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WITHHOLDING CONSENT TO ASSIGNMENT:
THE CHANGING RIGHTS OF THE
COMMERCIAL LANDLORD

Murray S. Levin*

Interpretation of assignment approval clauses in commercial leases has become uncertain following publication of the Restatement (Second) of Property because the Restatement has adopted a minority position that under such a clause assignment may not be unreasonably withheld. Professor Levin criticizes this rule as an inappropriate change in landlord-tenant law that overturns a widely accepted and well established rule without compelling reason or substantial support in the case law. Special attention is directed to the distinction between the issues surrounding lease assignment and a landlord's duty to mitigate damages, issues which have commonly been confused by courts and commentators alike.

A well established rule of landlord-tenant law is that absent either a statutory restriction or a restriction fixed by the parties themselves, a tenant may freely assign a lease without the landlord's consent. This rule contemplates that a lease provision restricting or prohibiting assignment will be given effect. Of course, such a provision may be variously worded. The

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1. For the purposes of this Article, the word "assign" and its derivatives may be considered synonymous with all transfers of an interest in the lease or leasehold estate. Note, however, that in practice assignments, subleases, licenses, mortgages, hypothecations, and other such voluntary or involuntary transfers are all accorded separate regard because these terms, often used to effect restraints on alienation, are narrowly construed. A covenant against one form of alienation does not preclude another form. E.g., Ser-Bye Corp. v. C.P. & G. Markets, Inc., 78 Cal. App. 2d 915, 179 P.2d 342 (1947) (sale of controlling stock of lessee corporation not prohibited by restriction on assignment and subletting); Liberty Nat'l Bank v. Pollack, 337 Ill. App. 385, 85 N.E.2d 855 (1st Dist. 1949) (change in personnel of lessee partnership not prevented by lease provision against assignment without consent of lessor); DeBaca v. Fidel, 61 N.M. 181, 297 P.2d 322 (1956) (provision forbidding an assignment not violated by a subletting); Dunlap v. Mulry, 85 A.D. 498, 83 N.Y.S. 477 (1903) (mortgage not precluded by lease covenant prohibiting assignment). For a discussion of the Illinois law of assignment and subletting, see Morris, Assignment and Subletting, 46 Chi. B. Rec. 140 (1964).

2. See 1 American Law of Property § 3.56 (A.J. Casner ed. 1952); 2 R. Powell, The Law of Real Property ¶ 246[1], at 372.85 (1977); 3A G. Thompson, Commentaries on the Modern Law of Real Property ¶ 1205 (repl. 1959) [hereinafter cited as Thompson]. Statutes forbidding transfer by the lessee without the lessor's assent are found in only a few states, for example, Missouri and Texas. See C. Moyhahan, Introduction to the Law of Property 74 n.3 (1962). Courts have occasionally held that the interest of the lessee was non-transferable (even in the absence of a statutory provision or an expressed restriction in the lease) when the lessor relied upon the personal characteristics or business efficiency of the lessee and when the rent was fixed at a percentage of profits or sales. See, e.g., Nassau Hotel Co. v. Barnett & Barse Corp., 162 A.D. 361, 147 N.Y.S. 283, aff'd, 212 N.Y. 568, 106 N.E. 1036 (1914).

3. A tenant's breach of a lease provision that restricts or prohibits assignment does not terminate the lease. Karbelnig v. Brothwell, 244 Cal. App. 2d 333, 53 Cal. Rptr. 335 (1966);
restriction could be written in an absolute form, such as "[l]essee shall not sell or assign this lease or sublet the demised premises or any part thereof"\textsuperscript{4} or "[i]f lessee shall assign . . . the lease shall thereupon terminate."\textsuperscript{5} Yet, more often than not, the pro-landlord assignment clause is stated in terms of prior landlord approval, such as "Without the previous written consent of Landlord, neither Tenant nor Tenant's legal representatives or successors in interest by operation of law or otherwise, shall assign . . . this lease."\textsuperscript{6} The emphasized language is considered by some to lessen the effect of the restriction because it suggests the possibility of approval.\textsuperscript{7}

Courts have held that a landlord may arbitrarily reject a proposed assignee of a tenant who is a party to a lease containing an approval clause such as the one recited above without even stating a reason for the rejection.\textsuperscript{8}

\textsuperscript{5} Id. § 161:655. There are countless variations of restrictive language pertaining to assignments suggested by authors of form books. See, e.g., 11 Am. Jur. Legal Forms 2d Leases of Real Property §§ 161:641-668 (1972); Modern Legal Forms §§ 5191-5192 (1962); 5A Nichols Cyclopedia of Legal Forms Annotated §§ 5.1961-1984 (1974); 10 J. Rabkin & M. Johnson, Current Legal Forms with Tax Analysis 23.31(1)-(16) (1980).

Of course, when a lease absolutely prohibits assignment, the parties are not precluded from reaching a subsequent agreement permitting a proposed assignment. See Arlu Assoc., Inc. v. Rosner, 14 A.D.2d 272, 220 N.Y.S.2d 288, aff'd, 12 N.Y.2d 693, 185 N.E.2d 913, 233 N.Y.S.2d 477 (1962).

\textsuperscript{6} 1 M.R. Friedman, Friedman on Leases § 7.303e1, at 182 (1974) [hereinafter cited as Friedman] (emphasis added).

\textsuperscript{7} See text accompanying notes 63 & 70 infra.

\textsuperscript{8} E.g., Richard v. Degen Brody, Inc., 181 Cal. App. 2d 289, 5 Cal. Rptr. 263 (1960) (absent qualification in lease, lessor may arbitrarily and without regard to financial status of sublessee withhold consent to sublet); Friedman v. Thomas J. Fisher & Co., 88 A.2d 321 (D.C. Ct. App. 1952) (lessor under no duty to accept subtenant left in possession by defaulting tenant); Dutch Inns of Am., Inc. v. United Va. Leasing Corp., 134 Ga. App. 352, 215 S.E.2d 290 (1975) (assignment of lease by lessee without written consent of lessor void); Jacobs v. Klawans, 225 Md. 147, 169 A.2d 677 (1961) (right of lessor to arbitrarily reject sublessee upheld despite social evils flowing from restraint on alienation); White v. Huber Drug Co., 190 Mich. 212, 157 N.W. 60 (1916) (tenant's assignment to reorganized corporate successor in interest violated assignment approval clause); Gruman v. Investors Diversified Servs., Inc., 247 Minn. 502, 78 N.W.2d 377 (1960) (preferred subtenant would pay 20% less rent—court emphasized importance of not judicially changing terms of existing leases); Segre v. Ring, 103 N.H. 278, 170 A.2d 265 (1961) (lease containing plain and unqualified restriction against assignment valid even though lessors were town selectmen); Zuker v. Dehm, 128 N.J.L. 435, 26 A.2d 564 (N.J. 1942) (lessor under no obligation to relet abandoned apartment where lease required lessor's written consent to sublet); Dress Shirt Sales, Inc. v. Hotel Martinique Assocs., 12 N.Y.2d 339, 190 N.E.2d 10, 239 N.Y.S.2d 660 (1963) (lessor may refuse to rent to proposed sublessee, cancel lease, and lease to same proposed sublessee for increased rent); Coulos v. Desimone, 34 Wash. 2d 87, 206 P.2d 105 (1949) (lessor's right to arbitrarily refuse sublease not
Moreover, the approval clause has been considered a freely bargained unqualified prohibition of assignment.\textsuperscript{9} This position has not, however, escaped challenge.\textsuperscript{10} Most significantly, it was rejected by the American Law Institute in the 1977 edition of the Restatement of Property.\textsuperscript{11} Section 15.2(2) of the Restatement provides:

