, a knowledgeable third party is unlikely to step into the risk of litigation and possible loss of possession if reasonable alternative sites are available.

The proposed transferee is faced with a lessor who says consent is required and reasonably refused. The tenant says that the lessor is unreasonable and consent is not required. The propriety of the refusal can be litigated and the reasonableness issue reduced to a judgment. However, a knowledgeable third party will prefer a clean deal, and will not look forward to the thrill of prolonged and expensive litigation. There is a risk that the lessor might prevail and the transferee will have a business disruption and other problems of a relocation. Also, there is the possibility that a new site will be more expensive or more difficult to find at the time of relocation. Even if the proposed

transferee is reasonably certain of the result, and receives an indemnity agreement from the tenant, the transferee will likely need some inducement to proceed.

The tenant should not attempt to use the self help remedy without first asking the lessor for consent. In the Thrifty Oil case, the California Court of Appeal held that a subtenant and third parties could not prevail in an unlawful detainer action by the sublessor because there was a failure to seek consent. The court commented that the request for consent "is not a mere formality, as it affords the lessor the opportunity to protect his interests and also minimizes the risks that a (transferee) will place himself in jeopardy. It also is a hallmark of 'common courtesy,' which is the cornerstone of 'good faith and fair dealing.'"¹⁹ The court expressly left open the issue of the necessity of a request for consent where it would be a futile act. The court also left open the possibility of relief from forfeiture to prevent hardship in certain cases.²⁰ The need to rely on either of these two possibilities indicates a significant lapse in planning by the tenant.

IV. CONTRACT REMEDIES.

A lease is a contract.²¹ A lessor's unreasonable rejection of a transfer is a violation of a reasonable consent covenant.²² This results in a breach of the lease contract. The tenant is entitled to the normal remedies for breach of contract.²³

A. Excuse or Compel Consent.

The tenant who has requested consent and been refused is involved in an "actual controversy" necessary to seek declaratory relief.²⁴ The tenant is entitled to declaratory relief to establish that the lessor's refusal to consent is wrongful and that the requirement is excused.²⁵ The proposed transferee may also be entitled to bring an action for declaratory relief.²⁶

The tenant should also be able to obtain specific performance to compel consent.²⁷ The code provisions dealing with specific performance do not contain any impediments to such an action.²⁸ Damages must be inadequate in order to obtain specific performance,²⁹ but real property has historically been treated as unique.³⁰ The statutory presumption that damages are inadequate would not apply because the action is not for breach of an agreement to transfer real property.³¹ However, it shows the special treatment accorded real property. A recent California

case has pointed out that, although the tenant's leasehold is an estate in real property, the leasehold estate itself is not real property.³² This historically accurate curiosity should not prevent practical minds from recognizing the close relationship between a leasehold and real property.

B. Excuse Performance & Terminate Lease.

Can the tenant use the lessor's breach of covenant as a basis for excusing the tenant's performance, and for termination of the lease. This presents the classic confrontation between the lease as a conveyance and as a contract.

The Ringwood case from New Jersey contains an excellent discussion of this issue.³³ Traditional property law doctrine, applicable to the lease as a conveyance, treats covenants by the lessor and the tenant as independent. Thus, the lessor's breach did not justify the tenant's termination unless there was an actual or constructive eviction. This property rule limited the tenant to a damage remedy. Contract law recognizes mutuality of covenants, and a substantial breach of a material covenant by one party can excuse performance of the other party.

The court in Ringwood discusses the trend toward extending contract remedies to a tenant. Although the trend is particularly apparent in residential tenancies, the court recognized that it was also appropriate in commercial leases. The parties contemplate a contractual relationship, and the right to terminate for a substantial breach of a material dependent covenant is an important remedy in that relationship. The Ringwood decision contains an important discussion of the inadequacy of other remedies for a commercial tenant. It will be

difficult for the tenant to find a third party willing to participate in the transfer while faced with the lessor's rejection.³⁴ Damages are difficult to calculate. The court concisely summed up the situation. "When a party to a lease agreement has breached his obligation to render a certain performance (to reasonably consent) which is a substantial benefit for which the other party has bargained and given consideration, it would be inequitable to require the other party to continue his performance under the lease contract and hope for an adequate judicial remedy in the future."³⁵

The approach taken in Ringwood is fair, logical, and consistent with the trend to emphasize the contractual aspects of a lease. However, there is a jurisdictional split on the issue.³⁶ The more recent cases reflect the contract approach and allow termination.³⁷ The Restatement recognizes that the mutually dependent covenants doctrine applies to leases when the performance of a promise by the lessor has a significant impact on the benefits anticipated by the tenant.³⁸ It also specifically recognizes termination of the lease as a remedy for breach of a covenant to not unreasonably withhold consent.³⁹

There is no California case which specifically resolves the issue of lease termination as a remedy for wrongfully withholding consent to a leasehold transfer. However, California has clearly adopted the contract doctrine of mutually dependent covenants for residential⁴⁰ and commercial⁴¹ tenancies. It would be

inconsistent to deny mutuality with respect to the reasonable consent covenant. There appears to be no substantial reason to deny the tenant the right to terminate upon establishing a substantial breach of a material covenant.

