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Assignment of Commercial Leases - The Reasonableness Standard and Withholding Consent: Kendall v. Ernest Pestana, Inc.

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ASSIGNMENT OF COMMERCIAL LEASES—THE REASONABLENESS STANDARD AND WITHHOLDING CONSENT: *KENDALL v. ERNEST PESTANA, INC.*

I. INTRODUCTION

In *Kendall v. Ernest Pestana, Inc.*,[1] the California Supreme Court held that commercial lessors may not unreasonably withhold consent from a tenant's assignment of the lease. While all jurisdictions require reasonableness when the lease prohibits unreasonable withholding of consent,[2] jurisdictions are split over the imposition of reasonableness into an unqualified consent clause. When a lease contains an unqualified consent clause, the majority of jurisdictions allow a lessor to withhold consent for any reason,[3] while the minority of jurisdictions require the lessor to show reasonableness.[4] Prior to *Kendall,* California had not clearly adopted the majority or minority rule.

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1. 40 Cal. 3d 488, 709 P.2d 837, 220 Cal. Rptr. 818 (1985).

2. *See, e.g.*, Robinson v. Weitz, 171 Conn. 545, 370 A.2d 1066 (1976) (finding of reasonableness in consent denial when lessor's accountants unable to verify proposed assignee's financial statements); Roundup Tavern, Inc. v. Pardini, 68 Wash. 2d 513, 413 P.2d 820 (1966) (lessor's objection to sublessee's use of premises for tavern does not satisfy express reasonableness requirement). *See* R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT (1980) [hereinafter SCHOSHINSKI]. Schoshinski explains that if a restrictive provision states that the lessee will not assign without the lessor's consent, and further provides that such consent will not be unreasonably withheld, the lessor may not withhold consent without sufficient reason under the circumstances. *Id.* at 581. The standard of reasonableness is an objective one, and personal objectives of the lessor usually are not considered by the court. *Id.*

For a discussion of the reasonableness standard as imposed by either contract provision or judicial implication, see Todres & Lerner, *Assignment and Subletting of Leased Premises: The Unreasonable Withholding of Consent,* 5 FORDHAM URB. L.J. 195 (1977). The article analyzes the common law parameters of the reasonableness requirement concluding that the term is neither well established nor generally known. *Id.* at 196-97. *See also infra* note 136 and accompanying text.

3. *See* Richard v. Degen & Brody, Inc., 181 Cal. App. 2d 289, 5 Cal. Rptr. 263 (1960); Jacobs v. Klawans, 225 Md. 147, 169 A.2d 677 (1961); Segre v. Ring, 103 N.H. 278, 170 A.2d 265 (1961); Dress Shirt Sales, Inc. v. Hotel Martinique Assoc., 12 N.Y.2d 339, 190 N.E.2d 10, 236 N.Y.S.2d 613 (1963); Isbey v. Crews, 55 N.C. App. 47, 284 S.E.2d 534 (1981); B & R Oil Co., Inc. v. Ray's Mobile Homes, Inc., 139 Vt. 122, 422 A.2d 1267 (1980); 3A R. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1205 (J. Grimes ed. 1981) [hereinafter THOMPSON].

4. Cases adopting the minority view include: Homa-Goff Interiors, Inc. v. Cowden, 350 So. 2d 1035 (Ala. 1977) (setting forth moral need for the change); Hendrickson v. Fredricks, 620 P.2d 205 (Alaska 1980) (adopting minority view even though breach was found because assignment had been made without request for consent); Schweiso v. Williams, 150 Cal. App. 3d 883, 198 Cal. Rptr. 238 (1984) (relying in part on the scarcity of commercial space); Cohen

The *Kendall* court adopted the minority rule, but neglected to consider the impact of the decision. The court failed to state whether a lessor may reserve the right to unreasonably withhold consent. If parties are allowed to draft "unreasonable consent" provisions into their leases, the effect of the *Kendall* decision may be simply that California attorneys will routinely include these provisions in the parties' leases.

Kendall evidences the growing strength of the minority trend. This Note discusses the reasoning applied by both the minority and majority jurisdictions. The Note then proposes that the minority courts, in their efforts to support the rights of tenants, have been too quick to set aside fundamental principles of property and contract law. Furthermore, the minority jurisdictions have not defined the imposed reasonableness standard or distinguished the reasonableness standard from the duty of good faith.

II. BACKGROUND

While a lease may be characterized as a contract to create an estate, it is also a conveyance of land.[5] Because the law favors the free alienation of property, the power of assignment is a legal right incident to a leasehold estate.[6] Under common law, a tenant had the right to assign his leasehold

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v. Ratinoff, 147 Cal. App. 3d 321, 195 Cal. Rptr. 84 (1983) (while holding that provision requiring the lessor's consent to an assignment is not inherently repugnant to the leasehold interest created, nevertheless finding an unreasonable restraint on alienation when the assignment provision is implemented in such a manner that its underlying purpose is perverted by the arbitrary withholding of consent); Fernandez v. Vasquez, 397 So. 2d 1171 (Fla. Dist. Ct. App. 1981) (withholding of consent to assign lease, which fails the test for good faith and commercial reasonableness, constitutes breach of the lease agreement); Funk v. Funk, 102 Idaho 521, 633 P.2d 586 (1981) (explaining that no desirable public policy is served by upholding a lessor's arbitrary refusal of consent merely because of whim or caprice or for purely financial gain); Arrington v. Walter E. Heller Int'l Corp., 30 Ill. App. 3d 631, 333 N.E.2d 50 (1975) (despite lease provision requiring reasonableness, addressing the issue of an unqualified consent clause and holding refusal to consent to person acceptable by reasonable commercial standards is an unreasonable exercise and thus violative of the lease); Boss Barbara, Inc. v. Newbill, 97 N.M. 239, 638 P.2d 1084 (1982) (explaining that no logical reason exists for not requiring good faith in the rental of commercial premises).

The term "consent clause" shall refer to a clause in a lease requiring the landlord's consent before the tenant may assign or sublease. The term "qualified consent clause" shall refer to a consent clause which requires that the lessor adhere to a standard of reasonableness in his determination of consent.

5. SCHOSHINSKI, *supra* note 2, at 2; THOMPSON, *supra* note 3, § 1205. *See also Kendall,* 40 Cal. 3d at 498, 709 P.2d at 843, 220 Cal. Rptr. at 824 (referring to the dual nature of a lease as a conveyance of a leasehold interest and a contract); Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 705 (1974) (noting the contractual nature of a lease); Medico-Dental Bldg. Co. v. Horton & Converse, 21 Cal. 2d 411, 132 P.2d 457 (1942) (lease as contract and conveyance). *See generally* Stollery, *The Lease as a Contract,* 19 ALBERTA L. REV. 234 (1981) (examines the traditional view of a lease as a conveyance and the modern view of the lease as a contract, and reviews the nature of the landlord- tenant relationship).

6. M. FREIDMAN, 1 FREIDMAN ON LEASES § 7.2 (1974) [hereinafter FREIDMAN]. THOMPSON, *supra* note 3, § 1205. *See also* C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 74 (1962) (interest of lessee normally transferable) [hereinafter MOYNIHAN].

interest without the consent of the lessor.[7] This common law right, however, was and continues to be altered by contract.[8] Many leases provide conditions under which the lessee may assign the lease. Because these provisions constitute restraints on alienation,[9] courts strictly construe them.

When a commercial lease provides for assignment upon the lessor's consent, the courts disagree on whether the provision is subject to an implied rule of commercial reasonableness. The older, and still prevailing rule, is that the lessor may withhold consent for any reason.[10] Courts refuse to imply reasonableness into a restrictive assignment clause, explaining that to do so would violate the integrity of the contract and ignore the express intention of the parties.[11] Furthermore, the majority courts reason that to rewrite the provision to include reasonableness would encroach upon the lessor's right to maintain control over his property[12] and modify the extent of the estate conveyed.[13]

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7. FREIDMAN, *supra* note 6, § 7.2.

8. THOMPSON, *supra* note 3, § 1205. *See, e.g.*, Isbey v. Crews, 55 N.C. App. 47, 284 S.E.2d 534 (1981) (tenant for an estate for years may be absolutely barred from assignment by an express covenant).

Although the *Kendall* court and most courts interpreting consent clauses do not differentiate between an assignment and a sublease, the terms are not technically interchangeable. The basic distinction between an assignment and a sublease is that by an assignment, the lessee conveys his entire interest in the unexpired term, leaving himself no reversion. In a sublease, the lessee transfers only a part of the lease for a period less than the original term. *See* THOMPSON, *supra* note 3, § 1210. The courts have not found the distinction relevant in the application of reasonableness to consent clauses. *See Kendall,* 40 Cal. 3d at 492 n.2, 709 P.2d at 839 n.2, 220 Cal. Rptr. at 820 n.2.

9. THOMPSON, *supra* note 3, § 1211. *See, e.g.,* Boss Barbara, Inc. v. Newbill, 97 N.M. 239, 638 P.2d 1084 (1982) (explaining that reasonable restraints upon the alienation of property must be strictly construed so as to operate within their exact limits). For example, because consent clauses are strictly construed by the courts, a provision against assignment without the lessor's consent does not prevent a subletting without his consent. MOYNIHAN, *supra* note 6, at 75. *See* Stevinson v. Joy, 164 Cal. 279, 286, 128 P. 751, 754 (1912) (covenant against assignment did not affect lessee's right to sublease). *See also Kendall,* 40 Cal. 3d at 495, 709 P.2d at 840 n.7, 220 Cal. Rptr. at 821 n.7 (setting forth California examples of the narrow effect given to lease terms purporting to restrict assignment).

10. In the absence of a contract provision restricting the lessor to an objective determination of consent, the lessor is entitled to a subjective determination. THOMPSON, *supra* note 3, § 1205. *See, e.g.,* Richard v. Degen & Brody, Inc., 181 Cal. App. 2d 289, 5 Cal. Rptr. 263 (1960) (asserting the majority rule that lessor may withhold consent for any reason). *See also supra* note 3 (comparison of the majority and minority views).