A restraint on alienation without the consent of the landlord of the tenant's interest in the leased property is valid, but the landlord's consent to an alienation by the tenant cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent.\textsuperscript{12}

The Reporter's Note and Comment make clear that the commonly used approval clause language does not satisfy the Restatement test for a clause providing "an absolute right to withhold consent."\textsuperscript{13}

The Reporter acknowledged that the Restatement set forth a minority position but indicated that support for the Restatement rule could be found in several jurisdictions.\textsuperscript{14} The Restatement suggested that the degree of reasonableness required of the landlord "be appraised from cases in which the lease agreement has stipulated that such consent shall not be withheld impaired by alleged damage to lessee's business). See also 1 American Law of Property § 3.58 (A.J. Casner ed. 1952); 3A Thompson, supra note 2, § 1211, at 67.


11. Restatement (Second) of Property § 15.2(2) (1977) [hereinafter cited Restatement].

12. Id.

13. Id. Comment a & Reporter's Note 7.

The Comment to section 15.2 summarizes this case law position by indicating that an objective test of reasonableness is to be applied; elaborating, the Comment states that "most courts look to the standard of the reasonably prudent man, and leave no room for considerations of personal taste and convenience." Thus, the Restatement rule effectively incorporates into the approval clause an implied covenant not to unreasonably withhold consent.

15. Restatement, supra note 11, § 15.2(2), Reporter's Note 7. For a discussion of these cases, see Annot., 54 A.L.R.3d 689 (1973), and Todres & Lerner, Assignment and Subletting of Leased Premises: The Unreasonable Withholding of Consent, 5 Fordham Urb. L.J. 195 (1977) [hereinafter cited as Todres & Lerner].

16. Restatement, supra note 11, § 15.2, Comment g. The Restatement merely imposes the reasonableness requirement; it does not define the standard for measuring reasonableness. For direction on this, one must look to the Comment and Reporter's Note to Section 15.2. Although the applicable standard of reasonableness is repeatedly characterized therein as "objective," there is perhaps an indication that something less than a purely objective analysis may be appropriate. For example, it is acknowledged in Comment g that "[a] reason may be reasonable in relation to residential property that is the personal home of the landlord that would not be reasonable as to other residential property." Such an added consideration would seem to be at variance with the traditional standard of objective reasonableness which would foreclose regard of personal tastes. Were this the only aberration it could be justified by the logic of treating residential and commercial leases with different rules. See note 18 infra. Illustration 7 of Comment g, however, also seems to be at variance with a strict test of objective reasonableness. Illustration 7 reads:

L leases commercial property to T, the lease requiring L's consent to any assignment or sublease. L wanted T personally as a tenant because he thought T's presence on the leased property would improve the commercial tone of the area and L owned the commercial property nearby. L gave T quite favorable terms to induce T to locate his business on the leased property. T requests L's permission to assign the lease to T1, who is also a successful businessman. It may be found that L's refusal to consent under the circumstances is reasonable.

In agreeing to rent the property on such favorable terms, surely L would have a good opportunity to negotiate an absolute restriction on assignment. Strict adherence to the Restatement would thus lead to the conclusion that the absence of such a clause is an expression of a contrary intent. Therefore, a purely objective analysis of reasonableness would not give consideration to L's personal desire to have T above all others as tenant unless it was so expressed in the lease; nor would it permit special treatment because of this particular landlord's interest in other non-integrated property. Cf. Krieger v. Helmsley-Spear, Inc., 62 N.J. 423, 302 A.2d 129 (1973). For a discussion of English cases making a distinction between nonintegrated properties and several properties forming an integrated unit, see Todres & Lerner, supra note 15, at 204-07.

The treatment of cases involving an express convenant not to unreasonably withhold consent has been largely confined to an objective analysis, sometimes using the label "commercially reasonable." Some of these cases, however, do seem to vary from strict objectivity, giving some weight to subjective elements. See, e.g., Mitchell v. Rockefeller Center, Inc., 174 Misc. 441, 20 N.Y.S.2d 755 (App. Term 1940) (landlord was justified in objecting to assignment to a corporation whose name, Rockefeller Purchasing Corp., could be misleadingly confused with that of landlord); Butterick Pub. Co. v. Fulton & Elm Leasing Co., 132 Misc. 366, 229 N.Y.S. 86 (Sup. Ct. 1928) (landlord's objection to a proposed subtenant because of the similarity of business to that of landlord's other tenants in the neighborhood was upheld as reasonable). Thus, while the Comment and Reporter's Note refer to a standard of objective reasonableness with no room for consideration of distinctions of the particular landlord involved, some of the discussion and authority is suggestive of a lesser standard, at least in certain circumstances.
This Article reviews the case law in support of the Restatement position, analyzes the Restatement rule, and suggests that the Reporter's test for measuring the reasonableness of withholding consent not be strictly followed in the context of commercial leases. As a critical part of this undertaking, the Article discusses the closely related subject of the landlord's duty to mitigate damages in the event of tenant default, specifically addressing the duty to relet the premises, a subject often confused with the landlord's right to withhold consent to assignment. The Article emphasizes the relationship

17. Restatement, supra note 11, § 15.2, Reporter's Note 7. E.g., Chanslor-Western Oil & Dev. Co. v. Metropolitan Sanitary Dist., 131 Ill. App. 2d 527, 266 N.E.2d 405 (1st Dist. 1970) (unreasonable for municipal corporation to withhold consent to sublet until establishment of new rental rate where lease specifically provided for rental increases); Broad & Branford Place Corp. v. J.J. Hockenjos Co., 132 N.J.L. 229, 39 A.2d 80 (N.J. 1944) (reasonable person standard must be applied to determine if landlord was justified in refusing consent to tenant paint store's proposed poultry store subtenant); American Book Co. v. Yeshiva Univ. Dev. Foundation, Inc., 59 Misc. 2d 31, 297 N.Y.S.2d 156 (Sup. Ct. 1969) (lessor's refusal to sublet to planned parenthood association rejected as contrary to public policy).

