Chapter 4

The Term—Possession

§ 4:1 In General

"Term" is sometimes used to indicate the interest or estate a lease gives a tenant. It is also used to designate the length of time for which the lease is granted.[1] When used in the latter sense questions have arisen whether the time is the full time specified in the lease or the time as it may have been shortened by its termination before the

1. St. Joseph & St. Louis R.R. v. St. Louis Iron Mountain & S. Ry., 135 Mo. 173, 190, 36 S.W. 602, 605, 33 L.R.A. 607 (1896); Baldwin v. Thibaudeau, 17 N.Y.S. 532, 534 (N.Y. Com. Pl. 1892); 1 E. WASHBURN, REAL PROPERTY § 609 (6th ed. 1902); 51C C.J.S. *Landlord and Tenant* § 202(11) (1968); 41 WORDS AND PHRASES 579–82 (1965).

designated expiration. The sooner expiration may be as a result of tenant breach, fire, condemnation, mutual cancellation, or other matters. Where an obligation is measured by the term of a lease there is authority that holds the full term is the proper measure.[2] A landlord's undertaking to pay tenant at the end of the term for tenant improvements is generally construed to mean the designated expiration, with no right in the tenant to expedite this obligation by tenant default.[3] Similar questions may arise if the lease ends, or is claimed to end, by merger of the fee and leasehold interests.[4]

It is essential to the validity of a lease that the commencement and end of the term be indicated with reasonable certainty.[5] It is preferable that the precise date of the beginning and end of the term be expressed. There are times when this is not possible. But the rule that a thing is certain that is capable of being made certain is applicable to leases.[6] A lease may validly create a term to begin in the future.[7] If it provides

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2. A landlord's agreement to pay a brokerage commission during the term for effecting a twenty-year lease was held to continue after termination for tenant breach. Cty. Inv. Corp. v. Hollander, 265 Md. 448, 290 A.2d 517 (1972). An agreement by an assignee of a lease to make monthly payments to the tenant-assignor for the "balance of the term of the lease" was held not released by cancellation of the lease by agreement between the assignee and the landlord. Tenneco Chems., Inc. v. F.M.C. Corp., 73 A.D.2d 865, 423 N.Y.S.2d 668 (1st Dep't 1980). *But see* Gindi v. Fallas, 146 A.D.2d 559, 537 N.Y.S.2d 172 (1st Dep't 1989); chapter 35, note 21; Index, Term of lease, definition. *Cf.* chapter 5 at note 87.
3. *See* chapter 22 at notes 139, 140.
4. *See* chapter 39 at notes 35–40.
5. Wunsch v. Donnelly, 302 Mass. 286, 19 N.E.2d 70 (1939); Carolina Helicopter Corp. v. Cutter Realty Co., 263 N.C. 139, 139 S.E.2d 362 (1964); 49 AM. JUR. 2D *Landlord and Tenant* § 125 (1995 rev.). *Cf.* the rule with respect to common-law tenancies, section 21:2.2. The time of expiration lends itself easily to error, *e.g.*, a lease for ten years, beginning on January 1, 1991, ends on December 31, 2000, but is apt to be stated as 1991. *See* Gothard v. Murphy Oil Corp., 659 So. 2d 26 (Tenn. Ct. App. 1983), chapter 26, note 182. Where instrument provides that one clause providing for a lease termination date will apply "notwithstanding any conflicting or inconsistent provisions . . . including specifically paragraph 3," but provision appears in paragraph 4, setting eighteen-month term and the preceding paragraph 3 creates a twenty-seven-year term, court will treat parties' intent as ambiguous and will admit parole evidence to permit jury to ascertain meaning of agreement. Land O'Sun Realty v. REWJB Gas Inv., 685 So. 2d 870 (Fla. Dist. Ct. App. 1997).
6. *See* Moran v. Commonwealth Edison Co., 74 Ill. App. 3d 964, 393 N.E.2d 1269, 30 Ill. Dec. 922 (1979); Stanmeyer v. Davis, 32 Ill. App. 227, 53 N.E.2d 22 (1944); 49 AM. JUR. 2D *Landlord and Tenant* § 125 (1995 rev.).
7. Johnston v. Corson Gold Mining Co., 157 F. 145 (9th Cir. 1907); Becar v. Flues, 64 N.Y. 518 (1876); *see also* Wright v. Baumann, 239 Or. 410, 398 P.2d 119 (1965).

for a term beginning "from _____" or "from and after _____" it will not be clear whether the date mentioned is included or excluded. This is a matter of intention, to be gleaned from the circumstances.[8] Preferable draftsmanship would be "from _____ to _____, inclusive" or "beginning on _____." If it provides for a term to commence on the happening of an event, the occurrence of that event removes any uncertainty and makes the lease unconditional. If the event does not occur no tenancy is created.[9] A typical example is a lease for a term to begin on the completion of construction by the landlord, but other conditions may be involved.[10] The end of the lease must be a matter of certainty.[11] Marking its termination by an event certain to occur is not sufficient if the time of the occurrence is uncertain. Thus, leases for the balance of tenant's life, for the duration of a war, until sixty days after a peace treaty is signed, until landlord determines to demolish a building, etc., were held mere tenancies at will.[12] A lease for a specified term and for so much longer as oil and gas should be found in paying quantities,

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8. *See* Lord Mansfield in Pugh v. Duke of Leeds, 2 Cowp. 714 (K.B. 1777); Best v. Crown Drug Co., 154 F.2d 736, 738 *et seq.* (8th Cir. 1946) (and cases cited); Pomeranz v. More, 187 Misc. 383, 385, 63 N.Y.S.2d 111, 114 (Mun. Ct. 1946).
9. *See* Wunsch v. Donnelly, 302 Mass. 286, 288, 19 N.E.2d 70, 71 (1939); Carolina Helicopter Corp. v. Cutter Realty Co., 263 N.C. 139, 145, 139 S.E.2d 362, 366 (1964); 51C C.J.S. *Landlord and Tenant* § 28 (1968).
10. Completion of construction: Imperial Water Co. v. Cameron, 67 Cal. App. 591, 228 P. 678 (1924); Omath Holding Co. v. City of New York, 523 N.Y.S.2d 969 (Sup. Ct. 1988) (or when tenant should open for business); Oldfield v. Angeles Brewing & Malting Co., 62 Wash. 260, 113 P. 630 (1911); *see also* cases cited *infra* this section. A term to begin on tenant's written acceptance of a new building was held not to begin on tenant's taking possession when tenant gave notice this was no acceptance. The issue was the timeliness of tenant's exercise of a purchase option, required to be ninety days prior to expiration. Sun Oil Co. v. Franklin Co., 311 A.2d 269 (Me. 1973). Other conditions: Indus. Mach., Inc. v. Creative Displays, Inc., 344 So. 2d 743 (Ala. 1977) (erection of roof sign; cases); Carolina Helicopter Corp. v. Cutter Realty Co., 263 N.C. 139, 139 S.E.2d 362 (1964) (permission to use roof for helicopter service); Wunsch v. Donnelly, 302 Mass. 286, 19 N.E.2d 70 (1939) (term to begin with erection of roof sign). In *Wunsch*, the date of the erection of the sign was not the sole criterion. The lease had indicated an intent that the term commence no later than June 1, 1930.
11. Tenant's entry under a purported lease with no stated duration is as tenant at will. Virani v. Syal, 836 S.W.2d 749 (Tex. Civ. App. 1992).
12. *See* authorities collected and discussed in Nat'l Bellas Hess v. Kalis, 191 F.2d 739 (8th Cir. 1951) (sixty days after peace treaty); Stanmeyer v. Davis, 321 Ill. App. 227, 53 N.E.2d 22 (1944) (duration of war); Barbee v. Lamb, 225 N.C. 211, 34 S.E.2d 65 (1945) (discussing North Carolina cases); Nitschke v. Doggett, 489 S.W.2d 335 (Tex. Civ. App. 1972) (balance of tenant's life).

was held not a lease at the will of both parties.[13] The existence in either landlord or tenant of a right to cancel the lease does not deprive it of the certainty necessary to support a fixed term.[14] A lease of a plant as long as tenant desired was not enforceable and any promise of tenant was merely illusory.[15]

§ 4:1.1 Term Tenancy and Periodic Tenancy Defined

Almost all American lease agreements take one of two basic forms: a fixed-term tenancy (or, simply, a term tenancy) or a periodic tenancy.

The fundamental distinction between a fixed-term tenancy and a periodic tenancy lies in the method by which the lease terminates. A fixed-term tenancy, traditionally called a tenancy for years, has a specifically stated ending to the term.[15.1] The tenancy can be for any set period—days, weeks, months, or years—but the tenancy must have a clear expiration date. The fixed-term tenancy automatically expires at the end of the stated period because notice of termination is not required to end the tenancy.[15.2] Typically rent is not paid in advance for the entire term but is made in periodic installments—normally monthly, semi-annually, or annually.

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13. Myers v. E. Ohio Gas Co., 51 Ohio St. 2d 121, 364 N.E.2d 1369 (1977); *see also* RESTATEMENT (SECOND) OF PROPERTY (Landlord and Tenant) § 1.6 (1977). *Accord* Philpot v. Fields, 633 S.W.2d 546 (Tex. Civ. App. 1982). For common-law tenancies at will, see section 21:2.2. However, when the oil and gas production ceases under such a provision, this may have the effect of converting the lease to an at-will tenancy. *See* Heasley v. KSM Energy, Inc., 52 A.3d 341 (Pa. Sup. Ct. 2012). In *Heasley*, the lease contained the language stating that it would "remain in full force for a term of twenty years from [the date of execution], and as long thereafter as oil or gas, or either of them, is produced therefrom by [tenant], his heirs, . . . successors or assigns." In that case, production ceased, and the court ruled that this left the tenant in an at-will arrangement that was "subject to termination at any time." *Id*. at 347.

14. Collins v. Shanahan, 34 Colo. App. 82, 523 P.2d 999 (1974), *aff'd on this point sub nom.* Shanahan v. Collins, 189 Colo. 169, 539 P.2d 1261 (1975). *See also* sections 21:2.1, 21:2.2, 21:2.3, 21:2.4.

15. Dwyer v. Graham, 99 Ill. 2d 205, 457 N.E.2d 1239, 75 Ill. Dec. 680 (1983). The court said the arrangement was not even a tenancy at will.

15.1. RESTATEMENT (SECOND) OF PROPERTY (Landlord and Tenant) § 1.4 (1977) ("a landlord-tenant relationship may be created to endure for any fixed or computable period of time"); David v. Selk, 151 So. 2d 334 (1963) (the distinction between the term of years and other tenancies is that the parties know the exact date for when the tenancy expires).

15.2. Notice to terminate is required by statute in the following states: CONN. GEN. STAT. ANN. § 52-532 (ten days; required if summary process is brought); DEL. CODE ANN. tit. 25 § 5107 (1974) (sixty days; other than farm lands); IOWA CODE ANN. § 562.6 (1950) (agricultural lands); MD. CODE ANN., REAL PROP. § 8-402(b) (1974) (one month; required if summary process is brought); N.H. REV. STAT. ANN. § 540.10 (1955) (seven

By comparison, the periodic tenancy has a potentially indefinite term because the tenancy will automatically renew for successive rent payment periods until either party gives proper notice to terminate the tenancy.[15.3] The rent payment period in a periodic tenancy can also be for any successive period—days, weeks, months, or years.[15.4] A periodic tenancy has traditionally been referred to as a tenancy from year to year, or month to month, depending on the successive periods of the tenancy.[15.5] Occasionally, rent will be payable for a period but will be payable *during* that period in installments, rather than all at the beginning. For instance, an annual periodic tenancy may provide that the annual rent will be paid in monthly installments during the rent payment period. This does not make the tenancy into a monthly periodic tenancy if it is clear that the parties view the rent as an annual rent.[15.6]

Although many states have abrogated the common law notice requirements, those jurisdictions lacking a legislation to the contrary still adhere to the common law rules for terminating the periodic

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days for holdover tenant); Minor v. Hicks, 235 Ala. 686, 180 So. 689 (1938) (holding, that where "the tenancy is for a specified period of time the expiration of the time terminates the tenancy"); AMERICAN LAW OF PROPERTY § 3.88 (Casner ed. 1952).