11. *See, e.g.,* Funk v. Funk, 102 Idaho 521, 525, 633 P.2d 586, 590 (1981) (Bakes, C.J., dissenting) (asserting that majority opinion had disregarded intent of the parties). *See also* Segre v. Ring, 103 N.H. 278, 170 A.2d 265 (1961) (suggesting that if the parties had intended otherwise, they could easily have qualified the approval clause in a number of ways); Herlou Card Shop, Inc. v. Prudential Ins. of Am., 73 A.D.2d 562, 422 N.Y.S.2d 708 (1979) (explaining that the landlord had merely exercised his contractual right).

12. *See, e.g.,* Funk v. Funk, 102 Idaho 521, 526, 633 P.2d 586, 591 (1981) (Bakes, C.J., dissenting) (criticizing the court for encroaching on the lessor's right to maintain control over his own property).

13. *Id.* at 526-27, 633 P.2d at 591-92. Chief Justice Bakes asserted that because the

Despite the prevalence of the majority rule, a growing trend requires the landlord to act in a commercially reasonable manner when withholding consent.[14] The majority rule, also called the "arbitrary and capricious" rule,[15] is undergoing constant erosion. Courts adopting the minority view reason that unreasonable restraints on alienation are invalid, and thus reasonableness must be imposed.[16] They assert that if the lessor can withhold consent unreasonably, the lessee's freedom to alienate the property has been unreasonably restrained.[17] The minority jurisdictions also reason that the implied duty of good faith mandates that the lessor act reasonably.[18] Some courts stress basic principles of fairness, justice, and fair

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majority rule so readily modifies the nature of the estate conveyed by the lessor, "[i]t is only a short step to stating that it can also modify the terms of a grant of a fee conditional estate." *Id.* at 527, 633 P.2d at 592. The majority rationale is that a lessor's right to select a lessee outweighs any possible evils stemming from the restriction on alienation.

14. *See supra* note 4. *See also* Comment, *The Right to Sublease,* 53 TUL. L. REV. 556 (1979) (minority trend); Comment, *The Approval Clause in a Lease: Toward a Standard of Reasonableness,* 17 U.S.F. L. REV. 681 (1983) (advocating adoption of the minority rule) [hereinafter Comment, *The Approval Clause*]; Note, *Landlord-Tenant - Lessor's Rejection of Sublease Agreement, Pursuant to a Consent Clause, Must be Judged Under a Reasonable Commercial Standard,* 9 CUMB. L. REV. 309 (1978) (approving Alabama court's decision to adopt minority rule in Homa-Goff Interiors, Inc. v. Cowden, 350 So. 2d 1035 (Ala. 1977)) [hereinafter Note, *Landlord-Tenant*]. *But see* Levin, *Withholding Consent to Assignment: The Changing Rights of the Commercial Landlord,* 30 DEPAUL L. REV. 109 (1980) (criticizing the minority trend as an inappropriate change in landlord-tenant law) [hereinafter Levin].

15. Fernandez v. Vasquez, 397 So. 2d 1171, 1173 (Fla. Dist. Ct. App. 1981).

16. Cohen v. Ratinoff, 147 Cal. App. 3d 321, 329, 195 Cal. Rptr. 84, 86 (1983). *See also* Boss Barbara, Inc. v. Newbill, 97 N.M. 239, 638 P.2d 1084 (1982) (holding that because reasonable restraints are to be strictly construed, and because the lease said nothing about reasonableness, the landlord must act reasonably).

17. As the court explained in Funk v. Funk, 102 Idaho 521, 524, 633 P.2d 586, 589 (1981), the imposition of a reasonableness standard in consent clauses gives greater credence to the doctrine that restraints on alienation may not be unreasonable. *See also* Comment, *The Approval Clause, supra* note 14, at 683. The author proposes that the landlord should be held to an objective standard of reasonableness for two reasons. First, because unqualified approval clauses are seen as unreasonable restraints, the problem would be resolved by implying reasonableness into the approval clause. *Id.* at 684. Second, the author notes the need to prevent the harsh results that befall the lessee when the consent clause is interpreted literally. *Id.* For further discussion of the pro-tenant rationale, see *infra* note 113 and accompanying text.

18. Cohen v. Ratinoff, 147 Cal. App. 3d at 329, 195 Cal. Rptr. at 88. The trend is to imply a duty of good faith into every contract. *See, e.g.,* Larwin-Southern Cal., Inc. v. JGB Inv. Co., 101 Cal. App. 3d 626, 162 Cal. Rptr. 52 (1979) (recognizing the implied existence of a duty of good faith).

For a discussion of good faith and the RESTATEMENT OF CONTRACTS, see Summers, *The General Duty of Good Faith - Its Recognition and Conceptualization,* 67 CORNELL L. REV. 810 (1982). For a treatment of good faith and the Uniform Commercial Code, see Burton, *Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code,* 67 IOWA L. REV. 1 (1981). Burton proposes that a cost perspective on contractual expectations can supply an operational meaning for the UCC obligation. *Id.* at 3. For a suggestion that an expansive notion of good faith presents overwhelming difficulties, see Gillette, *Limitations on the Obligations of Good Faith,* 1981 DUKE L.J. 619, 665.

dealing.[19] Other courts rely on public policy and the modern necessity of permitting reasonable alienation of commercial space.[20] Relying on these rationales, the American Law Institute adopted the minority view in the 1977 edition of the *Restatement of Property*.[21]

A brief state survey evidences the split in the courts. One of the leading cases adopting the minority rule was *Homa-Goff Interiors, Inc. v. Cowden*.[22] In that case, the Alaska Supreme Court followed the lead of the

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19. Boss Barbara, Inc. v. Newbill, 97 N.M. 239, 638 P.2d 1084 (1982). According to *Boss Barbara*, "New Mexico law has consistently required fairness, justice and right dealing in all commercial practices and transactions." *Id.* at 241, 638 P.2d at 1086. Therefore, "[n]o logical reason exists for not requiring good faith in the rental of the commercial premises." *Id.*

20. *See* Schweiso v. Williams, 150 Cal. App. 3d 883, 887, 198 Cal. Rptr. 238, 240 (1984). *See also* Comment, *The Approval Clause, supra* note 14, at 683 (explaining that a decrease in residential and commercial space has resulted from increased urbanization, and the problem has been increased by unreasonable restraints upon free alienation); Survey, *1984 California Courts of Appeal Survey - Landlord and Tenant Law*, 7 WHITTIER L. REV. 211 (1985) (discussing necessity of permitting reasonable alienation of commercial space).

21. RESTATEMENT (SECOND) OF PROPERTY § 15.2(2) (1977): "A restraint on alienation without the consent of the landlord of the tenant's interest in the leased property is valid, but the landlord's consent to an alienation by the tenant cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent."

Further support for the minority rule comes from legislative action. The legislatures in Alaska, Hawaii, and New York imposed a standard of reasonableness on consent clauses, but only with respect to residential leases.

ALASKA STAT. § 34.03.060 (1975) states:

> (b) The tenant's right to sublease the premises or assign the rental agreement to another shall be conditioned on obtaining the landlord's consent, which may be withheld only upon the grounds specified in (d) . . . . Section (d) sets forth reasonable grounds for rejecting the prospective occupant, such as insufficient credit standing, number of persons in the household, or commercial activity.

HAW. REV. STAT. § 516-63 (Supp. 1975) states that:

"The lessor shall not require payment of any money for his consent except the service charge, nor withhold such consent unreasonably."

N.Y. REAL PROP. LAW § 226-b (McKinney Supp. 1980) sets forth:

> 1. Unless a greater right to assign is conferred by the lease, a tenant renting a residence may not assign his lease without the written consent of the owner, which consent may be unconditionally withheld without cause provided that the owner shall release the tenant from the lease upon request of the tenant upon thirty days notice if the owner unreasonably withholds consent which release shall be the sole remedy of the tenant. If the owner reasonably withholds consent, there shall be no assignment and the tenant shall not be released from the lease.

The *Kendall* court expressly addressed commercial leases. The majority/minority dichotomy described throughout this Casenote, likewise, is limited to commercial leases. However, the statutes governing residential leases, as well as providing indirect support for the minority rule, serve as examples of prospective legislative change in the common law rules. *See* Kendall v. Ernest Pestana, Inc., 40 Cal. 3d at 473, 709 P.2d at 852, 220 Cal. Rptr. at 833 (Lucas, J., dissenting) (proposing to overrule the common law by legislative action).

22. 350 So. 2d 1035 (Ala. 1977). For further minority court decisions, see *supra* note 4.

Alabama Supreme Court in *Hendrickson v. Fredricks.*[23] Similarly, the New Mexico Supreme Court adopted the minority position in *Boss Barbara, Inc. v. Newbill.*[24] In contrast, other recent state decisions continue to adhere to the majority rule. Vermont declined to abandon the majority rule in *B & R Oil Co. v. Ray's Mobile Homes, Inc.*,[25] and New Hampshire reaffirmed the majority position in *Segre v. Ring.*[26]

Prior to *Kendall,* the lower courts in California disagreed on the consent issue. In 1960 in *Richard v. Degen & Brody, Inc.*,[27] a California appellate court followed the majority rule. The court held that the lessor could withhold his consent arbitrarily and without regard for the qualifications of the proposed assignee. Because the court held that the lessor could withhold consent for any reason, the court did not address the lessor's purported reason for withholding consent.[28]

In 1983, the California Second District in *Cohen v. Ratinoff,*[29] abandoned the *Richard* rule, and held that the lessor must not withhold consent arbitrarily. The court set forth the rule that the lessor could not withhold consent absent a good faith reasonable objection, even in the absence of a provision prohibiting the unreasonable withholding of consent.[30] The court found no good faith objection by the lessor in *Cohen* but rather, only an admission of arbitrariness.[31] Therefore, the court concluded that the lessor had breached the lease.[32]

Following the lead of the Second District, the First District, in *Schweiso v. Williams,*[33] adopted the minority rule. The court found that the conduct

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23. 620 P.2d 205 (Alaska 1980).