18. This Article is concerned only with commercial leases. Treating commercial and residential leases differently is logical for several reasons. First, in the commercial context a tenant's right to assign is best characterized as an object of value that is often the subject of bargaining, as noted by the courts. "Where a businessman must make contingency plans in order to protect himself against the unpredictable vicissitudes of business, both good and bad, the ability to assign a lease is a valuable right for which he bargains and gives consideration." Ringwood Assocs., Ltd. v. Jack's of Route 23, Inc., 153 N.J. Super. 294, 310, 379 A.2d 508, 516 (1977). In contrast, the typical residential tenant has little concern for assignment rights. If the matter arises at all, it will arise long after the lease is consummated, and in connection with an unanticipated abandonment. Second, the residential landlord and tenant relationship is traditionally so one-sided that, like most lease provisions, rights of assignment are usually not a subject for bargaining. Third, a landlord's concerns may be quite different regarding commercial and residential leases. For example, a commercial lease is usually for a substantially longer term, and the commercial tenant's identity is apt to affect the long-term market value of the rental property. Thus, commercial landlords scrutinize tenants more closely than their residential counterparts. The commercial landlord has traditionally demanded freedom to decide how the property will be used and specifically who the tenants will be. A succession of commercial occupants moving in and out is anathema. See Friedman, supra note 6, § 7.1, at 163. In fact, many state legislatures, recognizing the differences between residential and commercial tenancies, have afforded special treatment to the residential tenancy. See note 160 infra.

19. This Article uses the term "mitigation of damages" to refer to what is more technically denominated the "avoidable consequences rule." The avoidable consequences rule imposes a duty on a party to minimize the amount of damages for which another party would be liable by exercising reasonable care and diligence to avoid further loss. See, e.g., Birge v. Toppers Menswear, Inc., 473 S.W.2d 79 (Tex. Civ. App. 1971). See also D. Dobbs, Remedies § 3.7, at 186 (1973). Mitigation of damages, on the other hand, refers to proof of facts which tend to show that the damages the plaintiff seeks are not as large in amount as claimed. Black's Law Dictionary 1153 (4th ed. 1968). Although technically mitigation of damages is an improper term to refer to the duty of a party to a contract or a lease to not "run up" damages, the usage is so frequent that it is almost accepted as equivalent in meaning to the avoidable consequences rule. For examples of cases and authorities using mitigation of damages to refer to the avoidable consequences rule, see Shaker Bldg. Co. v. Federal Lime & Stone Co., 28 Ohio Misc. 246, 277 N.E.2d 584 (Shaker Heights Mun. Ct. 1971); Bulkeley, Does a Landlord Have a Duty to Mitigate Damages When a Tenant Abandons During the Lease?, 68 Ill. B.J. 588 (1980) [hereinafter cited as Duty to Mitigate].
between the rules of assignability and mitigation of damages by reletting, and notes the Restatement's curious positions on these issues—on the one hand embracing a minority, pro-tenant position on the assignment issue and, on the other, rejecting the popular pro-tenant minority trend regarding mitigation.20

**The Confusion of the Issues of Assignability and the Landlord's Duty to Mitigate Damages**

Before exploring the case law treatment of the assignability issue and the confusion evident therein, it is necessary to consider the relationship between the concepts of assignability and the landlord's duty to mitigate damages. As will be seen, the relationship of the concepts stems not from any affinity grounded in legal doctrine, but rather from the simple fact that the issues often arise from the same fact pattern. That is, commonly a tenant produces a party to whom he or she desires to assign his or her lease and asks the landlord to approve the assignment—at this point the assignment issue is raised. If the landlord refuses to allow the assignment, the tenant frequently abandons the premises. If the landlord then sues the tenant for rents accruing subsequent to abandonment, the tenant often defends by asserting that the landlord had a duty to mitigate damages by reletting—at this point the mitigation issue is raised. Before considering this common fact pattern in more detail, it is useful to establish the legal distinction between the assignability and mitigation issues. This can be accomplished by examining the positions of those who advocate and those who oppose both the imposition of a duty to mitigate damages upon landlords and the ability of a landlord to unreasonably withhold consent to assignment.

**Rationales for the Varying Rules on Assignability and Mitigation**

In evaluating the mitigation issue,21 the distinction between a contract and a lease is critical.22 Proponents of mitigation have emphasized the changed

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20. Restatement, supra note 11, § 12.1(3). This section does not impose on the landlord a duty to mitigate the tenant's damages by reletting the premises, but rather provides:

- **(3)** Except to the extent the parties to the lease validly agree otherwise, if the tenant abandons the leased property, the landlord is under no duty to attempt to relet the leased property for the balance of the term of the lease to mitigate the tenant's liability under the lease, including his liability for rent, but the landlord may:
  - (a) accept the tenant's offer of surrender of the leased property, which offer is inherent in the abandonment, and thereby terminate the lease, leaving the tenant liable only for rent accrued before the acceptance and damage caused by the abandonment; or
  - (b) notify the tenant that he will undertake to relet the leased property for the tenant's account, thereby relieving the tenant of future liabilities under the lease, including liability for future rent, to the extent the same are performed as a result of a reletting on terms that are reasonable.

21. See generally Duty to Mitigate, supra note 19.

character of the landlord and tenant relationships, contending that while leases were once solely proprietary in nature, contemporary leases now include other substantial mutual obligations and are therefore more contractual in nature. Moreover, it is asserted that pure conveyance theory is absurd when applied to the modern urban lease. Modern leases, typically for a portion of a larger building, generally contemplate a continuous mutual exchange of consideration, not a single unilateral conveyance. Because changes in circumstances have rendered the historical lease-contract distinction suspect, it is often asserted that contract principles, including the duty to mitigate damages, should apply to leases.

Opponents of mitigation emphasize that tenants should not by their own wrongdoing be able to impose a duty on their landlord. At least one court has taken the position that imposition of a duty to mitigate damages when a lease has been breached results in a legal absurdity; there can be no duty to mitigate damages because the landlord has no right to re-rent the property if the landlord has not accepted the tenant’s surrender; if the landlord has accepted the property and re-rented it, a recission of the lease would have occurred, releasing the tenant from the rent obligation.


