

Memorandum 89-7

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,

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