The right to contract damages depends on treating the reasonable consent standard as a covenant rather than a condition.⁴²

C. Damages.

"For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."⁴³ This is the basic California statutory provision for breach of contract damages. The reasonable consent covenant is an obligation arising from contract, so the tenant should be entitled to damages upon its breach.⁴⁴ There may be problems calculating the damages, but this should not affect the basic entitlement unless they are too speculative.⁴⁵

The right to contract damages depends on treating the reasonable consent standard as a covenant rather than a condition.⁴⁶

D. Unlawful Detainer Defense.

The issues permitted in an unlawful detainer action are limited in order to preserve the summary nature of the remedy.⁴⁷ However, when a lessor seeks to terminate the lease and recover possession based on an alleged wrongful transfer by the tenant, the wrongful withholding of consent is obviously in issue. A transfer without consent is not a breach if that consent is wrongfully withheld. It is important for the tenant to actually request the consent in order to protect his position.⁴⁸

V. TORT REMEDIES.

The tenant may also be able to establish the lessor's liability on a tort theory. This includes the possibility of recovering punitive, as well as compensatory, damages.

A. Economic Interference.

California recognizes the related torts of interference with contract and interference with prospective economic advantage.⁴⁹ It is not necessary that an enforceable contract exist between the parties.⁵⁰ Thus, it would not be a defense if the tenant and the prospective transferee had only entered into a conditional contract or no contract at all. The plaintiff must show that the defendant intended to cause the result of interfering with the transaction.⁵¹ This should not be difficult for the tenant to accomplish. The essence of the transaction is the proposed transfer to the third party, and the lessor wrongfully refuses to allow the transfer.

In the Richardson case, the California Court of Appeal upheld a tenant's⁵² judgment against a lessor based on interference with contract.⁵³ The corporate tenant and third party originally proposed an assignment of the leasehold as part of the sale of a restaurant business operated on the premises.

The lessor refused to consent unless the lease was renegotiated to provide for a higher rent and future escalation provision. The parties restructured the transaction as a sale of the corporate tenant's stock by the shareholders to the third party. The lessor insisted that its consent was still necessary. This caused a delay of about 30 days in closing the stock sale.

The corporate tenant and its shareholders filed an action for declaratory relief and for damages due to intentional interference with contract. The transfer restriction clause in the lease prohibited assignment or sublease without the lessor's consent. Sale of stock by the shareholders of the corporate tenant was neither an assignment or a sublease, so the lessor was without power to reject the transaction. A judgment for damages caused by the delay in closing was affirmed.

The Sade Shoe case involved a transfer restriction clause which specifically covered a sale of voting shares of a corporate tenant.⁵⁴ The lessor refused consent to a sale of the corporate stock. When the deal failed, the prospective purchaser sued the lessor for damages, including punitive damages, on the tort theory of interference with contract. The trial court sustained a demurrer without leave to amend. It found that the lessor's refusal of consent was justified and there was no tort liability. The court of appeal reversed. The decision appears to make the curious suggestion that a refusal of consent which is permissible under the terms of the lease might still result in tort liability.

The court in the Hamilton case commented that it was "somewhat bemused" by this apparent inconsistency in Sade.⁵⁵ In Hamilton, the California Court of Appeal affirmed a judgment that the lessor's refusal to consent to a sublease did not create liability to the tenant for tortious interference with contract. This case was disapproved by the California Supreme Court in the Kendall case.⁵⁶ However, the disapproval was based on the issue of the appropriate consent standard to apply.⁵⁷ The court did not specifically discuss the propriety of the tort action.

The recent Kreisher case involved a tort cause of action for interference with prospective economic advantage, and a jury verdict for over two million dollars in punitive damages.⁵⁸ The trial court entered judgment against lessor Mobil Oil, following a jury verdict, for \$214,000 compensatory damages and \$2,002,500 punitive damages. The tenant, a Mobil station franchisee, based his causes of action on the lessor's failure to comply with a reasonableness standard when refusing consent to a transfer of the tenant's leasehold and gasoline service station franchise. The lease and franchise agreements both contained a "silent consent standard" clause. That is, the clause required Mobil's consent to transfer, but it did not specify the standard governing consent. One third party offered the tenant \$28,000 for the transfer and another offered \$31,000.

The relationship between the parties was based on two related documents: a franchise agreement and a station lease. The

relationship continued through a series of three year term contracts going back to 1971.