15.3. RESTATEMENT (SECOND) OF PROPERTY (Landlord and Tenant) § 1.5 (1977) (Periodic Tenancy: "a landlord-tenant relationship may be created to endure until one of the parties has given the required notice to terminate the tenancy at the end of a period"); RESTATEMENT (SECOND) OF PROPERTY (Landlord and Tenant) § 1.5 (1977) (Estate from Period to Period: "an estate from period to period is an estate which will continue for successive periods of a year, or successive periods of a fraction of a year, unless it is terminated"); Camp v. Matich, 87 Cal. App. 2d 660, 197 P.2d 345 (1948) ("the most important difference between a periodic tenancy and a tenancy for a fixed term, such as six months, is that the latter terminates at the end of such term, without any requirement of notice as in the former"); Olds v. Morse, 98 Ohio App. 382, 129 N.E.2d 644 (1954) (the "death of a lessor does not terminate a lease from month to month" nor does the death of the tenant); Levigton v. Tuly, 126 N.J. Eq. 552, 10 A.2d 641 (1940) ("a tenancy from month to month is not terminated by the death of the tenant").

15.4. RESTATEMENT (SECOND) OF PROPERTY (Landlord and Tenant) § 1.5 (1977) (cmt. (a) varieties of periodic estates).

15.5. AMERICAN LAW OF PROPERTY § 3.23 (Casner ed. 1952) (referring to the tenancies as yearly, monthly, or weekly rather than as a periodic tenancy tends to lead to confusion).

15.6. Steffens v. Earl, 40 N.J.L. 128, 137–38 (N.J. 1878) (where it appears that there is an annual rental reserved, and the payment is to be made by the quarter, or month, or week, then the renting is a yearly letting, without regard to the periods of payment. But where there is no such letting, and there is no evidence but the mere fact of payment at intervals of a week or a month, the implication is that the renting is a monthly or weekly one, just as the payment is monthly or weekly).

tenancy. To terminate a year-to-year periodic tenancy, notice must be given six months prior to the end of the current year.[15.7] However, if the period of the tenancy is for less than a year, the notice required must be equal to the length of the period—weekly, monthly, or quarterly (to a maximum of six months).[15.8] Statutory language affecting particular types of leases, such as farm leases, may alter the rule.[15.9] The death of the tenant does not end the lease, and landlord must still provide appropriate notice to the successors of the deceased tenant.[15.10]

Most of the litigation surrounding periodic tenancies involves whether the parties actually formed a fixed-term tenancy or a periodic tenancy. Although residential tenancies often are periodic tenancies, even month-to-month tenancies, this form of lease is less common in commercial lease agreements, as each side would prefer to know exactly when the arrangement will end. Periodic tenancies in the commercial context are most often created by a tenant holding over after the expiration of the fixed term, through the tenant's taking possession under a lease made invalid due to the statute of frauds, or where there is no express agreement for any term, and the tenant takes possession and the landlord accepts rent for a certain period.[15.11] Where the parties have entered into a lease without a clearly stated

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15.7. State v. Fin & Feather Club, 316 A.2d 351 (Me. 1974) ("a year to year tenancy may be terminated upon six months notice with the end of the current year as the date of termination"); AMERICAN LAW OF PROPERTY § 3.90; Maniatty v. Carroll Co., 41 A.2d 144 (Vt. 1945) ("*six months notice of termination is necessary*").

15.8. Sunset Mobile Home Park v. Parsons, 324 N.W.2d 452 (Iowa 1982) ("at common law a month-to-month periodic tenancy required a 30 day or a month notice to terminate prior to the end of a recurring monthly period"); RESTATEMENT (SECOND) OF PROPERTY § 1.5 (1977); Currier v. Perley, 24 N.H. 219 (1851) ("in case of a tenancy for a shorter period, as from quarter to quarter, or month to month, the length of the notice is regulated by the letting, as a month's notice for a monthly letting"); AMERICAN LAW OF PROPERTY § 3.90 (Casner ed. 1952).

15.9. *See* Gardner v. Prochno, 963 N.E.2d 620 (Ind. Ct. App. 2012) (applying Indiana Code § 32-31-1-9, requiring three-month written notice of intent to terminate year-to-year farm leases; court interprets provision to require notice to be in writing).

15.10. Wilson v. Fieldgrove, 787 N.W.2d 707 (Neb. 2010) (oral year-to-year lease—six months' notice required to deceased tenant's surviving heir).

15.11. Maniatty v. Carroll Co., 41 A.2d 144 (Vt. 1945) ("when a tenant for a fixed term of years or for a year under a formal written lease holds over after the expiration of the term, with the consent or acquiescence of the landlord, a tenancy by implication results"); Radvansky v. City of Olmsted Falls, 395 F.3d 291 (6th Cir. 2005) ("a party who takes possession under an invalid lease created tenancy at will, which converts to a periodic tenancy upon payment and acceptance of rent").

expiration of the term and rent is paid weekly, monthly, or quarterly, a periodic tenancy is presumed.[15.12] The presumption in favor of a periodic tenancy can be challenged by a showing of a contrary intent by the parties.[15.13]

§ 4:1.2 Defining the End of a Lease Term

As indicated in the preceding section, commercial parties typically agree to an express lease term that is terminable upon the happening of a certain event.[15.14] The death of a tenant typically will not terminate a lease term.[15.15]

The "expiration" of a lease generally refers to the time fixed in the lease for it to end in the absence of default, fire, condemnation, or any other matter that would accelerate such end.[16] But a lease of a unit in a multifamily structure that was to last until the building was converted to condominiums was held valid and enforceable, even though the tenant paid all rent in advance and even though the landlord's interest

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15.12. RESTATEMENT (SECOND) OF PROPERTY (Landlord and Tenant) § 1.5 (1977); AMERICAN LAW OF PROPERTY § 3.25 (Casner ed. 1952); Steffens v. Earl, 40 N.J.L. 128, 137–38 (N.J. 1878) ("where it appears that there is an annual rental reserved, and the payment is to be made by the quarter, or month, or week, then the renting is a yearly letting, without regard to the periods of payment. But where there is no such letting, and there is no evidence but the mere fact of payment at intervals of a week or a month, the implication is that the renting is a monthly or weekly one, just as the payment is monthly or weekly"); Elliott v. Birrell, 127 Va. 166 (Va. 1920) (the intention of the parties should be considered when resolving disputes between the parties as to the character of the tenancy).

15.13. RESTATEMENT (SECOND) OF PROPERTY (Landlord and Tenant) § 1.5 (1977); Ruiz v. New Garden Twp., 376 F.3d 203 (3d Cir. 2004).

15.14. For a discussion of a landlord's right to terminate the lease for tenant's breach of its terms, see *infra* chapter 15.

15.15. 100 W. 72nd St. Assocs. v. Murphy, 545 N.Y.S.2d 901 (N.Y. Civ. Ct. N.Y. Cty. 1989). For special circumstances that might change this rule, see Russell G. Donaldson, Annot., *Death of a Lessee as Terminating Lease*, 42 A.L.R.4TH 963 (1985). *See, e.g.*, Marine Terrace Assocs. v. Kesoglides, 24 Misc. 3d 35 (N.Y. App. Term 2009) (usual rule states that a lease term is not cancelled by the death of a tenant; but where the apartment is a section 8 federally subsidized unit, and tenant must periodically recertify eligibility with public authorities, the certification must be provided by the listed tenant, and does not devolve upon successors to that tenant, leading ultimately to lease termination).

16. *See* chapter 5, note 87 and connecting text. Tenant's covenant not to compete with landlord after termination of the lease for tenant's fault or by reason of tenant's cancellation, was held inapplicable to expiration of the term. Gramercy Park Animal Ctr., Inc. v. Novick, 41 N.Y.2d 874, 362 N.E.2d 608, 393 N.Y.S.2d 977 (1977).

had been taken over by a mortgagee and no condominiums were planned. The court indicated a willingness to accept the theoretical result that this interpretation resulted in a lease "in perpetuity."[17]

If the beginning of the term is postponed, is its expiration commensurately postponed? It may be unimportant whether the lease expires on one day or another, but it is important that this date be known in advance. Otherwise some difficulties may plague the parties at the end of the term. If it is doubtful when the lease expires, the landlord is necessarily uncertain when he is entitled to possession and as of what day he may relet to another. The tenant is also uncertain of his tenure and for how long he will be liable for rent. For instance, a lease for a term from May 1, 1938, to April 30, 1941, was held to expire on April 30, 1941, although the premises were not ready for occupancy until July 15, 1938.[18] It followed that the landlord was not entitled to rent that would otherwise have accrued between April 30 and July 15, 1941. The court noted that the lease did not specify a term of three years. On the other hand, a lease of a building to be built, for a term of ten years "beginning September 1, 1927 or thereabout," rent to begin with possession, was held to be for a term of ten years from December 1, 1937, when possession was delivered.[19] If the lease provides for a graduated rent it may be doubtful when the increase or increases in rent begin to accrue. If a renewal option is to be exercised a specified time before expiration, the time for such exercise will be in doubt.[20] The lease should make clear what effect a delayed inception is

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17. Bussiere v. Roberge, 714 A.2d 894 (N.H. 1998).

18. Burns v. Great Atl. & Pac. Tea Co., 312 Mass. 551, 45 N.E.2d 739 (1942). Town & Country Shopping Ctr. v. Swenson Furniture Co., 261 Minn. 100, 110 N.W.2d 525 (1961), reached a similar conclusion under a lease providing for a term of five years from April 1, 1952. The court noted that the lease did not provide for five years from the date of occupation. Here too the landlord sued for rent accruing from the date specified for expiration. *Accord* Robert v. Canning, 455 P.2d 302 (Okla. 1969) (renewal right exercised too late). 29 W. 25th St. Parking Corp. v. Penn Post Parking, Inc., 105 A.D.2d 610, 481 N.Y.S.2d 346 (1st Dep't 1984), is in accord in result where a "new tenant" was the old tenant who delayed its vacation of possession and subsequently obtained an assignment of lease from the new tenant.

19. DePaul Univ. v. United Elec. Coal Co., 299 Ill. App. 339, 20 N.E.2d 146 (1939). *Accord* Byrd Cos., Inc. v. Birmingham Tr. Nat'l Bank, 482 So. 2d 247 (Ala. 1985); Williams v. James, 188 La. 884, 178 So. 384 (1938) (landlord unjustly withheld possession); E.I. Du Pont de Nemours & Co. v. Zale Corp., 462 S.W.2d 353 (Tex. Civ. App. 1971). Lang v. Pac. Brewing & Malting Co., 44 Cal. App. 618, 187 P. 81 (1919) reaches the same result under a lease that provided that the rent would be "abated" and the term extended in case of delay in construction.

20. A requirement that a renewal election be exercised at least sixty days before expiration of the term was held fulfilled, on the assumption that

to have on expiration.[21] It should provide for a written stipulation to fix the dates of inception and expiration whenever these become known. If the lease is to a high-credit tenant, on which the landlord expects to rely for a fee or leasehold mortgage or other financing commitment, the expiration should be extended for a period commensurate with any delay in inception so that the lease will run for the full term—a term that is apt to coincide with the term of the mortgage.

The term of a lease is not affected by the rule against perpetuities. There is one case, however, that holds that a lease for a term of ten years to begin on completion of a building is violative of the rule. The case stands alone,[22] has never been followed, and was finally overruled.[23] It is now clear that the rule against perpetuities does not come into play if the condition precedent to the existence of the lease may occur in a reasonable time. This has been applied to a requirement of rezoning.[24] But a failure to provide for termination if there was no rezoning violated the rule against perpetuities.[25]

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postponement of the inception postponed the expiration. Tynes v. Kelly, 116 So. 2d 54 (La. Ct. App. 1959). The facts were similar generally to those in the cases cited *supra* note 5.

21. The lease of The Real Estate Board of New York, Inc. provides "no such failure to give possession . . . shall . . . extend the term of this lease."