24. 97 N.M. 239, 638 P.2d 1084 (1982).

25. 139 Vt. 122, 422 A.2d 1267 (1980).

26. 103 N.H. 278, 170 A.2d 265 (1961).

27. 181 Cal. App. 2d 289, 5 Cal. Rptr. 263 (1960). In *Richard,* the lessor brought an unlawful detainer action against the lessee. The commercial lease between the parties prohibited assignment or subletting by the lessee without the written consent of the lessor. *Id.* at 292, 5 Cal. Rptr. at 265. In violation of the contract, the lessee subletted a portion of the leased premises to a third party without the lessor's consent. *Id.* at 293, 5 Cal. Rptr. at 265.

28. *Id.* at 299, 5 Cal. Rptr. at 269. The only reason apparent from the decision is that the lessor "want[ed] the building for [him]self." *Id.* at 296, 5 Cal. Rptr. at 267.

29. 147 Cal. App. 3d 321, 195 Cal. Rptr. 84 (1983). In *Cohen,* plaintiff lessee and defendant lessor entered into a four year commercial lease, limiting the use of the premises to the sale of carpet, drapery, and furnishings. *Id.* at 324, 195 Cal. Rptr. at 85. As in *Richard,* the lease expressly prohibited assignment or subletting without the lessor's consent. *Id.* at 325, 195 Cal. Rptr. at 85. The lessee entered into a sales contract with a third party to purchase lessee's business, along with the lease. *Id.* at 325, 195 Cal. Rptr. at 86. The buyer, Floormart, was a carpet company and thus would be using the premises for the purposes described in the original lease. *Id.* When the lessee requested the lessor's consent, the lessor's attorney informed the lessee that "my client may be as arbitrary as he chooses." *Id.* Floormart then terminated the sales agreement with the lessee.

30. *Id.* at 330, 195 Cal. Rptr. at 89.

31. Cohen v. Ratinoff, 147 Cal. App. 3d 321, 195 Cal. Rptr. 84 (1983).

32. *Id.*

33. 150 Cal. App. 3d 883, 198 Cal. Rptr. 238 (1984).

of the lessors in *Schweiso* was even more indicative of bad faith than the lessor's conduct in *Cohen*.[34] The court adopted a standard of reasonableness and then held that withholding consent in order to charge a higher rent failed the test of reasonableness.[35]

Subsequent to *Schweiso* and *Cohen*, the Ninth Circuit Court of Appeals followed *Prestin v. Mobile Oil Corp.*,[36] and applied the minority rule. The *Prestin* court referred to *Schweiso* and *Cohen* and noted that the *Richard* view had little support in later cases.[37]

Recently, the California Appellate Court for the Fourth District in *Hamilton v. Dixon*,[38] declined to follow the *Cohen* and *Schweiso* trend and adopted the majority rule. In *Hamilton*, the court found that the tenant had breached the lease by subleasing without the landlord's required consent.[39] The court refused to evaluate the reasonableness of the lessor's refusal and concluded that even if the refusal was arbitrary, the landlord's contractual right to refuse consent should be enforced.[40] The court explained that the lessee had offered no authority which would justify the court's ignoring the unambiguous language of the lease and rewriting the contract fifteen years later.[41]

Although the California legislature has not expressly addressed the issue of a lessor's consent to assignment, one statute implicitly recognizes the existence of the majority rule. In Civil Code section 1951.4,[42] which deals

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34. *Id.* at 886, 198 Cal. Rptr. at 240. In *Schweiso*, the lessees entered into sales contracts with third parties to sell their businesses, including their leases. *Id.* at 885, 198 Cal. Rptr. at 239. The court held that the defendant lessor, for no valid commercial reason, had refused to consent to assignment unless the lessees paid a certain percentage of the purchase price. *Id.* The lessor told one lessee that the consent provision in the lease was the lessor's "license to steal;" that the transfer fee was "blood money;" and that the lessor had a right to be unreasonable. *Id.* at 885, 198 Cal. Rptr. at 238.

35. *Id.* at 886, 198 Cal. Rptr. at 240.

Courts generally agree that the application of a reasonableness standard, whether by express provision or implication, precludes denial of consent for purely financial gain. *See, e.g.*, Funk v. Funk, 102 Idaho 521, 633 P.2d 586 (1981) (withholding consent, because lessor wanted new lease agreement with increased financial benefits, unreasonable).

For a decision in which the court refused to impose a reasonableness standard, and upheld the lessor's denial of consent based on financial motives, see Herlou Card Shop, Inc. v. Prudential Ins. of Am., 73 A.D.2d 562, 422 N.Y.S.2d 708 (1979). The court explained: "In the circumstances, the landlord was merely exercising its legal contractual rights in refusing to consent to an assignment of the lease unless the lease was modified to increase the rent." *Id.* at 562, 422 N.Y.S.2d at 708-09.

36. 741 F.2d 268 (9th Cir. 1984).

37. *Id.* at 271.

38. 168 Cal. App. 3d 1004, 214 Cal. Rptr. 639 (1985).

39. *Id.* at 1004, 214 Cal. Rptr. at 639.

40. *Id.* at 1009, 214 Cal. Rptr. at 642.

41. Hamilton v. Dixon, 168 Cal. App. 3d 1004, 214 Cal. Rptr. 639 (1985)

42. CAL. CIV. CODE § 1951.4 (West 1985) provides:

. . . (b) Even though a lessee of real property has breached his lease and abandoned the property, the lease continues in effect for so long as the lessor does

with the mitigation of damages, the legislature provided for the existence of the majority rule in one of the provisions. Section 1951.4 allows a lessor to avoid the statutory duty to mitigate damages[43] by shifting that duty to the lessee by contract. The statute provides that where consent to assignment is required by the lease, the lease must expressly state that the consent will not be unreasonably withheld.[44] Without a consent clause, the majority rule allows a lessor to refuse consent for any reason. In sum, the legislature in section 1951.4 both recognized the right of the landlord to bargain for the ability to arbitrarily withhold consent, and provided an incentive for him not to do so.[45]

While the legislature had addressed the issue of a lessor's consent to assignment only indirectly prior to *Kendall,* the lower California courts set the stage for a supreme court decision. The appellate courts, which had adopted the minority rule in *Schweiso* and *Cohen,* indicated a growing

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not terminate the lessee's right to possession, and the lessor may enforce all his rights and remedies under the lease, including the right to recover the rent as it becomes due under the lease, if the lease permits the lessee to do any of the following:

. . . (3) Sublet the property, assign his interest in the lease, or both, with the consent of the lessor, and the lease provides that such consent shall not unreasonably be withheld.

43. CAL. CIV. CODE § 1951.2 (West 1985). This section sets forth general mitigation rules which apply except as otherwise provided in section 1951.4. If section 1951.4 is not invoked by compliance with its requirements, section 1951.2 places the burden on the lessor of reletting the property to mitigate the damages.

As section 1951.4 illustrates, California has chosen to resolve by statute the issue of whether a landlord has a duty to mitigate damages incurred when the lessee abandons during the lease term. The general rule among jurisdictions is that the lessor has no duty to mitigate. "If the tenant abandons possession and refuses to pay any further rent the landlord can, in most states, allow the premises to remain idle and sue the tenant for rent as it falls due." MOYNIHAN, *supra* note 6, at 78-79. However, a growing trend places a duty on the landlord to mitigate. *See, e.g.*, Note, *Landlord-Tenant—Landlord's Duty to Relet When a Tenant Abandons Leased Property,* 43 Mo. L. REV. 359 (1978). The author favors adoption of a landlord's duty to mitigate because of changing social conditions, the tendency of courts to recognize the contractual nature of leases, and the public policy against waste. *See also* Comment, *Landlord's Duty to Mitigate Damages—A New Obligation,* 16 AM. BUS. L.J. 351 (1979) (noting the need to recognize the lease as being an agreement to which contract rights and duties apply). The rationales behind the imposition of a duty to mitigate often coincide with those behind the imposition of a standard of reasonableness. However, the issues involved are separate and should not be confused. *See* Levin, *supra* note 14, at 109.

For an extensive survey of the case and statutory law on the landlord's duty to mitigate, see Weissenberger, *The Landlord's Duty to Mitigate Damages on the Tenant's Abandonment: A Survey of Old Law and New Trends,* 53 TEMP. L.Q. 1 (1980). The primary purpose of the article is to facilitate reform through the identification of current trends relating to abandonment and mitigation. *See also* Bulkeley, *Does a Landlord Have a Duty to Mitigate Damages When a Tenant Abandons During the Lease?,* 68 ILL. B.J. 588 (1980) (surveying Illinois law and presenting advice to landlords as to how to avoid the duty to mitigate).

44. CAL. CIV. CODE § 1951.4 (3) (West 1985): "[A]nd the lease provides that such consent shall not be unreasonably withheld."

45. Hamilton v. Dixon, 168 Cal. App. 3d 1004, 1010, 214 Cal. Rptr. 639, 643 (1985).

disfavor with the majority rule. However, in *Hamilton,* a Fourth District Appellate Court had reaffirmed the majority rule. To resolve the conflict between the lower courts, the California Supreme Court, in *Kendall v. Ernest Pestana, Inc.,* decided to adopt the minority rule for the state of California.

III. *KENDALL V. ERNEST PESTANA, INC.*

In *Kendall,* the lessee, Bixler, requested consent from the lessor's successor-in-interest, Pestana, to assign his lease to another commercial tenant, Kendall.[46] The original lease provided that the lessor's consent was necessary before the lessee could assign.[47] The lease did not, however, require that consent be withheld for commercially reasonable objections. Despite Kendall's credentials, lessor Pestana denied consent.[48] Pestana conditioned consent on an increase in rent,[49] and Kendall sued for an unlawful restraint on his freedom of alienation. The Superior Court, Santa Clara County, entered an order sustaining the lessor's demurrer, and the First District Appellate Court affirmed.[50]

The supreme court reversed the lower court's holding and adopted the minority rule for California. The court relied on two rationales for the holding.[51] First, the court reasoned that the lease, as a conveyance, invoked the policy against unreasonable restraints on alienation.[52] The court cited

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46. Kendall v. Ernest Pestana, Inc., 40 Cal. 3d at 495, 709 P.2d at 840, 220 Cal.Rptr. at 821.

