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Lee M. Smolen

FILLING THE GAP IN A REAL PROPERTY LEASE

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The lack of clear lease language often causes disputes between landlords and tenants. Consequently, courts have developed rules of construction and default to resolve disputes not anticipated by the parties to a lease. Part I of this article discusses these rules and their application by the courts in the process of resolving landlord/tenant disputes. Part II demonstrates that (a) the default rules are logical because they imply lease provisions for which most landlords and tenants would bargain in the absence of the rules, and (b) the rules of construction are a logical guide for the interpretation of ambiguous lease provisions.

I. THE RULES

A. Construction and Operation of Leases

1. Ambiguous Terms

Judicial interpretation is unnecessary where lease language is clear and definite.[1] In *Hoffman v. Clark Street Roadhouse, Ltd.*,[2] the lease provided that rent would be paid "in coin or currency which at the time . . . of payment . . . is legal tender for . . . debts in the United States."[3] The tenant tendered payment of rent with third-party checks endorsed to the landlord.[4] The landlord refused the tender and brought suit against the tenant to receive payment in cash.[5] The tenant argued that checks constitute cash in modern commercial practice, and thus, the court should permit the rental payment in either form.[6] The court found for the landlord and

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* Lee M. Smolen, B.S., University of Illinois; J.D., University of Chicago. Mr. Smolen is an associate with Sidley & Austin in Chicago. He wishes to thank Geoffrey P. Miller, Assistant Professor of Law at the University of Chicago, for his contribution to the preparation of this article. Mr. Smolen also wishes to thank his family for the support that they have given to him throughout the years.

1. J.B. Stein & Co. v. Sandberg, 95 Ill. App. 3d 19, 22, 419 N.E.2d 652, 655 (2d Dist. 1981); Hoffman v. Clark Street Roadhouse, Ltd., 79 Ill. App. 3d 41, 43, 398 N.E.2d 238, 239 (1st Dist. 1979); O'Fallow Dev. Co. v. Reinbold, 69 Ill. App. 2d 169, 174, 216 N.E.2d 9, 11 (5th Dist. 1966). *See also* Sol K. Graff & Sons v. Leopold, 92 Ill. App. 3d 769, 771, 416 N.E.2d 275, 277 (1st Dist. 1981) (court refused to interpret intention of parties regarding installation of sign on leased property where that intention was clear).

2. 79 Ill. App. 3d 41, 398 N.E.2d 238 (1st Dist. 1979).

3. *Id.* at 42, 398 N.E.2d at 239.

4. *Id.*

5. *Id.*

6. *Id.*

held that the lease language was unambiguous.[7] The court noted that the intention of the parties was clear, and that rent must be paid in coin or currency.[8] Therefore, the court concluded that judicial interpretation was unnecessary.[9]

Courts generally construe ambiguous lease provisions most strongly against the landlord and in favor of the tenant.[10] In *Bogan v. Postlewait,*[11] the landlord leased premises as a drive-in restaurant.[12] During the lease term the central air conditioning system failed.[13] The court addressed the issue of whether the landlord or the tenant was obligated to repair the air conditioning system.[14] The court held that, under the lease terms, the landlord was responsible for "maintenance of the exterior," while the tenant was responsible for "interior maintenance."[15] The court concluded that a tenant's obligations under a lease could not be increased by construction.[16] Furthermore, the court stated that ambiguities in the lease must be construed against the landlord.[17] The court concluded, therefore, that the landlord was responsible for repairing the air conditioning system.[18]

In *Windsor at Seven Oaks v. Kelly,*[19] the landlord sued the tenant to recover for fire damage to the leased premises[20] that was caused by the tenant's alleged negligence.[21] The court found that the lease imposed no responsibility for fire damage on the tenant.[22] The court concluded that "[w]here a landlord has drafted a lease, a court will not impose a responsibility upon the tenant unless the circumstances and the contract clearly indicate that the tenant intended to assume such a responsibility."[23]

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7. *Id.* at 43, 398 N.E.2d at 239.
8. *Id.* at 43, 398 N.E.2d at 240.
9. *Id.* at 43, 398 N.E.2d at 239-40.
10. J.B. Stein & Co. v. Sandberg, 95 Ill. App. 3d 19, 22, 419 N.E.2d 652, 655 (2d Dist. 1981). *See also* Sanni, Inc. v. Fiocchi, 111 Ill. App. 3d 234, 241, 443 N.E.2d 1108, 1114 (2d Dist. 1983) (ambiguous lease provisions construed against drafter); Bogan v. Postlewait, 130 Ill. App. 2d 729, 731, 265 N.E.2d 195, 197-98 (4th Dist. 1970) (ambiguous lease provisions construed in favor of tenant). *But see* McGann v. Murray, 75 Ill. App. 3d 697, 701-02, 393 N.E.2d 1339, 1343 (3d Dist. 1979) (dispute over ambiguous lease provisions not always resolved in favor of tenants).
11. 130 Ill. App. 2d 729, 265 N.E.2d 195 (4th Dist. 1970).
12. *Id.* at 730, 265 N.E.2d at 196.
13. *Id.*
14. *Id.* at 731, 265 N.E.2d at 197.
15. *Id.*
16. *Id.* at 731, 265 N.E.2d at 198.
17. *Id.*
18. *Id.* at 731-32, 265 N.E.2d at 197-98.
19. 113 Ill. App. 3d 978, 448 N.E.2d 251 (3d Dist. 1983).
20. *Id.* at 978-79, 448 N.E.2d at 251.
21. *Id.* at 979, 448 N.E.2d at 252.
22. *Id.* at 981, 448 N.E.2d at 254.
23. *Id.* at 980-81, 448 N.E.2d at 253-54.

2. *Independent and Dependent Covenants*

Absent contrary language, covenants in a lease are independent.[24] When drafting a lease, the landlord and tenant should consider which covenants must be dependent in order to protect their respective interests. In *Loop Office Building Corp. v. Hogan*,[25] the lease provided that rental payments were dependent upon the landlord's completion of work to the leased premises.[26] The tenant refused to make any rental payments when the landlord failed to complete the promised work.[27] Consequently, the landlord sued for the unpaid rent.[28] The court found for the tenant, concluding that the covenants at issue were mutual and dependent.[29] Accordingly, no rent was due or payable until the landlord completed the specified work.[30]

In *Loop Office Building*, the tenant protected his interests by making the obligation to pay rent dependent upon the landlord's completion of specific work to the leased premises. If the convenants had been independent, the tenant would have had to pay the stipulated rent even though the work had not been performed. Thus, it is important for the parties to a lease to decide which covenants must be made dependent in order to protect their individual interests.

3. *Conflicting Provisions*

A lease often goes through many drafts before it is executed by the parties. During this process the parties change, delete and add provisions to the lease. The parties must be careful not to create conflicting lease provisions when modifying a lease. If, however, a conflict between two lease provisions arises, the first provision controls.[31] Accordingly, the parties may defeat their true intent by hastily or carelessly modifying the lease.

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24. Truman v. Rodesch, 168 Ill. App. 304, 306 (2d Dist. 1912). *See also* Restaurants, Inc., v. Halsa Corp., 309 A.2d 108, 110 (D.C. 1973) (absent contrary language, covenants in restaurant lease were independent).

25. 253 Ill. App. 574 (1st Dist. 1929).

26. *Id.* at 576.

27. *Id.* at 577.

28. *Id.* at 575.

29. *Id.* at 578.

30. *Id.*

31. *See* Thomas Hoist Co. v. William J. Newman Co., 365 Ill. 160, 166, 6 N.E.2d 171, 174 (1st Dist. 1937) (the first of two conflicting clauses prevails); Ryan Oil Co. v. Ewald, 40 Ill. App. 2d 145, 149, 189 N.E.2d 404, 406 (1st Dist. 1963) (where two clauses in a lease are in conflict, the first controls); Northwest Racing Ass'n v. Hunt, 20 Ill. App. 2d 393, 397, 156 N.E.2d 285, 288 (2d Dist. 1959) (in a lease that has two conflicting provisions, the first provision controls).

4. Home Rule Units

Many Illinois home rule units have enacted landlord/tenant ordinances. In *Landry v. Smith*,[32] the court held that these ordinances are a valid exercise of the home rule power.[33] Thus, a landlord who leases property in different parts of Illinois should not assume that lease provisions that are valid in one lease are necessarily valid in another lease. An Illinois landlord must be familiar with the various home rule ordinances. A landlord who fails to recognize such differences runs the risk of paying damages and attorneys' fees to a tenant who complains of damages by reason of a prohibited lease provision.[34]

B. Use and Enjoyment of the Premises

1. General Terms

The parties to a lease should explicitly state what the landlord is leasing to the tenant. In *Vinissky v. Lazousky*,[35] the court concluded that where general terms such as "house," "farm" or "land" appear in a lease, all things ordinarily understood to be within the general meaning of these terms will pass under the lease.[36]

In *400 North Rush v. D.J. Bielzoff*,[37] the tenant leased the sixth and seventh floors of the landlord's building[38] and subsequently erected a sign on the outside wall of the demised premises.[39] The landlord brought suit, claiming that the tenant had trespassed by affixing a sign to the outside wall.[40] The landlord argued that the landlord/tenant relationship did not extend to the outside wall.[41] The court found that the landlord's rights to the outside wall were no different than his rights to the inside wall.[42] The court held that absent a contrary agreement, the exterior walls of leased premises are part of the demised leasehold.[43]

These cases exemplify the need for specificity in describing the leased property. If the lease is ambiguous, the chance of future litigation in-

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32. 66 Ill. App. 3d 616, 384 N.E.2d 430 (1st Dist. 1978). *See also* City of Evanston v. Create, Inc., 84 Ill. App. 3d 752, 759, 405 N.E.2d 1350, 1355 (1st Dist. 1980), *aff'd*, 85 Ill.2d 101, 421 N.E.2d 196 (1981) (city landlord and tenant ordinance held to be valid exercise of city's home rule powers granted by Illinois Constitution).

33. 66 Ill. App. 3d at 618-20, 384 N.E.2d at 432-33.