The application of contract law to lease interpretation necessitates that leases be construed like other contracts. This construction effectively promotes consumer protection because courts have broadened seller’s responsibility for the quality of goods sold by implying warranties of merchantability and fitness. Similarly, in landlord-tenant relations, the law should protect tenants’ reasonable expectations regarding enforcement of lease terms whenever tenants cannot, for reasons beyond their control but in the hands of landlords, protect themselves. See Javins v. First Nat’l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970).


27. See Haycock v. Johnston, 81 Minn. 49, 83 N.W. 494 (1900).
Restatement section 12.1(3) indicates that the modern policy approved by the American Law Institute in deciding to reject a duty to mitigate damages is that “[a]bandonment of property is an invitation to vandalism, and the law should not encourage such conduct.”28 Moreover, opponents of mitigation seek to retain, at least in part, the historical distinction between a lease, as a purchased interest in real estate, and a purely executory contract.29

This lease-contract distinction, although important to the mitigation issue, is nevertheless largely unrelated to the assignment issue, a fact illustrating an important distinction between assignment and mitigation. The primary concern of the courts with respect to assignment is interpretation of the lease. In this regard, lease interpretation usually focuses on three interacting matters—one of intent and two of policy. First, and most important, is the intent of the parties. The fundamental inquiry is what the parties to the lease actually intended with respect to the landlord’s ability to prevent a transfer of the tenant’s interest.30 Second, is the long-standing policy against restraints on alienation.31 The third is the duty of good faith which may be imposed upon parties to legal transactions.32

Advocates of the minority rule on the assignment issue take the position that if some element of uncertainty or ambiguity can be found in the restrictive language, the clause should be construed in a manner that promotes, rather than restricts, transferability.33 Those advocates assert that language mentioning approval is ambiguous because it suggests that approval can be secured if a reasonably acceptable tenant is presented; this “false” expectation should therefore be given effect by making the parties to an approval clause deal with each other “reasonably” or in “good faith.”34

Supporters of the majority rule take the position that the approval clause is clear and unambiguous; landlord has exercised a personal choice in the selection of tenant and has expressly indicated that only a substitute tenant

28. Restatement, supra note 11, § 12.1(3), Comment i.
30. See notes 129-130 and accompanying text infra.
31. A lease restriction against assignments of the term, while valid, nevertheless constitutes a restraint against alienation. Such restrictions are strictly construed by the courts against the lessor and in favor of the lessee. Gazley v. Williams, 147 F. 678 (6th Cir.), aff’d, 210 U.S. 41 (1908); Homa-Goff Interiors, Inc. v. Cowden, 350 So. 2d 1035 (Ala. 1977); Lawrence v. Cooper Independent Theatres, 177 Kan. 125, 276 P.2d 350 (1954); Plotkin v. Milwaukee Metal Working Co., 255 Wis. 456, 39 N.W.2d 439 (1949).
34. E.g., Homa-Goff Interiors, Inc. v. Cowden, 350 So. 2d 1035 (Ala. 1977). For a discussion of this case, see notes 57-70 and accompanying text infra.
to which he or she consents shall be acceptable. Supporters also contend that many leases now in effect covering a substantial amount of real property were carefully prepared by competent counsel in reliance upon the accepted and longstanding interpretation of the assignment clause, and that should a tenant desire to protect the right to transfer the estate to a suitable substitute, a clause can be readily inserted in the lease to the effect that landlord's consent shall not be unreasonably withheld.35

In short, the various contentions regarding mitigation and assignability are not transferable. The mitigation dispute turns on the validity of a lease-contract distinction; the assignability controversy centers on lease interpretation. Moreover, the lease-contract distinction is unrelated to assignability questions, and lease interpretation has no relation to questions of mitigation. The authorities that confuse the two issues simply fail to grasp the difference. Having outlined the arguments both in favor of and against the duty to mitigate and the propriety of the landlord's right to unreasonably withhold consent to assignment, it is worthwhile to briefly consider the contexts in which these issues arise.

The Two Fact Patterns Creating Confusion of the Mitigation and Assignability Issues

In considering the subject of this article, a distinction between two commonly confused situations must be noted.36 The first, which is the target of the assignment approval clause, occurs when a tenant wishes to assign to a party produced by the tenant.37 If the lease is silent on assignability, the tenant is generally free to proceed.38 More commonly, however, leases restrict the tenant's rights of transfer by providing that the tenant must secure the landlord's permission.39 The second situation occurs when a tenant abandons the premises during the tenancy and is sued by the landlord for rent accruing thereafter. The tenant typically defends by asserting that the landlord should have attempted to mitigate damages by seeking a new tenant.40 The combination of the two longstanding majority rules pertaining to these situations—when the lease contains a standard approval clause the

36. See notes 82-85 and accompanying text infra.  
37. See Fried man, supra note 6, § 7.304a, at 187.  
38. See McFadden-Deauville Hotel, Inc. v. Murrell, 182 F.2d 537 (5th Cir. 1950) (assignability of lease not restricted by provision for rental to be computed as a percentage of income); Valley Oil Co. v. Barberian, 344 Mass. 759, 183 N.E.2d 109 (1962) (assignment of filling station premises included right to assign lease and option to purchase); Smithfield Oil Co. v. Furlange, 237 N.C. 388, 126 S.E.2d 167 (1962) (lease and option to purchase are assignable in absence of statutory or contractual restriction). See generally 2 R. Fow ell, The Law of Real Property ¶ 246[1], at 372-84-85 (1977).  
landlord may, for any or for no reason, refuse to permit the tenant to assign, and when the tenant has wrongfully abandoned the landlord need not attempt to relet the premises—may effect a considerable hardship on a tenant no longer having a use for the premises.41

Courts have often been confronted with cases in which a landlord refused to approve the tenant's selected assignee and the tenant then abandoned the property, resisting liability for future rents.42 In this instance, when addressing the assignability issue, tenants' counsel have routinely buttressed arguments directed at assignability with theory, policy, and authority more applicable to the mitigation of damages issue.43 The courts have generally been unclear whether they were deciding the nature of the landlord's right to prevent assignment or the landlord's duty to mitigate damages.44 This confusion likely has contributed to the split of authority across and even within jurisdictions on these two issues.45

The assignability issue is of obvious concern in the majority jurisdictions where there is no duty to mitigate damages. Unless the vacating tenant has the right to transfer an interest in the leasehold estate and thereby secure relief from or assistance in meeting the rent obligation, the tenant is at the mercy of the landlord.46