22. Haggerty v. City of Oakland, 161 Cal. App. 2d 407, 326 P.2d 957, 66 A.L.R.2d 718 (1958), *noted with approval in* 35 N.D. L. REV. 170 (1959), *and critically in* 47 CAL. L. REV. 197 (1959), 10 HASTINGS L.J. 439 (1959), and 6 UCLA L. REV. 165 (1959). It was blistered in Leach, *Perpetuities: New Absurdity, Judicial and Statutory Correctives*, 73 HARV. L. REV. 1318 (1960). Prof. Leach notes that the perpetuities issue would have been eliminated by a simple change in the *Haggerty* lease, *i.e.*, by creating a present lease to last for ten years after completion of the building, rent to commence on completion. *Id*. at 1321. *Contra* to *Haggerty* are *In re* Wonderfair Stores, Inc., 511 F.2d 1206 (9th Cir. 1975); Isen v. Giant Food, Inc., 295 F.2d 136 (D.C. Cir. 1961), discussed by Summers, *Business Lease for a Term to Commence upon Completion of a Building Does Not Violate the Rule Against Perpetuities*, 37 NOTRE DAME LAW. 561 (1962), *noted in* 19 WASH. & LEE L. REV. 91 (1962); Kmart Corp. v. First Hartford Realty Corp., 810 F. Supp. 1316 (D. Conn. 1993) (follows *Wonderfair Stores* without question); S. Airways Co. v. DeKalb County, 216 Ga. 358, 116 S.E.2d 602 (1961), *noted in* 24 GA. B.J. 142 (1961), and cases *cited in* Omath Holding Co. v. City of New York, 523 N.Y.S.2d 969, 972–73 (Sup. Ct. 1988). The effect of the rule against perpetuities on renewal rights is discussed in section 14:1 at note 16.23, and on purchase options in chapter 15 at notes 37 and 38.

23. Wong v. Di Grazia, 60 Cal. 2d 525, 386 P.2d 817, 35 Cal. Rptr. 241 (1963) (collating authorities).

24. *Isen*, 295 F.2d 136; *see also Omath Holding*, 523 N.Y.S.2d 969, 972–73.

25. *Omath Holding*, 149 A.D.2d 179. The New York rule requires vesting in lives in being, plus twenty-one years. N.Y. EST. POWERS & TRUSTS § 9-1.1 (McKinney 1967).

§ 4:1.3 Can There Be a Perpetual Lease?

Can the parties contract for a perpetual term? Although early common law was uncertain,[26] some jurisdictions certainly have accepted that possibility. Where a partnership leased property from a condominium association for an annual term with an option to continue through annual renewals "solely at the option of the Lessee under the same terms and conditions," an Ohio appeals court found that the tenant had an enforceable perpetual lease right.[27] The conclusion was *dicta*, however, since the court noted that the parties must be quite explicit about their intent, and concluded that the lease in question lacked such specificity. In Pennsylvania, literally perpetual ground leases have been common. In Maryland, however, parties in the nineteenth century concerned that perpetual leases might run afoul of the Statute Quia Emptores adopted the practice of making ninety-nine-year ground leases renewable at the tenant's option for an indefinite number of renewal terms,[27.1] presumably because such leases would not literally be perpetual and therefore would not run

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26. *See* 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 112–13 (2d ed. 1923): "It is possible that for a while the notion prevailed that a lease should not be for a longer term than fourty years. The writer of the Mirror protests that this was the old law [cite]. . . . But Bracton contemplates the possibility of a lease for a term which exceeds that of human life; Britton speaks of a lease for a hundred years [cite]; and in 1270 such a lease was granted [cite]." *See also* A.W.B. SIMPSON, AN INTRODUCTION TO THE HISTORY OF THE LAND LAW 234 (1961): "In the sixteenth century the practice of granting farming leases for periods of twenty-one years became increasingly common. There are vague hints that extremely long leases were void at common law, [cite] but in the seventeenth century it is clear that there were no restrictions upon the possible length of terms. Very long terms, however, are usually employed only as conveyancing devices. The longest customary period for a lease which is not merely a device is the building lease, customarily fixed in the nineteenth century at ninty-nine years. . . ." Many English leases are written for ninety-nine years. The reason may be found in old English Common Law and may be traced back to the Statute of 32 Hen. VIII c. 28 (2 WILLIAM BLACKSTONE, COMMENTARIES 319 (16th ed.)). Ninety-nine years was considered to be the length of three lives, which, at that time, was the limit of time for which a lease could be given.

27. Orchard Isle Mobile Home Park I Condo. Ass'n, Inc. v. Sandy Shores, 2006 WL 205110 (Ohio Ct. App. 6th Dist. Jan. 27, 2006). *See also* Smyrniotis v. Marshall, 744 N.E.2d 532 (Ind. Ct. App. 2001) (*semble*, case recognized principle but finds lease in question).

27.1. For further discussion of perpetually successive renewal terms, see *infra* chapter 14, Renewals (*see* section 14:1, notes 16.20–16.22).

afoul of the Statute, which was assumed to apply.[28] Properties in Vermont dated back to pre-Colonial times are held under an arrangement known in the trade as the "glebe" (if the church was involved) or "Lease" lands (otherwise), that were leased under leases with a term to run for "as long as grass grows and water run."

Some jurisdictions place strict limits on the length of a lease term. Alabama, for instance, states that leases may have a term of no more than ninety-nine years, and that leases for more than twenty years must be recorded in their first year or the term beyond twenty years is void.[29]

Other jurisdictions simply conclude that long-term leases are tantamount to a fee,[30] although frequently the cases that so hold[31] do so for relatively narrow purposes, and there are *contra* holdings.[32] Parties who elect to use such leases, where lawful, should be aware that zoning authorities, lenders, or others dealing with the property may also treat a lease in excess of ninety-nine years as tantamount to a fee,

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28. This issue is discussed in Heritage Realty, Inc. v. City of Baltimore, 252 Md. 1, 248 A.2d 898 (1969). MD. CODE ANN., REAL PROP. § 8-110 requires that tenants under renewable ninety-nine-year commercial leases have a right to "redeem" at specified terms.

29. *See* ALA. CODE § 35-4-6, construed in Achenbach v. FB Huntsville Owners, LLC, 783 So. 2d 4 (Ala. 2000) (impact of statute cannot be avoided by estoppel argument where parties have continued to accept benefit of lease for over twenty years—reversing prior authority); NEV. REV. STAT. § 111.200 (1999) (ninety-nine-year limit on leases generally, twenty-five years for agricultural leases).

30. In Massachusetts, by statute, a lease for a term of one hundred years or more is regarded as an estate in fee simple for so long as fifty years remain unexpired in the term of the lease. MASS. GEN. LAWS ch. 186, § 1 (2001). *But compare* Fulgenitti v. Cariddi, 198 N.E. 258 (Mass. 1935) (500-year lease not the equivalent of a fee); Stark v. Mansfield, 59 N.E. 643 (Mass. 1901) (perpetually renewable ninety-nine-year lease not the equivalent of a fee).

31. *See, e.g.*, Queen Emma Found. v. Tingco, 845 P.2d 1186 (Haw. 1993) (summary possession not available to oust long-term tenant); Ctr. for Molecular Med. & Immunology v. Twp. of Belleville, 357 N.J. Super. 41, 813 A.2d 1243 (App. Div. 2003) (long-term leases are tantamount to fee for purposes of statute granting property tax exemption to nonprofit owners); Lake End Corp. v. Twp. of Rockaway, 448 A.2d 475 (N.J. Super. Ct. App. Div. 1982) (parcels leased for ninety-nine years should be treated as separately assessable parcels for property tax purposes); *but see* Atl. City v. Cynwyd Invs., 689 A.2d 712 (N.J. 1997) ("99-year lessees are not considered fee simple owners for condemnation purposes, but they might be so considered under other situations").

32. In addition to the Massachusetts cases cited above, see Trinity Prof'l Plaza Assocs. v. Metrocrest Hosp. Auth., 987 S.W.2d 621 (Tex. Ct. App. 1999) (fifty-five-year lease with automatic renewals up to ninety-nine years not the equivalent of a fee, and consequently landlord's restriction on assignment is not an invalid restraint on alienation).

although frequently the cases that so hold[33] do so for relatively narrow purposes, and there are *contra* holdings.[34]

An Ohio case[34.1] held that a residential lease providing that the lease automatically renewed, unless the tenant provided written notice to terminate sixty days prior to the annual term, amounted to a "perpetual lease" and not an annual lease. Thus, acknowledgment of signatures was necessary or the lease was void.

§ 4:2 Landlord's Responsibility to Deliver Possession at Commencement

The fundamental right delivered in a lease is possession. Consequently, delivery of possession at commencement of the lease is a matter of special concern.[34.2] A landlord who failed to deliver possession of the leased premises to his tenant on the date specified therefor was held liable for damages though the delay was caused by a failure to complete construction of the building on time.[35] In this situation tenant may also terminate the lease.[36] The usual measure of damages for landlord's failure to deliver possession is the difference between agreed rent and the rental value during the term.[37] Inasmuch

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33. *See, e.g., Queen Emma Found.*, 845 P.2d 1186; *Lake End Corp.*, 448 A.2d 475; *but see Atlantic City*, 689 A.2d 712.
34. In addition to Massachusetts cases cited above, see *Trinity Prof'l Plaza Assocs.*, 987 S.W.2d 621 (fifty-five-year lease with automatic renewals up to ninety-nine years not the equivalent of a fee, and consequently landlord's restriction on assignment is not an invalid restraint on alienation).
34.1. Haught v. Geissinger, 2009 WL 57620 (Ohio Ct. App. Jan. 12, 2009).
34.2. The Superior Court of Pennsylvania has referred to the failure of the lessor to tender possession of the premises by the cut-off date as "the most extreme possible type of breach of the covenant of quiet enjoyment." 2401 Pa. Ave. Corp. v. Fed'n of Jewish Agencies of Greater Phila., 466 A.2d 132, 139 (Super. Ct. 1983), *aff'd*, 489 A.2d 733 (Pa. 1985).
35. Coronado Co. v. Jacome's Dep't Store, Inc., 129 Ariz. 137, 629 P.2d 553 (Ct. App. 1981); 136 E. 36th St. Corp. v. Stockbridge, 114 Misc. 98, 185 N.Y.S. 577 (App. Term 1921). "There is an implied obligation that the premises shall be completed and ready for occupancy at the commencement of the term." Canaday v. Krueger, 156 Neb. 287, 295, 56 N.W.2d 123, 127 (1952) (lessor and his grantee liable for damages).
36. *Coronado*, 129 Ariz. 137. *Coronado* held completion must be within a reasonable time, but indicated that time may have been made of the essence. It recognized the necessity of a substantial shopping center tenant to have sufficient lead time for a seasonal opening. Acceptance of delayed possession bars tenant's right to rescind without prejudice to a claim for consequential damages. Draper Mach. Works, Inc. v. Hagberg, 34 Wash. App. 483, 663 P.2d 141 (1983).
37. L'Enfant Plaza Props., Inc. v. United States, 3 Cl. Ct. 582 (1983) (plus sums paid for the period); Foreman & Clark Corp. v. Fallon, 3 Cal. 3d 875, 479

as the benefit of any excess of rental value over the agreed rent is spread over the entire term, tenant's recovery should be the commuted, or present, value of the difference.[38] If agreed rent and rental value are substantially equal, as is frequently true, the damages recoverable by tenant are nominal.[39] A new tenant recovered for loss of profit against his landlord for failure to deliver possession, and the landlord recovered for indemnity against the old tenant, whose retention of possession barred the new tenant.[40] The recovery against the landord was larger than under the general rule.[41] Recovery for loss of profits is usually denied in this situation,[42] but not when tenant's projections are established with reasonable certainty.[43] It should also be noted that the liability of a holdover tenant to his landlord is usually for rental value but may extend to special damages and loss of profits.[44]

P.2d 362, 92 Cal. Rptr. 162 (1971); 104 A.L.R. 132, 141 (1936); 88 A.L.R.2D 1024, 1032 (1963). *See generally* Vault, Inc. v. Michael Nw. P'ship, 372 N.W.2d 7 (Minn. Ct. App. 1985). In *Vault, Inc.*, the denial of possession was deliberate.

38. Bondy v. Harvey, 218 A.D. 126, 217 N.Y.S. 877 (1st Dep't 1926); *see also* chapter 13 at text following note 71, and chapter 16 at text following note 75.