34. 2 LANDLORD TENANT PRACTICE 1, 14 (Ill. Inst. for CLE, 1979).

35. 155 Ill. App. 596 (1st Dist. 1910).

36. *Id.* at 600.

37. 347 Ill. App. 123, 106 N.E.2d 208 (1st Dist. 1952).

38. *Id.* at 124, 106 N.E.2d at 208.

39. *Id.* at 126, 106 N.E.2d at 209.

40. *Id.*

41. *Id.*

42. *Id.* at 126-27, 106 N.E.2d at 209.

43. *Id.* at 128, 106 N.E.2d at 210.

creases. Two different scenarios may arise. First, as in *400 North Rush*, landlords may believe that they have not leased certain property that has in fact passed to the tenant under the lease. Second, tenants may believe that they have rights to property under the lease that they do not actually possess.

2. *Rights of Ingress and Egress*

The rights of ingress and egress by the usual way generally pass to the tenant under a lease.[44] These rights are essential to the tenant's use and enjoyment of the leased premises. A tenant is well advised, however, to address the rights of ingress and egress expressly when drafting the lease. These rights pass by operation of law only where they are necessary to the complete enjoyment of the property.[45] Thus, a tenant who assumes that certain rights of ingress and egress pass automatically risks possible future litigation because necessity is a question of fact.[46]

3. *Premises Leased for a Specific Purpose*

Absent restrictive stipulations in the lease, the tenant may use the demised premises for any lawful purpose.[47] When the premises are leased for a particular purpose, however, the tenant may use the premises only for that purpose.[48] In *Belvidere South Towne Centre, Inc. v. One Stop Pacemaker*,[49] the landlord brought a declaratory judgment action against the tenant for the interpretation of a shopping center lease.[50] The lease provided that the premises would be used "for the purpose of a Drug Store."[51] The tenant sold food products in the demised premises.[52] The

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44. The Fair v. Evergreen Park Shopping Plaza, 4 Ill. App. 2d 454, 464-65, 124 N.E.2d 649, 655 (1st Dist. 1954). *See also* Great Atlantic & Pacific Tea Co., Inc. v. LaSalle Nat'l Bank, 77 Ill. App. 3d 478, 482, 395 N.E.2d 1193, 1199 (1st Dist. 1979) (upheld tenant's action to enjoin drive-in bank from constructing facilities impairing tenant's use of parking lot); RESTATEMENT (SECOND) OF PROPERTY §§ 453, 487 (1980).

45. The Fair v. Evergreen Park Shopping Plaza, 4 Ill. App. 2d 454, 124 N.E.2d 649 (1st Dist. 1954).

46. 24 I.L.P. LANDLORD AND TENANT § 275 (1986).

47. Northern Trust Co. v. Thompson, 336 Ill. 137, 168 N.E. 116 (1929). From the landlord's point of view, the safest clause is one that would only permit the use immediately contemplated. However, the tenant will want to bargain for a clause which provides that the premises may be used for the anticipated purpose as well as for certain specified alternate uses, as long as such use does not violate any law, regulation or governmental order. *See* Kemph, *Drafting Commercial Leases*, 10 REAL ESTATE L.J. 99, 103 (1981).

48. Belvidere South Towne Centre, Inc. v. One Stop Pacemaker, 54 Ill. App. 3d 958, 961-62, 370 N.E.2d 249, 252 (2d Dist. 1977). *See also* R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 5:7-8 (1980) (discussing express lease provisions restricting use and residential lease provisions).

49. 54 Ill. App. 3d 958, 370 N.E.2d 249.

50. *Id.* at 959, 370 N.E.2d at 250.

51. *Id.* at 959, 370 N.E.2d at 251.

52. *Id.* at 960, 370 N.E.2d at 251.

court concluded that the lease provision limited the tenant's use of the premises to a drugstore and prohibited the sale of food.[53]

Where the lease limits the rights granted to a particular use, all uses that are not inconsistent with the rights granted are reserved to the landlord. The landlord retains these rights even if the lease does not specifically grant them to the landlord. The landlord, however, must exercise these rights without interfering with the tenant's possession or use of the premises.[54]

In drafting a use clause, the landlord should attempt to prohibit the tenant from conducting any use that would (1) violate any certificate of occupancy, (2) make void or voidable any insurance policy or make it impossible to obtain insurance, (3) cause structural injury to the demised premises, or (4) constitute a nuisance. In addition, consideration should be given to the relationship between the use clause and the practicability of an assignment or sublease. Harsh restrictions on the use of the premises could make subleases or assignments almost impossible.[55]

4. *Services*

Landlords are not obligated to provide any services to their tenants unless set forth in the lease.[56] In *Rockford Savings & Loan Association v. City of Rockford*,[57] the court concluded that the landlord was under no obligation to pay for the tenant's water furnished to the premises by a municipal water department.[58] Similarly, in *Revell v. Illinois Merchants Trust Co.*,[59] the court concluded that, in the absence of a contractual provision, the landlord is not under an obligation to furnish heat to the demised premises.

The general rule that landlords are not obligated to provide services to their tenants unless set forth in the lease does not apply to the common

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53. *Id.* at 961-62, 370 N.E.2d at 252.

54. *See* Gustin v. Barney, 250 Ill. App. 209, 213 (2d Dist. 1928) (in exercising reserved rights, the grantor must do so in a manner that does not interfere with grantee's rights). *See also* R. SCHOSHINSKI, *supra* note 48, at § 5:7-9 (discussing express lease provisions restricting use).

55. Kemph, *supra* note 47, at 103.

56. Lippman v. Harrell, 39 Ill. App. 3d 308, 311, 349 N.E.2d 511, 514 (4th Dist. 1976) (lease silent on the duty to supply water did not obligate landlord to supply water). *See also* Continental Illinois Nat'l Bank v. National Casket Co., 27 Ill. App. 2d 447, 454, 169 N.E.2d 853, 856-57 (1st Dist. 1960) (burden of proof for establishing landlord's duty was on tenant under terms of the lease).

57. 352 Ill. 348, 185 N.E. 623 (1933).

58. *Id.* at 355, 185 N.E. at 627. The court reasoned that a tenant has a right to use the water supplied to the leased property and that the landlord has no right to interfere with that use.

59. 238 Ill. App. 4 (1st Dist. 1925).

areas of leased property.[60] In *Mangan v. F.C. Pilgrim & Co.*,[61] the common areas of an apartment building had become infested with mice.[62] The plaintiff fell and injured her hip as a result of being frightened by a mouse that she saw in the kitchen of her leased apartment.[63] The plaintiff brought a personal injury action against the landlord. The court concluded that where an area of the leased premises is reserved for common use, a duty is imposed upon the landlord to use ordinary care to keep that area in a safe condition.[64] The court stated that it made no difference that the injury occurred on the demised premises if the landlord's negligent maintenance of a common area caused the injury.[65]

From the tenant's perspective, the lease should set forth the particular services the landlord must provide. Furthermore, tenants should attempt to incorporate in the lease a provision that grants the right to request additional services consistent with the enjoyment of the property.[66] This provision would give tenants greater flexibility and enhance the enjoyment of the premises during the lease term.

Most commercial leases contain provisions that require the landlord to maintain parking and common areas, and provisions for tenants to reimburse the landlord, on a pro rata basis, for the maintenance costs incurred. Tenants should consider four factors before agreeing to sign such a lease.[67] First, if tenants are liable for their pro rata share of the landlord's costs, they should ensure that such costs are reasonable.[68] Second, in the event an injury occurs on the common areas, the injured party will often sue the large tenant or join that tenant as a party defendant.[69] This manuevering may result in additional legal and liability insurance expenses. Third, stores with basements or second floors may be required to contribute to the common area expense at the same rate as ground floor space.[70] Finally, if the landlord has vacant rentable space, tenants may be required to make larger contributions to absorb the fixed maintenance costs for the common areas.[71]

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60. Mangan v. F.C. Pilgrim & Co., 32 Ill. App. 3d 563, 569, 336 N.E.2d 374, 379 (1st Dist. 1975).

61. *Id.*

62. *Id.* at 566, 336 N.E.2d at 378.

63. *Id.* at 566, 336 N.E.2d at 377.

64. *Id.* at 567, 336 N.E.2d at 379.

65. *Id.* at 569, 336 N.E.2d at 379.

66. 5 LANDLORD TENANT PRACTICE 1, 49 (Ill. Inst. for CLE, 1979).

67. Berman, *Safeguards for the Lessee of Commercial Real Estate*, 52 CHI. B. REC. 345, 347-48 (1971).

68. *Id. See also* A.H. Woods Theatre v. North Am. Union, 246 Ill. App. 521, 524 (1st Dist. 1927).

69. *See* Berman, *supra* note 67.

70. *Id.*

71. *Id.*

5. Repairs

Absent specific lease provisions, tenants generally have the burden to repair the demised premises.[72] The mere relationship of landlord and tenant does not obligate the landlord to repair leased property. In *Laster v. Chicago Housing Authority,*[73] the plaintiff's parents leased an apartment from the defendant.[74] The plaintiff was injured when he fell from a window that had a defective screen.[75] The plaintiff subsequently brought an action for damages against the defendant landlord.[76] The court found for the landlord because the lease did not obligate the landlord to repair the screens or otherwise keep the apartment in a good state of repair.[77]

Thorson v. Aronson[78] highlighted three exceptions to the above-stated rule:

> (1) where a latent defect exists at the time of the leasing, which defect is known or should have been known to the landlord in the exercise of reasonable care and which could not have been discovered upon a reasonable examination of the premises by the tenant;
> (2) where the landlord fraudulently conceals from the tenant a known, dangerous condition; and
> (3) where the defect causing the harm, in the law, amounts to a nuisance.[79]

If the landlord has not expressly contracted to make repairs to the demised premises, such a contract cannot be implied from a voluntary or gratuitous attempt by the landlord to make repairs.[80] Similarly, a lease provision that obligates a landlord to do specified work prior to commencement of the lease term is an agreement to do only that work and does not give rise to a covenant of general repair.[81] However, if the landlord voluntarily repairs the demised premises, the tenant is not responsible for the cost.[82] For example, in *Rose v. Stoddard,*[83] the landlord made various repairs to the leased premises.[84] The landlord subsequently

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72. Laster v. Chicago Hous. Auth., 104 Ill. App. 3d 540, 542, 432 N.E.2d 1185, 1186-87 (1st Dist. 1982); Forshey v. Johnson, 132 Ill. App. 2d 1106, 1107, 271 N.E.2d 81, 82 (4th Dist. 1971).