41. Friedman, supra note 6, § 7.304a, at 189-90.
44. An extreme example is Gruman v. Investors Diversified Servs., Inc., 247 Minn. 502, 78 N.W.2d 377 (1956). In Gruman, the tenant vacated the premises and sought the landlord's approval to sublet. The court held that because the lease contained a prohibition against assignment, the landlord had no obligation to accept a suitable tenant proposed by the breaching tenant to mitigate damages. Id. at 509, 78 N.W.2d at 381. In so doing, the court confused two situations. In the first situation, the tenant locates an acceptable tenant and requests the landlord's consent to a sublease. This gives rise to the issue of whether the landlord must consent to the sublease despite the no assignment clause. In considering this issue, the Gruman court failed to distinguish a second situation where the tenant abandons prior to the end of the lease without locating a subtenant. The issue here is whether the landlord has the duty to mitigate damages by finding a new tenant. Due to the court's confusion, the Gruman decision squarely presents a conflict between a policy favoring the sanctity of the contractual no-sublease clause and a policy favoring mitigation of damages and the free alienability of property interests. See generally Comment, Landlord's Duty to Mitigate Damages Upon Tenant's Default, 24 U. Chi. L. Rev. 567 (1957).
45. Illinois is one state with split authority. See Duty to Mitigate, supra note 19; Morris, Assignment and Subletting, 46 Chi. B. Rec. 140 (1964). Illinois law is discussed more fully in notes 102-122 and accompanying text infra.
In the minority of states that recognize a landlord's duty to mitigate damages,\(^47\) no practical reason at first appears for concern about the assignability issue. If the landlord withholds consent to an assignment, the tenant will probably abandon and thereby trigger the duty to mitigate. The landlord would then be obligated to lease to the proposed assignee or to some other tenant of the landlord's choosing. If the landlord does not relet, the tenant would be relieved of future liability under the lease, the exact result the tenant desires.\(^48\)

Even in a mitigation jurisdiction, however, the assignment issue causes concern when the current rental value of the property exceeds the rent reserved under the lease. If rental rates have risen sharply, a tenant desiring to quit the premises will want to reap the benefits of a relatively low rental by assigning an interest in the leasehold estate at a higher market rate rental and thereby profit from the differential.\(^49\) If the landlord can refuse the assignment, and the tenant defaults under the lease by quitting the premises, the landlord can acquire a windfall by reletting the premises at a higher rent. If, however, the landlord must consent to a responsible assignment, the tenant will benefit. Thus, receipt of the profit from the increased market value of the leasehold estate is dependent on whether a landlord is able to refuse a proposed assignment.\(^50\) Other factual variations involving

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48. See T.A.D. Jones Co. v. Winchester Repeating Arms Co., 55 F.2d 944 (D. Conn.) (a landlord failing to perform duty to mitigate damages had lost remedy against the breaching tenant), aff'd, 61 F.2d 774 (2d Cir. 1932), cert. denied, 288 U.S. 609 (1933). Cf. Lefrak v. Lambert, 89 Misc. 2d 197, 390 N.Y.S.2d 959 (Civ. Ct. 1976) (duty held breached where lessor produced no evidence to establish lessor's good faith effort to mitigate damages); Marson, Inc. v. Terwaho Enterprises, Inc., 259 N.W.2d 289 (N.D. 1977) (duty held breached where landlord substantially raised rent while mitigating damages following tenant's breach).

49. See, e.g., Moore v. Bannister, 269 So. 2d 291 (La. App. 1972) (sublessee paid more than double the rent paid by the lessee).

50. Cf. Bedford Inv. Co. v. Folb, 79 Cal. App. 2d 363, 180 P.2d 361 (1947) (landlord cannot insist on receiving a share of the lessee's profit as the price for landlord's consent under an express covenant that consent would not be unreasonably withheld). The situation presented in the text is common in eras of high inflation and rapidly changing land values. The lack of case law dealing with the issue of increased rent value is probably a function of the frequent settlements fostered by an opportunity for both the landlord and tenant to receive money that neither fully anticipated. In a typical scenario, a supermarket tenant leases space in a regional
disputes over increased market value can arise when a tenant proffers an apparently suitable substitute tenant and the landlord prefers to relet to another party at a lesser rental, but nonetheless in excess of the amount reserved in the lease. The dispute may also arise where a landlord prefers to take over the property for his or her own use, intending simply to release the tenant from the rent obligation.51

Case Law Support for the Restatement Rule

As shown above, the two issues of mitigation of damages and assignability involve different legal concerns, and therefore deserve independent consideration. The American Law Institute has recognized this independent status, and has rejected the minority pro-mitigation position by adopting Restatement section 12.3(1), which favors maintenance, at least in this respect, of the historical distinction between leases and contracts.52 The Institute, however, embraced the minority position on assignments in Restatement section 15.2(2) which gives the approval clause a new interpretation.53 Although this section disfavors restraints on alienation by providing that a landlord’s consent cannot be unreasonably withheld, it is tempered by an overriding accommodation for the party’s intent—the qualification is added that a freely negotiated provision in a lease that gives a landlord an absolute right to withhold consent should be enforced.54

There is abundant authority opposed to the Restatement’s position that a landlord may not unreasonably withhold consent to assignment under an shopping center, with the tenancy for a term of twenty years and with several options to extend. After several years, the tenant finds that a large regional shopping center location is not as well suited to its business as a small strip center location. Consequently, the tenant wishes to assign or sublease to five smaller retail tenants who will partition the space, and the tenant intends to exact in the aggregate from these five tenants several times its own rent obligation. The landlord cites the lease prohibition against transfer without the landlord’s approval and states that the approval will not be forthcoming, and the tenant then argues that the lease is ambiguous and should be construed against the restraint on alienation. The parties compromise. In exchange for a sum of money, the tenant agrees to an early termination of the lease. The tenant thus receives a share of the increased rental value and the landlord benefits from the net of the increased rents that will now be received, less the cost of regaining control of the rental space. Perhaps the best anticipatory solution from the landlord’s point of view is to secure a clause granting the landlord the right to cancel the lease as an alternative to assignment. See Friedman, supra note 6, ¶ 7.303e3, at 185 (Supp. 1979).

51. Cf. Cedarhurst Park Apartments, Inc. v. Milgrim, 55 Misc. 2d 118, 284 N.Y.S.2d 330 (Dist. Ct. 1967) (withholding consent because landlord corporation’s officer required apartment held unreasonable). English courts have held that a landlord’s consent “is unreasonably withheld even when the landlord offers to pay the tenant the same price that the transferee is to pay for the proposed transfer.” Todres & Lerner, supra note 15, at 209 n.75. Modern English law is consistent with Restatement § 15.2(2) because by statute every English lease with an approval clause impliedly includes a covenant of reasonableness. Landlord-Tenant Act, 1927, 17 & 18 Geo. 5, C. 36, 19, sched. 1.