39. Berhard v. Curtis, 75 Conn. 476, 54 A. 213 (1903); 104 A.L.R. 132, 145 (1936).

40. Cason v. Leverette, 255 Ark. 841, 502 S.W.2d 459 (1973). Loss of profits was held a proper basis for tenant's recovery, but not proved, in L'Enfant Plaza Props., Inc. v. United States, 3 Cl. Ct. 582 (1983); Vogue v. Shopping Ctrs., Inc., 58 Mich. App. 421, 228 N.W.2d 403 (1975). Loss of profits was given, even in the case of a new business. Fera v. Vill. Plaza, Inc., 396 Mich. 639, 242 N.W.2d 372, 92 A.L.R.3d 1278 (annot. at 1286) (1976). For cases pro and contra, see 92 A.L.R.3d at 1286. The older cases deemed loss of profits too conjectural for award. Gross v. Heckert, 120 Wis. 314, 97 N.W. 952 (1904). But for the change in this, see Note, 46 HARV. L. REV. 696 (1933). Loss of profits was denied in Vault, Inc. v. Michael Nw. P'ship, 372 N.W.2d 7 (Minn. Ct. App. 1985). For landlords' claims against tenants who fail to surrender possession on time, see chapter 18, particularly section 18:2. Tenant may recover lost profits calculated over the entire term of the twelve-year lease where landlord failed to deliver possession because the landlord could not obtain the financing necessary to construct the improvements. Tom Thumb Food Mkts., Inc. v. TLH Props., LLC, No. C9-98-1277, 1999 Minn. App. LEXIS 84 (Jan. 26, 1999) (unpublished opinion). Tenant's individual testimony on likelihood that tenant could derive rental over five years from billboard leases is inadequate basis for determination of future damages for breach of lease of ground on which billboard was to be located. Frierson v. Delta Outdoor, Inc., 794 So. 2d 220 (Miss. 2001).

41. *See* text *supra* at note 36.

42. Rapid Assocs. v. Shopko Stores, Inc., 96 Wis. 2d 516, 292 N.W.2d 668 (1980).

43. *See generally* chapter 34 at note 191 *et seq.*; Index, Damage and destruction of leased premises.

44. *See* chapter 18 at notes 130–41.

In situations where the tenant has a special need to commence operations on a date certain, such as where the tenant is vacating other premises at end of lease term on those premises, or where a retail tenant must take possession to take advantage of a business cycle, such as the Christmas shopping season, it would not be unusual to find the parties bargaining over special penalty provisions—liquidated damages, rent reductions, specified special damages (such as for leasing of alternate space)—so that the tenant need not deal with the reluctance of the courts to award speculative damages or so that it is clear that the damages the tenant suffers from late delivery are deemed to be "foreseeable."

Where possible, a landlord will attempt to protect itself against liability for such damages by stipulating factors that will excuse delivery of the premises at the scheduled time.[45]

In a Pennsylvania case,[45.1] the tenant was vacating its old space to enter the landlord's new building, which was to be constructed. The landlord pledged "best efforts" to provide the space by a stipulated date, but the lease provided that the landlord would not be liable for damages for delay in delivering possession. By the time for possession, landlord had not even applied for a building permit and did not do so for nine months thereafter. Landlord tendered alternate space to tenant, but the space was inadequate for tenant's business. Tenant was forced to continue to occupy the alternate space (in the meantime, tenant lost two subtenant clients because of inadequate space in the alternate space) and to holdover in tenant's old space, where tenant paid higher holdover rent. The court denied summary judgment to tenant because there was an issue of fact as to whether landlord had exercised "best efforts." As to the "no damages for late delivery" clause, however, the court commented:

> An unreasonable delay is particularly a delay which is not within the contemplation of the parties to the contract, and a "no damage" clause does not preclude recovery for damages due to a delay which is specifically unreasonable in length or duration, and particularly delay which might fairly be deemed to be equivalent to an abandonment of the contract.[45.2]

A clause enforcing rent during a delay of tenant's entry was held inapplicable to landlord's negligent notification that the premises were ready. For this, landlord was held liable in tort.[46]

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45. *See* discussion in section 4:2.2, *infra.*
45.1. Freedom Props., L.P. v. Lansdale Warehouse, Co., 2008 WL 4771849 (E.D. Pa. Oct. 30, 2008) (relying upon this treatise in part).
45.2. *Id*. at *4.
46. Sales Careers, Inc. v. Atrium Office Park, Inc., 318 So. 2d 534 (Fla. Dist. Ct. App. 1975).

Some leases provide that the tenant's taking possession shall be conclusive evidence as against the tenant that the premises were in good and satisfactory condition at the time possession was so taken. A clause of this character has been enforced as an estoppel against the tenant.[47] The tenant may be unaware of this provision, buried in fine print, and may not be in a position to make a detailed inspection of the premises and discover all latent defects immediately prior to taking possession, particularly while his goods are on the moving van.[48] This is especially true if the landlord is to make

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47. Sheehy v. Bober, 76 Ill. App. 3d 1061, 398 N.E.2d 80, 34 Ill. Dec. 405 (1979); Bedrosky v. Hiner, 230 Neb. 200, 430 N.W.2d 535 (1938); Axelrod v. 11 Riverside Drive Corp., 203 Misc. 880, 117 N.Y.S.2d 597 (Sup. Ct. N.Y. Cnty. 1952). *Accord* Lebrum v. Hill, 452 So. 2d 814 (La. Ct. App. 1984). *See also* Howard v. Horn, 61 Wash. App. 520, 810 P.2d 1387 (1991). *See also* chapter 18 at note 54. But a statement in a lease of premises under construction, that tenant had examined the premises and relied on his inspection, was disregarded by the court. Edwards Hotel Co. v. Chambers, 141 Miss. 487, 106 So. 763 (1926). *See also* chapter 17 at notes 5, 6. A clause for the purpose mentioned in the text appears in *Bedrosky*, 230 Neb. at 202, 430 N.W.2d at 338:

> Lessee has examined said premises prior to his acceptance and the execution hereof and is satisfied with the physical condition thereof, including all equipment and appurtenances, and his taking possession thereof shall be conclusive evidence of his receipt thereof in satisfactory order and repair, except as otherwise specified hereon, and Lessee agrees and admits that no representation as to the condition or repair hereof has been made by the Lessor or his agent which is not herein expressed or indorsed hereon; and likewise agrees and admits that no agreement or promise to decorate, alter, repair, or improve said premises including all equipment and appurtenances, either before or after the execution hereof, not contained herein, had been made by Lessor or his agent.

48. "Latent defects in this context . . . the existence and significance of which are not reasonably apparent to the ordinary prospective tenant, were certainly not assumed" by a clause accepting the "demised premises" in their "present condition." Reste Realty Corp. v. Cooper, 53 N.J. 444, 454, 251 A.2d 268, 273, 33 A.L.R.3d 1341 (1969); *see also* Collins v. Econ. Opportunity Atl., Inc., 159 Ga. App. 898, 285 S.E.2d 562 (1981). In *Reste*, however, the defective condition was on an adjacent driveway, owned by landlord and designed for common use, but not part of the demised premises. But a tenant who took "as is" was barred from claiming he was unaware of the physical shortcomings of the premises. Olson v. Scholes, 17 Wash. App. 383, 563 P.2d 1275 (1977). For more on "as is" see Annot., 8 A.L.R.5TH 312 (1992). In several vendor-vendee cases the results were similar to *Reste*. Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970). Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1975), held that a provision that purchaser takes a house in its "present condition" meant that seller was not to do additional work, *e.g.*, paint or add a room, but did not preclude an implied warranty of fitness. *See also* FRIEDMAN ON CONTRACTS § 2:2.

alterations in preparation for the tenant's occupancy. A tenant will see little justification for this clause. The clause has been held not to relieve landlord from compliance with a building code or to permit landlord to frustrate an implied warranty of habitability.[49] It has been held against public policy when included in a lease of public housing.[50]

If actual possession of all the premises, as included in the lease, is available to tenant, it is immaterial that part of these premises is included in an overlapping description of another lease.[51]

Tenant need not accept possession of the premises if their condition would justify tenant's moving out on the ground of constructive eviction.[52] Similarly, tenant need not accept possession if the premises have been substantially changed or damaged between the execution of the lease and the beginning of the term, "as the premises tendered are not those hired."[53]

Taking possession by a tenant with landlord's consent, before execution of a lease or under an invalid or unenforceable lease, creates a tenancy at will.[54]

A landlord who puts a tenant in possession of the premises prior to the execution of a long-term lease, but under the understanding that there is such a lease, may be able to invoke the doctrine of part performance, so that the lease will be deemed in effect. Note that this is the landlord's option, and the tenant more than likely would have to engage in more part performance than simply taking possession to invoke the exception to the statute.[55]

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49. S. Austin Realty Ass'n v. Sombright, 47 Ill. App. 3d 89, 5 Ill. Dec. 472, 361 N.E.2d 795 (1977).
50. Jones v. Houston Aristocrat Apartments, Ltd., 572 S.W.2d 1 (Tex. Civ. App. 1978).
51. Zalud v. Ethan Assocs., 418 N.E.2d 309 (Ind. Ct. App. 1981). *But cf.* Perrigo v. Boehm, 194 Or. 507, 242 P.2d 791 (1952).
52. *See* chapter 29, note 171.
53. Thompson v. Walker, 6 Ga. App. 80, 64 S.E. 336 (1909); Meeks v. Ring, 51 Hun. 329, 330, 4 N.Y.S. 117, 118 (Sup. Ct. 1889) (dictum); McCandless v. Findley, 86 Pa. Super. 288 (1926); Schomaker v. Heinz, 77 Pa. Super. 30 (1921); Rosenthal v. Rittenberg, 49 Luz. Leg. Reg. 152 (Com. Pl. 1957); 51C C.J.S. *Landlord and Tenant* § 306 (1968).
54. Fisher v. Queens Park Realty Corp., 41 A.D.2d 547, 339 N.Y.S.2d 642 (2d Dep't 1973); 49 AM. JUR. 2D *Landlord and Tenant* § 113 (1995 rev.); 51C C.J.S. *Landlord and Tenant* §§ 163, 164 (1968); chapter 34 at note 35.
55. In Stonewood Hotel Corp., Inc. v. Davis Dev., Inc., 447 N.W.2d 286 (N.D. 1989), the court held that, although there was part performance, the lease term was limited by statute to one year. After the landlord purchased the premises occupied by the tenant, the parties negotiated on a long-term

Some leases provide that they will have no valid inception until tenant delivers to landlord a letter of final acceptance of the premises and often, further, that tenant's moving into the premises will be without prejudice to tenant's right to deny it has accepted the premises. These leases generally involve a large corporate tenant, which has many leases plus a technical staff that passes upon landlord's initial construction or alterations. A clause of this nature has been enforced.[56] But it may be waived by extended possession and payment of rent.[57]

If the leased premises are large, or tenant's installations substantial, moving into the premises may be a logistical problem. If there are other tenants doing business in the building, and using its entranceways and elevators, it may make little sense to try to take possession during normal business hours. Trucks with their crews and tenant's property may spend expensive hours waiting for entry. It is often possible to arrange for the tenant to move in after normal business hours or on a holiday or a weekend and to provide that sufficient elevator and porter service will be available, perhaps at landlord's expense, for this purpose. The lease may also provide for a temporary supply of light and power until the tenant can arrange for his own supply. If the tenant is to install heavy equipment in a building that is still in process of construction it may be possible to use the scaffold elevators for this purpose.[58]

§ 4:2.1 Third Parties in Possession at Commencement of Lease

Special rules apply where the premises are occupied by a third person—usually a holdover tenant, at the time set for delivery of possession. Of course, where the third party is there because of some act of the landlord—such as agreement to a holdover or even a new lease—the landlord will clearly be liable. Further, even where the landlord is innocent of any complicity in the possession by the third party, the prevailing rule, called the English rule, makes the landlord responsible to clear the unpermitted property from the premises and to give the

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lease, but the deal fell through. The court found that the landlord's partial performance required the application of N.D. CENT. CODE § 47-16-05 that required the tenancy created to be for a term of one year.

56. Sun Oil Co. v. Franklin Co., 311 A.2d 269 (Me. 1973).

57. T-M Oil Co. v. Barnes, 402 A.2d 857 (Me. 1979); Phillips Petroleum Co. v. Taggart, 271 Wis. 261, 73 N.E.2d 482 (1955). *See also* Northland Assocs. v. F.W. Woolworth Co., 362 F. Supp. 75, 77 (N.D. Ill. 1973).