73. 104 Ill. App. 3d 540, 432 N.E.2d 1185 (1st Dist. 1982).

74. *Id.* at 541, 432 N.E.2d at 1186.

75. *Id.*

76. *Id.*

77. *Id.* at 542, 432 N.E.2d at 1186-87.

78. 122 Ill. App. 2d 156, 258 N.E.2d 33 (2d Dist. 1970).

79. *Id.* at 160, 258 N.E.2d at 34.

80. *Id.* at 160, 258 N.E.2d at 34-35.

81. Eschner v. Peoples Radio Stores, Inc., 321 Ill. App. 634, 634, 53 N.E.2d 254, 255 (1st Dist. 1944).

82. *See* Rose v. Stoddard, 181 Ill. App. 405, 408 (1st Dist. 1913).

83. 181 Ill. App. 405 (1st Dist. 1913).

84. *Id.*

sought to recover his repair costs.[85] The landlord argued that the clause in the lease permitting the landlord to enter the premises "to make any needful repairs" obligated the tenant to pay for such repairs.[86] The court disagreed, concluding that the tenant was not responsible for the cost of the landlord's gratuitous repairs.[87]

When drafting a lease it is important that the parties recognize who has the responsibility to repair the leased premises. As exemplified by *Rose*, a party to a lease may be liable for repairs made to the premises even if that party believed otherwise. In this situation, the party who is in fact liable for the repairs may find it difficult to cover the costs. If, on the other hand, the parties are aware of who will bear the repair costs at the inception of the lease, the responsible party will be able to plan for possible future costs.

It is advantageous for a landlord to have a tenant's obligations under a lease unaffected by the inability of the landlord to complete any specified repair work prior to the beginning of the lease term. Absent this lease provision, a tenant may refuse to take possession of the premises if the landlord fails to complete the specified repair work.[88] If the tenant does take possession, he cannot retain possession and simultaneously withhold rent for breach of the covenant to make the promised repairs.[89] The tenant must either sue the landlord for damages or set off the damages in an action by the landlord for rent.[90]

Landlords generally have an obligation to repair those portions of the premises retained in their control and used in common by two or more tenants.[91] For example, in *Darkin v. Lewitz*,[92] the plaintiff was a household employee of the tenant in an apartment owned by the defendant landlord.[93] The plaintiff injured herself when she slipped on some loose ice on the second floor landing of the building.[94] The second floor landing was part of the building under the control of the landlord and maintained for the tenants' common use.[95] The plaintiff sued the landlord for negligence, claiming that the landlord failed to repair a defective roof gutter that leaked water onto the second floor landing.[96] The court found for the

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85. *Id.*
86. *Id.* at 408.
87. *Id.*
88. 5 LANDLORD TENANT PRACTICE 1, 37 (Ill. Inst. for CLE, 1979).
89. *Id.*
90. *Id.*
91. Seago v. Roy, 97 Ill. App. 3d 6, 8, 424 N.E.2d 640, 641 (3d Dist. 1981); Darkin v. Lewitz, 3 Ill. App. 2d 481, 487, 123 N.E.2d 151, 154-55 (1st Dist. 1954).
92. 3 Ill. App. 2d 481, 123 N.E.2d 151 (1st Dist. 1954).
93. *Id.* at 483, 123 N.E.2d at 153.
94. *Id.*
95. *Id.*
96. *Id.*

plaintiff, concluding that the landlord violated his duty to use due care in maintaining the common areas in a reasonably safe condition.[97]

It may be advantageous for tenants to set forth clearly in the lease which portions of the premises constitute common areas. In *Seago v. Roy*,[98] the plaintiff tenant brought a negligence action against the defendant landlord.[99] The plaintiff had leased the second floor apartment in a two-flat apartment building.[100] The plaintiff was injured when he fell through a faulty guardrail on the stairway leading to his apartment.[101] The court found that the stairway serviced the plaintiff's apartment exclusively.[102] Thus, the court concluded that the landlord had no obligation to repair the railing since the stairway was not a common area.[103]

A lease often requires the landlord to maintain the structural portions of the demised premises and the tenant to maintain the interior or nonstructural portions. Thus, disputes often arise over whether a repair involves structural or nonstructural portions of the premises. Courts generally resolve this dispute on a case-by-case basis after an evaluation of the surrounding circumstances.[104]

In *Hardy v. Montgomery Ward & Co.*,[105] the plaintiff, a customer in the tenant's store, sustained a head injury from falling plaster.[106] The plaintiff brought a personal injury action against the tenant.[107] The tenant subsequently filed a third-party complaint against the landlord.[108] The lease provided that "[t]he tenant shall make . . . all interior nonstructural repairs . . . ."[109] The same lease provision obligated the landlord to "make all repairs . . . (other than those specifically required to be made by the Tenant) . . . ."[110] The court had to determine whether the plaster and any related repairs were "structural" and thus the obligation of the landlord, or "interior non-structural" and the obligation of the tenant.[111] The court

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97. *Id.* at 487, 123 N.E.2d at 154-55.

98. 97 Ill. App. 3d 6, 424 N.E.2d 640 (3d Dist. 1981).

99. *Id.* at 7, 424 N.E.2d at 641.

100. *Id.*

101. *Id.*

102. *Id.* at 8-9, 424 N.E.2d at 642.

103. *Id.* at 8, 424 N.E.2d at 642. The plaintiff in *Seago* might have lost even if the lease had provided that the stairway was a common area. In such a situation, the court might still have concluded that the stairway was not a common area despite the language in the lease.

104. 5 LANDLORD TENANT PRACTICE 1, 64 (Ill. Inst. for CLE, 1979).

105. 131 Ill. App. 2d 1038, 267 N.E.2d 748 (5th Dist. 1971).

106. *Id.* at 1039, 267 N.E.2d at 749.

107. *Id.* at 1039-40, 267 N.E.2d at 749.

108. *Id.* at 1040, 267 N.E.2d at 749.

109. *Id.* at 1040-41, 267 N.E.2d at 750. The lease provided that such repairs were the responsibility of the tenant irrespective of any negligence on the tenant's part. *Id.*

110. *Id.* at 1042, 267 N.E.2d at 751.

111. *Id.*

concluded that plaster is interior and non-structural, and that it was the tenant's duty to make any necessary repairs.[112]

In *Kaufman v. Shoe Corp. of America*,[113] the defendant leased property from the plaintiff for use as a store.[114] The building was steam-heated at the time the lease was executed.[115] The power company subsequently discontinued steam-heat service for the building, thereby necessitating the installation of alternative heating equipment.[116] The court addressed the issue of whether the tenant or the landlord was obligated to install the heating equipment.[117] The lease provided that the tenant would keep the building "in good repair" and that the "Lessee shall not be required to make any structural repairs."[118] The court found that the word "repair" referred only to pre-existing defects.[119] The court held that the installation of heating equipment involved a structural change that was not contemplated by the parties at the time the lease was executed.[120] Therefore, the court concluded that the landlord was obligated to install the new equipment.[121]

As exemplified by *Hardy* and *Kaufman*, parties often disagree on whether or not a particular repair is structural. The maxim that leases must be construed most strongly against the landlord has been applied to lease provisions that relate to repairs.[122] Thus, it is in the landlord's best interests to set forth in the lease various situations that may necessitate repairs and which party will bear the related expense. The landlord, however, might encounter two difficulties in attempting to plan for various repair situations. First, a tenant may purposely wish to leave the repair clause vague since, in the case of litigation, courts are more likely to construe the clause in favor of the tenant. Second, the landlord will likely be unable to foresee every problematic situation, and ultimately the cost of enumerating situations will outweigh the attendant benefits of such foresight.

An additional concern of the parties to a lease is whether the landlord or the tenant is responsible for repairs necessitated by fire or casualty damage. In *Lewis v. Real Estate Corp.*,[123] the court stated that "in the absence of any . . . agreement, there is no duty resting upon either the

112. *Id.*
113. 24 Ill. App. 2d 431, 164 N.E.2d 617 (3d Dist. 1960).
114. *Id.* at 433, 164 N.E.2d at 618.
115. *Id.*
116. *Id.*
117. *Id.* at 433-34, 164 N.E.2d at 619.
118. *Id.* at 434, 164 N.E.2d at 619.
119. *Id.* at 435, 164 N.E.2d at 619.
120. *Id.* at 436-38, 164 N.E.2d at 620-21.
121. *Id.* at 436, 164 N.E.2d at 620.
122. *See* Rosenblum v. Neisner Bros. Inc., 231 F.2d 322, 325 (7th Cir. 1956) (court construed ambiguous provision in lease regarding alterations in favor of the tenant).
123. 6 Ill. App. 2d 240, 127 N.E.2d 272 (1st Dist. 1955).

lessor or lessee to restore or replace the leased premises when destroyed by fire [or casualty] and the lessee under such circumstances would still be required to pay the stipulated rent."[124] As a practical matter, this requirement forces the tenant to make the necessary repairs or replacements to the demised premises due to fire or casualty. Therefore, tenants should include a rent abatement clause in the lease that operates in the event of a fire or casualty. If the landlord will not consent to the inclusion of such a provision, then one of the parties should obtain rental insurance.[125]

In some leases, tenants may covenant to return the premises to the landlord in the same condition in which they were received. In this instance, the tenant is obligated to make both ordinary and extraordinary repairs, and even to rebuild the premises in the event they are destroyed by fire or casualty.[126] Additionally, the tenant must continue to pay rent while the repairs are being made.[127] The tenant should insist that the language "except in the event of fire or casualty" is included in a provision that the tenant will return the premises in the same condition as when received.[128]

Courts have had difficulty defining and interpreting the meaning of the term "casualty" in a lease.[129] For example, if the clause states that "[a] casualty requires the landlord to repair," a dispute may arise as to whether a particular situation is a casualty. This determination is traditionally a question of fact for the jury.[130] In an attempt to prevent litigation, more

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124. *Id.* at 244, 127 N.E.2d at 275.