52. Restatement, supra note 11, ¶ 12.3(1).

53. Id. ¶ 15.2(2).

54. Id. ¶ 15.2(2) & Comment i. See notes 12-13 and accompanying text supra.
assignment approval clause. Yet the Reporter and other commentators have cited cases in support of the Restatement position, and one court has adopted the Restatement rule subsequent to its publication. An examination of these cases contributes to an appreciation of both the problem that gave rise to this newly favored position of law and the nature and extent of the foundation on which that position rests.

The Post-Restatement Case

The most recent rejection of the long-standing common law rule regarding the approval clause is found in Homa-Goff Interiors, Inc. v. Cowden. Landlord Cowden and Homa-Goff Interiors had entered into a lease that included the following restriction on assignment: "The Lessee shall not assign or sublease all or any part of the demised premises except by and with approval of the Lessor in writing." After several months' operations, Homa-Goff realized that it would be financially unable to continue its business. Homa-Goff therefore sought and reached a tentative agreement with the state of Alabama to sublease the premises. After Cowden refused to approve this transaction, Homa-Goff proposed to sublease to another party and vacated the premises when this second proposal was likewise refused. Cowden eventually leased the premises to the second proposed sublessee for the same rental paid by Homa-Goff.

In an action brought by Cowden for lost rents, the trial judge ruled in favor of the landlord, recognizing that a "landlord's withholding of consent can be arbitrary and unreasonable." The Alabama Supreme Court reversed and adopted the minority position, holding that "even where the lease provides an approval clause, a landlord may not unreasonably and capriciously withhold his consent." The Supreme Court adopted a "reasonable commercial standard" to judge a landlord's rejection of a proposed transferee. Because the evidence in this case showed "extreme bad faith" by the landlord, the court ruled in favor of the tenant.

Three Justices dissented, contending that "[t]o overturn a century and a quarter of existing real estate law without giving contracting parties 'fair notice' destroys the law's predictability." The dissenter were critical of the majority for rewriting "a contract so as to rid it of its alleged moral harshness," with the effect of rewriting "tens of thousands of existing real

55. See cases cited in note 8 supra.
56. See notes 57-70 and accompanying text infra.
57. 350 So. 2d 1035 (Ala. 1977).
58. Id. at 1037.
59. Id.
60. Id. at 1038.
61. Id.
62. Id.
63. Id. at 1039 (Bloodworth, J., dissenting).
64. Id. (Almon, J., dissenting).
estate leases in Alabama which were negotiated by lessors and lessees in good faith reliance on . . . existing law.”

The facts of the case do indeed attract sympathy for the tenant. It certainly appears inequitable if a landlord is able to reject a proposed sublessee of unquestionable financial means, to reject a second proposed sublessee, and after tenant vacates, to rent to the second proposed sublessee while bringing suit against the original tenant for lost rents. Yet, the facts may not be as tainted as they first appear. Unfortunately, the Court did not report the reasons, if any, given by the landlord for rejecting the first proposed sublessee, thus obscuring the landlord’s motive. The original tenant operated a furniture store, and the first proposed new tenant—the State of Alabama—almost certainly wished to put the property to a different use. If the lease restricted the permissible uses of the premises, the landlord’s rejection would have been reasonable because a suitable substitute tenant should be willing to abide by all of the terms of the prime lease. Surely, for example, a landlord who negotiates a restriction in the lease allowing only retail activities should not be forced to accept a non-retail use. Even the Restatement position would not go so far as to force a landlord to permit

65. Id. at 1041 (Bloodworth, J., dissenting on denial of rehearing).
66. The court’s silence indicates that the landlord may have expressed no reason for these rejections. It would be unfair from this alone to infer bad faith on the landlord’s part because it might be the case that the landlord remained silent in reliance on the overwhelming authority supporting his right to reject a proposed subtenant without giving reasons when the lease contains an approval clause. The transaction in Homa-Goff predated the adoption of Restatement § 15.2(2). In this situation, the Restatement suggests: “The denial by the landlord or the tenant of the other party’s request that he consent to a proposed transfer without stating his reasons for the denial, when requested to give his reasons, will be deemed a withholding of his consent unreasonably . . . .” Restatement, supra note 11, § 15.2, Comment g.
67. See, e.g., Whitman v. Pet, Inc., 335 So. 2d 577 (Fla. Dist. Ct. 1976) (restaurant tenant assigned to party that failed to qualify under provision that assignee operate substantially the same type, class, and quality of business); Reget v. Dempsey-Tegler & Co., 70 Ill. App. 2d 32, 216 N.E.2d 500 (5th Dist. 1966) (lease provided that premises would not be used for purpose other than an investment brokerage office; proposed transferee wanted to operate a beauty parlor, and court stated that a landlord should not be required to re-let the premises for a different purpose if he reasonably believes that such use will damage the premises). See also Texaco, Inc. v. Greenwich-Kinney, Inc., 39 A.D.2d 877, 333 N.Y.S.2d 544 (1972), aff’d mem., 32 N.Y.2d 910, 300 N.E.2d 424, 347 N.Y.S.2d 67 (1973); Peltz v. Standard Homes Co., 342 S.W.2d 921 (Tex. Civ. App. 1961). But see Burr v. Spencer, 26 Conn. 159 (1857) (holding that a lease authorizing lessee to quarry stone does not restrict use of premises to quarry purposes); Otting v. Gradsky, 294 Ky. 779, 172 S.W.2d 554 (1943) (holding that provisions in lease stating use of premises was not exclusive); Rapid Assocs. v. Shopko Store, Inc., 96 Wis. 2d 516, 292 N.W.2d 668 (1980) (absent express restrictive terms, descriptive clauses in lease are merely permissive and do not restrict tenant’s use of premises).
68. Clauses that purport to limit a tenant’s use have also been the subject of some interpretative controversy. Thus, a restriction limiting use to a specified purpose “only” has been upheld, Doherty v. Monroe Eckstein Brewing Co., 198 A.D. 708, 191 N.Y.S. 59 (1921), but a lease merely stating a specified use has been held to be neither a restrictive covenant nor a conditional limitation. Courts have interpreted such descriptions to be simply permissive. See cases collected in Annot., 148 A.L.R. 583 (1944).
assignment to a substitute tenant who insisted on terms different from the original bargain. 69

Likewise, the rejection of the second proposed sublessee in Homa-Goff and the subsequent rental to that proposed sublessee can raise varying interpretations of the landlord’s motivation. Despite the court’s insinuation, the landlord may have had the best of motives. For example, Cowden may have located a highly desirable replacement tenant, but when unable to consummate the anticipated deal, may have let the space to the marginally acceptable second proposed sublessee to mitigate the vacating tenant’s damages.