58. *See infra* section 23:2.

tenant actual possession.[59] This is the position of the *Restatement*.[60] Under this rule, the original landlord and his grantee are liable in damages for failure to deliver possession.[61] Another rule, once called the "New York" or "American" rule, and which is applicable in many other states, requires the landlord to give a new tenant only the right to possession.[62] Under the latter rule, if an occupant remains in possession, and claims under neither the landlord nor a paramount right—the usual example being an existing tenant who fails to move out on expiration of his lease—the new tenant has no claim against the landlord based on his exclusion. New York, which formerly gave the new tenant only the right to possession, changed its rule by a statute that implies in every lease a promise by the landlord to give the tenant actual possession, for breach of which the tenant may rescind and recover the consideration paid.[63] The

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59. One court held:

> [I]t is unthinkable that a man should enter into a contract as the lessee of real property, if it could be anticipated, or within remote probabilities, that a lawsuit would be required to enable him to enter upon the enjoyment of his term. We therefore adopt the doctrine that a lease of real property, and the covenant of quiet enjoyment, involves the obligation on the part of the lessor to place the lessee in possession of the premises at the time fixed for commencement of the term.

Obermeier v. Mattison, 98 Or. 195, 206, 192 P. 283, 286, 193 P. 915 (1920); *see also* Hall v. Major, 312 So. 2d 169 (La. Ct. App. 1975). Annot., 70 A.L.R. 151 (1931); 51C C.J.S. *Landlord and Tenant* § 310 (1968); 49 AM. JUR. 2D *Landlord and Tenant* § 493 (1995 rev.). For an exhaustive discussion of the English and American rule, see Weissenberger, *The Landlord's Duty to Deliver Possession: The Overlooked Reform*, 46 U. CIN. L. REV. 937 (1978). For the measure of damages under the English rule, see Weissenberger *supra*; Annot., 96 A.L.R.3D 1155, 1157 (1979). For the tenant's right to obtain possession by ejectment, see chapter 34, note 139.

60. RESTATEMENT (SECOND) OF PROPERTY (Landlord and Tenant) § 6.2 (1977).

61. Sempek v. Minarik, 200 Neb. 532, 264 N.W.2d 426 (1978); *Obermeier*, 98 Or. 195.

62. *See* Sw. Drug Co. v. Howard Bros. Pharmacy of Jackson, Inc., 320 So. 2d 776 (Miss. 1975), *and* authorities *supra* note 59. Landlord's position may be waived by an express covenant to give the tenant actual possession. Steinberg v. Arnold, 42 Md. App. 711, 402 A.2d 1302 (1979), Annot., 96 A.L.R.3D 1155, 1160 (1979). For a criticism of the American rule, see Weissenberger, *The Landlord's Duty to Deliver Possession: The Overlooked Reform*, 46 U. CIN. L. REV. 937 (1978). For a classification of states following the English or American rule and of statutory modifications, see *id*. at 966–68.

63. N.Y. REAL PROP. LAW § 233-a (McKinney 1968), applicable to leases executed on or after September 1, 1962. The statute gives no right to damages. Atl. Bank v. Sutton Assocs., Inc., 36 A.D.2d 943, 321 N.Y.S.2d 380 (1st Dep't 1971), but states that the tenant's rights thereunder shall not be deemed inconsistent with any right of action the tenant has to recover damages.

statute permits the tenant to waive its provisions, and waiver is generally included in printed lease forms prepared for landlords. Under the former New York rule, a new tenant was unable to dispossess his predecessor because of the lack of a landlord-tenant relationship but nevertheless remained liable to his landlord, with a right to recover against the old tenant as a holdover or for damages.[64] This has been changed by a statute that permits a new tenant to evict his predecessor who holds over without permission by summary proceedings.[65] A comparable statutory change in the District of Columbia expands the nature of people entitled to maintain summary possessory proceedings.[66]

If a third party is in possession before the beginning of the term of a new lease, there is some risk that he will still be in possession thereafter. This possibility makes it appropriate to ask landlord to agree to take appropriate steps, with reasonable promptness and continuity, to obtain the removal of such party.

§ 4:2.2 Delays in Possession Due to Landlord's Construction Delays

A risk comparable to holdovers exists that a building in course of construction or being altered will not be finished at the time specified. Landlords frequently are unwilling to expose themselves to damages because of the vagaries of a construction schedule or the possibility of strikes or other delays.

Because of these possibilities a lease may provide for postponement of the beginning of the term until the premises become available. A literal construction of this language would tie up a tenant indefinitely. But it has been construed to imply a promise by the landlord to give possession within a reasonable time, unless factors beyond his control make this impossible, for failure of which tenant is entitled to rescission and return of rent paid in advance and of security deposited.[67] A provision for postponement of the beginning of the

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64. *See* Eells v. Morse, 208 N.Y. 103, 101 N.E. 803 (1913); United M.R.&I. Co. v. Roth, 193 N.Y. 570, 86 N.E. 544 (1908); Teitelbaum v. Direct Realty Co., 172 Misc. 48, 13 N.Y.S.2d 886 (Sup. Ct. Nassau Cty. 1939); Nodine v. State, 192 Misc. 572, 79 N.Y.S.2d 834 (Ct. Claims 1948); 51C C.J.S. *Landlord and Tenant* § 315 (1968). *Accord* Sw. Drug Co. v. Howard Bros. Pharmacy of Jackson, Inc., 320 So. 2d 776 (Miss. 1975).

65. N.Y. REAL PROP. ACTS. LAW § 721(11) (McKinney 1979). *Accord Southwest Drug Co.*, 320 S.W.2d 776.

66. D.C. CODE § 11-735 (1940); *see* Shannon & Luchs Co. v. Jeter, 469 A.2d 812 (D.C. 1983).

67. Hartwig v. 6465 Realty Co., 67 Misc. 2d 450, 324 N.Y.S.2d 567 (App. Term 1st Dep't 1971); Rein v. Robert Metrik Co., 200 Misc. 231, 105 N.Y.S.2d 160 (Sup. Ct. 1951). Seabrook v. Commuter Hous. Co., 72 Misc. 2d 6, 338 N.Y.S.2d 67 (Civ. Ct. 1972), reaches the same result on entirely

term for these reasons does not justify landlord in giving the existing occupant a formal extension of his lease.[68] A tenant usually cannot subject himself to this indefinite postponement in view of his necessity to terminate his status at his present quarters, arrange for moving, preparing the new premises for occupation, etc.

A partial solution is to specify one date for the commencement of the term and another, later, "cutoff" date, beyond which the tenant need not wait. Under this arrangement, if the landlord is unable to deliver actual possession on the first day (because of occupancy by third persons, delay in construction, inability to complete repairs, or for other delays), the beginning of the term is postponed until actual possession is available and the effect of this on the expiration of the term and other matters (for example, time to exercise a renewal option, when graduated rent changes become effective) is specified. But if for any reason possession is not available by the cutoff date the tenant is permitted to rescind. The cutoff ends the tenant's liability under the lease and frees him to make other arrangements.[69] It does not, however, give him possession. It leaves the basic problem unsolved. This may be all the tenant can get in the circumstances.[69.1]

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different grounds, by analogizing provisions of the U.C.C. In this, landlord was deemed a "merchant" within U.C.C. § 2-104, and the provisions in a lengthy printed residential lease, with respect to possession, were deemed unconscionable.

68. 2401 Pa. Ave. Corp. v. Fed'n of Jewish Agencies, 319 Pa. Super. 228, 466 A.2d 132 (1983), *aff'd*, 507 Pa. 166, 489 A.2d 733 (1985).

69. A right given tenant to terminate, if the premises should not be ready for occupancy by a specified date, was enforced in Young v. Kaplan, 288 N.E.2d 698 (Ill. App. Ct. 1972). The court instructed the jury that the premises were not ready for occupancy if there existed on the leased premises, or upon its access areas, such defects that landlord failed to remedy in a reasonable time that tenant could not occupy them for tenant's specified purpose. It rejected landlord's contention that the premises would not be ready for occupancy only if "grave and permanent defects" precluded tenant's specified use. The court said this phrase was drawn from constructive eviction cases, which were inapplicable. A tenant's right to cancel on sixty-days' notice, for failure to deliver possession on a specified date, was held to give landlord no right to nullify the notice by delivering possession during the sixty-day period. 67 Wall St. Co. v. Franklin Nat'l Bank, 333 N.E.2d 184 (N.Y. 1975). For a restriction against landlord's leasing for a similar purpose after such cancellation, see Bayside Corp. v. Va. Super Food Fair Stores, Inc., 128 S.E.2d 263 (Va. 1962), discussed in *infra* section 28:64, at note 147.

69.1. In Milford Paintball, LLC v. Wampus Milford Assocs., LLC, 978 A.2d 118 (Conn. App. Ct. 2009), the lease provided that the term of possession under the lease did not begin if landlord had not completed improvements within sixty days of having received notice of zoning approval for the proposed project. In fact, eight months after receiving such notice, landlord

If a lease requires landlord to make expensive alterations for the tenant, landlord is unlikely to agree to any "cut-off" date, and the wasting of this work, unless this date is so far in advance as to be of little use to the tenant.

A caveat is in order in drafting "cut-off" clauses. A shopping center lease provided for its automatic termination after five years, if by then landlord had not closed several major, and ten satellite, leases. In an action by landlord for a judgment declaring the lease terminated, judgment was for tenant on the ground that only a nondefaulting party may cancel for failure to perform a condition precedent.[70] This accords with the general rule under which a condition making a contract void on breach by one party is generally construed to make it voidable at the option of the party for whose benefit the condition was included.[71] Preferable draftsmanship in this situation would give either party an express option to cancel, the exercise of which would undoubtedly be subject to good faith.

§ 4:3 Landlord's Right to Enter, Inspect, Repair, and Exhibit Leased Premises

§ 4:3.1 Business and Practical Aspects of Landlord's Right to Enter, Inspect, Repair, and Exhibit Leased Premises[72]

By leasing the property, a landlord vests the tenant with a right to exclusive possession, which precludes landlord's entry except for a few limited purposes.[73] Because of this a provision is usually included in a lease to give the landlord an express right to enter for some purposes. A typical lease prepared for short-term business use is apt to permit

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had not yet begun its improvements. The trial court ruled for tenants, basing its conclusion on the fact that the lease had never commenced because possession never passed, meaning that tenants had no lease and were entitled to restitution of their deposit. The appeals court reversed, ruling that other language indicated that the lease was in effect from the moment it was executed, even though the commencement of the term was subject to the completion of improvements. How this affected the ultimate outcome of the case is unclear, as the court simply remanded.

70. Northland Assocs. v. F.W. Woolworth Co., 362 F. Supp. 75 (N.D. Ill. 1973).
71. 8 A. CORBIN, CONTRACTS § 40.10 (1999 rev.); 14 S. WILLISTON, CONTRACTS § 41:3 (4th ed. 2000); FRIEDMAN ON CONTRACTS § 1:4.2.
72. This section deals with activities of the landlord in pursuit of the landlord's management of the premises, including advertising other space. For a consideration of issues that might arise concerning the landlord's later use of space let to the tenant for other profitable activities that do not interfere with the tenant's activities, see section 29:2.3, *infra*.
73. *See infra* note 78.

entry to inspect and to repair during reasonable hours and at any time during an emergency, a right to post "For Sale" signs, and during a final part of the term to exhibit the premises to prospective tenants and to post "For Rent" signs.

In some respects this may not be broad enough for a landlord's reasonable needs. Landlord should have a right to enter to make any repairs or alterations that the tenant is required to but fails to make. His right to enter to comply with laws should be free from any doubt. Nor should there be any doubt of landlord's right to permit inspection by existing or prospective mortgagees or by possible purchasers of the property.

It may be necessary to enter to repair facilities located in or accessible through the leased premises but which serve other parts of the building.[74] This may involve repair, replacement, or introduction of wires, pipes, cables, and the like. Any of these should be recessed if possible, under floors, or within walls or ceilings. In warehouse or industrial space it may not be important if these items are exposed, provided any diminution of tenant's usable space or inconvenience to tenant is minimal and no hazard is involved. If any restoration or redecoration is necessary as a result of landlord's entry this should be the landlord's obligation.

