

9 Landlord and Tenant

The distinguishing feature of a leasehold interest is the right to exclusive possession and use of real property, for a fixed period of time, held by the lessee (or “tenant”). The lessor (or “landlord”), having parted with this right to exclusive possession, merely holds the basic title (the “reversion”) during the existence of the lease. Hotel guests, licensees and employees may all be privileged to use a given space under certain contractual conditions, but since none of these has an exclusive right to possession, they are not governed by the laws regulating the relationship of landlord and tenant.

A leasehold estate itself is *chattel real*. Although the lessee has an estate/interest in real property, the estate is in fact a form of personal property, governed by laws applicable to personal property.

Types of Leasehold Estates

Most authorities classify leases into four categories, based on the lease term:

- Estate for years;
- Estate from period to period (periodic tenancy);
- Estate at will; and
- Estate at sufferance.

Estate for years. An *estate for years* is one which is to continue for a definite period fixed in advance by agreement between landlord and tenant. The name is somewhat misleading because the period may be for less than a year, measured in specific days, weeks, or months.

Estate from period to period. An *estate from period to period* (or periodic tenancy) is one which continues for periods of time (typically year-to-year, month-to-month, or week-to-week) as designated by landlord and tenant in their agreement. The most common periodic tenancy is the month-to-month tenancy.

Estate at will. An *estate at will* is one which is terminable at the will or unilateral decision of either party with no designated period of duration. Tenancies at will are uncommon because the landlord’s acceptance of periodic rents causes the tenancy to be treated like a periodic tenancy (Civil Code Section 1946). By statute, California and certain other states have modified the potentially summary and abrupt conclusion of such estates to require advance 30-day notice of termination by either party.

Estate at sufferance. An *estate at sufferance* is one in which the tenant who has rightfully come into possession of the land retains possession after the expiration of the term. For example, a tenant who holds over after the expiration of a lease would be deemed to be holding an estate at sufferance.

Dual Legal Nature of Lease

A lease is an oral or written agreement that creates and governs, by express or implied terms, a landlord-tenant relationship. A lease has two characteristics, each of which has its own set of rights and obligations:

1. a conveyance by the landlord to the tenant of an estate in real property covering the premises leased (which creates “privity of estate” between the landlord and tenant); and
2. a contract between the landlord and tenant which governs both the landlord’s delivery and maintenance of the premises and the tenant’s possession of, use of, and payments for the premises (which creates “privity of contract” between the landlord and tenant).

Verbal and Written Agreements

A lease with a term of one year or less may be created by verbal agreement. However, for the sake of clarity and to reduce the risk of disagreement (both during the lease term *and* after tenant’s surrender of the premises), all leases, even those with month-to-month terms, should be reduced to written form.

California’s Statute of Frauds requires a lease to be in writing if it either:

1. has a term longer than one year; or
2. has a term less than one year which expires more than one year after the agreement is reached.

An example of a lease with a term of less than one year that must be in writing is a lease for a ten month term that begins three months from the date when an agreement is reached. Although one might automatically assume

that the lease would not need to be in writing since it is for a term of less than one year, the contractual relationship (which will exist during the three month “pre-tenancy” period *and* the ten month term of lease) will actually be maintained for thirteen months.

Unwritten leases that are for a term of longer than one year or that expire more than one year after the agreement is reached are unenforceable. If a tenant enters into possession under an unenforceable lease, the tenant becomes a tenant at-will.

Lease Ingredients

No particular words, form, or language are required to create an oral or written lease. However, the words used must:

1. evidence the landlord’s and tenant’s intent to create a landlord-tenant relationship (which intent is apparent from either the parties’ acts or deeds, or the language of a written agreement);
2. identify the parties;
3. describe the premises leased;
4. specify the time, amount, and manner of rental payments; and
5. establish a definite term.

Contract and Conveyance Issues

In light of its dual character of being a contract and a conveyance, an enforceable lease must satisfy specific laws with respect to:

1. the creation and interpretation of a contract; and
2. the prerequisites for the transfer of an interest in real property.

Contract specifics. The general rules regarding the creation of a lease (and contract), in addition to those governing whether or not there must be a writing, include:

1. mutual assent of landlord and tenant (i.e., an offer and an acceptance);
2. mutuality of obligation (i.e., neither party may have an unrestricted right to withdraw from the lease);
3. legal capacity of each party to contract (which, in general, excludes minors, persons of unsound mind, and persons deprived of their civil rights); and
4. lawful object (e.g., use does not violate health and safety regulations or criminal statutes). Although a lease may, indeed, have a lawful object, specific provisions within the lease may be deemed against public policy and therefor void. For example, residential leases that waive tenant procedural rights (such as the right to receive a notice of default) or rights regarding security deposits; or waive any future course of action against the landlord.

As a contract, a written lease is construed according to the intent of the parties, as gathered from the language of the lease and the performance of the parties under the lease, and in accordance with the rules of interpretation of contracts. Furthermore, like other written contracts, the executory (yet to be performed) provisions of a written lease may not be orally modified. Rather, such provisions must be modified in a writing signed by all parties to the original lease. To the extent that the parties mutually agree to modify the lease with respect to fully performed lease obligations, such modifications become *executed* modifications of the lease. When a lease is negotiated in Spanish and is for a residential unit, the lease must be written in Spanish.

Execution, delivery and acceptance. In general, a written lease must be executed, delivered, and accepted before it may be enforced according to its express terms. However, a lease signed and delivered by the landlord is enforceable by the tenant even if the tenant fails to sign the lease. On the other hand, if the tenant takes possession of the premises or pays the stipulated rent, having still failed to sign the lease, the tenant’s acceptance of the landlord’s delivery of the executed lease and premises is presumed and the landlord may then enforce the lease provisions against the tenant. The lease must be fully executed, however, before the landlord may enforce the lease’s special contractual covenants (e.g., a covenant to repair) against the tenant.

Recording. A lease (or memorandum thereof summarizing key provisions) may be recorded in the official public records of the county in which the leased premises are situated. However, even an unrecorded lease is enforceable between the parties and against any party who, with notice of the tenant’s interest, receives an

interest in the property in which the premises are situated. If a lease term exceeds one year and the lease is not properly recorded, and if the tenant's possession under the lease does not give a bona fide purchaser notice of the tenant's on-going tenancy, that tenancy becomes subject (and subordinate) to the bona fide purchaser's interest in the leased premises.

Rights and Obligations of Parties to a Lease

A number of matters should be considered before entering into a lease agreement. Many of these are relatively unimportant in an oral month-to-month tenancy, but become increasingly important in the case of written leaseholds for a longer period of time. Since these subjects are each covered in considerable detail by contract provisions of the instrument, each written lease must be studied to determine the rights and obligations of the parties involved. Some of the more important aspects of a lease are:

1. term of lease;
2. rent;
3. security deposit;
4. possession, maintenance, and improvements;
5. liability of parties for injuries resulting from condition of premises;
6. transfer of interest in leased premises;
7. special covenants, conditions and provisions; and,
8. termination.

Term of lease. The lease term is that period of time during which the tenant may occupy the premises. Since the lease term is an essential element of a lease, if the lease fails to specify its term, a specific period of time will be implied as a matter of law, and the length of that period of time hinges on the nature of the lease and the circumstances surrounding it.

A lease term need not commence with full execution of the lease, and it ordinarily is based on a fixed or computable period. On some occasions, however, the length of a tenancy is either:

1. conditioned on the occurrence of an event which may trigger the commencement of the lease term, terminate the lease term, or both; or
2. based on the life of the landlord.

A common example is a term which commences upon the landlord's completion of certain improvements to the premises and/or delivery thereof to the tenant. If, however, a lease is to commence upon the occurrence of a future event, the lease becomes invalid if the term does not commence within 30 years of full execution of the lease.