Nevertheless, this case suggests a fact pattern illustrating the desirability of rejecting, or at least altering, the long-standing majority rule by requiring good faith conduct. Certainly, if Cowden rejected the proposed sublessees only to treat Homa-Goff maliciously, all but the most staunch property rights advocates would support the tenant. Moreover, there is no readily apparent excuse for permitting a landlord to reject, without justification, a proposed transferee and subsequently to rent to the same party while simultaneously seeking damages for the interim vacancy. There is none, that is, unless one simply believes that considerations of fairness are irrelevant when a tenant has assented to the full and unlimited risks of the bargain under the lease.

The Illusory Authority

A case cited by the Reporter in support of Restatement section 15.2(2) and considered by the court in Homa-Goff 70 is Shaker Building Co. v. Federal Lime & Stone Co. 71 Here, too, the landlord (Shaker Building Co.) and the tenant (Federal Lime & Stone Co.) entered into a lease containing an approval clause. Because its business had greatly increased, Federal Lime wished to relocate and suggested that Shaker advertise the premises for rent. Upon learning of Federal Lime’s plans to vacate, a month-to-month tenant in the same office building asked to occupy the premises. Shaker refused without giving any reason. Six months later, Federal Lime vacated. In a suit brought to collect rents, Federal Lime de-

69. Cf. Mitchell’s, Inc. v. Nelms, 454 S.W.2d 809 (Tex. Civ. App. 1970) (landlord acted reasonably in refusing consent where the sublease would bind him to a longer term at a lower rent); Filmways, Inc. v. 477 Madison Ave., Inc., 36 A.D.2d 609, 318 N.Y.S.2d 506 (1971), aff’d mem., 30 N.Y.2d 597, 282 N.E.2d 119, 331 N.Y.S.2d 31 (1972). In Filmways, the sublease did not expressly restrict the right of the subtenant to further sublet, nor did it place restrictions on the subtenant’s occupancy that were similar to the limitations placed on the tenant by the prime lease. In both the appellate division and the court of appeals the majority held the refusal to consent to a second sublease would be unreasonable because the subtenant was found to be bound to the same terms as the original lease. 36 A.D.2d at 609, 318 N.Y.S.2d at 506, aff’d. 70. 350 So. 2d at 1037.

70. 350 So. 2d at 1037.

ned liability alleging "that plaintiffs owed a duty to mitigate damages by acceptance of . . . [the month-to-month tenant] as sublessee." 72

After surveying the law regarding a landlord's duty to accept or procure a new tenant in mitigation of damages, the Ohio municipal court concluded that there was pronounced disagreement among and even within the jurisdictions, including Ohio. 73 The court reasoned that ambiguities in the lease should be construed against the landlord who had prepared it and that the clause conditioning approval upon the landlord's consent was in effect a representation that consent was possible. Such a representation, the court concluded, embodied the notion that "consent will not be withheld under any and all circumstances, reasonable or unreasonable." 74 From this, the court enunciated its rule that under an approval clause "consent may not be withheld unless the prospective assignee is unacceptable, using the same standards applied in the acceptance of the original lessee." 75 Because the prospective assignee had been a lessee of this landlord for five years, and thereafter on a month-to-month basis, the court found that the assignee was an acceptable tenant. 76

Shaker illustrates nicely that tenants involved in assignment clause controversies are not always in pathetic, failing postures and therefore do not always create concern about the equity of rules governing the assignability of leases. On the contrary, Shaker involved a tenant's success story and is therefore less evocative of a protective pro-tenant reaction. Federal Lime was not an unfortunate victim of circumstances, forced to seek some final relief; rather, the tenant's business had grown. The landlord would understandably want to retain this prosperous tenant and enforce the advantages of the bargained-for relationship.

Therefore, in the commercial setting, the tenant should not always be portrayed as the unfortunate party in an assignability and mitigation controversy. 77 A healthy commercial tenant may wish to discontinue leased

72. Id. at 247, 277 N.E.2d at 585 (emphasis added).
73. Id. at 249, 277 N.E.2d at 586. Ohio decisions demonstrate disagreement about whether or not a landlord has a duty to mitigate damages following a tenant's breach. See Bumiller v. Walker, 95 Ohio St. 344, 116 N.E. 797 (1917) (duty to mitigate); Stern v. Taft, 49 Ohio App. 2d 405, 361 N.E.2d 279 (1976) (duty to mitigate); Rosenberger v. Hearsnip, 42 Ohio App. 536, 182 N.E. 596 (1930) (no duty); Baker v. Herrlinger, 16 Ohio App. 253 (1922) (duty to mitigate); White v. Smith, 8 Ohio App. 368 (1917) (no duty); Enquirer Bldg. Co. v. Menke, 28 Ohio N.P. 238 (1930) (no duty).
74. 28 Ohio Misc. at 251, 277 N.E.2d at 587.
75. Id. at 252, 277 N.E.2d at 587.
76. Id. An amusing and contrasting view was expressed in Millers Mut. Cas. Co. v. Insurance Exch. Bldg. Corp., 216 Ill. App. 12, 19 (1st Dist. 1920), where the court reacted to an allegation that the proposed sublessee should be considered satisfactory because the proposed sublessee was already a tenant of the same lessor by observing astutely that this very fact may indeed furnish the lessor reasonable grounds for its refusal to consent to the sublease.
premises for numerous reasons. For example, the tenant may discover that the traffic count or neighborhood conditions differ from earlier assessment. As a practical matter, a business often cannot be sold unless the leasehold can be assigned in connection with the sale. It is when the prosperous tenant desires to quit the premises or transfer a right in the leasehold that the rules on assignability and mitigation are of greatest significance. This is the situation where the landlord is more apt to refuse the transfer and, in the event the tenant abandons, to be carefree about reletting. In contrast, when the matter involves a failing tenant, the practicalities of the situation will encourage cooperation and mitigation. Because the prospect of collecting damages from the failing tenant will be poor, it will be in landlord's self-interest to seek and accept a replacement tenant.

Although the Shaker holding offers some support for the Restatement position on assignment, it is not sound authority for the rule of Restatement section 15.2(2) because the court mixed its discussion of the doctrine of mitigation and the question of assignability. Further, the authority considered by the Shaker court was directed solely to the broader issue of a landlord's duty to mitigate damages. Although the court's narrow holding was definitely limited to the approval clause context, and hence to the question of assignability, the court was clearly sympathetic to the minority trend of recognizing a landlord's duty to mitigate damages. Yet, because the Restatement rejects the duty to mitigate damages, a case truly supportive of Restatement section 15.2(2) would not draw its strength from the doctrine of mitigation. Further, the language of Shaker possibly expresses a subjective test of reasonableness in withholding consent to assignment rather than the objective test of the Restatement. The court's statement that acceptability of a proposed assignee should be measured by "the same standards applied in the acceptance of the original lessee" seems to permit consideration of concerns purely personal to a particular landlord, concerns that would not necessarily match those of an objective "reasonable commercial standard."