The sequence of events leading to litigation started with a notice of default from the lessor to the tenant. The notice referred to the tenant's breach of a continuous operation clause and stated the lessor's intention to terminate if the default was not cured. The tenant responded with a notice of a third party's offer of \$28,000 for a transfer and a request for the lessor's consent. The lessor refused without stating a reason, other than the lessor's intention to terminate the lease and franchise. The lessor then learned of an additional breach, the failure to maintain insurance, and of revocation of the tenant's resale permit by the State Board of Equalization. After giving an additional notice of termination for default, the lessor served tenant with a three-day notice to quit. The tenant then notified the lessor of the second third party offer, this one for \$31,000, and asked if the lessor wished to either meet that offer or consent to the transfer. The lessor rejected both proposals and commenced an unlawful detainer action. The tenant vacated prior to any further judicial action.

The tenant then filed an action against the lessor for compensatory and punitive damages based on eight causes of action. The three causes of action which ultimately went to the jury and led to the judgment were: breach of contract and the

implied covenant of good faith and fair dealing; intentional interference with prospective economic advantage; and, intentional infliction of emotional distress.

The refusal to consent was at the heart of all the causes of action leading to the judgment. On appeal, the court pointed out that contract execution, consent refusal and jury verdict all occurred before the Kendall decision was filed on December 5, 1985.⁵⁹ That case subjected lessors to a reasonableness standard, implied into a "silent consent standard" clause. The Kreisher decision reviewed the principles involved in retroactivity, including foreseeability, reliance, public policy and fairness. It concluded that the lessor was not required to conform to standards which took effect after the significant events had occurred.

The court reversed the judgment because the lessor's refusal to give consent produced it. It did not question the propriety of an interference tort cause of action based on a wrongful refusal to consent. It merely held that the consent was not wrongful under the circumstances presented.

When considering the potential of punitive damages in cases of this nature, it is interesting to note that the highest price offered to the tenant for a transfer in Kreisher was \$31,000. The punitive damage award was \$2,002,500. It is not possible to determine from the opinion the full extent of the facts which

produced this sizeable award, or to determine the facts on the cause of action for infliction of emotional distress which might have contributed to it.

I have not found any California appellate decision questioning the availability of tort actions for economic interference based on a wrongful refusal of the lessor to consent to a transfer by the tenant. There does not seem to be any significant policy reason which would deny such a remedy to the tenant, as long as the cause of action can be factually established.

B. Bad Faith Breach of Contract.

The reasonableness consent standard is closely related to the implied covenant of good faith and fair dealing which is implied in leases.⁶⁰ The California Supreme Court, in the Seaman's case, discussed the issue of "whether, and under what circumstances, a breach of an implied covenant of good faith and fair dealing in a commercial contract may give rise to an action in tort."⁶¹

A tort action for breach of that contract covenant has been recognized when there is a special relationship between the contracting parties. This special relationship has been characterized by elements of public interest, adhesion, and fiduciary responsibility.⁶² This relationship has been found primarily between an insurer and insured.⁶³ Seaman's recognized that there are probably similar characteristics in other relationships which deserve similar treatment.

A relationship between an employer and employee might have similar characteristics.⁶⁴ Subsequent to Seaman's, a court of appeal in the Wallis case held a tort cause of action had been stated for bad faith breach of an employment related contract.⁶⁵ The court discussed the similar characteristics of contracts that may generate tort liability. They are: (1) inherently unequal bargaining power; (2) a nonprofit motive for entering the

contract, such as peace of mind or security; (3) inherently inadequate contract damages because they do not make the superior party account for its actions and they do not make the inferior party whole; (4) special vulnerability because of the type of potential harm and the need to place trust in the other party's performance; and (5) the defendant's awareness of the vulnerability. The relationship between a bank and its depositor was involved in the Commercial Cotton case.⁶⁶ In an action for tortious breach of the covenant of good faith and fair dealing, the court found sufficient similarities between banking and insurance company relationships with their customers to uphold a punitive damage award. When the relationship does not involve the special elements of a basic dependence, it will not generally be sufficient to generate tort liability for breach of contract. The Multiplex case distinguished Wallis and Commercial Cotton in an action by an insurance agency against an insurance company for refusal to pay commissions.⁶⁷ The court reversed a judgment for punitive damages and pointed out that the parties were both commercial enterprises, the contract was entered into for profit, there was no disparity in bargaining power, and contract damages were adequate.

The usual commercial lease transaction does not seem to involve the special relationship which leads to a tort action for breach of the covenant of good faith and fair dealing. Although

this study does not specifically address residential tenancies, it seems that a modern urban dweller seeking basic shelter would be a likely candidate for special relationship protection.⁶⁸

When considering extension of tort remedies beyond situations where the special relationship exists, the court pointed out "largely uncharted and potentially dangerous waters" and suggested that "it is wise to proceed with caution."⁶⁹ The court went on to recognize that, even without a special relationship, tort remedies may be available against a party who denies that a contract exists in order to avoid liability. The denial must be in bad faith and without probable cause.