Where the parties fail to specify the lease term, the term is determined in accordance with the following statutory presumptions, each of which applies to a certain type of rental property:

1. For lodgings, dwelling-houses, and residential properties, the period of time adopted for the payment of rent. For example, if rental payments are due on a monthly basis, the lease term is equal to one month. If the lease fails to address the period adopted for rental payments, the tenancy is presumed to be for one month. (Civil Code Section 1944).
2. For agricultural or grazing properties, one year.
3. For all other properties where there is no custom or usage on the subject, the tenancy is for one month unless otherwise designated in writing. (Civil Code Section 1943).

Even if the landlord and tenant do specify a lease term or the term is implied by statute, the following statutory restrictions will supersede and limit the lease term:

1. A lease for agricultural or horticultural purposes cannot have a term exceeding 51 years.
2. A lease for any town or city lot cannot have a term exceeding 99 years.
3. A lease of land for the production of minerals, oil, gas, or other hydrocarbon substances cannot have a term exceeding 99 years.

4. A lease of property owned by an emancipated minor or an incompetent person cannot have a term longer than a probate court may authorize.

A *lease renewal* creates a new and distinct tenancy. Accordingly, the parties should execute an entirely new instrument.

A *lease extension* is a continuation in possession under the original lease. A lease extension may also occur if the tenant holds over with permission from the landlord. Indeed, if a tenant remains in possession of the premises after expiration of the lease term and the landlord accepts rental payments, the parties are presumed to have renewed the lease on the same terms and conditions on a month-to-month basis if rent is payable monthly, and in no event longer than one year.

A contractual right to extend or renew a lease is an irrevocable offer by the landlord to lease the premises in the future on specific terms. Such a right to extend or renew a lease is within the Statute of Frauds and, therefore, if the original lease is covered by the Statute of Frauds or if the lease, as extended, would be covered by the Statute of Frauds, the renewal or extension must be in writing to be enforceable.

To be enforceable, lease provisions for the extension or renewal of a lease must be reasonably specific and contain all of the material terms. A provision on terms “to be mutually agreed upon” is generally unenforceable. An unexercised option to extend the term for a specified period does not create a property right until it is exercised unequivocally and in strict accordance with its terms. Whether specified in the lease or not, an option hinges on the continued viability of the lease and must be exercised prior to expiration or earlier termination of the lease. A lease that is limited to the hiring of residential real property and provides for an automatic renewal or extension of the lease if the tenant either remains in possession after lease expiration or fails to give notice of intent not to renew, is voidable by the party who did not prepare the lease. Provided, however, that such a lease is valid if, in a printed lease, the automatic renewal clause is printed in 8-point boldface type and a recital of inclusion of the automatic renewal clause appears in 8-point boldface type immediately above the signature line.

Rent. Rent is the consideration paid for possession, use, and enjoyment of leased property. A tenant’s obligation to pay rent arises from either the express terms of a lease (privity of contract) or a tenant’s mere occupancy of the premises where no gift is intended (privity of estate).

Through privity of contract, a tenant is bound by a covenant to pay rent even if the tenant never enters into possession of the premises. Through privity of estate, even if a lease does not specify the terms for payment of rent, an obligation to pay rent arises out of a tenant’s occupancy of the premises (again, assuming no gift is intended).

Since, by statute, the term “rent” includes “charges equivalent to rent,” rental payments need not be paid in currency (unless otherwise specified in the lease), but may be made in the form of goods, crops, and any other product or other consideration agreed upon by the parties.

Unless there is either a course of dealing between the parties or a lease provision to the contrary, rental payments are due at the end of each successive holding period or term (e.g., at the end of the day, week, month, quarter, or year). In addition, in the absence of any lease provision to the contrary, rental payments must be delivered to the demised premises. Most commercial and residential leases, however, specifically provide for payment of rent in advance of the period covered by such payment and provide for payment of rent to a specific address.

Rent paid by check constitutes payment of rent conditioned on the landlord presenting the check to the drawee bank, and the tenant’s obligation to pay rent is merely suspended until the check is presented to the drawee bank. If, however, the tenant knows that there are insufficient funds to honor the check at the time of delivery to the landlord, the tenant’s obligation to pay rent is not suspended and the landlord may, immediately after the rent is due, sue for the payment of rent or commence eviction proceedings. In addition, although the landlord is liable for any loss caused by its delay in presenting a rental check to the drawee bank, the landlord’s acceptance of a rental payment by check does not prejudice its right to sue for collection of rent or to evict the tenant for failure to pay rent.

A *late charge* is enforceable by the landlord if the amount specified in the lease is reasonably related to the landlord’s anticipated administrative costs and loss of interest caused by the late payment. However, since

forfeiture of a lease is a drastic remedy, when a lease does provide for a late charge the landlord may not have the right to terminate the lease solely because of a late rental payment.

In general, rent that is paid in advance is due on a specific date and is not apportionable. However, if, after prepayment of rent, the lease is terminated due to the fault of the landlord (thereby causing a “constructive eviction”), or if the lease provides for apportionment of rent, the rule against apportionment is inapplicable. If rent is not prepaid and the lease is terminated prior to the expiration of the term, the tenant is liable for that portion of the rent due for the time during which the tenant had the right to occupy the premises.

Unless otherwise specified in the lease or unless terminated prior to the expiration of the lease term (for example, due to complete destruction or condemnation of the premises, or the tenant’s death), a tenant must pay rent throughout the term of the lease and thereafter until the tenant returns possession of the premises to the landlord. If the tenant tenders possession of premises to the landlord upon the expiration of the lease, the tenant’s rental obligation terminates at that time.

A tenant’s obligation to pay rent is generally deemed an “independent” lease obligation: i.e., independent of the landlord’s lease obligations to the tenant. Therefore, even if the landlord fails to honor its lease obligations (e.g., fails to perform its maintenance obligations), the tenant must continue to pay rent according to the provisions of the lease.

In contrast, if the landlord breaches a material covenant of the lease, the tenant’s obligation to pay rent may be abated or terminated. For example, in a residential lease, if the landlord fails to honor the implied warranty of habitability (which is deemed so material that it cannot be waived by the tenant), the tenant is deemed constructively evicted and may remain in possession and abate rental payments in proportion to the impairment of use and enjoyment of the premises. In addition, if a residential or commercial tenant is actually or constructively evicted from the premises as a result of events not caused by the tenant, such as partial condemnation or lack of access to the premises (and assuming that the risk of such occurrence is not allocated to the tenant in the lease), the tenant’s rental obligations terminate if (and only if) the tenant vacates the premises.

Generally, if the leased premises are taken by government power or eminent domain, the lease will be terminated as of the date of taking (unless the lease specifically provides otherwise), and the tenant’s obligation to pay rent would cease. However, if only a portion of the leased premises is taken and the remaining portion is still usable for the purpose for which it was leased, the tenant may still be obligated to continue to pay rent according to the terms of the lease agreement. Thus, it may be advisable for the parties to provide in the lease for a proportional abatement of rent if the leased premises are partially taken; and to specify what portion of the premises (e.g., 50%), if taken, will constitute a complete taking and terminate the tenant’s obligation to pay rent.

Security deposit. A security deposit secures a tenant’s performance of lease obligations. It constitutes assurance to the landlord that, in the very least and to the extent of the security deposit, the tenant’s monetary obligations will be satisfied.

Although a security deposit is generally cash deposited with the landlord, other forms are often used in commercial transactions: letters of credit and certificates of deposit. In addition, a security deposit may generally be categorized pursuant to the terms of the lease as:

1. prepaid rent (generally for rent payable at the end of the term);
2. a forfeitable security deposit (forfeited in its entirety upon a tenant default specified in the lease);
3. a non-forfeitable security deposit (refunded at the end of the term, less debits attributable to specified tenant defaults); or
4. a bonus for lease execution (non-refundable).

