

Second Supplement to Memorandum 67-32

Subject: Study 50 - Leases

John DeMouilly and I have gone over the respective drafts submitted in the main memorandum and first supplement and have prepared the attached draft, which supersedes the prior versions. This draft combines features of both preceding drafts.

Section 1951

Section 1951 of this draft authorizes any lessor to sue immediately for damages. The measure of damages is fixed, the burden of proof is allocated, the discount rate is specified, the right to liquidated damages is stated, and the applicable statute of limitations is stated.

It should be noted that Section 1951 provides the only remedy for the lessor in a case where he evicts the tenant, and it provides the only remedy for the lessor in short term (under five years) and low rent (under \$500 a month) leases. However, the length of the statute of limitations will permit most lessors to wait until the end of the lease (if they wish to) before suing so that the full amount of the damages can be determined by experience. A lessor may, however, sue immediately for his damages if he does not think the defaulting lessee will wait around that long to be sued.

It should also be noted that the remedy specified here may be substantially modified by the parties acting pursuant to the "unless" provision at the beginning of the section.

Section 1951.5

This section permits the parties to long term or large rent leases to provide by contract for a continuing rental obligation which the lessee cannot avoid by abandoning the lease. The lessor here has no duty to relet

or otherwise minimize his loss. Of course, if he does relet, the amount is offset against the original lessee's obligation.

Section 1952

This is the anti-forfeiture section in substantially the same form previously approved.

Section 1952.5

This section is designed to prevent the exaction of forfeitures by waivers of the anti-forfeiture provisions of this statute.

Section 1953

This provision excuses a repossessing lessor from further performance of his obligations so that the defaulting lessee cannot defend on the ground that the lessor, after the lessee's breach, no longer performed.

Sections 1953.5 and 1954

These sections are provisions the Legislature has insisted upon.

Section 3308

The only modification here from the previously approved version is the language permitting the parties to limit the damages period.

Section 1174 (Code of Civil Procedure)

This is the same as the previously approved version.

Respectfully submitted,

Joseph B. Harvey
Consultant

1951. (a) Unless the lease otherwise provides, 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. For the purpose of this paragraph, the present worth of an unpaid rental installment that is not yet due shall be taken as that sum which, together with four percent simple interest thereon from the present time to the due date of the rental installment, shall be equal to the amount of the rental installment.

(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.

1951.5. (a) Subject to subdivision (b), when the lessee under a lease of real property has abandoned the property before the end of the term 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 if the lease so provides 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.

(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, less the reasonable expenses of reletting, shall be set off against any amount to which the lessor is otherwise entitled under subdivision (a).

1952. 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 1951.5.

1952.5. The rights of a lessee provided in Sections 1951, and 1952 may not be waived prior to the accrual of such rights.

1953. 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 lessee's breach, and the lessor retakes possession of the property, the obligation of the lessor thereafter to perform his obligations under the lease is excused, but without prejudice to the right of the lessor to seek relief for the default in performance or to enforce any other provisions of the lease.

1953.5. Sections 1951, 1951.5, 1952, 1952.5, and 1953 do not apply to:

- (a) Any lease that was executed before January 1, 1968.
- (b) Any lease executed on or after January 1, 1968, if the terms of such lease were fixed by a lease or other contract executed prior to January 1, 1968.

1954. Where an agreement for a lease of real property from or to any public entity or any nonprofit corporation whose title or interest in the property is subject to reversion to a public entity would be made invalid if any provision of Section 1951, 1951.5, 1952, 1952.5 or 1953 were applicable, such provision shall not be applicable to such 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 or any shorter period specified in the lease 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.