In the typical case where a lessor wrongfully refuses to consent to a transfer, the lessor does not deny the existence of the contract. However, the court in Seaman's relied in part on the Adams case by the Oregon Supreme Court.⁷⁰ Adams involved a contract to drill a water well for a price that varied depending on the soil encountered while drilling. The driller exacted an overcharge by threatening to sue the property owner. The owner was allegedly fearful of the stress that litigation would cause his critically ill wife. The court upheld a punitive damage award against the driller. He was a tortious wrongdoer because he coerced payment of the money by threat of a suit, and he knew he had no rightful claim to the money. The Seaman's court referred to Adams and stated: "There is little difference, in principle, between a contracting party obtaining excess payment in such

manner, and a contracting party seeking to avoid all liability on a meritorious claim by adopting a 'stonewall' position ('see you in court') without probable cause and with no belief in the existence of a defense. Such conduct goes beyond the mere breach of contract. It offends accepted notions of business ethics."⁷¹

Suppose a lessor seeks to exact an increase in rent or other premium as the price of consent that he knows he is not entitled to withhold. Suppose further that he threatens to bring an unlawful detainer action to forfeit the lease and recover possession unless his demands are met. It seems likely that the members of the court in Seaman's would allow a tort action.⁷²

In Cohen v. Ratinoff, the tenant included a cause of action for bad faith breach of contract based on the lessor's wrongful refusal to consent, and sought punitive damages.⁷³ The court reversed a judgment in favor of the lessor on the pleadings. However, the case focused on the issue of applying the reasonableness standard to the lessor's refusal to consent. There was no significant discussion of the appropriateness of a tort cause of action. The Seaman's case had not yet been decided. In the Kendall case, the Supreme Court recognized the effect of the Cohen decision and commented: "While we express no view on the merits of the claim for punitive damages in Cohen, we note that not every breach of the covenant of good faith and fair dealing in a commercial contract gives rise to an action in tort."⁷⁴

It is well beyond the scope of this study to deal with the propriety of providing tort remedies, including punitive damages, for breach of contract. This is a major and complex issue. The admonition by the Seaman's court to proceed cautiously is good advice. However, certain general observations can be made with respect to the wrongful denial of consent to transfer. There does not appear to be a sufficient "special relationship" between the parties to a commercial lease to justify a tort action for breach of contract, although that relationship might be present in some residential tenancies. There might be tort liability without a special relationship if, in order to exact a better deal than the lease provides, the lessor: wrongfully withholds consent to transfer; threatens action to terminate the lease; has no probable cause to withhold consent; and, is without belief in the right to withhold consent. There is no California case expressly adopting any of these positions.

C. Other Torts.

Occasionally, an overzealous lessor (or agent) will avoid the niceties of due process procedures and use wrongful self help methods to dispossess a tenant and the unconsented transferee.⁷⁵ Self help methods of recovering possession are wrongful even if the tenant is in breach.⁷⁶ When there is a wrongful refusal of consent, the self help dispossession is a separate wrong. The situation can produce a variety of torts, such as trespass, assault, battery, and conversion. The truly zealous lessor may invite an action for infliction of emotional distress.⁷⁷

D. Punitive Damages.

The fact that a wrongful refusal to consent to a transfer may lead to a tort cause of action does not necessarily mean that punitive damages are likely. Punitive damages are reserved for the odious conduct characterized by "oppression, fraud or malice."⁷⁸ The following instructions for jurors give an excellent summary of the required foul deed.

If you find that plaintiff suffered damage as a...result of the conduct of the defendant on which you base a finding of liability, you may then consider whether you should award punitive damages against defendant..., for the sake of example and by way of punishment. You may in your discretion award such damages, if, but only if, you find by clear and convincing evidence that said defendant was guilty of {oppression} {fraud} {or} {malice} in the conduct on which you base your finding of liability.

("Malice" means conduct which is {intended by the defendant to cause injury to the plaintiff} {or} {despicable conduct which is carried on by the defendant with a willful and conscious disregard for the {rights} {or} {safety} of others.} {A person acts with conscious disregard of the rights or safety of others when {he} {she} is aware of the

probable dangerous consequences of {his} {her} conduct and willfully and deliberately fails to avoid those consequences).

{"Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.}

{"Despicable conduct" is conduct which is so {vile,} {base,} {contemptible,} {miserable,} {wretched,} {or} {loathsome} that it would be looked down upon and despised by ordinary decent people.)

{"Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant and with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.)

The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, you are to consider the following:

(1) The reprehensibility of the conduct of the defendant.

(2) The amount of punitive damages which will have a deterrent effect on the defendant in light of defendant's financial condition.

(3) That the punitive damages must bear a reasonable relation to the actual damages.

...79

VI. STATUTORY REMEDIES.

There are statutory remedies available if the lessor wrongfully dispossesses the tenant and transferee. A forcible entry and detainer action can be brought to recover possession and damages.⁸⁰ Treble punitive damages are possible in such an action when the lessor is guilty of "malice."⁸¹

In addition to actual damages, punitive damages of up to \$100.00 per day are available to a residential tenant when the lessor seeks to dispossess the parties by interfering with access or utilities⁸²

VII. SUMMARY OF CONCLUSIONS.

A. Covenant vs. Condition.

1. Absent express language of covenant, there are two views concerning the effect of an express reasonableness consent standard. One treats the standard as a covenant by the lessor. Under this view, the tenant has contract remedies for breach of covenant if the lessor unreasonably withholds consent. The other view treats the standard as a qualification or condition of the tenant's obligation to obtain the lessor's consent. Under this latter view, the tenant is excused from obtaining consent which is unreasonably withheld, but the tenant is not entitled to damages for breach of contract, nor to other contract remedies.