In any event, a security deposit is held by the landlord for the benefit of the depositing tenant, and a tenant’s claim to the security deposit has priority over claims of all the landlord’s creditors except a trustee in bankruptcy.

In a residential lease, notwithstanding the specific terminology (e.g., “advance payment,” “fee,” or “charge”) or the purpose designated (e.g., a “cleaning” or “security” deposit) used to describe a tenant’s monetary deposit to secure performance under the lease, the money deposited is a refundable security deposit. Any purported waiver

by a tenant of the right to a refund of the security deposit (less allowable debits attributable to the tenant's defaults as specified in the lease) is null and void.

A landlord may require that the tenant pay, regardless of the purpose therefor and in addition to the first month's rent, a maximum of:

- two months' rent in the case of an unfurnished residential property;
- three months' rent in the case of a furnished residential property.

If, however, the term of the lease is six months or longer, the landlord is not prohibited from collecting an advance payment of not less than 6 months rents.

These limitations do not preclude the landlord and tenant from entering into a mutual agreement for the landlord, at the request of the tenant and for a specified fee or charge, to make structural, decorative, furnishing, or other similar alterations, if the alterations are other than cleaning or repairing for which the landlord may charge the previous tenant as provided by Civil Code Section 1950.5 (e).

Within three weeks after a tenant vacates and surrenders the premises, but not earlier than the time that either the landlord or the tenant provides a lawful notice to terminate the tenancy or not earlier than 60 calendar days prior to the expiration of a fixed-term lease, the landlord must furnish the tenant, by personal delivery or by first class mail, postage prepaid, a copy of an itemized statement indicating the basis for, and the amount if, any security received and the disposition of the security and must return any remaining portion of the security to the tenant. Along with the itemized statement, the landlord must also include copies of documents showing charges incurred and deducted by the landlord to repair or clean the premises, as detailed by Civil Code Section 1950.5.

If the landlord sells the residential property or transfers its interest in the premises, the landlord may transfer the security deposit (less any lawful deductions) to the new landlord. In the event of any such transfer, the landlord must (by personal delivery or first-class mail, postage prepaid) give the tenant written notice specifying the amount of the transfer, itemizing the deductions, and identifying the successor landlord by name, address, and telephone number. Alternatively, the landlord may return the security deposit to the tenant, less any lawful deductions, with a statement itemizing the deductions therefrom. The successor residential landlord has the same rights and obligations with respect to a security deposit as the original landlord.

The existence of a security deposit creates a debtor/creditor relationship between the landlord and tenant. Consequently, the landlord has a personal obligation to return the security deposit (less any lawful deductions). If the original landlord fails to satisfy either statutory alternative set forth immediately above, both the original landlord and the successor landlord remain personally liable to the tenant for the amount of the deposit (less any lawful deductions).

If the landlord retains any portion of the deposit in bad faith, the landlord is liable for actual damages, along with possible statutory penalty of up to twice the amount of the security. A court may award to the tenant damages for bad faith whenever the facts warrant such an award.

The law governing commercial property security deposits is less onerous to landlords in each of the following material respects (and is otherwise similar to that governing residential property security deposits):

1. The landlord may claim of the payment or deposit only those amounts as are reasonably necessary to remedy tenant defaults in the payment of rent, to repair damages to the premises caused by the tenant, or to clean the premises upon termination of the tenancy, if the payment or deposit is made for any or all of those specific purposes.
2. If the claim of the landlord upon the payment or deposit is only for the defaults in the payment of rent and the security deposit equals no more than one month's rent plus a deposit amount clearly described as the payment of the last month's rent, then any remaining portion of the payment or deposit must be returned to the tenant at a time as may be mutually agreed upon by the landlord and tenant, but in no event later than 30 days from the date the landlord receives possession of the premises.
3. If the claim of the landlord upon payment or deposit is only for defaults in the payment of rent and the security deposit exceeds the amount of one month's rent plus a deposit amount clearly described as the payment of the last month's rent, then any remaining portion of the payment or deposit in excess of an amount equal to one month's rent must be returned to the tenant no later than two weeks after the date the

landlord receives possession of the premises, with the remainder to be returned or accounted for within 30 days from the date the landlord receives possession of the premises.

4. If the landlord in bad faith fails to return the security deposit in a timely manner, the statutory penalty is \$200, in addition to any actual damages.
5. If the claim of the landlord upon the payment or deposit includes amounts reasonably necessary to repair damages to the premises caused by the tenant or to clean the premises, then any remaining portion of the payment or deposit must be returned to the tenant at a time as may be mutually agreed upon by landlord and tenant, but in no event later than 30 days from the date the landlord receives possession of the premises.

Possession, maintenance and improvements. In a *commercial lease*, the landlord's right of entry to perform maintenance obligations should be set forth in the lease. If not, a landlord would likely be permitted access to the premises to perform obligations under the lease, following reasonable advance notice.

In contrast, a landlord may enter premises rented to a residential tenant only in specific situations, at certain times, and after giving (or attempting to give) advance notice.

Specifically, a landlord may enter a dwelling unit only:

1. in case of emergency;
2. to make necessary or agreed repairs, decorations, alterations, or improvements;
3. to supply necessary or agreed services;
4. to show the dwelling to prospective or actual purchasers, mortgagees, tenants, workers, or contractors;
5. where the tenant has abandoned or surrendered the premises; or
6. pursuant to court order.

A landlord may not abuse the right of access or use it to harass the tenant. Any purported waiver or modification by tenant of the statutory protection in this regard is null and void.

Except for cases of emergency, unless the tenant has abandoned or surrendered the premises or the tenant is present and consents at the time of entry, a landlord may only enter the dwelling unit during normal business hours. Unless it is impracticable to do so, the landlord must give the tenant reasonable notice of intent to enter the premises. Twenty four hours advance notice is presumed to be reasonable absent evidence to the contrary.

If the purpose of the entry is to exhibit the dwelling unit to prospective or actual purchasers, the notice may be given orally, in person or by telephone, if the landlord or his or her agent has notified the tenant in writing within 120 days of the oral notice that the property is for sale and that the landlord or agent may contact with the tenant orally for the purpose described in the statute. Twenty-four hours is presumed reasonable notice in the absence of evidence to the contrary. The notice must include the date, approximate time, and purpose of the entry. At the time of entry, the landlord or agent must leave written evidence of the entry inside the unit. The tenant and the landlord may agree orally to an entry to make agreed repairs or supply agreed services. The agreement must include the date and approximate time of the entry, which must be within one week of the agreement. In this case, the landlord is not required to provide the tenant a written notice.

While a landlord's limited right of entry is defined by statute, a tenant's remedy against a landlord who fails to honor the statutory requirement is not specified in the statute. A tenant may, however, pursue either: the common law remedy for breach of the implied warranty of quiet enjoyment, including invasion of privacy and intentional infliction of emotional distress; or the statutory remedy of relief from harassment under California Code of Civil Procedure Section 527.6.

Similarly, a landlord's remedy against a tenant for failure to permit access (after providing the requisite notice) is not defined by statute. Denied access, the landlord may have to seek entry under court order.

The essence of a tenant's leasehold interest is possession, or the right to possess, the leased premises. In every lease, the law implies a covenant on the part of the landlord to provide the tenant with possession and "quiet enjoyment" of the premises. This "covenant of quiet enjoyment" constitutes a warranty by the landlord that the landlord will not take any action or make any omission which disturbs a tenant's right to possession and quiet enjoyment of the premises. The covenant does not protect the tenant from the acts of third parties over whom the landlord has no control.