125. At first it may seem that as long as there is a rent abatement clause, the tenant will not be hurt if the landlord does not replace the demised premises. However, this is often not the case. First, the tenant probably incurred heavy "start-up" costs when the lease began. Second, when the lease was executed, it probably provided for fair market value rent. As the years go by, however, the rent may have become relatively cheap. This situation will arise if the rent for which the lease provided is below the fair market value rent. Thus, the tenant will want the lease to contain the following safeguards: (1) a provision requiring the landlord to maintain adequate insurance; (2) a provision requiring the landlord to rebuild the property so that it will be in a condition substantially similar to the condition prior to the damage; (3) a provision requiring the landlord to rebuild the property within a specified period of time; and (4) a provision requiring that all insurance proceeds be held in trust for the restoration of the premises. *See* Berman, *The Anatomy of Fire and Casualty Clauses in a Commercial Lease*, 55 CHI. B. REC. 86 (1973).

126. *Id.*

127. *Id.*

128. *Id.*

129. 9 LANDLORD TENANT PRACTICE 1, 9 (Ill. Inst. for CLE, 1979). In Miland v. Meiswinkel, 82 Ill. App. 522 (1st Dist. 1898), the court cited the Webster Dictionary definition of casualty as "that which comes without design or without being foreseen; contingency" and the definition of contingency as "an event which may or may not occur; that which is possible or probable; a fortuitous event; a chance."

130. *See* Miland v. Meiswinkel, 82 Ill. App. 522 (1st Dist. 1898) (whether overflow of "water, sewage & filth" upon plaintiff's property was a "casualty" within the meaning of the lease agreement was a question of fact).

cautious or sophisticated parties may try to set forth in the lease those situations that will constitute a "casualty." For example, the lease may provide that "Fires, Acts of God, Explosions and Earthquakes will constitute a casualty." This clause, however, runs the risk of exclusion by implication. Therefore, it is advisable to draft the clause in terms of the *fact* of damage and not the *cause* of the damage. For example, the clause might state "if the building is totally or partially destroyed or damaged by fire or any other cause, without fault of the lessor or lessee . . . ."[131]

6. Real Estate Taxes

Unless the lease provides otherwise, landlords must pay real estate taxes on leased property.[132] In *Metropolitan Airport Authority v. Farliza Corp.*,[133] the plaintiff landlord instituted a declaratory judgment action against the defendant tenant to declare the rights and obligations of the parties regarding the payment of real estate taxes.[134] The court stated the general rule that the landlord must pay all property taxes in the absence of a contrary agreement.[135] The court noted, however, that landlords could relieve themselves of this duty by including an express provision in the lease.[136]

Lanon v. Lamps stated the exception to the general tax rule.[137] The *Lanon* court concluded that it would be unfair to require landlords to pay taxes on property that they neither own nor from which they receive any benefit.[138] Thus, tenants must pay the taxes resulting from their improvements to leased property that, by reason of the terms of the lease and the nature of the improvements, will be of little or no benefit to the landlord.[139] However, if the improvements become the property of the landlord, the landlord must pay the taxes.[140]

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131. 9 LANDLORD TENANT PRACTICE 1, 9 (Ill. Inst. for CLE, 1979). *See also* Hardy v. Montgomery Ward & Co., 131 Ill. App. 2d 1038, 1041, 267 N.E.2d 748, 750 ("the tenant shall not be obligated to make any repairs . . . caused by fire, the elements, or any cause covered by the expanded coverage insurance").

132. Metropolitan Airport Auth. v. Farliza Corp., 50 Ill. App. 3d 994, 997, 366 N.E.2d 112, 113 (3d Dist. 1977) (declaratory judgment for judicial construction of a commercial lease); First Nat'l Bank v. Mid-Central Food Sales, 129 Ill. App. 3d 1002, 1006, 473 N.E.2d 372, 376 (1st Dist. 1985) (express lease provision was unambiguous in placing burden on tenant for taxes).

133. 50 Ill. App. 3d 994, 366 N.E.2d 112 (3d Dist. 1977).

134. *Id.* at 994, 366 N.E.2d at 112.

135. *Id.* at 997, 366 N.E.2d at 113.

136. *Id.* Should the landlord desire to impose the tax burden on the tenant, he must do so in clear, concise, and express terms. *Id.*

137. 53 Ill. App. 3d 145, 368 N.E.2d 196 (3d Dist. 1977).

138. *Id.* at 151, 368 N.E.2d at 200.

139. *Id.*

140. 24 I.L.P. LANDLORD AND TENANT § 311 (1986). *See also* Beck v. F.W. Woolworth Co., 111 F. Supp. 824 (N.D. Iowa 1953) (landlord held liable for taxes under provision in lease).

There are two ways in which a lease may require a tenant to pay taxes. First, the parties may provide that the tenant will pay the taxes directly to the taxing authority.[141] If such a clause is used, the tenant should provide the landlord with evidence that the taxes were paid. Alternatively, the landlord may include a clause that obligates the tenant to reimburse the landlord for the taxes paid upon the presentation of evidence to the tenant by the landlord of the amount paid.[142]

7. *Assignments and Subleases*

Whether a transaction constitutes an assignment or a sublease depends upon its legal effect rather than upon the parties' designation of the transaction.[143] Generally, an assignment occurs when a tenant conveys its entire interest in the demised premises.[144] In a sublease, however, the tenant merely sublets the demised premises, or a portion thereof, for a period less than the remaining term of the tenant's lease.[145]

A lease may be freely assigned in the absence of a lease provision that restricts assignments.[146] In *Cole v. Ignatius*,[147] the lease did not contain any prohibitions on assignment.[148] Thus, the court concluded that the lease assignment was valid.[149] The *Cole* court rejected the landlord's argument that the assignment was void because the tenant failed to notify the landlord, and the assignment had not been recorded.[150] The court reasoned that because the lease was silent as to notice and recording, neither was required.[151]

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141. For instance, in Myers v. Ruddy, 154 Ill. App. 438 (2d Dist. 1910), the lease contained a provision obligating the lessee to pay all the taxes on the property. The lessee did not pay the taxes for the years 1899, 1900 and 1901. The lessor paid the taxes and then filed a claim against the lessee. The lessor recovered a judgment solely for the amount of the taxes paid. The lessor appealed, claiming that he was also entitled to interest on the amount paid for the taxes. The court agreed with the lessor and concluded that he was entitled to interest on the money expended.

142. *What Taxes Must Tenant Pay?* 42 CHI. B. REC. 258 (1961).

143. Chemical Petroleum Exch., Inc. v. Metropolitan Sanitary Dist. of Greater Chicago, 81 Ill. App. 3d 1005, 1009, 401 N.E.2d 1203, 1205-06 (1980); Danaj v. Anest, 77 Ill. App. 3d 533, 535, 396 N.E.2d 95, 97 (2d Dist. 1979); Burnax Oil Co. v. Floyd, 106 Ill. App. 2d 16, 20-21, 245 N.E.2d 539, 542 (1st Dist. 1969); Glanz v. Halperin, 251 Ill. App. 572, 576 (1st Dist. 1929).

144. *Id.*

145. 24 I.L.P. LANDLORD AND TENANT § 101 (1986).

146. Cole v. Ignatius, 114 Ill. App. 3d 66, 70, 448 N.E.2d 538, 541 (1st Dist. 1983).

147. 114 Ill. App. 3d 66, 448 N.E.2d 538 (1st Dist. 1983).

148. *Id.* at 70, 448 N.E.2d at 541.

149. *Id.*

150. *Id.*

151. *Id.* at 70-71, 448 N.E.2d at 542. The court noted that even though the landlords did not receive written notice of the assignment until May 1980, they were made aware of it prior to that time. *Id.*

A landlord may include lease provisions that prohibit assignment.[152] In *Associated Cotton Shops v. Evergreen Park Shopping Plaza*,[153] the plaintiff was the tenant of property leased from the defendant.[154] The lease provided that if the tenant were a corporation, and if, during the lease term, any part of the corporate shares were transferred so as to result in a change of control, the landlord could terminate the lease by giving the tenant sixty days written notice.[155] The landlord served the tenant with a lease termination notice after control of the corporate tenant was transferred.[156] The tenant filed a declaratory judgment action seeking to have the court declare the tenant's right to retain possession.[157] The tenant argued that the lease provision was an invalid restraint on alienation.[158] The court found for the landlord, holding that a prohibition against assignment is valid.[159]

Landlords frequently insert provisions into leases that prohibit assignments. These provisions protect a landlord's option to reject proposed assignees who appear less desirable than the original tenant.[160] Landlords often use the power to prohibit assignments as leverage in the negotiation of lease terms with tenants. A landlord is often able to obtain more favorable lease terms in exchange for allowing a tenant the right to assign a lease.[161]

Most commercial leases are long term. Thus, the right of the tenant to assign the lease provides important flexibility. More specifically, the right

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152. Associated Cotton Shops v. Evergreen Park Shopping Plaza, 27 Ill. App. 2d 467, 473, 170 N.E.2d 35, 37 (1st Dist. 1960).

153. 27 Ill. App. 2d 467, 170 N.E.2d 35 (1st Dist. 1960).

154. *Id.* at 467, 170 N.E.2d at 35.

155. *Id.* at 472, 170 N.E.2d at 37.

156. *Id.* at 470, 170 N.E.2d at 36.

157. *Id.* at 471, 170 N.E.2d at 36.

158. *Id.* at 473, 170 N.E.2d at 37.

159. *Id.* A distinction is made between a "limitation" and a "condition subsequent" in construing provisions restricting assignment. In the case of a limitation, the term of the lease is limited to the time of the happening of a contingency, at which time the leasehold estate is terminated. Alternatively, a condition subsequent permits the lessor, upon the happening of a designated event, to terminate the leasehold, but the leasehold will continue until this power is exercised. *Id.* at 474, 170 N.E.2d at 38.