47. Kendall v. Ernest Pestana, Inc., 40 Cal. 3d 488, 709 P.2d 837, 220 Cal. Rptr. 818. The proposed assignees had a strong financial record, and they were willing to be bound by the terms of the lease.

48. *Id.* The lessor maintained that he had an absolute right to arbitrarily refuse any request.

49. *Id.* The complaint recited that the lessor demanded "increased rent and other more onerous terms" as a condition of consenting. *Id.* at 495, 709 P.2d at 840, 220 Cal. Rptr. at 821.

50. Kendall v. Ernest Pestana, Inc., 40 Cal. 3d 488, 709 P.2d 837, 220 Cal. Rptr. 818. The court which held for the lessor in *Kendall* was the same court (the first district) which had previously adopted the minority rule in *Schweiso.* The appellate court in *Kendall* decided that "[b]oth *Schweiso* and *Cohen* were wrongly decided." Kendall v. Ernest Pestana, Inc., 163 Cal. App. 3d 11, 209 Cal. Rptr. 135, 136 (1984).

51. *Kendall,* 40 Cal. 3d at 497, 709 P.2d at 843, 220 Cal. Rptr. at 824. As the court explained, "[T]he impetus for change in the majority rule has come from two directions, reflecting the dual nature of a lease as a conveyance of a leasehold interest and a contract." *Id.* at 497, 709 P.2d at 843, 220 Cal. Rptr. at 824.

52. Because the *Kendall* court was willing to view the lease as both a contract and a conveyance, the court was free to rely on selected principles of both contract and property law. The use of particular contract principles can be especially advantageous to the tenant. According to Professor Levin:

> The application of contract law to lease interpretation necessitates that leases be construed like other contracts. This construction effectively promotes consumer protection because courts have broadened seller's responsibility for the quality of goods sold by implying warranties of merchantability and fitness. Similarly, in landlord-tenant relations, the law should protect tenant's reasonable expectations

Civil Code section 711 and noted the modern necessity of permitting reasonable alienation of commercial space.[53] Section 711 provides that restraints on alienation are void when repugnant to the interest created. The court cited *Cohen* for the proposition that if an assignment provision is implemented so that its purpose is undermined by an unreasonable withholding of consent, an unreasonable restraint on alienation is established.[54] In other words, the court questioned the continued validity of the traditional lease exception to the common law's hostility toward restraints on alienation.[55] The court explained that the policy justifications supporting the common law exception, such as the lessor's right to personal selection, did not justify the lessor's arbitrary refusal to consent.[56] The court noted the Restatement's position that the lessor's interests are sufficiently protected by the lessor's right to object on reasonable commercial grounds.[57]

The court's second basis for adopting the minority rule was the contractual nature of a lease.[58] The trend, according to the court, is to recognize a duty of good faith in every contract.[59] Because of this implied duty, the court

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regarding enforcement of lease terms whenever tenants cannot, for reasons beyond their control but in the hands of the landlord, protect themselves.

Levin, *supra* note 14, at 115 n.23.

Although a lease is increasingly viewed as a contract, it continues also to be viewed as a conveyance. "Although significant contractual inroads have been made, the estate or property concept of the lease has not been discarded." SCHOSHINSKI, *supra* note 2, at 5. *See generally* Hicks, *The Contractual Nature of Real Property Leases,* 24 BAYLOR L. REV. 443, 544 (1972) (explaining that the two aspects of the lease make it a more flexible instrument for the parties involved); Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?,* 9 U. KAN. L. REV. 369, 377 (1961) ("For if the warp is conveyance, the woof is contract, and neither alone makes a whole cloth."); Siegel, *Is the Modern Lease a Contract or a Conveyance? - A Historical Inquiry,* 52 J. URB. L. 649, 651 (1975) (favoring a mixed contract/conveyance theory); Stollery, *The Lease as Contract,* 19 ALABERTA L. REV. 234 (1981) (examining both the traditional view of a lease as a conveyance and the modern view of a lease as a contract). Kendall v. Ernest Pestana Inc., 40 Cal. 3d at 498, 709 P.2d at 843, 220 Cal. Rptr. at 824.

53. CAL. CIVIL CODE section 711 provides: "Conditions restraining alienation, when repugnant to the interest created, are void." The court further explained that it is well settled that the rule forbids only unreasonable restraints on alienation, and that "[r]easonableness is determined by comparing the justification for a particular restraint with the quantum of restraint actually imposed by it." Kendall v. Ernest Pestana, Inc., 40 Cal. 3d at 498, 709 P.2d at 843, 220 Cal. Rptr. at 824.

54. *Kendall,* 40 Cal. 3d at 498, 709 P.2d at 843, 220 Cal. Rptr. at 824. *See Cohen,* 147 Cal. App. 3d at 329, 195 Cal. Rptr. at 88.

55. Kendall v. Ernest Pestana, Inc., 40 Cal. 3d at 499, 709 P.2d at 844, 220 Cal. Rptr. at 825.

56. *Id.*

57. *Id. See* RESTATEMENT (SECOND) OF PROPERTY §15.2 (7) (1977).

58. Kendall v. Ernest Pestana, Inc., 40 Cal. 3d at 500, 709 P.2d at 844, 220 Cal. Rptr. at 825.

59. *Id.* For an example of this trend noted in *Kendall,* see Larwin-Southern Cal., Inc. v. JGB Inv. Co., 101 Cal. App. 3d 626, 162 Cal. Rptr. 52 (1979) (recognizing an implied covenant in every contract).

explained that the lessor's discretionary power to consent should be exercised in accordance with commercially reasonable standards.[60] The court did not differentiate between the standard of objective commercial reasonableness and the contractual duty of good faith.[61] Instead, by imposing reasonableness, the court simply noted that reasonableness was a question of fact.[62] The court referred to other court decisions which had established guidelines for reasonableness,[63] and concluded that the lessor's conduct in *Kendall* had not been commercially reasonable. The court held that it was not reasonable for a lessor to withhold consent in order to charge a higher rent.[64]

The *Kendall* court next discussed five rationales for the majority rule and concluded that none of these were persuasive. The court first rejected the majority's assertion that since a lease is a conveyance, the lessor has no obligation to look to anyone else but the lessee for rent. The court rejected this argument because most courts require the lessor to mitigate damages, and therefore, the modern landlord-tenant relationship is not a pure conveyance.[65] Second, the court set forth varying interpretations of the standard lease approval clause to negate the majority courts' assertion that the clause is unambiguous.[66] Third, the court dismissed the claim of stare decisis by stressing the need for change.[67] Next, in response to the assertion that the lessor had the right to realization of any increased value, the court stated

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60. Kendall v. Ernest Pestana, Inc., 40 Cal. 3d at 500, 709 P.2d at 845, 220 Cal. Rptr. at 826.

61. *Id.* The court used the terms relatively interchangeably.

62. *Id.*

63. *See, e.g.*, Fernandez v. Vasquez, 397 So. 2d 1171, 1174 (Fla. Dist. Ct. App. 1981) (setting forth the five general factors to consider in determining commercial reasonableness: (1) financial responsibility; (2) identity or business character; (3) need for alteration of the premises; (4) legality of the proposed use; (5) the nature of the occupancy). *See also* American Book v. Yeshiva Univ. Dev. Found., Inc., 59 Misc. 2d 31, 297 N.Y.S.2d 156 (1969) (setting forth reasonableness criteria similar to *Fernandez*).

64. Kendall v. Ernest Pestana, Inc., 40 Cal. 3d at 501, 709 P.2d at 845, 220 Cal. Rptr. at 826. For precedent supporting the court's determination of unreasonableness when the lessor simply wishes to charge a higher rent, see *infra* note 117.

65. Kendall v. Ernest Pestana, Inc., 40 Cal. 3d at 502, 709 P.2d at 846, 220 Cal. Rptr. at 827.

Modern mitigation laws de-emphasize the traditional conveyance nature of a lease, stressing the altered nature of the landlord and tenant relationship. The court noted the California statute which adopts the rule that lessors have a duty to mitigate damages, when the lessee abandons the property, by seeking a substitute lessee. *See* CAL. CIV. CODE § 1951.2, *supra* note 43. For a discussion of the judicial confusion between the issues of mitigation and consent, see Levin, *supra* note 14, at 109. *See also supra* note 43.

66. Kendall v. Ernest Pestana, Inc., 40 Cal. 3d at 503, 709 P.2d at 846-47, 220 Cal. Rptr. at 827-28. The court noted judicial opinions which held reasonableness inherent in the general consent provision, even absent express wording. *See, e.g.*, Shaker Bldg. Co. v. Federal Lime & Stone Co., 28 Ohio Misc. 246, 252 N.E.2d 587 (1971) (inherent in the provision that consent will not be withheld under all circumstances).