A landlord can breach the covenant of quiet enjoyment in various ways, some of which are:

1. causing a tenant to be “evicted,” i.e., physically removed from the leased premises under circumstances where the tenant otherwise has the legal and contractual right to possession.
2. denying a tenant access to the premises.
3. causing or permitting a third party who has paramount title to physically oust the tenant. For example, if a lender forecloses upon the landlord’s property pursuant to a mortgage which is senior to the tenant’s lease (and there is no “non-disturbance” agreement between the tenant and the lender), the lease is extinguished and the foreclosing lender has the right to evict the tenant. This would constitute a breach of the covenant by the landlord, even though it is the lender rather than the landlord actually evicting the tenant.
4. any disturbance, caused either directly by the landlord or by a person or circumstance within the landlord’s legal control, of the tenant’s use or possession of the leased premises whereby the property is rendered wholly or substantially unsuitable for the use for which it was leased. For example: a landlord’s attempt to lease the property to a third party; harassing the tenant or making unwarranted threats of expulsion; making extensive and unwarranted alterations to the leased property which materially and adversely interfere with the tenant’s use and enjoyment thereof; or failing to make necessary repairs to the premises. Of course, a tenant cannot establish a constructive eviction if the tenant, by wrongful or negligent action, causes the defects in the premises.

It must be emphasized that a tenant must have a legal right to possession of the premises in order to make a claim of breach of the covenant of quiet enjoyment. Thus, if a landlord evicts a tenant through proper legal procedures following a default by the tenant under the lease, the tenant no longer has a legal right to occupy the premises and eviction would not constitute a violation of the covenant of quiet enjoyment.

For many years, the courts held that a tenant relying on the doctrine of constructive eviction must surrender possession of the premises in order to escape the obligation to pay rent. This rule still applies to leases of commercial buildings. However, the California Supreme Court has held that there is no obligation to vacate the premises in order to avoid the obligation to pay rent where the leased premises is a dwelling. Instead, the California Supreme Court held that there exists an implied warranty of habitability from the landlord to the tenant that the premises will be maintained in a condition to meet *bare living requirements*, and that if the landlord breaches this implied warranty the tenant will remain liable for the reasonable rental value of the premises in the condition existing at the time of the violation as long as the tenant continues to occupy the premises. A condition which renders a dwelling partially or entirely uninhabitable, however, does not *automatically* give the tenant the right to reduce or cease paying rent. Before the tenant may be entirely or partially absolved from the obligation to pay rent, or may vacate the premises, the tenant must have given notice to the landlord of the defects which allegedly render the premises uninhabitable or unusable and the landlord must have failed to cancel or cure such defects within a reasonable time following receipt of tenant’s notice. If a tenant vacates the leased premises or pays a reduced rent based upon even a good faith belief that the condition of the premises supports a claim of constructive eviction, such tenant does so at the risk that a court may deny the allegation that the premises are totally or partially uninhabitable. In such circumstances, a court may rule that the tenant violated the lease by failing to pay the full amount of rent owed under the lease, entitling the landlord to the same remedies as if a tenant simply defaulted in the obligation to pay rent, including ordering that the tenant be evicted from the premises and awarding the landlord damages against the tenant for the reasonable rental value of the premises for the remainder of the lease term.

A landlord of a residential dwelling has a legal duty to keep the dwelling in a habitable condition. Civil Code Section 1941.1 sets forth the following criteria:

1. Effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors;
2. Plumbing or gas facilities which conformed to applicable law in effect at the time of installation, maintained in good working order;
3. A water supply approved under applicable law, which is under the control of the tenant, capable of producing hot and cold running water, or a system which is under the control of the landlord which produces hot and cold running water, furnished to appropriate fixtures and connected to a sewage disposal system approved under applicable law;

4. Heating facilities which conformed with applicable law at the time of installation, maintained in good working order;
5. Electrical lighting, with wiring and electrical equipment which conformed with applicable law at the time of installation, maintained in good working order;
6. Building, grounds, and appurtenances at the time of commencement of the lease or rental agreement in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin, and all areas under control of the landlord kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin;
7. An adequate number of appropriate receptacles for garbage and rubbish, in clean condition and good repair at the time of the commencement of the lease or rental agreement, with the landlord providing appropriate, serviceable receptacles thereafter, and being responsible for the clean condition and good repair of such receptacles under his control; and
8. Floors, stairways, and railings maintained in good repair.
9. A locking mail receptacle for each residential unit in a residential hotel, as required by Section 17958.3 of the Health and Safety Code.

There are other statutory provisions which affect the landlord's maintenance obligations. For example, the California Health and Safety Code requires that every dwelling intended for human occupancy have an operable smoke detector. The landlord is responsible for installing and maintaining the smoke detector, but if a smoke detector is operable when the tenant takes possession, the tenant has a duty to inform the landlord if it becomes inoperable.

It is not always clear that a landlord's failure to maintain constitutes a breach of the implied warranty of habitability. A court will decide this on a case-by-case basis. Generally, if a unit falls into disrepair but still meets basic living requirements, the court will find that the landlord has not breached the warranty. Serious housing code violations, lack of adequate heat, serious rodent infestation, or extremely unsafe utilities or appliances are examples of factors upon which courts will base a finding that the implied warranty of habitability has been breached.

In cases where a landlord breaches the implied warranty of habitability, a tenant is not obligated to give the landlord notice and an opportunity to correct the conditions causing the breach of this warranty prior to exercising the tenant's remedies. Moreover, when this warranty is breached, a tenant is temporarily relieved of its obligation to pay rent until the deficient conditions are corrected. However, a court will ultimately determine the rental value of the premises in the substandard condition and the tenant will be obligated to pay that rent. Accordingly, a court will often require the tenant to deposit with the court the rent the tenant otherwise would have paid the landlord until the dilapidated condition is repaired and the court has determined the extent of the tenant's rental obligation for the period in which the property was in substandard condition. Alternatively, the tenant can exercise the same remedy available for breach of the covenant of quiet enjoyment, vacate the property, and be relieved of the obligation to pay rent for the remainder of the lease term. In either case, the tenant can seek to recover monetary damages from the landlord for breach of the implied warranty of habitability. However, as with the covenant of quiet enjoyment, a tenant who exercises his remedies for breach of this warranty does so at the risk that the court will not agree that the warranty has been breached.

Civil Code Section 1941.2 provides that if a tenant fails in certain affirmative obligations and the failure "contributes substantially" to a condition which renders the property uninhabitable or interferes substantially with the landlord's repair obligations, the landlord has no duty to repair the condition. The tenant's obligations under Section 1941.2 are as follows:

1. Keep his/her part of the property as clean and sanitary as the condition of the property permits (unless the landlord has expressly agreed in writing to do so);
2. Dispose of rubbish, garbage, and other waste from the dwelling in a clean and sanitary manner (unless the landlord has expressly agreed in writing to do so);
3. Properly use the plumbing, electrical and gas fixtures and keep them as clean and sanitary as their condition permits;

4. Not permit any person on the property with the tenant's permission to willfully or wantonly destroy, deface, damage, impair, or remove any part of the structure or dwelling unit or the facilities, equipment, or appurtenances thereto; nor may the tenant do any such thing; and
5. Occupy the property as an abode, using for living, sleeping, cooking, or dining purposes only those portions which were designed or intended to be so used.

In addition to the implied covenant of habitability and the landlord's maintenance obligations expressed in a lease agreement, the California State Housing Law and various local housing codes require the landlord to keep a dwelling in good condition in accordance with specified structural, plumbing, electrical sanitation, fire and safety standards. Local government departments are generally empowered to investigate complaints and require the landlord to make needed repairs and/or to impose a fine upon the landlord.

If the landlord fails to maintain a residential property in a condition fit for human occupancy, the tenant may give the landlord notice to repair the premises. If, after receipt of tenant's notice, the landlord fails within a reasonable time to make the repairs necessary, the tenant has the statutory right to either:

1. spend up to one month's rent in repairs (only twice in any twelve-month period); or
2. abandon the premises, in which case the tenant is relieved from the requirement of paying additional rent and the performance of other conditions of the lease. (See Cal. Civil Code § 1942.)