160. *See* Pundeff, *The Anti-Assignment Clause and the Landlord's Legitimate Interests*, 11 REAL ESTATE L.J. 146 (1982) (courts have begun to closely examine the motives of landlords who refuse consent to assignment).

161. Kehr, *Lease Assignments: The Landlord's Consent*, 1980 CAL. ST. B.J. 108. An assignee of a lease usually pays rent directly to the landlord. If the assignee pays the rent and performs all the other obligations under the lease, the original tenant will not have any further dealings with the landlord. If the assignee defaults on the lease obligations and the landlord has not released the original tenant from liability under the lease, the landlord can demand payment from the original tenant for the damages that have resulted due to the assignee's acts. Thus, it is advantageous to both the landlord and the original tenant to find a responsible assignee. *Id.*

of a tenant to assign a commercial lease provides the tenant with (1) freedom to move the business to a better location, (2) the option to begin again in a different business in other premises better suited to the tenant's needs, and (3) the opportunity to retire with the possibility of no further obligations under the lease.[162]

Lease provisions that restrict the tenant's right to assign a lease are typically construed against the landlord and in favor of the tenant.[163] For instance, courts have held that when a lease provision prohibits assignment without the consent of the landlord, such consent may not be unreasonably withheld.[164] This rule applies even if the lease provision does not expressly state that consent shall not be unreasonably withheld.[165] In *Jack Frost Sales v. Harris Trust and Savings Bank*,[166] the tenant claimed it lost an opportunity to sell its lease because the landlord refused to consent to an assignment.[167] The tenant filed suit against the landlord for damages.[168] The court stated that:

> where a lease forbids any . . . assignment without the consent of the lessor, the lessor cannot unreasonably withhold his consent . . . . But a condition precedent to the lessor's duty to accept a sublessee is the tender to him of a suitable tenant as sublessee . . . . Thus . . . the plaintiff had the burden of proving . . . that it had tendered a person who was "ready, willing and able" to take over the lease and who, at the very least, met reasonable commercial standards.[169]

The court concluded that there was no evidence that the proposed assignee was a "commercially reasonable assignee," and thus, the landlord acted reasonably in refusing consent.[170]

A two-step test is helpful in determining whether the landlord's refusal to consent to an assignment was unreasonable.[171] First, it must be determined if the refusal was per se unreasonable. A per se unreasonable refusal would be based on subjective rather than objective criteria.[172] The second step is to evaluate whether the landlord's refusal is objectively acceptable

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162. Chanslor-Western Oil & Dev. Co. v. Metropolitan Sanitary Dist. of Greater Chicago, 131 Ill. App. 2d 527, 266 N.E.2d 405 (1970); Edelman v. F.W. Woolworth Co., 252 Ill. App. 142 (1st Dist. 1929).

163. Jack Frost Sales v. Harris Trust & Sav. Bank, 104 Ill. App. 3d 933, 944, 433 N.E.2d 941, 949 (1st Dist. 1982).

164. *Id.*

165. *Id.*

166. 104 Ill. App. 3d 933, 433 N.E.2d 941 (1st Dist. 1982).

167. *Id.* at 935, 433 N.E.2d at 942.

168. *Id.*

169. *Id.* at 944, 433 N.E.2d at 949.

170. *Id.* at 946, 433 N.E.2d at 950.

171. Todres, *Assignment and Subletting of Leased Premises: The Unreasonable Withholding of Consent*, 5 FORDHAM URB. L.J. 195 (1977).

172. *Id.* at 207.

in light of the surrounding circumstances.[173] Objectively acceptable reasons generally fall into three categories: (1) objections concerning the financial status of the proposed assignee;[174] (2) objections concerning the reputation or identity of the proposed assignee;[175] and (3) objections concerning the proposed use of the premises.[176]

The financial condition of a tenant is always an important concern for a landlord. A landlord's concerns, however, extend beyond the assurance that the rent will be paid. The transferee must be able to fulfill all of the obligations under the lease. Lease obligations may include maintaining or remodeling the premises after a specified period of time.[177]

The use to which the assignee puts the premises is also of concern to the landlord. As a general rule, absent restrictive stipulations in the lease, the assignee may use the premises for any lawful purpose.[178] However, where the premises are leased for a particular purpose, the assignee may use the premises only for the purpose stated in the lease.[179] Additionally, any uses not inconsistent with those set forth in the lease are reserved for the landlord.[180]

An assignment in violation of a lease restriction is not void, but rather voidable at the option of the landlord.[181] In *Waukegan Times Theatre Corp. v. Conrad*,[182] the lease provided that "the premises shall not be assigned without the written consent of the lessor."[183] The landlord brought a forcible entry and detainer action, claiming that the tenant had violated the lease by assigning it without the landlord's prior written consent.[184] The court found, however, that the landlord had been accepting rent from the assignee since the assignee took possession.[185] The court concluded that these acts constituted a waiver of any rights the landlord had against the tenant for failure to obtain written consent to the assignment.[186] According to the *Waukegan*

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173. *Id.* Reputation and identity of the assignee are the most subjective, yet acceptable, reasons for a landlord's refusal to accept an assignment. Nevertheless, purely subjective reasons for withholding consent are per se unreasonable. *Id.*

174. *Id.* at 212.

175. *See* Urban Inv. & Dev. v. Maurice L. Rothschild & Co., 25 Ill. App. 3d 546, 323 N.E.2d 588 (1st Dist. 1975).

176. Todres, *supra* note 171, at 212.

177. *Id.*

178. Northern Trust Co. v. Thompson, 336 Ill. 137, 168 N.E. 116 (1929).

179. People v. Chicago Metro Car Rentals, Inc., 72 Ill. App. 3d 626, 630, 391 N.E.2d 42, 45 (1st Dist. 1979); Belvidere South Towne Centre, Inc. v. One Stop Pacemaker, 54 Ill. App. 3d 958, 961-62, 370 N.E.2d 249, 252 (2d Dist. 1977).

180. Gustin v. Barney, 250 Ill. App. 209 (2d Dist. 1928).

181. Woods v. North Pier Terminal Co., 131 Ill. App. 3d 21, 23, 475 N.E.2d 568, 570 (1st Dist. 1985); Waukegan Times Theatre Corp. v. Conrad, 324 Ill. App. 622, 631-32, 59 N.E.2d 308, 312 (2d Dist. 1945).

182. 324 Ill. App. 622, 59 N.E.2d 308 (2d Dist. 1945).

183. *Id.* at 626, 59 N.E.2d at 309.

184. *Id.* at 625, 59 N.E.2d at 309.

185. *Id.* at 636, 59 N.E.2d at 314.

186. *Id.* at 632, 59 N.E.2d at 312.

case, once a tenant has violated a restriction on assignment, the landlord must promptly exercise its rights under the lease.

Tenants cannot relieve themselves from personal liability under the lease merely by assigning their interest.[187] After an assignment, the tenant remains liable under the lease.[188] The landlord's acceptance of rent from the assignee does not discharge the tenant from leasehold obligations.[189]

A lease provision restricting assignments is not violated by the subletting of the premises.[190] The tenant has the right to sublet the premises unless the lease contains an express[191] provision restricting this right.[192] Like assignments, courts construe lease provisions that restrict the tenant's right to sublet the demised premises against the landlord and in favor of the tenant.[193] In *Edelman v. F.W. Woolworth Co.*, the lease contained a provision that stated that "[l]essee agrees not to sublet these premises . . . without written consent of the lessor, but such consent shall not be unreasonably withheld."[194] In accordance with the lease provision, the defendant tenant asked the plaintiff landlord to consent to a subletting of the premises.[195] The tenant claimed that the landlord gave its consent.[196] The landlord, however, brought a forcible detainer action, claiming that the tenant had defaulted under the lease by subleasing the premises without the landlord's consent.

The *Edelman* court found that the proposed subtenant was in the same business as the landlord[197] and that the landlord's place of business was near the premises in question.[198] Thus, the subtenant would be a competitor of the landlord.[199] The court concluded that:

> [t]he provision against subletting is to be construed most strongly against the landlord . . . . [If the] plaintiffs had desired to prevent the subletting of the premises to a business competitor they should have so stated in the lease. Not having done so . . . their objection to the subtenant . . . that he would be a business competitor . . . was arbitrary and unwarranted.[200]

Similar to the rule regarding assignments, if a lease prohibits subletting without the consent of the landlord, the landlord may not unreasonably

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187. Bevelheimer v. Gierach, 33 Ill. App. 3d 988, 992, 339 N.E.2d 299, 302 (1st Dist. 1975). *See also* 24 I.L.P. LANDLORD AND TENANT § 87 (1986).

188. 24 I.L.P. LANDLORD AND TENANT § 87 (1986).

189. *Id.*

190. Union Trust Co. v. First Trust & Sav. Bank, 252 Ill. App. 337, 347 (1st Dist. 1929).

191. Edelman v. F.W. Woolworth Co., 252 Ill. App. 142, 145 (1st Dist. 1929) (absent an express provision to the contrary, the tenant reserves the right to sublet).

192. Logan v. North Lake Shore Drive, Inc., 17 Ill. App. 3d 584, 308 N.E.2d 278 (1st Dist. 1974).

193. Edelman v. F.W. Woolworth Co., 252 Ill. App. 142, 145 (1st Dist. 1929).

194. *Id.* at 143.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 145.