A landlord's right to enter may at times be limited because of special circumstances. A bank tenant, for instance, may refuse landlord permission to enter its vaults or any place where valuables are kept. A tenant engaged in confidential work for the government may be required by law to exclude almost everybody. Landlord should have no access to repositories of trade secrets.

A right to exhibit the premises to prospective tenants should be limited to a period of appropriate length immediately preceding the termination date of the lease. It should not continue beyond a time when the tenant exercises an option to renew or purchase.

Posting of "For Sale" or "For Rent" signs is objectionable to many tenants while they are in occupation. Some seek to eliminate such signs altogether, or, in the alternative, they may insist that any such signs be of limited size, and not be attached to doors or windows.

The rights exercised under a right of entry may exceed the landlord's obligations under the lease. The clause should, therefore, state that it does not impose any obligations on the landlord or increase any obligations imposed on the landlord elsewhere in the lease.[75] The landlord's reservation of the right to enter the premises may subject

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74. *See infra* note 91.
75. *See* section 4:3.2. *But see* chapter 10 at note 499 *et seq.*, especially at notes 508–10.

him to liability. If the right to enter the premises is given under the terms of the lease for the purpose of inspection and making repairs, such reservation may be deemed to constitute sufficient control so that landlord has constructive notice of a defective condition and is liable for such defective condition.[76] (This assumes that the landlord has liability for known and uncured defects, which it might have by contract or under an implied warranty of habitability.)

Some leases entitle a landlord to perform matters required of a tenant under the lease if tenant fails to perform them. A tenant should try to limit any such right of landlord to a reasonable time after tenant's receipt of notice and an opportunity for tenant to perform. Some tenants' form leases entitle a tenant to perform landlord's obligations in a comparable situation.[77]

§ 4:3.2 Legal Rights of a Landlord to Enter, Inspect, Repair, and Exhibit Leased Premises

The preceding section suggested that a landlord has need for an express right to enter to inspect, repair, and exhibit leased property. This section considers the status of the law that gives rise to this suggestion.

The making of a lease gives a tenant a right to exclusive possession and control of the leased premises.[78] The common-law rule with few exceptions, in the absence of an agreement otherwise, leaves landlord with no right to enter to inspect the premises,[79] make repairs therein,[80] or abate a nuisance.[81] This went so far as to prevent a

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76. Wiesen v. Moppa, 604 N.Y.S.2d 265 (App. Div. 1993).
77. A form of tenant's broad right to repair and perform landlord's obligations, including mortgage and other payments, appears in KPW Assocs. v. S.S. Kresge Co., 535 So. 2d 1173, 1182 (La. Ct. App. 1988).
78. Solomon v. Neisner Bros., Inc., 93 F. Supp. 310, 314 n.9 (M.D. Pa. 1950) (collecting Pennsylvania cases), *aff'd*, 187 F.2d 735 (3d Cir. 1951); Cent. Coat, Apron & Linen Serv., Inc. v. Indem. Ins. Co., 136 Conn. 234, 70 A.2d 126 (1949); Strycharski v. Spillane, 320 Mass. 382, 385–86, 69 N.E.2d 589, 591 (1946); Strand Enters., Inc. v. Turner, 233 Miss. 588, 78 So. 2d 769 (1955); Maas v. Platter Valley Pub. Power & Irrigation Dist., 167 Neb. 124, 91 N.W.2d 409 (1958); Smith v. Kerr, 108 N.Y. 31, 15 N.E. 70, 2 Am. St. Rep. 362, 13 N.Y. St. Rep. 115 (1888); Rickman Mfg. Co. v. Gable, 246 N.C. 1, 16–17, 97 S.E.2d 672, 683 (1957); 51C C.J.S. *Landlord and Tenant* § 318 (1968). *See also* chapter 37 at note 3.
79. Johnson v. Kurn, 95 F.2d 629, 632 (8th Cir. 1938) (collecting cases); *Strycharski*, 320 Mass. at 385–86, 69 N.E.2d at 591.
80. *Johnson*, 95 F.2d at 632 (collecting cases); Harperley Hall Co. v. Joseph, 187 N.Y.S. 120 (App. Term 1st Dep't 1921); 1 H. TIFFANY, LANDLORD AND TENANT § 3, at 6 (1910); 51 C.J.S. *Landlord and Tenant* § 370a (1968).
81. Lucas v. Brown, 82 F.2d 361 (8th Cir. 1936).

landlord from permitting entry by a neighboring owner to protect his building by shoring against the dangers of a prospective excavation on the adjoining property.[82] Landlord has no implied right to keys to the premises.[83] If a lease entitles landlord to a key, he should be aware of the potential liability this entails for loss or damage resulting from its misuse. He should therefore limit the people to whom the key is entrusted and keep a record of this. Tenant's right to exclusive possession during the term carries significant implications. To the extent that landlord deprives a tenant of or interferes with a part of the premises to which tenant is entitled to exclusive possession, the tenant may bring against landlord an action of unlawful detainer. However, this action is inappropriate in instances involving property to which tenant and landlord share nonexclusive rights.[83.1]

A right to enter to demand and collect rent was apparently always available to the landlord.[84]

On the other hand, more liberal and later cases permit a landlord to enter to make necessary repairs and cure dangerous conditions,[85] as well as to prevent waste.[86] They also permit entry to comply with various requirements of public authorities.[87]

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82. McKenzie v. Hatton, 141 N.Y. 6, 35 N.E. 929 (1894). See section 10:7 for a discussion of the laws and lease provisions designed to counter this situation.

83. Spencer v. Blackmon, 22 Ohio Misc. 52, 490 N.E.2d 943 (1985).

83.1. *See* Women's Healthpartners, Inc. v. River Landing, LLC, 414 S.W.3d 79 (Mo. Ct. App. 2013) (court affirms trial court grant of summary judgment to landlord in tenant's action for unlawful detainer; tenant could not establish that it had the exclusive right to possession of a storage area used by tenant).

84. Smith v. Caldwell, 78 Ark. 333, 95 S.W. 467 (1906); Sproul v. Gilbert, 226 Or. 392, 403, 359 P.2d 543, 549 (1961) (dictum); 1 H. TIFFANY, LANDLORD AND TENANT § 3b2 at 9 (1910).

85. People v. Plane, 274 Cal. App. 2d 1, 78 Cal. Rptr. 528 (1969); Zwerin v. Geiss, 38 Misc. 2d 306, 310, 237 N.Y.S.2d 280, 284 (Civ. Ct. 1963) (collecting New York cases); 1 H. TIFFANY, LANDLORD AND TENANT § 3b2 at 10 (1910). *See also* Dunnington v. Thomas E. Jarrett Co., 96 A.2d 274 (D.C. 1953) (concurring opinion). For the connection between this and constructive eviction and breach of covenant of quiet enjoyment, see chapter 29, note 124 and notes 204–20.

86. Flanders v. N.H. Sav. Bank, 90 N.H. 285, 7 A.2d 233 (1939); Helvich v. Geo. A. Rutherford Co., 96 Ohio App. 367, 375, 114 N.E.2d 514, 520 (1953); Rammell v. Bulen, 80 N.E.2d 167 (Ohio Ct. App. 1948). *See also Dunnington*, 96 A.2d 274.

87. *People*, 274 Cal. App. 2d 1; Ackerman v. Trs. of N.Y. & Brooklyn Bridge, 10 A.D. 22, 41 N.Y.S. 810 (1st Dep't 1896); *Zwerin*, 38 Misc. 2d at 310, 237 N.Y.S.2d at 284; Coffin v. United Mfg. Trimming Co., 85 Misc. 402, 147 N.Y.S. 463 (App. Term 1st Dep't 1914); Dunn v. Mellon, 147 Pa. 11, 23 A. 210, 30 Am. St. Rep. 706 (1892); Sunderman v. Warnken, 251 Wis. 471, 478, 29 N.W.2d 496, 499–500 (1947); 1 H. TIFFANY, LANDLORD AND TENANT § 3b2, at 10 (1910); 51C C.J.S. *Landlord and Tenant* § 370b

Some cases involve tenants with a right to remain in possession indefinitely under emergency rent laws. If in this situation a landlord were barred from entry, also indefinitely, he would have no way of knowing, let alone curing, conditions at the property.[88]

When a landlord is under a duty to act, as by a covenant to repair, the duty implies a right to enter to discharge the duty.[89] "What the landlord has covenanted to do, he has reserved the power to do."[90] This implied right has permitted a landlord to enter the premises of one tenant to make some repairs necessary for others in the same building.[91]

A provision in a lease giving landlord a right to enter, examine, repair, and make some improvements as landlord deems appropriate, is enforceable in accordance with its terms.[92] Barring landlord's access in this situation, as by changing the lock, was held a breach of the lease

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(1968). *See also* Lewis v. Jaeger, 818 N.W. 2d 165 (Iowa 2012). In *Lewis*, the tenant was alleged to have repeatedly allowed both the gas stove and water to continue running for hours when tenant was not present in the apartment. As a result, a city official instructed the landlord, via an oral order, to lock tenant out of the apartment. Iowa has enacted the Uniform Residential Landlord and Tenant Act. Iowa Code also allows that in emergencies, the city manager or a designee may "correct or abate" the condition causing the emergency. The court upheld the eviction.

88. *Dunnington*, 96 A.2d 274; Nat'l Metro. Bank v. Judge, 37 A.2d 446 (D.C. Mun. App. 1944), discussed in the text *infra* note 99. In *Dunnington*, a concurring opinion urged that the decision be based not on the rent laws but on a landlord's limited right of entry to make repairs for the prevention of waste.

89. Grimmeisen v. Walgreen Drug Stores, Inc., 229 S.W.2d 593, 599 (Mo. Ct. App. 1950); *Zwerin*, 38 Misc. 2d at 310, 237 N.Y.S.2d at 284 (collecting New York cases).

90. Appel v. Muller, 262 N.Y. 278, 283, 186 N.E. 785, 787, 89 A.L.R. 477 (1933), *noted in* 47 HARV. L. REV. 357, 18 MINN. L. REV. 229.

91. Timlan v. Dillworth, 75 N.J.L. 100, 67 A. 433 (Sup. Ct. 1907) (dumbwaiter for entire building), *rev'd on other grounds*, 76 N.J.L. 568, 71 A. 33 (1908); Berger Props., Inc. v. Kay Jewelry Co., 147 Misc. 173, 263 N.Y.S. 576 (Sup. Ct. 1933) (use of one tenant's basement to transport coal for general heating equipment). *See also* Tong v. Feldman, 152 Md. 398, 136 A. 822, 51 A.L.R. 1291 (1927), discussed in chapter 3 at note 151. *Cf.* Ragona v. Di Maggio, 42 Misc. 2d 1042, 249 N.Y.S.2d 705 (Sup. Ct. 1964) (beneficiary of easement for electric line through adjoining property entitled to increase voltage). *But see* Blue Cross Ass'n v. 666 N. Lake Shore Drive Assocs., 100 Ill. App. 3d 647, 427 N.E.2d 270, 56 Ill. Dec. 190 (1981); chapter 3 at note 157; chapter 29 at note 204.

92. Bijan Designer for Men, Inc. v. St. Regis Sheraton Corp., 142 Misc. 2d 175, 536 N.Y.S.2d 951, *aff'd*, 150 A.D.2d 244, 543 N.Y.S.2d 296 (1st Dep't 1989); Klugherz v. Sutphin Food Shop, Inc., 90 Misc. 2d 63, 67, 393 N.Y.S.2d 638, (Civ. Ct. 1977), *modified*, 91 Misc. 2d 262, 397 N.Y.S.2d 869 (App. Term 1977); 51C C.J.S. *Landlord and Tenant* § 370, at 976 (1968). Huron Assoc., LLC v. 210 E. 86th St. Corp., 794 N.Y.S.2d 360 (App. Div. 2005) (clause provided that landlord had extensive improvement and repair rights if it

by tenant.[93] But a provision entitling landlord to enter to repair, improve, and make decorations, without constituting an eviction of the tenant, was held to entitle landlord to decorate, etc., for a successor tenant when tenant had vacated before expiration of his lease.[94]

A tenant with a recognized disability may be able to set conditions on inspections, but where a landlord has an inspection right, the tenant may not set unreasonable conditions. The Maryland high court recently held that a tenant with life-threatening allergies to many common household products, who had postponed landlord's attempts to inspect for two-and-a-half years, could not establish the following conditions that inspector:

1. not use ordinary detergents to wash his clothes, not wear deodorant, recently dry-cleaned clothes, polished shoes, or scented fragrance of any kind;
2. not put gas in his car before coming to inspect;
3. come directly from his home as his first work activity of the day; and
4. not inspect when neighbors might be treating their own homes and yards with chemicals.