67. Kendall v. Ernest Pestana, Inc., 40 Cal. 3d at 503-04, 709 P.2d at 847, 220 Cal. Rptr. at 828. "We would be remiss in our duty if we declined to question a view held by the majority of jurisdictions simply because it is held by a majority." *Id.*

that the lessor was not entitled to receive any more than for what he had bargained.[68] The *Kendall* court also rejected the demand for legislative, rather than judicial, direction on the issue. The court explained that it was entitled to rule in the absence of legislative direction.[69] The court disagreed with the appellate court's suggestion that the California Legislature had rejected adopting the minority rule in section 1951.4 of the Civil Code.[70]

The dissent argued that the court should not rewrite the contract since the language of the lease was unambiguous.[71] Alternatively, the dissent argued that if the minority rule was adopted, the court should only apply the rule prospectively, since attorneys had relied on the existing law in drafting leases.[72] Moreover, the dissent explained that the legislature was the more appropriate decision-maker on the issue.[73] Justice Lucas suggested that the legislature's refusal to act in section 1951.4 implied legislative approval of the current law.[74]

IV. ANALYSIS OF *KENDALL V. ERNEST PESTANA, INC.*

The majority rule, abandoned by the California Supreme Court, rests on fundamental principles of property and contract law.[75] The majority courts stress the importance of upholding contracts which were voluntarily entered into by the parties.[76] The traditional rule respects the integrity of the contract

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68. *Id.* at 504, 709 P.2d at 847-48, 220 Cal. Rptr. at 829.

69. *Id.* at 506, 709 P.2d at 849, 220 Cal. Rptr. at 830. The court denied the existence of judicial direction in Civil Code § 1951.4, *supra* note 42. The court held that section 1951.4, which only implicitly recognized the majority rule, did not prevent the court from examining the rule.

70. Kendall v. Ernest Pestana, Inc., 40 Cal. 3d at 506, 709 P.2d at 849, 220 Cal. Rptr. at 830.

71. *Id.* at 511, 709 P.2d at 850, 220 Cal. Rptr. at 833 (Lucas, J., dissenting).

72. *Id.*

73. *Id.* at 508, 709 P.2d at 851, 220 Cal. Rptr. at 832. According to the dissent, overruling the common law by legislative action would be the wisest procedure, "if only to effect the repeal prospectively and thereby give force to those contracts entered into when the common law prevailed." *Id.*

74. *Id.* For the text of the statute and a discussion, see *supra* note 42 and accompanying text.

75. *See, e.g.*, Hamilton v. Dixon, 168 Cal. App. 3d 1004, 1009, 214 Cal. Rptr. 639, 642 (1985) (adhering to the majority rule, because finding little reason to interfere with the freedom of landlords and tenants to negotiate the terms of commercial leases); Funk v. Funk, 102 Idaho 521, 526, 633 P.2d 586, 591 (1981) (Bakes, C.J., dissenting) (noting that the majority rule rests on freedom of ownership and control over one's own property).

76. To uphold freely negotiated provisions is perhaps the most frequently cited reason given for the majority rule. *See, e.g.*, Hamilton v. Dixon, 168 Cal. App. 3d 1004, 1009, 214 Cal. Rptr. 639, 642 (1985) (freedom to negotiate terms of the lease); Gruman v. Investors Diversified Serv., 244 Minn. 502, 509-10, 78 N.W.2d 377, 382 (1956) (court finding itself compelled to give the lease terms their full force and effect); Isbey v. Crews, 55 N.C. App. 47, 49-50, 284 S.E.2d 534, 537 (1981) (court refused to insert terms into a contract when the parties elected to omit such terms); Segre v. Ring, 103 N.H. 278, 280, 170 A.2d 265, 266 (1961) (court declines to rewrite agreement for the parties); Herlou Card Shop, Inc. v. Prudential Ins. of Am., 73 A.D. 2d 562, 422 N.Y.S.2d 708, 708-09 (1979) (landlord merely exercising his legal contractual right).

and preserves the parties' intentions.[77] According to one dissenter in a minority jurisdiction, "For the members of this court to inject a new requirement . . . is in effect to say that this court may at any time disregard the intentions of the parties as expressed in their unambiguous agreement and rewrite the contract because a majority of this court is of the opinion that it should be altered."[78]

In addition to principles of contract law, the majority courts emphasize the property law's concern for the preservation of freedom of ownership and control over one's property.[79] A fundamental principle of property law is that an owner of property may transfer as much or as little control over his property as he pleases.[80] Equally fundamental to property law is the hostility with which courts view restraints on alienation.[81] At common law, lease restrictions were an exception to the general rule against restraints on alienation, because the law chose to protect the interests of the lessor who retains a reversionary interest in the property.[82]

Abandoning the fundamental concepts protected by the majority rule, the *Kendall* court adopted the reasoning of the minority courts. The minority rule rests on the concept that a lease is a contract, and therefore, should be limited by the contract principle of implied good faith.[83] Modern courts

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77. *See supra* note 76. *See also* Funk v. Funk, 102 Idaho 521, 525, 633 P.2d 586, 590 (1981) (Bakes, C.J., dissenting) (arguing that to abandon the majority rule is in effect to disregard the intentions of the parties as expressed in an unambiguous contract).

The *Kendall* court countered this rationale by explaining that it was not rewriting the contract to recognize the obligations imposed by the duty of good faith, since the duty is implied by law in every contract. Kendall v. Ernest Pestana, Inc., 40 Cal. 3d at 509, 709 P.2d at 847, 220 Cal. Rptr. at 828. The *Kendall* court, however, mistakenly equated the duty of good faith with an imposition of commercial reasonableness. *See infra* notes 89-90 and accompanying text.

78. Funk v. Funk, 102 Idaho 521, 525, 633 P.2d 586, 590 (1981) (Bakes, C.J., dissenting).

79. *Id.* at 526, 633 P.2d at 591.

80. *Id.* Of course, the lessee also holds an interest in the property—a leasehold, which entitles him to the exclusive possession of the property for the term of the lease. *See* SCHOSHINSKI, *supra* note 2, at 10.

81. *See* Chapman v. Great W. Gypsum Co., 216 Cal. 420, 14 P.2d 758 (1932). "It hardly needs citation of authority to the principle that covenants limiting the free alienation of property such as covenants against assignment are barely tolerated and must be strictly construed." *Id.* at 426, 14 P.2d at 760.

82. *Id.* "It was believed that the objectives served by allowing such restraints outweighed the social evils implicit in the restraints, in that they gave to the lessor a needed control over the person entrusted with the lessor's property and to whom he must look for the performance of the covenants contained in the lease." Note that Powell questions the full, continued validity of this reasoning, due to, for one, the increasingly impersonal relationship between the lessor and lessee.

83. Kendall v. Ernest Pestana, Inc., 40 Cal. 3d at 500, 709 P.2d at 844, 220 Cal. Rptr. at 825. *See also* Schweiso v. Williams, 150 Cal. App. 3d 883, 198 Cal. Rptr. 238 (1984) (holding that because a lease contained an implicit covenant of good faith, refusal to consent must not be arbitrary); Fernandez v. Vasquez, 397 So. 2d 1171, 1173-74 (Fla. Dist. Ct. App. 1981) (explaining that underlying the cases abolishing the arbitrary and capricious rule is the concept that a lease is a contract, and as such, should be governed by the general contract principles of good faith).

increasingly recognize the duty of good faith and fair dealing inherent in every contract.[84] The lessor, therefore, having discretionary power by the contract, is obligated to exercise the power in good faith.[85] The minority courts, however, have imposed more than a duty of good faith; they have imposed an objective standard of commercial reasonableness.[86]

While at least one court has used the terms good faith and commercial reasonableness interchangeably,[87] others recognize a fine distinction between the terms.[88] The minority courts equate a general duty of good faith with a covenant not to unreasonably withhold consent.[89] These courts fail to recognize that the covenant not to unreasonably withhold consent may change the fundamental character of the bargain.[90] Unlike the good faith requirement, the reasonableness standard does not take into account genuine concerns peculiar to the particular lessor.[91] The lessor must accept an assignee if it is commercially reasonable to do so.[92] Reasonableness suggests objective

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84. *See supra* note 18.

85. California Lettuce Growers v. Union Sugar Co., 45 Cal. 2d 474, 484, 289 P.2d 785, 791 (1955).

86. *See generally* Levin, *supra* note 14, at 140. Levin asserts that the minority view "[e]rroneously equates implied good faith with an express covenant of reasonableness, failing to appreciate that an approval clause that has been qualified by an express covenant of reasonableness differs from an unqualified approval clause." *Id.* at 140. For a comment suggesting that reasonableness is a more rigorous and advantageous standard to apply than good faith, see Comment, *The Approval Clause, supra* note 14, at 694: "Under the objective standard of reasonableness, the whims of the lessor are rendered irrelevant."

87. *See, e.g.*, Fernandez v. Vasquez, 397 So. 2d 1171 (Fla. Dist. Ct. App. 1981) (holding that withholding of consent to assign lease, which fails tests of good faith and commercial reasonableness, constitutes breach of lease agreement).

88. *See* Comment, *The Approval Clause, supra* note 14, at 694-95. For an explanation of the distinction, see Levin, *supra* note 14, at 139. Levin stresses that the objective reasonableness standard imposes a substantially greater burden on landlords than what would be required of mere good faith since it does not permit contemplation of the specific concerns of a particular landlord. *Id.*

89. *See* Kendall v. Ernest Pestana, Inc., 40 Cal. 3d at 499, 709 P.2d at 844, 220 Cal. Rptr. at 825.

90. *See* Levin, *supra* note 14, at 140. Levin explains that the difference between an express covenant of reasonableness and the judicial implication of reasonableness into an unqualified approval clause "is that parties to a qualified approval clause intended what the clause states—that consent shall not be withheld *unreasonably*—and the term the parties used has an established meaning and concomitant objective test . . . ." *Id.* In contrast, parties to an unqualified approval clause had no such intent. *Id.*

91. *See* American Book Co. v. Yeshiva Univ. Dev. Found., Inc., 59 Misc. 2d 31, 35, 297 N.Y.S.2d 156, 158 (1969) (interpreting lease clause expressly requiring reasonableness and holding that reasonableness involves objective criteria which do not vary with the identity of the lessor). *See also* Levin, *supra* note 14, at 139.