199. *Id.*

200. *Id.*

withhold consent.[201] This rule applies even if the lease provision does not expressly state that consent shall not be unreasonably withheld.[202] However, a landlord will not be held liable for failing to consent to a sublease unless the tenant proves that the proposed subtenant is a suitable tenant. The courts generally use the test of "reasonable commercial standards" to determine whether a sublessee is suitable.[203]

There are many factors involved in evaluating whether a landlord should grant the right to assign or sublet. Landlords should consider several factors when drafting assignment and sublease provisions. Where the tenant is a corporation, the landlord may want to provide that restrictions on assignments may not be avoided by selling the stock of the tenant corporation.[204] The landlord may want to prohibit the tenant from retaining all of the profits derived from an assignment or sublease when there is a rise in the rental market. The landlord may provide for a division of the profits between the parties.[205] Finally, the lease should forbid an assignment or sublease that violates restrictions placed on a landlord by a mortgagee.[206]

It is in the tenant's best interest to have a lease that has no restrictions on assignments or subleases. However, if there are restrictions, tenants should consider several factors when negotiating a lease. If the tenant is a partnership, the admission of a new partner, or the death or resignation of an existing partner, should not violate a clause restricting assignments or subleases.[207] If the tenant is a non-corporate entity, the formation of a corporation controlled by the original tenant should not constitute a violation of a clause restricting assignments or subleases. If the premises are residential in nature, the marriage of the tenant and occupancy of the premises by the spouse should not a violate a clause restricting assignments or subleases.[208] Finally, in the event of an assignment, a tenant should be relieved of further liability under the lease.[209]

8. *Injuries Resulting From Dangerous Or Defective Conditions Upon The Premises*

Absent an agreement to keep the demised premises in a reasonably safe condition, the landlord is not liable for damage resulting from a condition

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201. Jack Frost Sales, Inc. v. Harris Trust & Sav. Bank, 104 Ill. App. 3d 933, 944, 433 N.E.2d 941, 949 (1st Dist. 1982).

202. *Id.*

203. *Id.* The court concluded that the plaintiff lessee failed to meet the burden of providing an assignee who was "ready, willing and able" to take over the lease, and as a result, the lessor's decision to withhold consent was not unreasonable. *Id.*

204. Morris, *Assignment and Subletting*, 46 CHI. B. REC. 140, 144 (1964).

205. 10 LANDLORD TENANT PRACTICE 1, 5 (Ill. Inst. for CLE, 1979).

206. *Id.* at 6.

207. Morris, *supra* note 204, at 146.

208. *Id.*

209. *Id.*

that first became dangerous during the tenant's occupancy.[210] In *Watts v. Bacon & Van Buskirk Glass Co.*,[211] the plaintiff brought a personal injury action against the landlord and tenant of a drug store.[212] The plaintiff was injured when the glass door of the drug store shattered, causing pieces of broken glass to strike the plaintiff.[213] The court stated that "a landlord who has relinquished full control and possession of demised premises to a tenant, ordinarily is not liable for personal injuries suffered by a third person because of . . . the defective condition of the premises arising after the beginning of the lease."[214]

A tenant may recover damages for personal injuries due to the landlord's breach of a covenant to repair the demised premises.[215] In *Dial v. Mihalic*,[216] the plaintiff was the tenant of an apartment building owned by the defendant.[217] The plaintiff was visiting another tenant in the building when a defective oven door fell open, injuring the plaintiff.[218] The opening of the oven door startled the plaintiff and caused her to trip and fall onto the door.[219] Consequently, the plaintiff suffered severe burns.[220] The plaintiff sued the landlord, alleging a breach of the duty to repair under the lease with the tenant in whose apartment the accident occurred.[221] The plaintiff relied upon a lease provision that provided that the landlord was obligated to maintain appliances which he supplied "in good working order."[222]

The court found for the plaintiff and concluded that:

> [a] lessor of land is subject to liability for physical harm caused to his lessee and others upon the land with the consent of the lessee . . . by a condition of disrepair existing before or arising after the lessee has taken possession if
>
> (a) the lessor, as such, has contracted . . . to keep the land in repair, and
>
> (b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented, and
>
> (c) the lessor fails to exercise reasonable care to perform his contract.[223]

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210. Watts v. Bacon & Van Buskirk Glass Co., 20 Ill. App. 2d 164, 171, 155 N.E.2d 333, 336 (3d Dist. 1959).

211. 20 Ill. App. 2d 164, 155 N.E.2d 333 (3d Dist. 1959).

212. *Id.* at 166, 155 N.E.2d at 333.

213. *Id.* at 169, 155 N.E.2d at 335.

214. *Id.* at 171, 155 N.E.2d at 336.

215. Dial v. Mihalic, 107 Ill. App. 3d 855, 858-59, 438 N.E.2d 546, 549 (1st Dist. 1982).

216. 107 Ill. App. 3d 855, 438 N.E.2d at 546 (1st Dist. 1982).

217. *Id.* at 856, 438 N.E.2d at 546.

218. *Id.* at 856, 438 N.E.2d at 547.

219. *Id.* at 856-57, 438 N.E.2d at 547.

220. *Id.* at 857, 438 N.E.2d at 547-48.

221. *Id.* at 857, 438 N.E.2d at 548.

222. *Id.*

223. *Id.* at 858-59, 438 N.E.2d at 549.

Dial exemplifies the potential liability of a landlord who consents to include a repair clause in a lease. A landlord who has covenanted to keep leased premises in repair, and then subsequently fails to carry out this covenant, is potentially liable for injuries received by tenants, their families and invitees of the tenants.[224] Absent a repair clause, the burden of liability for injuries is shifted to the tenant.[225]

The landlord must remember, however, that even absent a repair clause, the landlord will be liable for injuries if the landlord had actual or constructive notice of a defective and dangerous condition at the beginning of the lease term.[226] Furthermore, even if a tenant is obligated to repair the premises, the landlord continues to have a duty to maintain the common areas.[227] If an injury occurs in the common areas, the landlord will be liable for damages.[228] Therefore, landlords must consider potential liability and not merely the actual cost of making repairs before deciding whether to incorporate a repair clause in a lease.

II. The Logic of the Rules

The default rules, or implied lease provisions, save landlords and tenants significant transaction costs in the negotiation of leases. By including the lease terms that most landlords and tenants would bargain for in the absence of the rules, the default rules save the typical landlord and tenant the expense of creating many of the lease provisions.[229] The high cost involved in negotiating specific lease terms is thereby reduced.

A second effect of the default rules is the reduction of formulation errors that arise when agreements are reduced to express lease provisions.[230] These benefits extend beyond the avoidance of administrative errors or ambiguities that can arise in lease terms. For example, the parties to a lease are unlikely to provide for low-probability events or contingencies that may arise during the lease term. These contingencies are too costly for individual landlords and tenants to consider in every lease. If, through experience with certain contingencies, express terms do develop, they can be implied in subsequent lease transactions between similarly situated parties.[231]

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224. Looger v. Reynolds, 25 Ill. App. 3d 1042, 1044, 324 N.E.2d 238, 240 (3d Dist. 1975).

225. Wagner v. Kepler, 411 Ill. 368, 371, 104 N.E.2d 231, 233 (1951).

226. *Id.* at 371-72, 104 N.E.2d at 233.

227. Gula v. Gawel, 71 Ill. App. 2d 174, 218 N.E.2d 42 (1st Dist. 1966). Although landlords have a duty to keep the common areas in good repair, they are generally not required to remove natural accumulations of ice and snow. *See* Erasmus v. Chicago Hous. Auth., 86 Ill. App. 3d 142, 144-45, 407 N.E.2d 1031, 1033 (1st Dist. 1980). If landlords choose to remove ice and snow, they are under a duty to exercise ordinary care in the accomplishment of that task. *Id.* at 145, 407 N.E.2d at 1033.

228. Gula v. Gawel, 71 Ill. App. 2d 174, 178, 218 N.E.2d 42, 44 (1st Dist. 1966).

229. Goetz & Scott, The Dynamics of Contractual Formulation and Interpretation 20 (1984) (unpublished manuscript on file with the authors).

230. *Id.*

231. *Id.* at 20-21.

Implied lease provisions also have certain adverse consequences. The implied terms developed by the common law are designed for general application.[232] These terms are often inconsistent with the needs of specific classes of landlords and tenants. If the needs of certain classes of landlords and tenants become sufficiently important, the courts may respond by developing special implied terms for particular subsets of transactions. The process of developing special implied terms, however, tends to be very slow. Newly created implied terms lag behind the emergence of even newer conditions or the new needs of certain classes of landlords and tenants.[233]

Default rules save landlords and tenants significant costs because they imply the lease terms for which most landlords and tenants would bargain if the default rules did not exist. This part of the article analyzes a sample of the default rules discussed above and demonstrates their logic.

A. Rights of Ingress and Egress

Generally, rights essential to the tenant's enjoyment of the demised premises pass under a lease. Thus, the rights of ingress and egress by the usual way pass to the tenant.[234]

This default rule is a rule of necessity. Absent such a rule the leased premises could be rendered worthless to the tenant. For example, if the tenant rented an apartment on the third floor of a building, but did not have any right to use the stairs or elevator, the tenant would find it impossible to get into the apartment. However, this default rule applies only when the rights of ingress and egress are necessary to the complete enjoyment of the property.[235] Therefore, litigation might arise subsequent to the execution of the lease if the parties do not agree upon which rights of ingress and egress are necessary to the complete enjoyment of the property. The question of necessity is one of fact.[236]

It can be argued that the default rule should provide that no rights of ingress and egress pass by operation of law, due to the possibility of litigation. In other words, the burden would be upon the parties to set forth in the lease which rights of ingress and egress pass to the tenant. Express lease provisions would arguably reduce the amount of litigation on this issue. However, there are two problems with this proposed default rule. First, many tenants are unsophisticated parties. These tenants may not be aware of the need to negotiate the question of rights of ingress and egress when they enter into a lease. This problem could be remedied, however, by shifting

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232. *Id.* at 21.

233. *Id.* at 21-22.

234. The Fair v. Evergreen Park Shopping Plaza, 4 Ill. App. 454, 124 N.E.2d 649 (1st Dist. 1954); Walgreen Co. v. American Nat'l Bank & Trust Co. of Chicago, 4 Ill. App. 3d 549, 281 N.E.2d 462 (1972).