2. It is more fair, practical and realistic to treat the express reasonableness standard as a covenant.

3. An implied reasonableness consent standard is subject to the same two views that it is either a covenant or a condition.

4. It is more fair, practical and realistic to treat the implied reasonableness standard as a covenant, as long as the lessor has reason to know that he is subject to a reasonableness standard.

B. Self Help.

1. The tenant can proceed with the transfer if the tenant has requested consent and the lessor has wrongfully denied it.
2. This remedy has serious practical limitations.

C. Contract Remedies

1. The tenant can bring an action to declare that the lessor's consent is not required, or to compel the lessor to consent.

2. There are differing views concerning the tenant's right to terminate the lease and be excused from further performance. One view, emphasizing the lease as a conveyance, treats the covenants as independent and denies the right to terminate. The other view, emphasizing the lease as a contract, treats material covenants as mutually dependent and allows termination. The better view would allow the tenant to terminate the lease if there is a substantial breach of a material covenant.

3. The tenant's right to the contract remedy of termination depends on treating the reasonable consent standard as a covenant.

4. The tenant is entitled to contract damages for breach of covenant.

5. The tenant's right to the contract remedy of damages depends on treating the reasonable consent standard as a covenant.

6. The tenant is entitled to use the lessor's wrongful refusal to consent as a defense against an unlawful detainer action based on an unconsented transfer.

D. Tort Remedies

1. The tenant may be able to establish tort causes of action against the lessor for interference with contract or interference with prospective economic advantage when the lessor's wrongful refusal to consent delays or disrupts the transfer transaction.

2. The lack of an enforceable contract between the tenant and the prospective transferee does not prevent recovery for economic interference.

3. There does not appear to be a sufficient "special relationship" between the parties to a commercial lease to justify a tort action for breach of contract, although that relationship might be present in some residential tenancies.

4. There might be tort liability without a special relationship if, in order to exact a better deal than the lease provides, the lessor: wrongfully withholds consent to transfer; threatens action to terminate the lease; and, is without probable cause to withhold consent and without belief in the right to withhold consent.

5. Several tort actions can be involved if the lessor wrongfully dispossesses the tenant and third party. For example, there may be circumstances of trespass, assault and battery, conversion and infliction of emotional distress.

6. Punitive damages are only recoverable if the lessor is guilty of oppression, fraud or malice.

E. Statutory Remedies.

1. The tenant has statutory remedies available if the lessor wrongfully dispossesses the tenant or transferee by direct or indirect means.

2. The statutory remedies provide for punitive, as well as actual, damages.

- 1 This study is also related to separate studies on assignment and sublease topics entitled: *Lessor Remedies for Breach of Assignment & Sublease Restrictions*; *Involuntary Leasehold Transfers: Effect of Restrictions Against Assignment & Sublease*; *Use Restrictions in Leases: Relationship to Restrictions Against Assignment & Sublease*; *Enforcement of Leasehold Transfer Restrictions Against Tenant's Successor: Should Dumpor's Case be Dumped?*
- 2 Cal. Civ. Code Sec. 1951.4 (West 1985).
- 3 For a discussion of the types of restriction clauses, see Sec. IV of the principal study. Coskran, *Restrictions on Lease Transfers: Validity & Related Remedies Issues*, Study H-111.
- 4 Consent standards are discussed in the principal study. Coskran, *Restrictions on Lease Transfers: Validity & Related Remedies Issues*, Study H-111.
- 5 Due to the policy of strict construction, a transaction will generally escape the restriction unless the clause expressly takes it into consideration. A discussion of strict construction is contained in the principal study. Coskran, *Restrictions on Lease Transfers: Validity & Related Remedies Issues*, Study H-111.
- 6 *Ringwood Asso., Ltd. v. Jack's of Route 23, Inc.*, 153 N.J. Super. 294, 379 A.2d 508, 513 (1977), *aff'd*, 166 N.J. Super. 36, 398 A.2d 1315 (1978).
- 7 Note, *Effect of Leasehold Provisions Requiring The Lessor's Consent to Assignment*, 21 Hastings L.J. 516, 521-522 (1970); Hall, *Construction And Effect Of Provision In Lease That Consent To Subletting Or Assignment Will Not Be Arbitrarily Or Unreasonably Withheld*, 54 A.L.R.3d 679 (1972); Dunn, *Right Of Lessor Arbitrarily To Refuse Or Withhold Consent To Subletting Or Assignment Which Is Barred Without Such Consent*, 31 A.L.R.2d 831 (1953); M. Friedman, *Friedman on Leases*, Sec. 7.304b, p.265 (2d ed. 1983) .
- 8 *Kendis v. Cohn*, 90 Cal. App. 41, 64-66, 265 P. 844 (1928).
- 9 *Kendall v. Ernest Pestana, Inc.*, 40 Cal. 3d 488, 500, 220 Cal. Rptr. 818, 825, 709 P.2d 837 (1985).
- 10 *Arlu Associates v. Rosner*, 14 App. Div. 2d 272, 275, 220 N.Y.S.2D 288, 291, *aff'd*, 12 N.Y.2d 693, 185 N.E.2d 477 (1962). See also: M. Friedman, *Friedman on Leases*, Sec. 7.304b, p.265 (2d ed. 1983); Note, *Effect of Leasehold Provisions Requiring The Lessor's Consent to Assignment*, 21 Hastings L.J. 516, 521-522 (1970).
- 11 Restatement Second Property (*Landlord and Tenant*) Sec. 15.2, comment h, p.106 (1977).
- 12 *Fahrenwald v. La Bonte* 103 Idaho 751, 653 P.2d 803, 809 (Idaho, 1982); Hall, *Construction And Effect Of Provision In Lease That Consent To Subletting Or Assignment Will Not Be Arbitrarily Or Unreasonably Withheld*, 54 A.L.R.3d 679 (1972). There is a statement to the contrary in a 1970 law review note, (Note, *Effect of Leasehold Provisions Requiring The Lessor's Consent to Assignment*, 21 Hastings L.J. 516, 521 (1970)), but it is likely that smart money today would bet on the covenant view.