Landlord's refusal to abide by these conditions, especially in light of lengthy delays, did not amount to a failure to provide "reasonable accommodation."[94.1]

A landlord's right to enter may be created by statute or other law.[95] Landlord, with evidence of hazardous waste under tenant's gasoline

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entered "following tenant's failure to make repairs or perform any work which Tenant is required to perform. . . ." Upon such entry, landlord was permitted to do extensive renovation work to add new floors to its building, unrelated to the tenant's failure to perform its duties.).

93. Carvajal v. Levy, 450 So. 2d 721 (La. Ct. App. 1984) (lease forfeited).

94. Fitzwilliam v. 1220 Iroquois Venture, 233 Ill. App. 3d 221, 598 N.E.2d 1003, 174 Ill. Dec. 371 (1992). The clause appears at 226–27, 598 N.E.2d at 1008. In *Fitzwilliam*, tenant failed to recover for eviction, but query if the clause, when activated, would constitute a surrender of the lease by operation of law. *See* sections 16:3.2, 16:3.3.

94.1. Solberg v. Majerle Mgmt., 819 A.2d 1015 (Md. 2005) (section 8 single-family home lease).

95. The Uniform Residential Land and Tenant Act (URLTA) gives landlord a right to inspect, make necessary or agreed repairs, decorations or improvements, or to supply necessary or agreed services. Landlord is entitled to enforce this right by injunction or to terminate the lease. URLTA §§ 3.103a, 4.302a. This Act has been enacted by ALASKA STAT. § 34.03.310 (1985); ARIZ. REV. STAT. ANN. §§ 33-1301 to -1317 (1974); FLA. STAT. ANN. §§ 83.40 to .66 (1987 & Supp.); HAW. REV. STAT. §§ 521-1 to -78 (1985 repl.); IOWA CODE §§ 562A.1 to .17 (1950 & 1980 Supp.); KAN. STAT. ANN. §§ 58-2540 to -2573 (1983); KY. REV. STAT. ANN.

station, was given a right by implication to inspect the premises in view of "a myriad of federal, state, and local statutes that regulate the disposal and cleanup of toxic waste."[96]

The right to exhibit leased premises to prospective tenants or purchasers, without provision therefor in the lease, is considered in a few cases. One ruled that a requirement that a month-to-month tenant give his landlord a thirty-day notice of termination was to permit landlord to seek another tenant, and that this requirement would be futile unless landlord could exhibit the premises.[97] The court also ruled that landlord's entry for this purpose was no violation of tenant's quiet enjoyment.[98]

A right to exhibit to prospective tenants was held to include a right to exhibit to prospective purchasers.[99] In this case, tenant's possession was under emergency rent laws that permitted tenant to remain in possession indefinitely. A contrary rule might also prevent a sale indefinitely.[100]

Parties seeking to exercise a right granted in the lease should abide carefully by the notice provision contained in the lease. Courts appropriately assume that the landlord negotiated and approved the notice provision, and in fact, that the landlord would strictly seek to enforce the notice provision in the event that the tenant failed to comply with its requirements. Similarly, landlords should strive to carefully follow the requirements of the notice provision when seeking

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§§ 383.500 to .700 (1972 & 1988 Supp.); MONT. CODE ANN. §§ 70-24-101 to 70-26-109 (1987); NEB. REV. STAT. §§ 76-1401 to -1449 (1986); N.M. STAT. ANN. §§ 47-8-1 to 47-8-40 (1988 Cum. Supp.); OR. REV. STAT. §§ 91-700 to -866 (1987 repl.); R.I. GEN. LAWS §§ 34-18-1 to 34-18-56 (1956; reenactment of 1984); S.C. CODE ANN. §§ 27-40-10 to 27-40-60 (1988 Supp.); TENN. CODE ANN. §§ 66-28-101 to 66-28-516 (1981 repl.); VA. CODE ANN. §§ 55-248.4 to 55-248.45 (1986 & 1988 Supp.). The New York City Administrative Code permits a landlord to enter a unit in a multiple dwelling to make repairs, and to make improvements required by law, or to inspect to determine if the unit is in compliance with specified laws. N.Y.C. MULT. DWELL. RULES & REGS. § D-26-3.6 (1988).

96. Sachs v. Exxon Co., USA, 9 Cal. App. 4th 1491, 12 Cal. Rptr. 2d 237 (4th Dist. 1992). Most of the laws were enacted after this lease. Landlord and tenant had contradictory inspection reports. Tenant unsuccessfully argued that its right to quiet enjoyment would be violated and any determination of waste could await the end of the term. Many of the statutes, including those of California, are listed in note 3, at 1497, 12 Cal. Rptr. 2d 241.

97. Gronek v. Neuman, 52 Ill. App. 2d 250, 201 N.E.2d 617 (1964), *criticized in* 10 VILLANOVA L. REV. 594 (1965); Eight W. Thirtieth St. Corp. v. Zelart Drug Co., 107 N.Y.S.2d 324 (Sup. Ct.), *aff'd*, 279 A.D. 653, 108 N.Y.S.2d 996 (1st Dep't 1951). *Gronek* remanded the case for trial, with a burden on landlord to prove tenant had unreasonably refused permission to landlord.

98. *Gronek*, 52 Ill. App. 2d 250.

99. Nat'l Metro. Bank v. Judge, 37 A.2d 446 (D.C. Mun. App. 1944).

100. For further consideration of rent laws, see text *supra*, at note 88.

to enter the leasehold premises during the term, whether to inspect or to show the premises to a prospective tenant. In a limited and unusual circumstance, one court was persuaded to permit the landlord to direct notice to the attorney for tenant, when this was not the addressee set forth in the lease. The attorney for tenant apparently directed landlord's attorney to cease direct communications with the tenant at the address set out in the lease.[100.1] In the editor's view, this was an unduly generous interpretation that benefitted the drafter of the lease agreement, and should only be very rarely repeated. There was no obstacle preventing the landlord from following the strict terms of the notice provision, and also directing a copy of the lease mandated notice to tenant's attorney.

After a tenant had given notice of an intention to vacate, his landlord was held to have authority to affix a "For Rent" sign to the outer walls of the premises despite the inclusion of the outer walls in the leased premises.[101] A form of permission for a landlord to enter, repair, improve, and exhibit leased premises appears in the next section.

§ 4:3.3 Form of Permission for Landlord to Enter, Repair, Improve, and Exhibit Leased Premises, Including Right to Post Signs

1. a. Landlord and its authorized representatives shall be entitled to enter the leased premises for the inspection, repair, compliance with laws, and improvement of the leased premises, or the property of which the leased premises are a part, and for the exhibition of said premises to prospective tenants and prospective purchasers, and to existing and prospective mortgagees.

100.1. *See* Euasia Schs. Worldwide, Inc. v. D.W. August Co., 159 Cal. Rptr. 3d 621 (Cal. Ct. App. 2013). The court acknowledged "apparent animosity" between the parties. The court stated:

> Read literally and in isolation, the lease notice provision requires that the notice be mailed to appellant at the premises. But we cannot conclude that, when the parties signed the lease, they intended that the lease notice provision could not be superseded. Here emphatic written instructions to the contrary were given by the lessee. On March 16, 2010, [the tenant's attorney'] legal assistant, on attorney letterhead, directed [landlord's] counsel to "have NO DIRECT CONTACT with" appellant without [tenant's attorney's] "express permission."

Id. at 625.

101. Whipple v. Gorsuch, 82 Ark. 252, 101 S.W. 735, 10 L.R.A. (n.s.) (1907), discussed in chapter 33 at note 61.

b. Tenant shall permit inspection of the leased premises by any federal, state, county, or municipal officer or representative to determine if the leased premises or the property of which they are a part shall comply with any relevant law or are in need of repair, correction, addition, or improvement.

c. The rights and obligations set forth in this Article shall be subject to the limits set forth in this Article. Tenant's breach of any such right or obligation shall, at Landlord's election, constitute a default under this lease, and Landlord shall be entitled to enforce such rights and obligations by injunction or otherwise.

2. a. Landlord shall be permitted to affix to any outer wall or walls of the leased premises one or more "For Rent" or "For Sale" signs, none of which shall exceed an area of _____ square feet or be fastened to a door or window.

b. Any inspection by or on behalf of prospective tenants, or any affixation of "For Rent" signs, shall occur only during the _____ months preceding the expiration of this lease, but not after tenant shall make an effectual election, or an agreement shall be made, to extend or renew this lease.

3. Landlord shall be entitled to make any repairs or perform any work or construction mentioned in Section 1 or 2 of this Article, whether such repairs[102] or performance are required by law or this lease, of Landlord or Tenant. It such requirement is of Tenant, such repairs or other performance, If made by Landlord, shall not constitute a waiver of Tenant's default in failing to perform the same or Landlord's right to payment therefor, as such right of payment is set forth in Article _____ of this lease.

4. During the course of any repair, work, or construction by Landlord in the leased premises, pursuant to this Article or to any other part of this lease, Landlord may store therein all necessary materials, tools, supplies, and equipment. No inconvenience, annoyance, disturbance, loss of business, or other damage suffered by Tenant or any subtenant by reason of such repairs, work or construction, or storage of materials, shall constitute the basis of (i) an actual or constructive eviction of Tenant, or (ii) liability on Landlord's part, and the obligations of the Tenant under this lease shall not be affected thereby.

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102. A provision permitting landlord to enter without notice was held unenforceable, absent an emergency. SKD Enters., Inc. v. L&M Offset, Inc., 318 N.Y.S.2d 539 (Civ. Ct. 1971).

5. Any right given Landlord by this Article to enter the leased premises shall be exercised only during ordinary business hours, and on reasonable advance notice to Tenant, except that if Landlord shall have reasonable ground to believe an emergency exists or is threatened, Landlord shall be entitled to take such actions and to proceed at such times that Landlord shall deem appropriate.

6. Notwithstanding anything in this Article, Landlord shall have no right to enter any vault or other place where money or valuables or trade secrets are kept. If a part of the leased premises shall be used for "classified work" within the meaning of any government laws or regulations, only persons authorized to do so may enter any such part of the leased premises and then only in accordance with any legal requirements for the same.

7. The rights of Landlord, given or mentioned in this Article, do not impose, nor does Landlord assume by reason thereof, any responsibility for the care, maintenance, or supervision of the leased premises, or any part thereof.

§ 4:4 Possible Right of Bankruptcy Trustee to Terminate Tenant's Lease Rights

Under the Bankruptcy Code, leases are regarded as executory contracts. The general rule regarding executory contracts is that the trustee in bankruptcy may reject such contracts, leaving the obligee of the contracts to a damages claim, secured by whatever security they may have negotiated to protect them from a breach. In the case of leases, typically tenants do give their landlords security in the form of security deposits, and landlords do have access to these deposits upon the tenant's trustee's rejection of the lease. Their access, however, is limited by the bankruptcy law "cap" on damages available to a landlord suffering a breach. These topics are developed fully in sections 16:2.3 and 20:3, below.

But it is not common for tenants to demand security for a landlord's performance. So, should a landlord be able to reject a lease in bankruptcy, a tenant might suffer massive damages but be left only with the claim of an unsecured creditor, which rarely will pay out fully. The drafter of the Bankruptcy Code, however, recognized that the interest acquired by a tenant is more than a simple contract—it is in fact an interest in property. Hence, it would be inappropriate for the bankruptcy estate to wrest back from an unwilling tenant the property rights that it had obtained under the lease, just as it would be inappropriate, except in special cases, for the estate to retrieve transfers in fee carried out when the bankrupt was solvent and actively doing business with others in good faith.