92. *See* Funk v. Funk, 102 Idaho 521, 524-25, 633 P.2d 586, 589-90 (1981) (setting forth that the proper standard by which to review the lessor's refusal to consent, is one of a reasonable person in the position of the landlord). *See also* Kehr, *Lease Assignments: The Landlord's Consent*, 55 CAL. ST. B.J. 108, 114 (1980) (stating that it is hard to defend "a landlord's rejection of a proposed commercial assignee for any reasons other than objective commercial

considerations, which do not vary with the identity of the lessor.[93] In contrast, a requirement of subjective good faith allows for genuine concerns of a particular lessor.[94] The imposition of a requirement of good faith may satisfy many of the policy concerns of the minority courts, without significantly altering the agreement of the parties. For example, a lessor in good faith may not be able to withhold consent in order to charge more rent.[95] However, a subjective standard of good faith would probably still allow the lessor to act arbitrarily, according to commercial standards.[96]

The minority standard does not provide sufficient protection of the lessor's interests. The lessor alone is aware of his own particular needs regarding his property.[97] Even a "reasonable lessor" in the same situation may not share the same concerns.[98] The lessor's main reasons for the inclusion of a consent

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standards relating to its ability to fulfill the terms of the lease and use the premises in a lawful way . . . ."); Comment, *The Approval Clause, supra* note 14, at 688 (explaining that one weakness of the minority rule is that it allows the defaulting lessee to select his successor and the lessor must accept the proposed transferee if it is reasonable to do so).

93. *See* American Book Co. v. Yeshiva Univ. Dev. Found., Inc., 59 Misc. 2d 31, 36, 297 N.Y.S.2d 156, 162 (1969) (rejecting subjective criteria and explaining that doctrinal anathema cannot be the predicate of and rational law of landlord and tenant). In *Yeshiva,* the lease itself contained a provision that refusal to consent must be reasonable. Because the proposed lessee was Planned Parenthood, the lessor refused consent on philosophical and ideological inconsistencies between itself and the subtenant. *Id.* at 37, 297 N.Y.S.2d at 159. The court held that the consent refusal was unreasonable; "Landlords are not censors—their dominion is over realty, not ideas." *Id.* at 37, 297 N.Y.S.2d at 163.

For a discussion of the elusive standard of reasonableness, see Todres & Lerner, *Assignment and Subletting of Leased Premises: The Unreasonable Withholding of Consent,* 5 FORDHAM URB. L.J. 195 (1977). *See also supra* note 63.

94. *See* Levin, *supra* note 14, at 139 (contrasting good faith and reasonableness).

95. Such a refusal would be a violation of the discretionary power given to the lessor by the contract. *See* Kendall v. Ernest Pestana, Inc., 40 Cal. 3d at 501, 709 P.2d at 845, 220 Cal. Rptr. at 826 (but note *Kendall* did not differentiate between good faith and commercial reasonableness).

96. *See* Comment, *The Approval Clause, supra* note 14, at 694. "Under a subjective good faith standard, the lessor still has the power to arbitrarily reject a proposed transferee." *Id. But see* Levin, *supra* note 14, at 139 (suggesting that an imposition of subjective good faith would eliminate the abuses of arbitrary, capricious, or malicious conduct).

Whether a good faith requirement would prevent arbitrariness may depend on a court's definition of arbitrariness. *See* Bedford Inv. Co. v. Folb, 79 Cal. App. 2d 363, 366, 180 P.2d 361, 362 (where the court explained that an arbitrary act is one that is arrived at through the exercise of will or by caprice, supported by mere option or discretion, and not by a fair and substantial reason).

97. These particular interests of the lessor were one of the justifications for the common law's allowance of lease restrictions against assignment and consent approval clauses. The lessor was thought to have an exceptionally personal concern about who possessed the property in which he had a reversionary interest. *See* 2 POWELL ON REAL PROPERTY § 246(1) (1986) [hereinafter POWELL].

98. For example, consider the following hypothetical: Suppose the proposed assignee is financially stable, has an ongoing business, and his business would not require alteration of the premises. The proposed assignee, then, would be accepted by the theoretical commercially reasonable lessor. But suppose further that this particular lessor has a "nose for business,"

clause are to protect his investment, and to see that his tenants meet his particular standards and not necessarily the standards of the "reasonable lessor."[99] In the absence of a covenant requiring commercial reasonableness, the lessor is held to a good faith, subjective determination of consent.[100]

The second rationale of the minority position is that restraints on alienation should be unenforceable.[101] Relying on this principle, one minority court reasoned that because restraints are to be strictly construed so as to operate within their exact limits, the court should require the lessor to act reasonably.[102] Alternatively, it can be argued that a court should not be allowed to add terms to a contract.[103]

Furthermore, the common law has long provided that leases are an exception to the general rule against restraints on alienation.[104] Lease restraints were an exception because they gave the lessor control over the person entrusted with his property.[105] Consequently, the common law enforced covenants requiring the lessor's consent to assignment.[106] The minority courts

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and over the past 50 years, his business instincts have never proved wrong. When the lessor examined the proposed assignee's credentials, although the business appeared sound on paper, the lessor's good faith gut instinct warned him that this business would only be trouble. Having contracted for an absolute right to withhold consent, the lessor will be sorely surprised when a minority court imposes a standard of reasonableness into the lease. By operation of the standard of the "reasonable lessor," this particular lessor's refusal to consent will be deemed arbitrary, and he will be held to have breached the lease. *See* Cohen v. Ratinoff, 147 Cal. App. 3d 321, 330, 195 Cal. Rptr. 84, 89 (a breach by the lessor of his duty of reasonableness constitutes a breach of the lease agreement). For a discussion of the possibility that the minority courts may further disallow this particular lessor from expressly providing in the lease an absolute right to consent, see *infra* note 128 and accompanying text.

99. For a discussion of the concerns of the lessor, see Note, *Landlord-Tenant*, *supra* note 14, at 309 (endorsing the minority view).

100. If the lessor and lessee had intended that the lessor's consent was to be subject to a reasonableness standard, they could have included such a provision.

An express provision requiring reasonableness, in contrast to the judicially implied requirement, will be bargained for by the parties. The lessor is thus not compelled to give up his absolute right to withhold consent without some corresponding concession on the part of the lessee. *See* Levin, *supra* note 14, at 140 (parties to an unqualified approval clause had no intent to impose reasonableness). *See also* Shaker Bldg. Co. v. Federal Lime & Stone Co., 28 Ohio Misc. 246, 251, 277 N.E.2d 584, 587, 57 Ohio Op. 486, 489 (1971) (explaining that parties did contemplate that consent to assign would be given under certain circumstances although these circumstances were not specifically described in the general consent clause).

101. Chapman v. Great W. Gypsum Co., 216 Cal. 420, 426, 14 P.2d 758, 760 (1932). *See also* Chanslor-Western Oil & Dev. Co. v. Metropolitan Sanitary Dist., 131 Ill. App. 2d 527, 266 N.E.2d 405 (1970) (explaining that since the covenant restricted the lessee's freedom to sublet, the provision was to be construed most strongly against the lessor).

102. *Boss Barbara*, 97 N.M. 239 at 241, 638 P.2d 1084 at 1086.

103. *See, e.g.*, Herlou Card Shop, Inc. v. Prudential Ins. of Am., 73 A.D.2d 708, 422 N.Y.S.2d 708 (1979) (holding that since there was no express limitation in the lease that consent should not be unreasonably withheld, the court would not add terms).

104. POWELL, *supra* note 97, § 246(1) (1986).

105. *Id.*

106. THOMPSON, *supra* note 3, § 1205.

further the alienability of property by imposing reasonablenesss into an unqualified consent clause.[107] According to one scholar, such a strict adherence to the common law is paradoxical in the face of the modern trend of viewing a lease as predominantly contractual.[108]

The *Kendall* court failed to reconcile the restraint on alienation rule with the fundamental principle of control over property.[109] A lessor retains a significant reversionary interest in the property he leases.[110] The court in *Kendall* modified the extent of the leasehold estate conveyed by the lessor, by imposing a standard of reasonableness to the consent clause.[111] The lessor is required to convey a larger estate than he intended. While he intended to convey a leasehold estate which could not be assigned unless he approved, he is forced, by judicial construction, to convey a leasehold estate which may be freely assigned unless he can demonstrate a commercially reasonable objection.[112]

Along with the asserted legal rationales, strong public policy considerations lie beneath the court's decision in *Kendall*. California courts have formulated a "pro-tenant" philosophy even with regard to commercial tenants.[113] While

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107. There does not seem to be any reason why such a rationale would not apply also to express provisions allowing for unreasonableness. *See infra* note 128 and accompanying text.

108. Levin, *supra* note 14, at 133. *See also supra* note 65 (discussion of modern mitigation rules).

109. Of course, the lessee as well as the lessor, holds an interest in the property. The lessee's interest—the leasehold estate—however, is a nonfreehold estate. *See* MOYNIHAN, *supra* note 6, at 63.

110. POWELL, *supra* note 97, § 246(1).

111. *See, e.g.*, Funk v. Funk, 102 Idaho 521, 526, 633 P.2d 586, 591 (1981) (Bakes, C.J., dissenting) (explaining that the majority rule interferes with the traditional rules for conveying real property). *See supra* note 13.

112. The minority courts hence disregard the intent expressed in the lease. *See supra* note 11.

113. *See, e.g.*, Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974). In *Green*, the California Supreme Court held that the breach of an implied warranty of habitability in residential leases in California may be raised as a defense in an unlawful detainer action. *Green*, 10 Cal. 3d at 619, 517 P.2d at 1169-70, 111 Cal. Rptr. at 705. While the *Green* holding applies to residential leases only, the decision is nevertheless relevant to the *Kendall* analysis, because it evidences the pro-tenant philosophy of the California courts. The *Green* court held that the common law doctrine of caveat emptor must be set aside, because "[c]ontinued adherence to the time worn doctrine conflicts with the expectations and demands of contemporary landlord-tenant relationships . . . . " *Green*, 10 Cal. 3d at 620, 517 P.2d at 1170, 111 Cal. Rptr. at 706. The court chose to protect the tenant by implying a warranty of habitability, because of such policy considerations as the scarcity of adequate housing. *Id.* at 625, 517 P.2d at 1173-74, 111 Cal. Rptr. at 709-10. Note that the *Kendall* court's concern for the lack of available commercial space parallels the *Green* court's concern for the shortage of adequate residential space.