- 13 There are limitations on the ability to contract away liability for wrongful acts, particularly if they are tortious. See e.g.: Cal. Civ. Code Sec. 1668 (West 1985); and, *Tunkl v. Regents of University of California*, 60 Cal. 2d 92 (1963). This is particularly true when a residential tenancy is involved. See e.g.: Cal. Civ. Code Sec. 1953 (West 1985); and, *Henriouille v. Marin Ventures, Inc.*, 20 Cal. 3d 512, 143 Cal. Rptr. 247 (1976).
- 14 *Kendall v. Ernest Pestana, Inc.*, 40 Cal. 3d 488, 220 Cal. Rptr. 818, 709 P.2d 837 (1985). The principal study discusses the circumstances in which the reasonableness consent standard will be implied. Coskran, *Restrictions on Lease Transfers: Validity & Related Remedies Issues*, Study H-111.
- 15 Restatement Second Property (*Landlord and Tenant*) Sec. 15.2, comment h, p.106 (1977).
- 16 *Fahrenwald v. La Bonte* 103 Idaho 751, 653 P.2d 803, fn. 3 at p.809 (Idaho, 1982). The court left resolution of the issue to another day because the issue was not before it.
- 17 Retroactive application of a reasonableness standard is discussed in Section XIII of the principal study. Coskran, *Restrictions on Lease Transfers: Validity & Related Remedies Issues*, Study H-111.
- 18 *Kendall v. Ernest Pestana, Inc.*, 40 Cal. 3d 488, 500. 220 Cal. Rptr. 818, 825, 709 P.2d 837 (1985).
- 19 *Thrifty Oil Co. v. Batarse*, 174 Cal. App. 3d 770, 775-776, 220 Cal. Rptr. 285 (1985).
- 20 *Thrifty Oil Co. v. Batarse*, 174 Cal. App. 3d 770, 776-778, 220 Cal. Rptr. 285 (1985).
- 21 Cal. Civ. Code Sec. 1925 (West 1982); *Medico-Dental Bldg. v. Horton & Converse*, 21 Cal. 2d 411, 132 P.2d 457 (1942).
- 22 See section II above regarding the covenant vs condition distinction.
- 23 Hall, *Construction And Effect Of Provision In Lease That Consent To Subletting Or Assignment Will Not Be Arbitrarily Or Unreasonably Withheld*, 54 A.L.R.3d 679 (1972).
- 24 Cal. Code of Civ. Proc. Sec. 1060 (West 1982).
- 25 Hall, *Construction And Effect Of Provision In Lease That Consent To Subletting Or Assignment Will Not Be Arbitrarily Or Unreasonably Withheld*, 54 A.L.R.3d 679, 683, 693-696 & 704 (1972).
- 26 *Kendall v. Ernest Pestana, Inc.*, 40 Cal. 3d 488, 220 Cal. Rptr. 818, 709 P.2d 837 (1985). The action was brought by the proposed assignees.
- 27 *Hedgecock v. Mendel*, 146 Wash. 404, 263 P. 593 (1928); M. Friedman, *Friedman on Leases*, Sec. 7.304b, p.266 (2d ed. 1983); Hall, *Construction And Effect Of Provision In Lease That Consent To Subletting Or Assignment Will Not Be Arbitrarily Or Unreasonably Withheld*, 54 A.L.R.3d 679, 684 (fn.18) & 696 (1972).