235. Patterson v. Graham, 140 Ill. 531, 30 N.E. 460 (1892).

236. *Id.*

the burden to the landlord to disclose to the tenant the need to set forth in the lease those rights of ingress and egress that will be granted to the tenant. A second problem with the proposed default rule is that it reduces the tenant's flexibility. If the environment surrounding the leased premises changes, the tenant might prefer other rights of ingress and egress. Other rights of ingress and egress might also be necessary to the complete enjoyment of the property. However, if the lease provides for specific rights of ingress and egress, the tenant might find it impossible to persuade the landlord to modify the lease provision.

B. Use of the Demised Premises

Absent restrictive stipulations in the lease, the tenant may use the demised premises for any lawful purpose.[237] Where the premises are expressly leased for a particular purpose, however, the tenant may use the premises only for the purpose expressed in the lease.[238]

This default rule arguably increases the number of lease transactions in the marketplace. A tenant would be reluctant to enter into a lease if the landlord could arbitrarily restrict the tenant's use of the property at any time during the lease term. Such a rule would greatly restrict the flexibility that a tenant might need in order to operate a business effectively. The default rule places the burden upon the landlord *ex ante* to determine in what manner the tenant can use the property. Thus, even if there are restrictions on the permissible use of the property, the tenant is aware of all the restrictions at the inception of the lease.

This default rule helps landlords to maximize the return on their investment in leased property. The rental payments that the landlord receives reflect, in part, the value of the property to the tenant. The property will arguably be of greater value to the tenant if the tenant has the right to use the property for any lawful purpose. Since conditions often change during the lease term, tenants frequently desire the flexibility to alter the manner in which they use their leased property.

In an effort to maximize their investment, most landlords would want to allow tenants flexibility in the use they make of the leased property. If the landlord has pre-existing reasons to limit the manner in which the tenant may use the property, such limitations can be expressly set forth in the lease. If the landlord has reason to believe that some event might occur that would necessitate a limited use of the property, the landlord can obtain protection by entering into a short term lease.

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237. Northern Trust Co. v. Thompson, 336 Ill. 137, 168 N.E. 116 (1929).

238. Belvidere South Towne Centre, Inc. v. One Stop Pacemaker, 54 Ill. App. 3d 958, 961-62, 370 N.E.2d 249, 252 (2d Dist. 1977).

C. Landlord's Obligation to Provide Services

Landlords are not obligated to provide any services to their tenants unless expressly set forth in the lease.[239] This default rule forces the tenant to set forth in the lease the services the landlord is to provide. Accordingly, litigation concerning what services the landlord is to provide is reduced. If the rule required the landlord to provide "basic services" to the tenant, litigation would likely arise over the definition of "basic services." However, if the lease expressly states the services to be performed by the landlord, there is less room for dispute.

A problem with this default rule is that an unsophisticated tenant might be unaware of the need to negotiate the services the landlord is to provide.[240] An unsophisticated tenant might assume that the landlord will provide the tenant with whatever services are necessary. However, if landlords were obligated to warn tenants of the need to discuss which party would be obligated to provide which services, the problem could be minimized.[241]

D. Landlord's Obligation to Repair

The mere relationship of landlord and tenant does not obligate the landlord to make repairs to the demised premises.[242] There are two exceptions to this rule: (1) where a latent defect exists at the time of the leasing, which defect is known or should have been known to the landlord in the exercise of reasonable care and which could not have been discovered upon a reasonable examination of the premises by the tenant, and (2) where the landlord fraudulently conceals from the tenant a known, dangerous condition.[243] This default rule impresses upon the parties the importance of setting forth in the lease the extent of the landlord's duty to repair. The rule is similar to the one regarding services. It also reduces the possibility of future litigation. Absent such a rule, the parties would often be forced to litigate the extent of the landlord's duty to repair. Any default rule that obligates the landlord to repair must be stated in general terms, since a default rule, by definition, has general applicability. However, any rule that provides for some general obligation to repair contains an inherently high probability of future litigation concerning what the general terms mean.

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239. Lippman v. Harrell, 39 Ill. App. 3d 308, 349 N.E.2d 511 (4th Dist. 1976).

240. *Id.*

241. Even if a burden to disclose is not placed upon the landlord, the problem may be illusory, because the tenant can pay the bills for whatever services are rendered to the demised property. This assumes that the cost of the services is not a component of the rental payments received by the landlord. If the tenant pays the bills for services rendered and the cost of the services is a component of the rental payment, the tenant would be paying twice for the same services.

242. Laster v. Chicago Hous. Auth., 104 Ill. App. 3d 540, 542, 432 N.E.2d 1185, 1186-87 (1st Dist. 1982).

243. Thorson v. Aronson, 122 Ill. App. 2d 156, 160, 258 N.E.2d 33, 34-35 (2d Dist. 1970).

Absent a lease provision, the default rule places the burden on the tenant to make repairs. In the context of a residential lease, an argument could be made that the burden should be placed upon the landlord. Landlords would be able to deduct the cost of repairs, as a business expense, on their tax return. Residential tenants would not be able to take a similar deduction. Furthermore, in a residential lease it is standard business practice to place the burden to repair upon the landlord. Thus, if parties are going to contract around the default rule, it would be economically efficient to change the rule and place the burden to repair upon the landlord in the residential transaction. On the other hand, both parties to a commercial lease are able to take advantage of the tax deduction. Thus, the above argument for placing the burden to repair on the landlord is not applicable.

There are problems with placing the burden to repair upon the landlord. As previously discussed, any default rule that places a general duty to repair upon the landlord carries a high probability of future litigation over the meaning of the general terms. Also, the tenant is in possession of the premises, while the landlord is the party obligated to repair. Therefore, a danger exists that the tenant will take inadequate care of the premises because any defects will be repaired by the landlord. This danger can be mitigated by incorporating lease terms that obligate tenants to take "ordinary care" of the premises. However, a general standard of "ordinary care" includes the possibility of litigation concerning the meaning of "ordinary care." Additionally, if the landlord must make repairs, the tenant may insist that the premises be kept in a higher state of repair than is economically efficient. If the tenant is responsible for repairs, the tenant will most likely maintain the premises in a state of repair that is both optimal for the tenant and economically efficient for the landlord.

The exceptions to the default rule regarding repairs are logical. When a tenant enters into a lease, the tenant is under an impression that the property is in a particular condition. The rent that the tenant agrees to pay partially reflects the tenant's perception of the condition of the property. For example, if tenants are aware that they are leasing property in need of repair, they will either demand lower rent or decide to rent elsewhere. When the tenant is required to make repairs to the property, the exception prevents the landlord from obtaining the rental value that a tenant would be willing to pay if the property were in perfect condition. However, the exception only applies to defects which the tenant "could not discover upon a reasonable examination of the premises."[244] If tenants could reasonably be expected to discover defects, they should be able to protect themselves when negotiating a rental payment.

E. Landlord's Obligation to Maintain Common Areas

Landlords are under an obligation to repair the portion of the demised premises retained in their control and used in common by two or more

244. Jones v. Chicago Hous. Auth., 59 Ill. App. 3d 138, 376 N.E.2d 26 (1st Dist. 1978).

tenants.[245] This default rule provides the most efficient way to maintain the common areas. The tenant lacks sufficient incentive to maintain common areas. Common areas are not part of the leased premises and tenants often assume that other tenants will maintain the area. Conversely, landlords are in a position to coordinate efforts to repair the common areas. Coordination by the landlord avoids disagreements among tenants as to what repairs to make and who will be hired. It also ensures that common areas will be maintained in their entirety. In commercial leases, it is common to find provisions that both require a landlord to maintain the common areas and require tenants to reimburse the landlord on a pro rata basis.[246]

F. Tenant Improvements

Absent a contrary agreement, landlords will not be liable to tenants for the value of improvements made by tenants.[247] This default rule protects landlords from liability for improvements to the leased property which the landlord may not desire.

G. Destruction of Leased Premises

There is no duty upon either the landlord or tenant to restore the leased premises when destroyed by fire or casualty unless the parties have agreed otherwise. Under such circumstances the tenant would still be required to pay the stipulated rent.[248] It may not seem equitable to obligate the tenant to pay rent for the leased property once it has been destroyed. However, this rule provides an incentive for the tenant to maintain the premises during the term of the lease. The tenant is in possession of the leased property and thus is in a better position to monitor the leased property in an effort to prevent damage. If the rule were otherwise, the tenant would have a disincentive to care for the leased property if the tenant wanted to break its lease. Thus, the rule acts as a type of insurance on the property.

This default rule should not be construed to impose a duty on either party to restore the leased premises when destroyed by fire or casualty. It would be illogical to impose the burden to restore on the tenant since the restored premises will most likely last longer than the lease term. In this situation, the landlord would obtain a windfall. Upon termination of the tenant's lease, the landlord would be able to rent the newly restored premises. The rental value of the premises in the new condition would arguably be higher than if the premises had never been destroyed. It would also be illogical to impose the burden of restoring the leased property on the landlord, since

245. Seago v. Roy, 97 Ill. App. 3d 6, 8, 424 N.E.2d 640, 641 (3d Dist. 1981).

246. *See supra* notes 67-71 and accompanying text.

247. Johnston v. Suckow, 55 Ill. App. 3d 277, 279, 370 N.E.2d 650, 653 (5th Dist. 1977).

248. Lewis v. Real Estate Corp., 6 Ill. App. 2d 240, 244, 127 N.E.2d 272, 275 (1st Dist. 1955).

this would provide the tenant with improper incentives. For example, if the leased premises were in poor condition, the tenant might attempt to burn down the premises with the understanding that the landlord would be obligated to restore the property. Of course, this would leave the tenant open to charges of arson. Thus, the rule requires the parties to decide how to allocate the burden to restore the premises.

H. Payment of Taxes

Absent a contrary agreement, it is the duty of the landlord to pay the taxes on the leased property.[249] This default rule would be logical regardless of the party upon whom the obligation to pay taxes falls. If the landlord pays the taxes, the tenant's rent will be proportionately higher. If the tenant pays the taxes, the annual rental payments will be proportionately lower. Thus, the tenant will pay its fair share of the taxes regardless of the default rule.