For an economic analysis of the recent changes in the landlord-tenant relationships, see Hirsch & Hirsch, *The Changing Landlord-Tenant Relationship in California: An Economic Analysis of the Swinging Pendulum*, 14 SW. U.L. REV. 1 (1983). The article discusses repair and deduct remedies, the implied warranty of habitability, and rent control, and concludes that "however well meaning the recent modifications in landlord-tenant relations may have been,

a commercial tenant may not be as disadvantaged by unequal bargaining power as a residential tenant,[114] a commercial tenant is adversely affected by an unreasonable refusal to consent, when commercial space is selling at a premium.[115]

The facts in *Kendall* also presented the court with good reason to sympathize with the tenant, who was harmed by a lessor's unreasonable withholding of consent. The lessor demanded a rent increase as a condition to consent to assignment.[116] Such a demand is certainly one of the least palatable reasons a lessor can give for withholding consent,[117] and the court was rightly concerned that the lessor should not be allowed to receive more rent than the amount bargained for with the original tenant.[118] Nevertheless, the court

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they at best helped tenants very little and at worst were counter-productive." *Id.* at 42. California courts have extended the pro-tenant rationale to the commercial context where policy concerns are arguably less compelling. Because the commercial lessor and lessee usually have relatively equal bargaining power, as contrasted with residential tenants and commercial lessors, there is less need for judicial protection in the commercial arena. For an explanation of how the pro-tenant rationale effects the law of California, in both the commercial and residential contexts, see Survey, *1984 California Courts of Appeal Survey—Landlord and Tenant Law,* 7 WHITTIER L. REV. 211 (1985). The article overviews the appellate court decisions and concludes that California courts have continued to emphasize and protect tenants' interests. *Id.* at 241.

114. *See generally* Levin, *supra* note 14, at 113 n.18. According to Levin, there are three distinctions between commercial and residential leases relevant to the consent issue: (1) the commercial tenant's right to assign is an object of value subject to bargaining; (2) residential leases are one-sided and not subject to such bargaining; and (3) the landlord has an increased concern with the identity of the commercial tenants because long-term market value is affected. *Id.*

Because of the increased concern for the unequal bargaining power of residential tenants, legislatures in Alaska, Hawaii, and New York have imposed a reasonableness standard into consent clauses. *See supra* note 21. *Compare* England's Landlord and Tenant Act, 1927, 17 & 18 Geo. 5, Ch. 36, § 19: A covenant against assignment without landlord's consent is deemed to provide that landlord's consent is not unreasonably withheld.

115. *See, e.g.,* Schweiso v. Williams, 150 Cal. App. 3d 883, 887, 198 Cal. Rptr. 238, 240 (1984) ("In recent times the necessity of permitting reasonable alienation of commercial space has become paramount in our increasingly urban society.").

116. Kendall v. Ernest Pestana, Inc., 40 Cal. 3d at 501, 709 P.2d at 844, 220 Cal. Rptr. at 826.

117. *See, e.g.,* Schweiso v. Williams, 10 Cal. App. 3d 883, 198 Cal. Rptr. 238 (1984) (referring to additional rent requests as blood money); Funk v. Funk, 102 Idaho 521, 633 P.2d 586 (1981) (finding no public policy served by allowing lessor to withhold consent for purely financial reasons). *See also* Bedford Inv. Co. v. Folb, 79 Cal. App. 2d 363, 180 P.2d 361 (1947) (finding, in the presence of clause requiring reasonableness, that it was not reasonable to deny consent in order to charge more rent). *But see* Herlou Card Shop, Inc. v. Prudential Ins. of Am., 73 A.D.2d 708, 422 N.Y.S.2d 708 (1979) (adhering to the majority rule and explaining that landlord was merely exercising his legal contractual rights in refusing to consent to assignment of lease unless lease was modified to increase rent).

118. Kendall v. Ernest Pestana, Inc., 40 Cal. 3d at 504, 709 P.2d at 848, 220 Cal. Rptr. at 829. According to the court, any increased value of the property belonged to the lessor only in the sense that the lessor's reversionary estate will benefit from it upon the expiration of the lease. *Id. See also* MILLER & STARR, CURRENT LAW OF CALIFORNIA REAL ESTATE § 27:92 (1977 & Supp. 1984). "The landlord agreed to dispose of possession for the limited term and he

failed to recognize that the lessor was not demanding that the tenant pay increased rent. The lessor had bargained for control over assignment, and he was simply exercising that control.[119]

If the traditional consent rule needs re-evaluation, the legislature is the more appropriate body to act.[120] The legislature, by applying an enactment prospectively, can avoid any undue harshness to lessors relying on previously drafted contracts.[121] While the California courts disagreed on the significance of the California legislature's implicit recognition of the majority rule in an unrelated statute,[122] none of the courts asserted that the legislature had directly addressed the issue. Perhaps *Kendall* will spark a legislative decision.

V. IMPACT

The essential question unresolved by the *Kendall* court is whether contract provisions which allow the lessor to withhold consent for any reason are still enforceable.[123] The court declined to decide this issue, but noted that the *Restatement* would allow such a provision if the provision was freely negotiated.[124] If the court allows commercial lessors to easily circumvent the

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could not reasonably anticipate any more than what was given to him by the terms of the lease. His reversionary estate will benefit from the increased value from the inflation in any event, at least upon the expiration of the lease." *Id.* at 321.

119. Thus the reason for his choice to exercise control is not relevant. *See* Herlou Card Shop, Inc. v. Prudential Ins. of Am., 73 A.D.2d 708, 422 N.Y.S.2d 708 (1979) (lessor exercising contractual right by refusing consent).

120. The decision to adopt the minority rule and abandon the majority rule calls for policy determinations more appropriate to a legislative body. It is not the role of the courts to balance pro-tenant policy factors against the legal rights of the lessors. *See* Kendall v. Ernest Pestana, Inc., 40 Cal. 3d at 510, 709 P.2d at 852, 220 Cal. Rptr. at 833 (Lucas, J., dissenting) (suggesting deference to the legislative branch); Funk v. Funk, 102 Idaho 521, 526, 633 P.2d 586, 591 (1981) (Bakes, C.J., dissenting) (asserting that the proper forum for such changes is the legislature).

121. *See* Funk v. Funk, 102 Idaho 521, 526, 633 P.2d 586, 591 (1981) (Bakes, C.J., dissenting) (expressing concern with leases already prepared in reliance upon the majority viewpoint); Gruman v. Investors Diversified Serv., 247 Minn. 502, 78 N.W.2d 377 (1956) (adhering to the majority rule). The *Gruman* court explained that "[m]any leases now in effect covering a substantial amount of real property and creating valuable property rights were carefully prepared by competent counsel in reliance upon the majority viewpoint." *Id.* at 509, 78 N.W.2d at 381.

122. *See supra* note 69 and accompanying text.

123. Kendall v. Ernest Pestana Inc., 40 Cal. 3d. at 500 n.14, 709 P.2d at 844 n.14, 220 Cal. Rptr. at 825 n.14. This case does not present the question of the validity of a clause absolutely prohibiting assignment, or granting absolute discretion over assignment to the lessor. *Id.*

124. *See* RESTATEMENT (SECOND) OF PROPERTY § 15.2(2) (1977): "A restraint on alienation without the consent of the landlord of a tenant's interest in leased property is valid, but the landlord's consent to an alienation by the tenant cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent." *Compare* section 15.2 to the tentative draft of the RESTATEMENT, section 14.2, which did not permit the lessor to act arbitrarily under any circumstances.

reasonableness standard imposed by the *Kendall* holding, the impact of *Kendall* may be narrow. Drafters will simply revise their leases to include such express provisions, subject only to the *Restatement's* requirement that the provision be freely negotiated.[125]

Despite the possibility of a narrow reading of *Kendall,* such an interpretation would be difficult to reconcile with the court's reasoning for requiring the new standard.[126] After all, the tenant who agrees to an express provision allowing for unreasonableness is not really any different than the tenant who agrees to a general consent provision, considering that the majority of courts interpret such a provision to include unreasonableness.[127] The reasons behind the *Kendall* court's holding are equally as applicable to explicit contract provisions allowing for unreasonableness as they are to general provisions for consent.[128] For example, the concern for reasonable alienation of leases, because of the shortage of commercial space,[129] is germane to both an explicit and an implicit allowance for an unreasonable refusal to consent. In either situation, the lessors' unreasonable actions add to the shortage of commercial space. Second, since the court asserted that it was following the trend of requiring good faith in contracts,[130] the court could have held that similar to the Uniform Commercial Code,[131] parties may not eliminate the require-

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125. Under the RESTATEMENT, if the lease provisions were not fairly bargained for, the lessor cannot unreasonably withhold consent, even if the lease provided for the absolute right to withhold consent. *See* Comment, *The Right to Sublease,* 53 TUL. L. REV. 556 (1979). "Thus, where the lease is an adhesion contract, a lessor may not unreasonably refuse a sublease even if the lease explicitly so provides. Without this rule, form leases would be amended to give the lessor the explicit right to refuse a sublease unreasonably." *Id.* at 561.

The Comment further suggests that section 15.2 of the RESTATEMENT requires even an absolute prohibition of subleases to be freely negotiated in order to be valid.

"If the Restatement was interpreted not to govern such restrictions, lessors could achieve precisely the power that its provisions attempted to regulate. A lessor, wishing to reserve the right to unreasonably refuse a sublease without having to negotiate such a provision freely, could absolutely forbid subletting . . . [and] then waive the provision for any reason he chose. *Id.* at 561.

126. *See supra* notes 52-74 and accompanying text (rationale of the *Kendall* holding).