- 28 Cal Civ. Code Secs. 3384-3395 (West 1970 & Supp. 1988).
- 29 *California Real Property Remedies Practice*, Sec. 5.5, (Cal CEB, 1982).
- 30 Witkin, *Summary of California Law, Equity*, Sec. 25 (8th edition, 1974 & supp. 1984).
- 31 Cal. Civ. Code Sec. 3387 (West Supp. 1988).
- 32 *Taylor v. Bouissiere*, 195 Cal. App. 3d 1197, 241 Cal. Rptr. 253 (1987).
- 33 *Ringwood Asso., Ltd. v. Jack's of Route 23, Inc.*, 153 N.J. Super. 294, 379 A.2d 508, 513-517 (1977), *aff'd*, 166 N.J. Super. 36, 398 A.2d 1315, 1319-1320 (1978).
- 34 See discussion of "Self Help" in Section III above.
- 35 *Ringwood Asso., Ltd. v. Jack's of Route 23, Inc.*, 153 N.J. Super. 294, 379 A.2d 508, 516 (1977), *aff'd*, 166 N.J. Super. 36, 398 A.2d 1315 (1978).
- 36 M. Friedman, *Friedman on Leases*, Sec. 7.304b, p.266 (2d ed. 1983); *Hall, Construction And Effect Of Provision In Lease That Consent To Subletting Or Assignment Will Not Be Arbitrarily Or Unreasonably Withheld*, 54 A.L.R.3d 679, 701-702 & 704 (1972).
- 37 See e.g. *Kapiolani Commercial Center v. A & S Partnership*, 723 P.2d 181, 184 (Hawaii, 1986).
- 38 Restatement Second Property (*Landlord and Tenant*) Sec. 7.1(1) & comment c. (1977).
- 39 Restatement Second Property (*Landlord and Tenant*) Sec. 15.2, comment h. (1977).
- 40 *Green v. Superior Court*, 10 Cal. 3d 616, 635, 111 Cal. Rptr. 704, 716-717, 517 P.2d 1168 (1974).
- 41 *Medico-Dental Bldg. v. Horton & Converse*, 21 Cal. 2d 411, 132 P.2d 457 (1942); *Kulawitz v. Pacific Woodenware & Paper Co.*, 25 Cal. 2d 664, 155 P.2d 24 (1945); *Groh v. Kover's Bull Pen, Inc.*, 221 Cal. App. 2d 611, 34 Cal. Rptr. 637 (1963).
- 42 See Section II, *supra*, for a discussion of "Covenant vs. Condition."
- 43 Cal. Civ. Code Sec. 3300 (West 1977).
- 44 *Fahrenwald v. La Bonte* 103 Idaho 751, 653 P.2d 803 (Idaho, 1982); *Hall, Construction And Effect Of Provision In Lease That Consent To Subletting Or Assignment Will Not Be Arbitrarily Or Unreasonably Withheld*, 54 A.L.R.3d 679, 697-699 (1972); M. Friedman, *Friedman on Leases*, Sec. 7.304b, p.266 (2d ed. 1983); Restatement Second Property (*Landlord and Tenant*) Sec. 7.1(2) (1977).
- 45 *Ringwood Asso., Ltd. v. Jack's of Route 23, Inc.*, 153 N.J. Super. 294, 379 A.2d 508, 516 (1977), *aff'd*, 166 N.J. Super. 36, 398 A.2d 1315 (1978).
- 46 See Section II, *supra*, for a discussion of "Covenant vs. Condition."
- 47 See generally *California Residential Landlord-Tenant Practice*, Sec. 7.6 (Cal CEB