I. Assignments and Subleases

Absent a lease provision restricting assignments, a lease may be freely assigned.[250] Absent a lease provision restricting subleases, the tenant has the right to sublet the premises.[251] These default rules are consistent with the common law rule against restraints on alienation. The underlying reason is that restraints on alienation take property out of the market, making it unuseable for the most efficient use dictated by the market.[252] By permitting subleases and assignments, the rule enhances economic efficiency.

Most commercial leases are long term. The right to assign a commercial lease provides a tenant with the freedom to move the business to a better location, the option to move to other premises better suited to its needs, and the opportunity to retire with no further obligations under the lease.[253]

J. Restrictions on Right to Assign or Sublet

Lease provisions restricting the tenant's right to assign or sublet are construed against the landlord and in favor of the tenant.[254] Where a lease forbids assignment or subletting without the consent of the landlord, the landlord may not unreasonably withhold consent, even if the lease does not expressly state "consent will not be unreasonably withheld."[255] These default

249. Metropolitan Airport Auth. v. Farliza Corp., 50 Ill. App. 3d 994, 997, 336 N.E.2d 112, 113 (3d Dist. 1977).

250. Cole v. Ignatius, 114 Ill. App. 3d 66, 70, 448 N.E.2d 538, 541 (1st Dist 1983).

251. Edelman v. F.W. Woolworth Co., 252 Ill. App. 142, 145 (1st Dist. 1929).

252. L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 1117 (1956).

253. Kehr, *supra* note 161, at 108.

254. Edelman v. F.W. Woolworth Co., 252 Ill. App. 142 (1st Dist. 1929).

255. Jack Frost Sales v. Harris Trust & Sav. Bank, 104 Ill. App. 3d 933, 944, 433 N.E. 2d 941, 949 (1st Dist. 1982).

rules are also consistent with the common law rule against restraints on alienation. Allowing a landlord to arbitrarily withhold consent undermines the policy of free alienability. The "reasonableness" standard enhances the productivity of land by preventing the landlord from arbitrarily withholding consent to an assignment or a sublease. The rule also protects the landlord's interest in the leased property. The tenant must present the landlord with a suitable assignee or sublessee, or the landlord need not consent to the transaction. The tenant has the burden of showing that the new tenant is ready, willing and able to take over the lease and meets reasonable commercial standards.[256]

K. Tenant's Liability after Assignment

Absent a lease provision releasing the tenant from personal liability, the tenant is not released from liability by merely assigning the lease.[257] This rule protects the landlord by granting recourse against the tenant for unsatisfied lease obligations. The particular lease provisions upon which a landlord and tenant agree are partially the result of the landlord's perception of the tenant and the tenant's financial status. Even if an assignee satisfies the "reasonable commercial standards" test, it does not mean that the assignee is identical to the tenant. If the assignee had independently entered into a lease with the landlord, the terms of the lease may have been different. This default rule provides the landlord with the benefit of the bargain because the landlord has recourse against the original tenant for unsatisfied lease obligations.

Arguments against the rule recognize that in certain cases the assignee may be more financially sound than the original tenant. In this situation, if the assignee had independently entered into a lease with the landlord, the landlord may have granted the assignee more favorable lease provisions than those granted to the tenant. Therefore, landlords can arguably get more than they bargained for if they have legal recourse against the original tenant.

A further argument against the rule is that it gives the landlord recourse against two entities: the tenant and the assignee. Before the assignment, the landlord had recourse only against the tenant. Accordingly, the landlord is in a better position after the assignment and receives more than was bargained for when entering into the lease.

L. Liability for Condition Arising during Occupancy

Absent a covenant by the landlord to keep the premises in good repair, the landlord is not liable for damage resulting from a condition that became

256. *Id.*

257. Bevelheimer v. Gierach, 33 Ill. App. 3d 988, 339 N.E.2d 299 (1st Dist. 1975); Springer v. DeWolf, 93 Ill. App. 260 (1901), *aff'd*, 194 Ill. 218, 62 N.E. 542 (1902).

dangerous during the tenant's occupancy.[258] Absent a covenant to repair, the landlord may have little incentive to keep abreast of what property on the demised premises is in need of repair. The imposition of liability upon the landlord for damage that results from items in need of repair would effectively imply a covenant to repair. A default rule that implied such a covenant would have adverse consequences.[259] It is more logical to impose liability on tenants. Tenants are in possession of the premises and are in a better position to determine what property needs repair and to oversee the repairs.

CONCLUSION

The default rules that are implied in leases of real property are both logical and rational. The rules are designed to imply lease terms for which most landlords and tenants would have bargained in the absence of the rules. The rules do not have a systematic bias favoring either landlords or tenants. In contrast, the rules of construction tend to favor the tenant over the landlord in disputes regarding the meaning of express lease provisions.[260]

One might wonder why the courts consistently favor tenants when interpreting ambiguous lease provisions. A common answer is that landlords are generally more sophisticated and in stronger bargaining positions than tenants.[261] Thus, there is a need to protect the weaker tenants. This argument is sensible, however, only if the landlord actually is in a stronger bargaining position than the tenant. This situation normally arises in a residential lease transaction.

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258. Watts v. Bacon & Van Buskirk Glass Co., 20 Ill. App. 2d 164, 171, 155 N.E.2d 333, 336 (3d Dist. 1959). The logic of this rule was set forth in Dial v. Mihalic, 107 Ill. App. 3d 855, 438 N.E.2d 546 (1st Dist. 1982), where the court stated: "the lessor by his promises [to repair] induced the tenant to forego repairs of his own, and so by his misleading undertaking has made himself responsible for the consequences." *Id.* at 859, 438 N.E.2d at 549.

259. *See infra* text accompanying notes 242-44.

260. The following three rules of construction are illustrative. First, where there is doubt as to the meaning of language used in a lease, the language should be construed most strongly against the landlord and in favor of the tenant. *See* J.B. Stein & Co. v. Sandberg, 95 Ill. App. 3d 19, 22, 419 N.E.2d 652, 655 (2d Dist. 1981). Second, where a landlord has drafted a lease, a court will not impose a responsibility upon the tenant unless the circumstances and the lease clearly indicate that the tenant intended to assume such a responsibility. *See* Windsor at Seven Oaks v. Kelly, 113 Ill. App. 3d 978, 980-81, 448 N.E.2d 251, 253-54 (3d Dist. 1983). Third, a "dispute" as to the meaning of a provision in a lease does not automatically result in a construction favorable to the tenant. There must be ambiguity as to the meaning of the lease provision. *See* McGann v. Murray, 75 Ill. App. 3d 697, 701-02, 393 N.E.2d 1339, 1343 (3d Dist. 1979).

It is important to note that the rules of construction only apply to the interpretation of ambiguous lease provisions. The rules do not provide that all landlord/tenant disputes are to be resolved in favor of the tenant. The following two default rules demonstrate the distinction: (1) absent a lease provision, the lessor is not obligated to provide the lessee with any services; and (2) the relationship of lessor and lessee does not obligate the lessor to repair the leased property.

261. *See* 2 R. POWELL & P. ROHAN, POWELL ON REAL PROPERTY §221(1), at 185 (1983).

The rule construing ambiguous lease terms against the landlord also applies to commercial lease transactions.[262] In a commercial setting, it is unfair to assume that the landlord is in a stronger bargaining position than the tenant. Commercial lease transactions often involve two sophisticated parties. The circumstances of a particular transaction dictate which party is in a stronger bargaining position.

A second possible reason why the rules of construction favor tenants is that the rules provide a necessary framework for interpreting ambiguous lease provisions. The rules arguably prevent judicial decisions in this area from having an ad hoc character. Judicial interpretations of ambiguous lease provisions would probably be inconsistent absent a rule providing that ambiguous lease terms must be construed in favor of a particular party to the transaction. In other words, in the absence of a rule of construction, two courts could rule differently on the interpretation of a particular ambiguous lease term.

In effect, the rules of construction alert the parties *ex ante* that the lease must be clear if it imposes a duty upon the tenant. The burden is on the landlord to draft the lease provisions in a clear and concise manner. It is more logical to place this burden on the landlord, since the tenant is normally not responsible for drafting the lease.

In contrast to the rules of construction, the default rules, by favoring neither landlords nor tenants, lack a systematic bias. The courts look to the default rules only when the express lease provisions do not resolve the issue in dispute. Therefore, it is logical for the default rules to be neutral, since the parties have either expressly or impliedly agreed not to deal with the issue in dispute.

A set of default rules favoring tenants would place undue burdens on the landlord. The landlord would be forced to draft a complicated lease addressing numerous contingencies, regardless of how remote those contingencies might be. This would entail undue time and expense on the part of the landlord. The cost would be passed on to the tenant in the form of higher rent. Furthermore, it is impossible to expect the landlord to draft a clear and concise lease that anticipates every possible situation. It is, however, logical to construe ambiguous lease terms against the landlord when the landlord has chosen to include the disputed terms in the lease.

If ambiguous lease terms are construed in favor of tenants, while default rules are neutral in application, tenants may be motivated to incorporate vague general clauses in leases so that disputes would be resolved by reference to the rules of construction. On the other hand, landlords will be motivated to use clear and specific lease terms. The landlord wants to ensure that all disputes are either clearly resolved by the lease language or by a default

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262. J.B. Stein & Co. v. Sandberg, 95 Ill. App. 3d 19, 419 N.E.2d 652 (2d Dist. 1981); Bogan v. Postlewait, 130 Ill. App. 2d 729, 265 N.E.2d 195 (4th Dist. 1970).

rule, as opposed to the rules of construction. There are two reasons why tenants are not motivated to incorporate such vague provisions in a lease. First, vague lease provisions lead to litigation. Most tenants seek to avoid the time and expense of litigation. Second, if tenants acted in such a manner, courts would probably modify the rules of construction to eliminate a systematic pro-tenant bias.

If a lease is silent concerning a disputed issue, the courts will apply default rules that arguably imply the terms for which most landlords and tenants would bargain in the absence of such rules. The implied terms do not have a systematic bias favoring either landlords or tenants. If the lease contains an ambiguous provision concerning the issue in dispute, the court will construe the provision against the landlord and in favor of the tenant. The rules of construction provide the courts with a logical framework for interpreting ambiguous lease terms.