127. Based on the lease provisions, both tenants knew, or at least constructively knew, of the lessor's right to withhold consent. Kendall v. Ernest Pestana, Inc., 40 Cal. 3d at 493-94, '09 P.2d at 840, 220 Cal. Rptr. at 821.

128. *See* Kehr, *Lease Assignments: The Landlord's Consent,* 55 CAL. ST. B.J. 108 (1980) (asserting that the policy rationale behind the minority rule should be extended to express provisions allowing for unreasonableness). *See also* Funk v. Funk, 102 Idaho 521, 526, 633 P.2d 586, 591 (1981) (Bakes, C.J., dissenting). Chief Justice Bakes asserted that while it is not clear whether lessors will have the right to contract for an absolute right to withhold consent, the broad language of the majority opinion suggests that even that provision would violate its "public policy." *Id.*

129. *See supra* note 115 and accompanying text.

130. Kendall v. Ernest Pestana, Inc., 40 Cal. 3d at 500, 709 P.2d at 844, 220 Cal. Rptr. at 825.

131. *See* section 1-102 of the Uniform Commercial Code (the obligation of good faith prescribed by the Act may not be disclaimed by agreement). Section 1-203 of the UCC imposes an obligation of good faith in the performance of every contract. Note, of course, that the UCC deals only with the sale of goods, and does not bear directly on the lease issue.

ment of good faith. The court adopted the minority position because of the conviction that a standard of commercial reasonableness was necessary. Furthermore, an express contractual allowance for unreasonable withholding of consent is just as much an unreasonable restraint on alienation as a general provision, permitting the lessor's refusal to consent for any reason. In both contexts, the lessee is denied freedom to assign based on the lessor's commercially unreasonable objections.

The *Kendall* court's rationales cannot be reconciled with the allowance of contract provisions providing for the absolute right to deny consent. Consequently, the future impact of the decision may be extensive. A lessor may never be able to withhold consent, except for a commercially reasonable objection, regardless of the parties' intent. Of course, such a result may not be disadvantageous to commercial lessees. However, the same result could be achieved without violating contract principles, by an express provision in the contract prescribing reasonableness.[132] Consequently, the lessor and lessee would have to negotiate the provision, and the agreed-upon provision would then indicate the express intent of the parties. By requiring reasonableness even without an express provision, the court subjects all lessor consent refusals to a judicial review of reasonableness.[133]

The phrase "unreasonable withholding of consent," whether imposed by contract or judicial interpretation, is neither well established nor generally known.[134] The term, as it has been used in express contract provisions denying an unreasonable refusal to consent, has been the subject of much litigation.[135] Many courts have not attempted to define the phrase, and many of those which have attempted to define the phrase, have used vague generalities.[136] Because the standard has not been delineated extensively in case law, a lessor may not know whether his reason for withholding consent is commercially reasonable until the lessee takes him to court. Furthermore, the concept of reasonableness, as with all reasonableness standards in the law, is subject to change over time and change in circumstances.[137]

The courts have not explicitly defined the term because the application of the standard makes generalization difficult. The outcome of each case is dependent on the facts involved, and as one scholar explained, "The situation is further complicated by viewing each piece of real property as unique."[138] The courts have established a list of objective factors to consider when

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132. *See, e.g.,* Segre v. Ring, 103 N.H. 278, 280, 170 A.2d 265, 266 (1961) (asserting that the parties could have qualified the consent clause in any number of ways).

133. *See supra* note 76.

134. For a discussion of the evasive standard, see Todres & Lerner, *supra* note 93.

135. Chanslor-Western Oil & Dev. Co. v. Metropolitan Sanitary Dist., 131 Ill. App. 2d 527, 529, 266 N.E.2d 405, 407 (1970).

136. For treatment of the standard, see American Book v. Yeshiva Univ. Dev. Found., 59 Misc. 2d 31, 297 N.Y.S. 156 (1969) (listing the objective criteria to apply to a contract provision requiring reasonableness). *See supra* note 63.

137. FREIDMAN, *supra* note 6, § 7.304c.

138. Todres & Lerner, *supra* note 93 at 199.

determining commercial reasonableness. Such factors include: (1) the financial responsibility and business character of the proposed assignee; (2) the legality of the proposed use; (3) the need for alteration of the premises; and (4) the general nature of the occupancy.[139] Examining the *Kendall* facts, it is reasonably clear that a landlord cannot make his consent conditional on increased payment.[140] Future facts, however, may not lend themselves so readily to judicial determination.

The impact of the *Kendall* decision on commercial lessors in California may be unduly severe, since the court applied the adopted rule retroactively.[141] Parties may have drafted a lease in reliance on the majority rule which allows a lessor to withhold consent for any reason with an unqualified consent clause. The lessor's right to withhold consent for any reason may have been an important element in the commercial bargain.[142] By applying the rule retroactively, the *Kendall* decision changed the nature of the contract to the detriment of the lessor.[143]

By adopting the minority view, the California Supreme Court evidenced the growing dissatisfaction with the traditional consent rule. The supreme courts in New Mexico,[144] Idaho,[145] and Alaska[146] have also expressed dissatisfaction with the majority rule. Appellate courts in Illinois,[147] Florida,[148] and Alabama,[149] along with lower courts in Massachusetts[150] and Ohio,[151] have applied the minority rule. However, some of the authorities have

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139. Fernandez v. Vasquez, 397 So. 2d 1171, 1174 (Fla. Dist. Ct. App. 1981). *See also* American Book v. Yeshiva Univ. Dev. Found., 59 Misc. 2d 31, 597 N.Y.S. 156 (1969) (listing objective criteria).

140. FREIDMAN, *supra* note 137, at 196. *See also* Bedford Inv. Co. v. Folb, 79 Cal. App. 2d 363, 180 P.2d 361 (1947) (not reasonable to deny consent in order to charge more rent).

141. The retroactive effect of the minority rule has been severely criticized. *See, e.g.*, Justice Bloodworth's dissent in Homa-Goff Interiors, Inc. v. Cowden, 350 So. 2d 1035, 1039 (Ala. 1977) (Bloodworth, J., dissenting) ("To overturn a century and a quarter of existing real estate law without giving contracting parties fair notice' is my principal complaint . . . . ")

142. *See, e.g.*, Hamilton v. Dixon, 168 Cal. App. 3d 1004, 1009, 214 Cal. Rptr. 639, 642 (1985) (adhering to the minority rule, to enforce the lessor's bargained-for rights and the reasonable expectations of the parties).

143. *See, e.g.*, Funk v. Funk, 102 Idaho 521, 526-27, 633 P.2d 586, 591-92 (1981) (Bakes, J., dissenting) (criticizing the majority for modifying the extent of the lease conveyed). *See supra* notes 107-12 and accompanying text.

144. *See* Boss Barbara, Inc. v. Newbill, 97 N.M. 239, 638 P.2d 1084 (1982).

145. *See* Funk v. Funk, 102 Idaho 521, 633 P.2d 586 (1981).

146. *See* Hendrickson v. Fredricks, 620 P.2d 205 (Alaska 1980).

147. *See* Jack Frost Sales v. Harris Trust & Sav. Bank, 104 Ill. App. 3d 933, 433 N.E.2d 941 (1982); Arrington v. Walter E. Heller Int'l Corp., 30 Ill. App. 3d 631, 333 N.E.2d 50 (1975).

148. *See* Fernandez v. Vasquez, 397 So. 2d 1171 (Fla. Dist. Ct. App. 1981).

149. *See* Homa-Goff Interiors, Inc. v. Cowden, 350 So. 2d 1035 (Ala. 1977).

150. *See* Granite Trust Bldg. Corp. v. Great Atlantic & Pacific Tea Co., 36 F. Supp. 77 (D. Mass. 1940) (uncertain authority).

151. *See* Shaker Bldg. Co. v. Federal Lime & Stone Co., 28 Ohio Misc. 246, 277 N.E.2d 584 (1971).

combined the consent issue with the mitigation issue in their determinations,[152] or have permitted subjective factors to be considered in the reasonableness standard.[153] Nevertheless, a growing trend exists in support of the minority rule.[154] Because the minority rule is usually applied retroactively,[155] leases currently drafted in reliance on the majority rule may someday be interpreted by a newly-proclaimed minority court.

VI. CONCLUSION

The *Kendall* court held that a commercial lessor may not withhold consent to an assignment absent a commercially reasonable objection.[156] The court relied on the dual rationale of the contractual duty of good faith and the rule against unreasonable restraints on alienation. The court neglected, however, the fundamental principles of freedom to contract, as well as freedom to control one's property. Historically, courts have exempted leases from the strict rules against restraints on alienation.[157] Furthermore, the *Kendall* court did not distinguish an implied reasonableness standard from a duty of good faith. The most important question left open by *Kendall* is whether an unreasonable consent allowance can be drafted into commercial leases. The rationale of the *Kendall* decision suggests that this would not be allowed, in which case the impact of the decision may be extensive.

In the absence of legislative direction, the most appropriate course for the courts to follow is to reaffirm the majority rule. While the policy considerations underlying the minority rule are persuasive, the majority rule rests on established contract and property principles. If the minority rule is to be adopted, the state legislature is the appropriate body to act. Most importantly, the rule, if adopted by the courts, should be applied prospectively.

Lynn Hayner

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152. *See, e.g.*, Shaker Bldg. Co. v. Federal Lime & Stone Co, 28 Ohio Misc. 246, 277 N.E.2d 584 (1971) (mixing the discussion of assignability and mitigation). *See also* Levin, *supra* note 65 (noting judicial confusion where courts have failed to distinguish between the issues of mitigation and consent).

153. *See, e.g.*, Arrington v. Walter E. Heller Int'l Corp., 30 Ill. App. 3d 631, 333 N.E.2d 50 (1975) (varying the reasonableness standard).

154. *See supra* note 4.

155. *See supra* note 121 and accompanying text.

156. Kendall v. Ernest Pestana, Inc., 40 Cal. 3d at 506, 709 P.2d at 849, 220 Cal. Rptr. at 830.

157. *See supra* note 82 and accompanying text.