- 1986).
- 48 See the discussion of the *Thrifty Oil* case above in Section III.
- 49 5 Witkin, *Summary of California Law, Torts*, Secs. V.D. and E. (9th edition, 1988).
- 50 *Seaman's Direct Buying Services, Inc. v. Standard Oil Co.*, 36 Cal. 3d 752, 766, 206 Cal. Rptr. 354 (1984); *Rader Co. v. Stone*, 178 Cal. App. 3d 10, 223 Cal. Rptr. 806 (1986); 5 Witkin, *Summary of California Law, Torts*, Secs. 645 & 652 (9th edition, 1988).
- 51 *Seaman's Direct Buying Services, Inc. v. Standard Oil Co.*, 36 Cal. 3d 752, 765-766, 206 Cal. Rptr. 354 (1984)
- 52 The successful plaintiffs were a corporate successor tenant (by way of a consented assignment) and its shareholders.
- 53 *Richardson v. La Rancherita*, 98 Cal. App. 3d 73, 159 Cal. Rptr. 285 (1979).
- 54 *Sade Shoe Co. v. Oschin & Snyder*, 162 Cal. App. 3d 1174, 209 Cal. Rptr. 124 (1984).
- 55 *Hamilton v. Dixon*, 168 Cal. App. 3d 1004, 214 Cal. Rptr. 639, 645 (1985).
- 56 *Kendall v. Ernest Pestana, Inc.*, 40 Cal. 3d 488, 498, 220 Cal. Rptr. 818, 824, 709 P.2d 837 (1985).
- 57 See Section IX.B of the principal study for a discussion of *Hamilton*. Coskran, *Restrictions on Lease Transfers: Validity & Related Remedies Issues*, Study H-111.
- 58 *Kreisher v. Mobil Oil Corporation*, 198 Cal. App. 3d 389, 243 Cal. Rptr. 662 (1988).
- 59 *Kendall v. Ernest Pestana, Inc.*, 40 Cal. 3d 488, 220 Cal. Rptr. 818, 709 P.2d 837 (1985).
- 60 *Kendall v. Ernest Pestana, Inc.*, 40 Cal. 3d 488, 220 Cal. Rptr. 818, 709 P.2d 837 (1985). See Section XII.B of the principal study. Coskran, *Restrictions on Lease Transfers: Validity & Related Remedies Issues*, Study H-111.
- 61 *Seaman's Direct Buying Services, Inc. v. Standard Oil Co.*, 36 Cal. 3d 752, 767, 206 Cal. Rptr. 354 (1984).
- 62 *Seaman's Direct Buying Services, Inc. v. Standard Oil Co.*, 36 Cal. 3d 752, 768, 206 Cal. Rptr. 354 (1984).
- 63 *Egan v. Mutual of Omaha Inc. Co.*, 24 Cal. 3d 809, 169 Cal. Rptr. 691, 620 P.2d 141.
- 64 *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 179, fn. 12, 164 Cal. Rptr. 839 (1980).
- 65 *Wallis v. Superior Court*, 160 Cal.App.3d 1109, 207 Cal.Rptr. 123 (1984).
- 66 *Commercial Cotton Co. v. United California Bank*, 163 Cal. App.3d 511, 209 Cal. Rptr. 551 (1985).

- 67 *Multiplex Ins. Agency, Inc. v. California Life Ins. Co.*, 189 Cal. App. 3d 925, 931, 235 Cal. Rptr. 12 (1987).
- 68 For a description of this tenant's characteristics, see *Green v. Superior Court*, 10 Cal. 3d 616, 623, 111 Cal. Rptr. 704, 708, 517 P.2d 1168 (1974).
- 69 *Seaman's Direct Buying Services, Inc. v. Standard Oil Co.*, 36 Cal. 3d 752, 769, 206 Cal. Rptr. 354 (1984).
- 70 *Adams v. Crater Well Drilling, Inc.*, 276 Ore. 789, 556 P.2d 679 (1976).
- 71 *Seaman's Direct Buying Services, Inc. v. Standard Oil Co.*, 36 Cal. 3d 752, 769-770, 206 Cal. Rptr. 354 (1984).
- 72 The case was heard before Justices Bird, Broussard, Grodin, Kaus, Mosk, and Reynoso. Although Chief Justice Bird filed a separate concurring and dissenting opinion, there is nothing in that opinion to indicate that she would be less likely to find a tort cause of action. Justices Broussard and Mosk are the only ones of the six still on the court.
- 73 *Cohen v. Ratinoff*, 147 Cal. App. 3d 321, 195 Cal. Rptr. 84 (1983). See Section IX.B of the principal study for a discussion of the Cohen case. Coskran, *Restrictions on Lease Transfers: Validity & Related Remedies Issues*, Study H-111.
- 74 *Kendall v. Ernest Pestana, Inc.*, 40 Cal. 3d 488, 497, fn. 11, 220 Cal. Rptr. 818, 823, 709 P.2d 837 (1985).
- 75 *Kassan v. Stout*, 9 Cal. 3d 39, 106 Cal. Rptr. 783, 507 P.2d 87 (1973).
- 76 *Jordan v. Talbot*, 55 Cal. 2d 597, 12 Cal. Rptr. 488 (1961). Regarding residential tenancies, see Cal. Civ. Code Sec. 789.3; *Kinney v. Vacari*, 27 Cal. 3d 348, 165 Cal. Rptr. 787 (1980); and, *Hale v. Morgan*, 22 Cal. 3d 388, 149 Cal. Rptr. 375 (1978)..
- 77 *Newby v. Alto Riviera Apts.*, 60 Cal. App. 3d 288, 131 Cal. Rptr. 547 (1976).
- 78 Cal. Civ. Code Sec. 3294 (West Supp. 1988).
- 79 BAJI Sec. 14.71 (1987 Rev'n.).
- 80 Cal. Code of Civ. Proc. Secs. 1159 & 1160 (West 1982), and 1174 (West Supp. 1988); *Kassan v. Stout*, 9 Cal. 3d 39, 106 Cal. Rptr. 783, 507 P.2d 87 (1973).
- 81 Cal. Code of Civ. Proc. Sec. 1174(b) (West Supp. 1988).
- 82 Cal. Civ. Code Sec. 789.3 (West 1982); *Kinney v. Vacari*, 27 Cal. 3d 348, 165 Cal. Rptr. 787 (1980); *Hale v. Morgan*, 22 Cal. 3d 388, 149 Cal. Rptr. 375 (1978).