Generally, *in non-residential leases*, the landlord is *not* under any *implied* obligation to make repairs or to maintain the leased premises in a tenable condition. The respective obligations of landlord and tenant with respect to maintenance and repair are typically addressed in their lease agreement. For example, it is common in a lease for a commercial building for the landlord to be obligated to maintain and repair the "structural elements" of the building (i.e., the foundation, exterior walls, roof supports and roof), and for the tenant to agree to maintain the remainder of the building, including interior, plumbing, electrical, heating, ventilation, and air conditioning systems. In the absence of a specific covenant obligating the landlord to maintain or repair the premises, the tenant is deemed to have taken the premises in "as is" condition and to have assumed the obligation to maintain the premises in a safe condition.

Closely related to the landlord's and tenant's maintenance obligations under a lease is the obligation to cause the premises to comply with laws existing as of the time the lease is entered into or enacted at any time during the term of the lease.

In the non-residential context, the lease agreement should specify which party shall bear the responsibility of complying with governmental laws and regulations affecting the leased premises, whether enacted before or after the lease date. If the law does not explicitly place upon the landlord the obligation to comply with its provisions, courts will look to the language of the lease agreement to determine where this responsibility lies. However, the lease agreement will not necessarily be dispositive on the issue of who will ultimately have to bear the time, expense, and effort necessary to bring the premises into compliance with applicable law. Using the terms of the lease as a starting point, pursuant to the California Supreme Court case of *Brown v. Green* (8 Cal. 4th 812, 35 Cal. Rptr. 2d 598 1994), courts will endeavor to analyze the relevant provisions of the lease in light of certain circumstantial factors in order to determine the "probable intent" of the parties in entering into the lease. Among these factors are the length of the lease term, the cost of compliance in relation to the rent, the nature of the repair (i.e., structural v. non-structural), the extent to which the tenant's enjoyment of the premises will be interfered with during the period in which the necessary alterations are made, and the likelihood that the parties, in entering into the lease, contemplated that the particular law or regulation would become effective.

Governmental mandates affecting leased premises can be enacted at any time during the lease term and compliance can be extremely expensive. Examples of governmental compliance issues which have been of great significance to landlords and tenants include: the requirement that asbestos or other toxic substances be removed from the leased premises; the requirement that the leased premises be reinforced for seismic safety; and the requirement that alterations be made to the leased premises to comply with the Americans With Disabilities Act. In light of the ambiguity in the standards set forth in *Brown v. Green*, it is important that both parties consider the potential impact of unforeseen governmental mandates and address the issue accordingly in drafting the lease.

The terms of the lease should address to what extent, if any, the landlord and the tenant have the right and/or obligation to make alterations or improvements to the leased premises. A lease should also specify whether or not the tenant has the right and/or the obligation to remove certain improvements upon the expiration or termination of the lease. Upon installation of fixtures or improvements in the premises, the issue arises as to the ownership thereof. Unless the landlord and tenant agree otherwise, many improvements and fixtures installed in a leased premises will as a matter of law be deemed “permanent” and will become part of the premises (and thus the landlord’s property) upon the expiration of the term. Thus, if a lease is not clear as to the nature of certain improvements which a tenant desires to make to the premises, the tenant should first attempt to establish an understanding with the landlord, perhaps entering into a separate agreement concerning such improvements. Otherwise, the tenant may not have the right to remove its fixtures or improvements upon the expiration of the lease term; or, the tenant may be obligated to remove certain fixtures or improvements which the tenant wanted to leave in the premises. The general rule that improvements will become part of the premises has been modified by statute in California in cases where a tenant has installed fixtures for the purposes of trade, manufacture, ornamental or domestic use. Such fixtures may be removed by the tenant during or upon expiration of the term of the lease unless they have become an integral part of the premises through the manner in which they are affixed and if removal cannot be accomplished without injury to the leased property.

The law in its current state leaves much room for honest differences of opinion between the landlord and tenant as to the characterization of fixtures and other improvements installed in the leased premises. It is therefore preferable for the landlord and tenant to provide in advance by agreement for the disposition of fixtures.

Liability of parties for injuries resulting from condition of premises. Depending on the circumstances, both residential and non-residential landlords may be held liable for injuries to tenants resulting from the condition of the premises. A residential landlord can be held liable on simple negligence grounds for injuries resulting from potentially hazardous conditions or defects in the premises existing at the time of renting the premises to the tenant if such conditions or defects could have been discovered by a reasonable inspection of the premises. Thus, if such an inspection would have revealed a potentially dangerous condition (e.g., a slippery bathtub or staircase), the landlord may be held liable for failing to take corrective measures to mitigate the condition. Merely warning a tenant will probably not be sufficient to protect the landlord from liability.

In addition, if a dangerous condition or defect does not exist at the commencement of the rental term but arises later, a residential landlord has a duty to repair such condition or defect after receiving notice from the tenant thereof. Failure to make such repair could subject the landlord to liability for injuries arising from such defect or condition.

The law pertaining to a residential landlord’s liability for a “latent” defect in the premises (i.e., a defect which is not discoverable by a reasonable, diligent inspection of the premises) existing at commencement of the rental term, has changed significantly. Previously, in the case of *Becker v. IRM Corp.* (38 Cal. 3d 454, 213 Cal. Rptr. 213 1985), the California Supreme Court held that a residential landlord was “strictly liable” for injuries to tenant resulting from a “defective” shower door which shattered, in spite of the fact that the “latent defect” in the premises (i.e., the fact that the shower door was made of regular glass, as opposed to tempered glass), would not have been discoverable by a reasonable inspection of the premises. Under such a ruling, a thorough, diligent inspection of the premises would not insulate a residential landlord from liability for injuries to a tenant resulting from the defective condition. However, in *Peterson v. Superior Court* (10 Cal. 4th 1185, 43 Cal. Rptr. 2d 836 1995), the California Supreme Court reversed its earlier holding in *Becker* and returned to the rule that a landlord will only be liable for injuries resulting from defects in residential premises existing as of the commencement of the rental term if the landlord is negligent in failing to discover and correct the defect in the premises. Thus, while a landlord may still be liable if a court finds that a defect should have been discovered and corrected by the landlord, the ruling in *Peterson* should provide residential landlords with some relief from liability for defects which are not readily discoverable.

In leases of non-residential premises, a landlord generally will not be liable for injuries sustained by tenants resulting from defects in the leased premises. However, the landlord will be liable for injuries resulting from the landlord’s failure to correct such defects if the lease:

1. places the obligation on the landlord to maintain all or a portion of the premises (e.g., making the landlord responsible for maintenance of the roof and structure);
2. contains an affirmative covenant requiring the landlord to correct or repair a defective item; or

3. gives the landlord control over a defective item or the area containing the defective item (e.g., defective or dangerous sidewalk in common areas of shopping center or office building which landlord controls).

Additionally, the landlord may be held liable for resulting injuries if the landlord:

1. is under a statutory duty to repair the defective condition;
2. knows of or has reason to know of a “latent” defective condition and fails to disclose it to the tenant or to adequately repair it; or
3. agrees to make a repair but does so negligently or fails to even make the repair.

Transfer of interest in leased premises by landlord. Unless prohibited by the terms of the lease, a landlord may transfer its interest in leased property to a third party. Following such transfer, the lease will remain in force and effect and the new landlord and the tenant will generally have the same rights and obligations with respect to each other as did the prior landlord and tenant. However, an exception to this principal is set forth in California Civil Code §823, which provides that successor landlord will not be liable for violations caused by the prior landlord of covenants against encumbrances or relating to title or possession of the premises.