In recognition of the principle that tenant's leases ought to enjoy protection to the extent that they constitute property, section 365(h)(1)(A) of the Bankruptcy Code provides that if a bankrupt landlord's trustee rejects an unexpired lease, the tenant has the option to treat the lease as terminated and to collect damages (as described above) or, in the alternative, if the lease term has commenced, to retain the possession rights under the lease "that are in or appurtenant to the real property" for the balance of the term or any contracted for extension or renewal. Specifically, these rights include rights pertaining to "radius, location, use, exclusivity, or tenant mix or balance."[103] The tenant must pay the full rent, but the landlord's trustee may avoid and refuse to perform those covenants of the lease that are not "appurtenances," such as the duty to repair. Under 365(h)(1)(B), the tenant may not collect damages for failure to perform these covenants in the future, but may offset any damages claims against the rent, even if the lease had no offset right.

Although for some time tenants and their leasehold lenders have taken great comfort from these provisions, recent cases have thrown the protections they promise into some uncertainty. In *Precision Industries, Inc. v. Qualitech*,[104] a bankrupt landlord's trustee elected to sell all of the assets of the landlord through a "free and clear" sale under Bankruptcy Code section 363. This federal law provision provides that the trustee may offer properties for sale free and clear of the interests of third parties if the third parties consent or if the third party could be compelled to accept money in satisfaction of its interest. Typically this section has been read to sell property free and clear of liens and to pay off all the lienholders from the sale proceeds in their order of priority, getting a better auction price due to the fact that the property passes unencumbered.

In light of the specific protection for tenants provided by section 365, most tenants' lawyers believed that a sale under section 363 did not transfer the interest of the bankrupt debtor free of the rights created by section 365. They believed that the party buying at the sale of the landlord's interest was free to reject the covenants, but could not avoid the protected rights under section 365. Perhaps because of this belief, the tenants in *Qualitech* did not object to the section 363 sale and later learned, to their surprise, that the court viewed them as having waived any objection to the sale free of their leases. In other words, failure to object to the sale amounts to an acceptance of the rejection of their leases if the purchaser of the sale so elects.

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103. BANKRUPTCY CODE § 365(h)(1)(C).
104. Precision Indus., Inc. v. Qualitech, 327 F.3d 527 (7th Cir. 2003).

Some regard *Qualitech* as nothing more than a call to arms to tenants' lawyers to object to the sale of property under section 363 free of their leases. One problem with this point of view is that if the tenants do object and the bankruptcy court elects to sell anyway, the tenants' right to appeal that decision may prove overly expensive, as the proposed sale often involves many properties, not just that occupied by an individual tenant, and the appeal bond conceivably would have to cover estimated losses from the sale of the whole package. The first judge to decide on the amount of the bond is the same judge who had originally ordered the sale. Further, if the tenant fails to post the bond, and later the decision to include its landlord's property in the "free and clear" sale is reversed, the tenant is still without a remedy, as once the sale is held, it is final, and any objections are moot.[105]

More importantly, the *Qualitech* opinion included much language indicating that the court was fully prepared to conclude that a section 363 sale preempts any protections under section 365 whether the tenant objects or not.[106]

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105. Weingarten Nostat, Inc. v. Serv. Merch. Co., 396 F.3d 737 (6th Cir. 2005) (involving landlord's appeal sale of tenant's property in a free and clear sale not withstanding landlord's claim right to restrict assignment; after the sale, the court held that any appeal was moot).

106. The court stated that the terms of section 365(h) did not supersede those of 363(f). The court reasoned that because section 363(f) does not contain any cross-reference subordinating its provisions to the lessee protections of section 365(h), Congress did not intend for section 365(h) to limit section 363(f). According to the court, "Congress authorized the sale of the estate property free and clear of 'any interest,' not 'any interest except a lessee's possessory interest.'" The court then stated that section 365(h) applies only where the trustee (or debtor in possession) actually rejects the lease, whereas in the present case a statutory sale of the property (which was leased) had occurred. According to the court, "[t]he two statutory provisions thus apply to distinct sets of circumstances."

The court ruled that section 363(e) provides a mechanism for lessees to protect their interests, *i.e.*, it directs the bankruptcy court upon the request of any party with an interest in the property to be sold or transferred, to "prohibit or condition such . . . sale . . . as is necessary to provide adequate protection of such interest." The court reasoned that the lessee therefore was not without an adequate remedy to protect its interests, and that while it was not guaranteed continued possession of the property, it was entitled to adequate protection and could seek to "be compensated for the value of its leasehold interest—typically from the proceeds of the sale."

But it should be noted that the kind of damages tenants suffer from loss of their leasehold estate often involve lost profits that are unprovable in a damages action. *See* Jerald I. Ancel, Marlene Reich & Jeffrey J. Graham, *Can a § 363 Sale Dispossess a Tenant Notwithstanding § 365(h)?*, 22 ABI J. 18 (2003); Peter N. Tamposi, *Tenants Beware—Your Lease Rights May Be Subject to Termination by the Bankruptcy Court*, 22 ABI J. 30 (2003).

Happily, one bankruptcy court in the First Circuit has considered and rejected the *Qualitech* reasoning.[107] In *Qualitech*, the court concluded that the Bankruptcy Code's protection of the tenant's right to possession applies only to rejection of the lease, not to a sale of the property "free and clear" from the lease under section 363. Since then, other courts have split on this question. A tenant is not completely without rights under section 363, however. First, the landlord can only sell the property free and clear of the tenant's interest if certain preconditions are met.[108] It may be possible to prevent the debtor/landlord from selling the property free and clear of the lease because none of the conditions is satisfied. Second, even if one of these conditions is met, section 363(e) provides that the tenant, as the interest holder, is entitled, upon request, to have the sale prohibited or conditioned "as is necessary to provide adequate protection" of its

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107. *In re* Haskell LP, 321 B.R. 1 (Bankr. D. Mass. 2005). The bankruptcy court, after examining the relationship between sections 363 and 365 (and finding that a lease constitutes an "interest" for purposes of section 363), and after reviewing the existing case law (including the *Qualitech* case), stated that the landlord-debtor "has failed to cite to any controlling or persuasive legal authority in support of its argument that section 363(f)(5) provides a hypothetical (*e.g.*, a taking by eminent domain), not an actual test." According to the court, section 363(f)(5) requires that "the trustee or the debtor be the party able to compel monetary satisfaction for the interest which is the subject of the sale," and not a third party, such as a governmental condemning authority. The court ruled that, in this case, the tenant was entitled to remain in possession of the leased premises and could not be compelled to accept monetary satisfaction of its claim because: (1) tenant's claim could not (as supported by uncontradicted testimony) be quantified and was incapable of calculation, and (2) where, as here, the landlord-debtor specifically sought to reject the lease as part of its liquidating plan and tenant objected to the landlord-debtor's request to sell the property free and clear of its lease, tenant retained the option under section 365(h) to remain in possession of the leased premises. The court also noted that the landlord-debtor had not offered any adequate protection for tenant's interest in its leasehold estate, as required by section 363(e), and that a lien on the proceeds of the sale (as opposed to continued possession) would be insufficient because the amount due on the prior first mortgage was almost double the value of the property.

108. To sell property free and clear of a given interest (such as a lease), the debtor or trustee for the landlord must show that at least one of five conditions is met: (1) applicable nonbankruptcy law permits sale of the property free and clear of the interest; (2) the interest holder (*i.e.*, the tenant) consents; (3) the interest is a lien and the sale price of the property exceeds the value of all of the other liens on the property; (4) the interest (*i.e.*, the lease) is in bona fide dispute; or (5) the interest holder "could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." 11 U.S.C. § 365(f).

The meanings of these factors are far from clear. For a discussion, see Dishi & Sons v. Bay Condos, LLC, 510 B.R. 696 (S.D.N.Y. 2014).

interest. Nevertheless, bankruptcy judges are in a difficult position when presented with a sale of the debtor/landlord's property that is critical to the case, but which could be blocked by the tenant's rights. Thus, there may be a tendency for bankruptcy courts to discount the legitimate rights of a tenant in an effort to maximize recovery for the entire estate of the bankrupt landlord. Furthermore, it can then be almost impossible for the tenant to appeal an adverse judgment under section 363 because the Code provides express protections for good faith purchasers that may render moot any appeal, unless the order is stayed, which often won't be possible.[109]

The Third Circuit recently provided an important victory to tenants seeking to protect their lease rights in these situations.[110] The Revel casino filed bankruptcy and proposed a sale of its property free and clear of Revel's existing lease with its tenant, IDEA Boardwalk, LLC (which ran a nightclub and beach club at the casino). The bankruptcy court approved the sale, finding that there was a bona fide dispute as to IDEA's interest (satisfying one of the five conditions for a sale free and clear), and following *Qualitech*'s reasoning that a tenant's possessory rights are not protected in a sale under section 363 of the Code. The bankruptcy and district courts each refused to enter a stay pending appeal, using a four-factor test.[111] The district court also rejected

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109. Section 363(m) of the Code provides that:

> [t]he reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

So, if a court permits a sale free and clear of the tenant's lease and denies a stay pending appeal, the tenant may find it impossible to challenge the order, because the sale will have been carried out before the appeal can be heard, at which point even a victory on appeal cannot "affect the validity of" the sale. It is then likely that a court will find that it cannot grant effective relief, rendering the appeal equitably moot.

110. *In re* Revel AC, Inc., 802 F.3d 558 (3d Cir. 2015).

111. Four factors are considered when determining whether or not to grant a stay pending appeal: (1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether it will be irreparably injured absent a stay; (3) whether the stay would substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. The district court had found that all four worked against IDEA's request: (1) as the legal issue is subject to a split of authority, IDEA could show only a possibility of success on appeal, not a likelihood; (2) a mooted claim does not amount to irreparable harm, and as IDEA has already been put out of possession, it would suffer no irreparable harm from loss of possessory rights; (3) the stay would substantially injure

IDEA's argument that the sale should be subject to its lease in order to provide "adequate protection" of its interest, finding that the right to file a claim for monetary damages (on which it would be paid little or nothing) was "adequate" enough.

IDEA appealed and the Third Circuit reversed, announcing an approach that could make such appeals far easier to pursue in the future. The Third Circuit held that the four-factor test for a stay should hereafter be used by balancing the factors, rather than requiring that all four militate in favor of a stay. Thus, a stronger showing on some may permit issuance of a stay despite a weaker showing on others—or even permit a stay where an element is not satisfied. The court gave primary weight to two factors: the likelihood of success on the merits and the risk of irreparable harm. Both of these factors are necessary, although the standards are not draconian. The party must show "a reasonable chance, or probability, of winning"—more than a negligible possibility, but it need not reach the level of "more likely than not." On the second factor, the applicant need not show that irreparable harm is certain, but must prove that it is more likely than not.

If these two elements are met, the court "balances the equities," weighing the harm to the movant if the stay is denied against the harm to the opponents if it is granted, as well as the public interest. To apply this, the court adopted a "sliding scale approach": "[D]epending on how strong a case the stay movant has on the merits, a stay is permissible even if the balance of harms and public interest weigh against holding a ruling in abeyance pending appeal."[112] The majority reasoned that requiring all four elements to support a stay could result in tremendous injustice in some cases, such as a very strong likelihood of success and great irreparable harm giving way to a slight public interest on the other side.

Applying these standards to balance the equities, the court found irreparable harm would occur absent a stay because IDEA's business would be destroyed by a sale free of its lease. The court found that Revel's alleged harm should a stay be granted (losing the sale and liquidating the debtor at a cost of the "permanent loss" of 4,000 jobs) was "speculative," and unsupported by the record. As to the public interest, the possibility of preserving jobs has to be weighed, the court wrote, against the public interest of "protecting the rights of tenants in commercial properties." Moreover, "public policy strongly favors the

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the debtor as it might cause the buyer to walk away from the deal; and (4) the public interest argues against a stay because of the interest in facilitating a successful bankruptcy proceeding and a sale that could preserve the jobs of employees. *Id.* at 565–66.

112. *Id.* at 571.

correct application of the Bankruptcy Code." Overall, it found the balance of public interest weighed slightly against issuance of the stay. The kicker, however, was success on the merits, which the court held was "all but assured." It found that there was no sound basis for the conclusion that IDEA's leasehold interest was subject to bona fide dispute, and thus a sale free and clear of the lease was impermissible. Accordingly, the court stayed the part of the bankruptcy court's sale order that allowed the sale free and clear of IDEA's lease.

The *Revel* decision is welcome news for tenants, providing an avenue for challenging "debtor friendly" decisions that had, until this point, appeared closed.