Transfer of interest in leased premises by tenant. Unless a lease expressly prohibits the tenant from transferring its interest in the premises, the tenant may “assign” (i.e., transfer its entire remaining interest in the premises for the remainder of the lease term) or “sublease” (i.e., transfer its right to a portion of the premises, or its right to the entire premises for less than the entire remaining lease term) its interest in the premises to any third party. Leases usually will either prohibit the tenant from subleasing or assigning its interest in the lease or, more often, prohibit it without the landlord’s consent. Since the law favors the transferability of a tenant’s leasehold rights, prohibitions against subleasing or assigning are construed strictly against the landlord. Nevertheless, courts generally have held that a prohibition in a lease against assigning or subleasing without the landlord’s consent will be valid if such consent is exercised in a reasonable manner.

Regardless of whether a transfer is *called* an “assignment” or a “sublease,” the *nature of the transfer* will determine whether it will be legally treated as an assignment or a sublease. An assignment of a tenant’s interest in a lease does not relieve the tenant from its liability under the lease, unless the landlord expressly agrees to do so. The original tenant will remain liable under the lease throughout the remainder of the lease term. Likewise, the successor tenant (the “assignee”), and each succeeding assignee will remain liable to the landlord throughout the term. However, the extent of this remaining liability of an assignee depends on whether the assignee expressly assumed the obligations of the assignor. If there is an express assumption, an assignee will be fully liable under the lease. If, instead, there is an assignment without an express assumption by the assignee, the assignee will be liable for certain obligations which derive from its “privity of estate” or its occupancy of the premises, such as the payment of rent and the duty to maintain, but will not be liable for purely contractual obligations under the lease, such as the obligation to pay the landlord’s attorney’s fees in the event of litigation between the parties.

Likewise, in a sublease the original tenant remains liable to the landlord for all obligations under the lease and for all acts or omissions committed by the subtenant. However, because there is neither “privity of contract” nor “privity of estate” between a subtenant and a landlord, a subtenant generally has no direct obligation to the landlord. The subtenant’s rights are derived entirely through the tenant. Thus, although a landlord has no right to enforce the provisions of the lease directly against a subtenant, the landlord *can* enforce them against the tenant, and if the landlord terminates the tenant’s lease for default, whether it was the tenant or the subtenant who performed the act or omission leading to the default, the subtenant’s rights in the premises will be simultaneously extinguished. Nevertheless, in some cases a landlord’s consent to a sublease, or a subtenant’s assumption of the obligations of the tenant contained in the lease, creates a sufficient “direct” relationship to enable the parties to enforce the terms of the lease against one another.

Termination. A lease automatically *expires* by its own terms at the end of the term specified in the lease. If neither party commits a breach or other act justifying a termination of the lease, the tenancy will continue until the term expires. If the tenancy is for a specified term (i.e., estate for years), the tenancy ends at the expiration of the term without notice or any other act or deed by either party.

In addition, since a lease is a contract, it may be *rescinded* by a party if that party enters into the lease in reliance upon the other party’s fraud or by either party if the parties enter into the lease in reliance upon a mutual mistake.

A lease is *terminated* only when a landlord or tenant exercises a specific right set forth in the lease or prescribed by statute, or when a lease-terminating event occurs that is not within the control of either the landlord or the tenant.

In general, a lease may be terminated for any of the following reasons:

1. notice;
2. destruction of the premises;
3. commercial frustration of purpose;
4. merger of estates;
5. death of a party;
6. insolvency or bankruptcy of the tenant;
7. insolvency or bankruptcy of the landlord;
8. exercise of option to terminate;
9. tenant's or landlord's breach of a condition or covenant;
10. illegal use of the premises; or
11. abandonment and surrender of the premises.

[Notwithstanding any lease provision to the contrary, a lease may *not* be terminated for any reason which contravenes public policy, including, without limitation: retaliatory eviction (e.g., retaliation by the landlord for tenant's reporting to governmental authorities the landlord's health or safety code violations); discrimination against children or physically disabled persons; or discrimination based on race, creed, color, national heritage, or sex.]

Termination by notice. Although a tenant at sufferance is not entitled to notice and a tenant under a lease with a specified term is not required to give or entitled to receive notice, either party to a tenancy at will or a periodic tenancy may terminate a lease by giving notice thereof to the other in accordance with the terms and provisions of the lease.

A tenancy at will may be terminated by not less than 30 days' written notice, regardless of whether the tenancy is created orally (and is an unenforceable lease), under no agreement, or otherwise.

Periodic tenancies, on the other hand, may be terminated by either party by written notice equal to the term of the tenancy or 30 days, whichever is less. For example, if a tenant pays rent weekly, one week's advance notice is sufficient, and if a tenant pays rent only bi-annually, 30 days' written notice is sufficient. Notwithstanding the foregoing, a lease for an unspecified term may provide for termination upon as little as 7-days' advance written notice. In a month-to-month tenancy, the tenant's notice of termination need not correspond to the due date for rent. For example, if rent is payable in advance monthly and due on the first of the month, the tenant can give written notice on the tenth of a month and move out on the tenth of the following month. The tenant will be liable, of course, for rent for the first 10 days of the following month.

It should be noted that the foregoing termination rights may be modified by specific statutory limitations on a landlord's ability to terminate tenancies without cause pursuant to local rent control ordinances, laws pertaining to publicly-owned and federally assisted housing projects, and mobilehome tenancies.

Destruction of the premises. If neither party assumes the duty to repair or rebuild, either party may terminate the lease upon complete destruction of the premises (so long as the party seeking to terminate the lease is not a cause of the destruction). If the premises are only partially destroyed (due to no fault of the tenant), the tenant may terminate the lease upon delivery of written notice to the landlord if a substantial portion of the premises is damaged or if a material portion of the premises necessary for tenant's use is damaged. Unless the lease provides otherwise, however, a tenant may not terminate the lease if the damage or destruction occurs to a part of the property not actually leased by the tenant; e.g., a ground lessee may not terminate a lease if a building situated on the leased land is damaged or destroyed.

If damage or destruction occurs and the lease continues in effect (either because neither party has the right to terminate the lease or neither party elects to do so), the tenant may not apportion rent if the lease does not permit apportionment and rent is required be paid in advance, even if the premises are uninhabitable. Of course, if the

tenant is entitled to exercise a right to terminate, a shrewd tenant desirous of staying in the premises would probably threaten to exercise its right to terminate if the landlord would not permit a retroactive apportionment of rent.

If a commercial landlord assumes an unconditional obligation to repair or rebuild the leased premises in the event of damage or destruction (as contrasted with an obligation merely to repair and maintain the premises), the tenant cannot terminate the lease. A landlord's general covenant to repair and maintain the premises, however, does not preclude the tenant from exercising a right to terminate when the premises are totally destroyed. In addition, if a commercial lease gives the tenant a right to terminate the lease within a certain period of time after the damage or destruction occurs, the tenant may terminate the lease within that time-frame, even if the landlord has commenced the repair or rebuilding.

Frustration of commercial purpose. Although a tenant may lease property for a specific purpose, the tenant may not terminate the lease because that purpose is frustrated. However, if the lease specifies and limits the tenant's use of the premises, the tenant may be excused from performance and terminate the lease if the tenant may no longer use the premises for the purpose specified in the lease.

A tenant's right to terminate for frustration of purpose, however, is only available in cases of extreme hardship. Indeed, the tenant's purpose must be completely frustrated. A "significant" or "material" frustration (e.g., the tenant's purpose becomes more difficult or less profitable) is not sufficient to justify termination. In addition, the tenant must not have assumed the risk of the occurrence of the intervening event (regardless of how unimaginable the event was at the time of entering into the lease), the intervening event must have been unforeseeable at the time of entering into the lease, and the intervening event must be uncontrollable by the tenant at the time of its occurrence.

Merger of estates. When a landlord acquires the leasehold estate (e.g., by tenant's assignment of the lease and surrender of the premises to landlord), or the tenant acquires title to the premises superior to that of the landlord (and there is no intervening estate), the landlord's fee simple ownership interest in the property and the tenant's leasehold interest are deemed to "merge" as a matter of law. In such a case, the lease is terminated and the tenant is relieved of its obligation to pay rent.

Death of a party. A lease terminable at the will of the landlord and tenant is terminated upon the death (or incapacity) of either party upon delivery of written notice to the other of such death (or incapacity). Although written notice is not required to terminate a tenancy at will or at sufferance upon the death of either party, if the landlord desires to terminate the lease upon the death of the tenant, the landlord must file and prosecute against the tenant an unlawful detainer action. In the absence of a provision to the contrary contained in the lease, a lease for a fixed term is not terminable or terminated upon the death of either party.

Insolvency or bankruptcy of tenant. In light of the "automatic stay" imposed on a bankrupt's financial and legal affairs, as long as a tenant has an interest in a lease a landlord may not, without prior bankruptcy court approval, recover possession of the bankrupt tenant's premises or evict the tenant therefrom.

The trustee in bankruptcy must, however, accept or reject a bankrupt's leases within a certain period of time (which period varies according to the nature of the property and the bankruptcy filing). If the trustee fails to do so within the specified time-frame, the lease is deemed rejected.

While the trustee decides whether to reject or confirm the lease, the landlord may petition the bankruptcy court for relief from the automatic stay (which requires a showing of either inadequate protection or both that the tenant lacks equity in the premises and the lease is not essential to the reorganization). During that time, the court may enforce specific lease provisions, including, without limitation, provisions regarding payment of rent and maintenance of the premises.

A lease is generally breached if a trustee rejects it. After rejection, the landlord can proceed with unlawful detainer proceedings to recover possession. In addition, as soon as a plan of reorganization is filed and the automatic stay is removed, the landlord may employ remedies for defaults which occurred after the bankruptcy petition.

Insolvency or bankruptcy of landlord. A trustee's power to reject leases entered into by a now bankrupt landlord is limited to:

- leases that would not, under federal bankruptcy law, be binding on a bona fide purchaser;
- situations where rejection would provide substantial benefit to the bankrupt's estate and other creditors.

If the trustee elects to reject a lease, the tenant may treat the lease as terminated or may remain in possession of the premises as permitted under state law.

Exercise of option to terminate. A lease may provide that it is terminable at the election of a particular party (or either party) upon: the occurrence or non-occurrence of a particular event (e.g., sale of the premises); the passage of time; or simply the party's election, for no particular reason at all. Such options to terminate may be exercised only by the delivery of notice from the terminating party to the other in strict accordance with the terms and provisions specified in the lease, regardless of statutory notice requirements for termination of leases.

Tenant's or landlord's breach of a condition or covenant. A *condition* is a prerequisite to a party's performance. If the condition does not occur, the party whose performance is conditioned need not perform. The non-occurrence of a lease condition entitles the party whose performance is conditioned to terminate the lease. A *covenant*, however, is a promise to do or not do a certain act. If the promise is not honored, the non-breaching party is generally only entitled to remedies for breach of lease (such as suing for damages or injunctive relief), which are usually less drastic than termination.

Lease provisions are often construed as both conditions and covenants. Because of the severity of the remedy for breach of a condition (termination), a court is likely to construe an ambiguous provision as merely a covenant. In addition, conditions are narrowly construed, and even if a condition is breached, the breach must generally be material or substantial to warrant the remedy of termination and forfeiture.

On the other hand, some *covenants* are so material to the efficacy of the lease that their breach justifies termination and forfeiture. For example, a landlord's implied covenant of habitability in a residential lease and a tenant's express covenant to not assign a lease or use the premises for unlawful purposes are deemed so material that their breach may warrant termination and forfeiture of the lease.

A landlord's and tenant's covenants to one another are the inducements by each of them to the other to enter into the lease transaction, and to the extent that covenants are not merely incidental or subordinate to the main purposes of the lease, they are mutual. Accordingly, a landlord's and tenant's covenants to one another are deemed dependent obligations, and each party's performance of its covenants is a condition precedent to its right to recover for the breach of a covenant by the other party. For example, if a landlord fails to continue to provide quiet possession of the premises or constructively evicts the tenant, the tenant may elect to terminate the lease.

There is, however, one significant exception to the doctrine of dependent covenants: if the tenant fails to pay rent, the landlord must continue to honor its lease obligations (e.g., the promise to maintain and repair the premises) and, conversely, if the landlord fails to honor its lease obligations, the tenant must continue to pay rent. This exception, however, does not apply to the landlord's implied covenant of habitability for residential premises. If the landlord breaches the implied covenant of habitability, the tenant may withhold rent until the landlord satisfies its maintenance and repair obligations.

Illegal use of the premises. A tenant's occasional use of the premises for an illegal purpose is not grounds for termination unless the lease specifically provides therefor, though the landlord may seek alternative remedies against the tenant. Only an illegality that specifically relates to the use of the premises may justify a termination of the lease.

Abandonment and surrender of the premises. A surrender of the premises (and termination of the lease), by mutual agreement of landlord and tenant, occurs upon an actual abandonment of the premises by the tenant and acceptance of them by the landlord. Upon surrender, the leasehold and fee title estates are merged, and the tenant remains liable for only its "pre-surrender" obligations.

A surrender may occur by express mutual agreement between the landlord and tenant, or by implication and operation of law. If a lease is surrendered and that lease is required by the Statute of Frauds to be in writing, the surrender must also be in writing, unless the surrender either occurs by an executed oral agreement or operation of law.

For example, a surrender by implication and operation of law occurs if a tenant abandons the premises and tenders it to the landlord, and thereafter the landlord relets the premises to a new tenant. In this scenario, the landlord will be deemed to have accepted the abandoned premises from the original tenant and that lease is automatically terminated, even without a writing, and the landlord will be estopped from asserting that the premises were not surrendered since it took actions inconsistent with such an assertion.

Condemnation of Leased Property

If a leased property is condemned under a proceeding in eminent domain, the tenant is ordinarily released from all of his or her obligations under the lease agreement, including the obligation to pay rent. If the premises are only partially taken and the portion of the property which has not been condemned may still be used by the tenant for the purpose for which it was leased, the tenant must continue to pay rent according to the terms of the lease agreement.

Notice Upon Tenant Default

If a landlord desires to terminate a lease upon the tenant's default, the landlord must comply with requirements set forth in the California Code of Civil Procedure. The required written notice must specify that the tenant must, within three days, either comply with the terms of the lease (if the breach is of a nature which can be cured by the tenant) or vacate and surrender the premises. Compliance with this procedural requirement is a prerequisite to the filing of an unlawful detainer action.

Service. The notice of default may be served:

1. by personal delivery on the tenant;
2. if the tenant is absent from the premises and from the tenant's usual place of business, by leaving a copy with a person of suitable age and discretion at the tenant's residence or place of business *and* mailing a copy to the tenant at the tenant's residence; or
3. if the tenant's place of residence or business address cannot be ascertained, or if a person of suitable age and discretion cannot be found, by affixing a copy in a conspicuous place on the premises, delivering a copy to the person occupying the premises, *and* mailing a copy to the tenant at the premises.

It must be noted that delivery of a notice in accordance with the statutory requirements does not automatically terminate the lease. See the discussion below regarding unlawful detainer actions.

Non-Waivable Tenant Rights

Any provision in a residential lease executed after January 1, 1976, which purports to modify or waive any of the following tenant rights is void and unenforceable:

1. A tenant's rights with respect to the security deposit, as set forth in California Civil Code Section 1950.5;
2. A tenant's rights with respect to limitations on the landlord's ability to enter the premises, as set forth in California Civil Code Section 1954;
3. A tenant's right to assert a cause of action against the landlord which may arise in the future;
4. A tenant's right to a notice, as provided by law;
5. The procedural rights available to a tenant in any litigation involving the tenant's rights and obligations under the lease;
6. A tenant's right to have the leased premises maintained in a habitable condition and in compliance with all applicable health, safety, environmental, and other laws, rules, regulations, and ordinances; and,
7. A tenant's right to have the landlord exercise a duty of care to prevent personal injury or personal property damage where that duty is imposed by law.

Remedies of Landlord

Right to maintain lease in effect. In the event the tenant is in default in rental payments, the landlord may sue for each installment as it becomes due. (Civil Code Section 1951.4) This is true whether the tenant remains in possession or abandons the premises.

In any suit by the landlord to collect unpaid rent, the tenant may assert certain defenses, such as any right of the tenant contained in the lease to withhold or offset rent due to landlord's failure to comply with the lease, or the landlord's breach of the implied warranty of habitability.

In any event, this remedy is usually unsatisfactory to the landlord from a financial standpoint, and is thus not often used.

Termination of lease. If a tenant breaches the obligation to pay rent or any other obligation under the lease, and fails to cure the violation or quit the premises after three days' notice from the landlord, the landlord can terminate the lease under Civil Code Section 1951.2, and receive damages resulting from the breach. Where the tenant abandons the property, the landlord usually retakes possession for the tenant's account and relets the premises to others. At the end of the term, the landlord sues the old tenant for damages in the amount of the difference between the lease rental and the lesser amount actually obtained by reletting. On the other hand, where the tenant refuses to give up possession although in default in rental payments, the landlord normally serves a three-day notice and files an unlawful detainer action as a means to regain possession of the premises.

Unlawful detainer. A landlord who seeks to oust a defaulting tenant from possession of the premises may bring an action in ejectment (which is a long process), or the more common and expeditious procedure of unlawful detainer. Because of the complexities involved in properly prosecuting an unlawful detainer, the landlord is likely to employ an attorney or reputable eviction service.

The remedy of unlawful detainer is available against a tenant who:

1. holds over after expiration of the term for which the property has been let.
2. continues in possession after default in payment of rent.
3. continues in possession after neglect or failure to perform conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet.
4. commits waste or causes a nuisance upon the leased premises.
5. fails to quit (i.e., leave/vacate) after giving written notice of intention to terminate lease.

In most cases, a three-day notice to cure a breach or quit is required. In instances where a breach of a lease cannot be cured, the three-day notice need not give the tenant the option to cure the breach.

The purpose of the unlawful detainer procedure is to provide a landlord with a relatively quick and direct means of regaining possession of leased premises following a tenant default in instances where the tenant refuses to vacate voluntarily. It is intended to encompass all claims a landlord may have against the tenant resulting from the tenant's default. Nevertheless, in connection with granting the landlord possession of the leased premises, a court in an unlawful detainer proceeding can award the landlord damages for rent owing up through the date of the court's judgment. A landlord cannot recover in an unlawful detainer proceeding rent which would have been owed by the tenant under the lease after the date of the unlawful detainer judgment. If the landlord desires to recover post-judgment rent or other damages from the tenant (e.g., losses resulting from tenant's physical damage to the premises), the landlord must do so in a separate proceeding.

Because possession is the focus of an unlawful detainer proceeding, if a tenant relinquishes possession of the leased premises to the landlord prior to the commencement of the unlawful detainer trial the case is converted into an ordinary civil lawsuit for damages and will not receive priority on the court's calendar as would an unlawful detainer proceeding.

A defendant/tenant in an unlawful detainer proceeding has five days from service of the summons in which to file an answer with the court, or judgment will be entered in favor of the landlord. In the tenant's answer, the tenant must raise any affirmative defenses it may have to the landlord's unlawful detainer, or they will be deemed waived. The most common defenses to an unlawful detainer action are allegations that:

1. the landlord has not complied with the procedural requirements for an unlawful detainer (e.g., failure to properly serve tenant with a three-day notice);
2. the landlord has breached the implied warranty of habitability;
3. the unlawful detainer was brought in retaliation for some lawful exercise of the tenant's rights (e.g., tenant's reporting landlord to governmental authorities for violation of building or health codes); or
4. the landlord is evicting the tenant on the basis of the tenant's race or some other form of prohibited discrimination.

After granting judgment in favor of the landlord in an unlawful detainer proceeding, the court will authorize the local sheriff or other evicting authority to remove the tenant and the tenant's property from the premises. A landlord is not permitted to enter the premises and forcibly remove the tenant or the tenant's property.

Disclosures by Owner or Rental Agent to Tenant

The owner of every multi-unit dwelling or a party signing a rental agreement on such owner's behalf must disclose the name and address of each person authorized to manage the premises and to receive process for notices and demands on behalf of the owner. In the case of an oral rental agreement, on written demand by the tenant, the owner or person acting on the owner's behalf must furnish the tenant with a written statement containing such information, which must be kept current. The statutory requirement to furnish a tenant with this information is enforceable against a successor owner or manager.

If the party who enters into a rental agreement on behalf of the owner fails to comply with the above provisions, such person is deemed an agent of each person who is an owner for the purpose of service of process, notices and demands and for the purpose of performing the obligations of the owner under the law and the rental agreement. It should be noted that the law provides for optional methods of disclosure. A printed or typed written notice containing the required information may be placed in every elevator and in one other conspicuous place. Where there are no elevators, notices must be posted in at least two conspicuous places.

Laws Protecting Tenants' Rights With Respect to Foreclosed Properties

As recently as early 2008, in the absence of a written lease agreement requiring greater notice, California law required that an owner provide only a 30-day notice to a tenant to vacate the property for any reason (other than the failure to pay rent, which required a 3-day notice). However, recent legislation has changed the rules.

Signed as an urgency measure in 2008, Senate Bill 1137 gives tenants at least 60 days after a foreclosure before they can be asked to vacate the property. The provisions of SB 1137 are due to sunset (be repealed) on January 1, 2013. To review a copy of the bill and get more details, please visit www.leginfo.ca.gov.

Federal legislation was enacted effective May 20, 2009, requiring property owners who have taken a residential property by foreclosure, to give their tenants at least a 90 day notice to vacate the property before beginning the eviction process. That federal law is applicable nationwide and it is known as "Protecting Tenants At Foreclosure Act". The law is found at Title 7 US Code section 701 ("the Act"). See <http://thomas.loc.gov>.

The Act provides that if a tenant is renting under a lease entered into before the notice of foreclosure was communicated to the tenant, the tenant may remain in the property until the lease ends, unless the owner sells the property to a purchaser who will occupy the property as his primary residence. In that case, the owner may properly give the tenant a 90day notice to vacate.

While the Act provides greater protection to tenants than State law, local law may provide even more protection. If a particular property is subject to local "rent control" or "housing assistance" laws, or so-called "just cause for eviction" ordinances, those laws may provide even greater protection than the Act itself. As an example, even the Act itself provides that the owner of a residential property which is subject to a "housing assistance contract", and who has a lease with a tenant in that property, is subject to any additional protections in the housing assistance contract (this typically applies to "Section 8" properties).

Finally, a California bill effective January 1, 2011 requires tenants be told of their rights when the property they occupy is foreclosed. Senate Bill 1149 requires that tenants who are living in foreclosed homes be given notice of their rights and responsibilities under these state and federal laws by requiring a cover sheet be attached to any eviction notice that is served within one year of a foreclosure sale. The cover sheet would delineate the laws and rights a tenant may have in cases where the property he or she occupies is foreclosed upon. The bill also seeks to help protect tenants who would otherwise have a negative mark on their rental history by prohibiting the release of court records in a foreclosure-related eviction unless the plaintiff landlord prevails. To review a copy of the bill and get more details, please visit www.leginfo.ca.gov.

Additional Resource

That State of California, Department of Consumer Affairs annually publishes a booklet entitled "California Tenants, A Guide to Residential Tenants' and Landlords' Rights and Responsibilities". A copy of the booklet can be downloaded from the Department of Consumer Affairs' web site at www.dca.ca.gov.