78. Friedman, supra note 6, § 7.1, at 162.
80. Friedman, supra note 6, § 7.1, at 162.
82. 28 Ohio Misc. at 248, 277 N.E.2d at 585-86.
83. The court stated that it found "great difficulty" in reconciling an absence of a duty to mitigate with general contract law. Id. at 249, 277 N.E.2d at 586.
84. Id. at 250, 277 N.E.2d at 587.
85. See notes 148-158 and accompanying text infra.
The Restatement also cites in support, Granite Trust Building Corp. v. Great Atlantic & Pacific Tea Co., 86 a federal district court decision applying Massachusetts law. In that case, the tenant argued that it was excused from performance under the lease by the unreasonable and arbitrary refusal of the landlord to consent to an assignment. 87 Noting that no relevant Massachusetts authority had been brought to its attention, the court proceeded to address the assignability question. It reasoned that because a lessee may freely assign unless restricted by the lease, a covenant permitting such assignment with the consent of the lessor is a covenant for the lessor's benefit and is to be construed strongly against the lessor. 88 The court observed that the better view would require a lessor to offer some reasons for withholding consent when a lease restricts a lessee's rights by requiring prior landlord consent. 89 Although concluding that the expression of such reasons "must have been in the contemplation of the parties," the court noted that courts and commentators stated the law otherwise. 90

The court's discussion of assignability was, however, mere dicta. In Granite Trust, the assignability issue was only one of two defenses raised by the tenant, either of which would have defeated the landlord's motion for summary judgment. 91 Because the tenant prevailed on the other defense, 92 the court found it unnecessary to reach a conclusion on the issue of assignability, although it clearly indicated that had a conclusion been necessary, the tenant would have prevailed.

To the court's credit, it did not intermingle the concepts of mitigation of damages and assignability but limited its discussion of assignability to a construction of a covenant in question. Nonetheless, any support in Granite Trust for the Restatement position is merely federal district court dicta, and the rule enunciated by the court falls considerably short of the Restatement rule. The court stated only that "some reasons" need be provided for withholding consent. Although even this would have been a departure from the majority rule, the court did not go so far as to suggest that an objective standard be used in judging the propriety of the landlord's refusal to consent. 93

87. Id. at 78.
88. Id.
89. Id.
90. Id.
91. The court in Granite Trust stated:
   [If] the defendant denies the existence of any contract binding upon it for the reason that the lease was not executed by any representative of the defendant having authority to act, and [if the defendant] was excused from performance by the unreasonable and arbitrary refusal of the plaintiff, [then the defense] presents a genuine issue of material fact.
   Id.
92. Id.
93. See text accompanying notes 148-158 infra.
Marmount v. Axe,\textsuperscript{94} is the oldest authority cited in support of the Restatement. In Marmount, because the tenant's shoe store was failing, he asked one of the landlords for permission to transfer the lease. The landlord responded that he would investigate whether the proposed transferee was responsible and, if so, the transfer would be acceptable.\textsuperscript{95} The proposed tenant bought the business, assumed its operations, and paid rent over a six-month period. The landlords then refused the assignment, and the new tenant vacated.\textsuperscript{96} Shortly thereafter, the landlords rented the premises to another party at a lower rent and sought recovery of the differential from the original tenant. In opposing the trial court finding that the proposed assignee was financially able, ready and willing to accept the assignment, the landlords argued for their absolute right to choose who would lease the property and suggested that because they did not see fit to assign to the proposed party, the matter had been put to an end.\textsuperscript{97} The Kansas Supreme Court disagreed:

Admitting the contention of [the landlords] that there was no agreement on their part to accept the [proposed assignee] for a tenant, what was [the landlords'] duty? Clearly it was to do everything they reasonably could to lessen the injury they were about to suffer on account of losing [the tenant].

We have concluded that this is a case for the application of the rule laid down in Lawson v. Callaway. There it was said: "Where a tenant under contract to pay rent on real property abandons the property and notifies the landlord of that abandonment, it is the duty of the landlord to make a reasonable effort to secure a new tenant for the property and obtain rent from the old tenant under the contract."\textsuperscript{98}

Although the facts and conclusion of Marmount do indeed support the result reached by applying the Restatement section 15.2(2) rule, Marmount is a classic example of a mitigation of damages case. The court made no attempt to identify the differences between the situations in which a tenant simply abandons the premises (the simple mitigation of damages context) and in which a tenant proffers a qualified substitute tenant prior to abandonment (the assignment context). The court reached the obvious conclusion that the mitigation of damages rule then in effect in Kansas would apply to this case which had ripened from the assignment context to the mitigation context.\textsuperscript{99} Moreover, the Marmount court did not discuss the issue of assignability. The opinion illustrates simply that the Kansas rule on a landlord's duty to mitigate damages may be applied to an abandonment that was

\textsuperscript{94} 135 Kan. 368, 10 P.2d 826 (1932).
\textsuperscript{95} Id.
\textsuperscript{96} Id. at 369, 10 P.2d at 826.
\textsuperscript{97} Id.
\textsuperscript{98} Id. at 370, 10 P.2d at 827 (citations omitted).
\textsuperscript{99} Kansas was a pioneer on the subject of a landlord's duty to mitigate damages. As early as 1916, Kansas recognized that when a tenant quit its premises "it was . . . the duty of the [landlord] . . . to lessen his loss by renting . . . to some other person . . . ." Hoke v. Williamson, 98 Kan. 580, 581, 158 P. 1115, 1116 (1916). In addition to Hoke and Lawson v. Callaway, 131 Kan. 789, 293 P. 743 (1930), which were quoted in Marmount, there is other early author-
preceded by an attempted assignment, and that in such a situation the rejec-
tion of the proffered substitute tenant may serve as evidence that the land-
lord failed to mitigate damages.

Interestingly, *Marmount* has been identified by Friedman\(^{100}\), a leading au-
thority on landlord-tenant law, as one of only a few cases\(^{101}\) in which a court
rejected the position that an absolute prohibition against assignment autho-
rizes a landlord to refuse permission for any or for no reason. Friedman
noted that several more cases are cited but that "these involve a landlord's
claimed duty to mitigate damages, not his tenant's right to assign or sublet" and observed that "some courts have confused these situations and it is not
always clear whether the court is passing on landlord's right to forbid trans-
fer or on his alleged duty to mitigate damages."\(^{102}\) However, because Kan-
sas was, and is, a "mitigation state" and because the *Marmount* court re-
solved the matter before it solely with reference to established Kansas law, *Marmount* is every bit as suspect as the other confused cases that, as Fried-
man has noted, are sometimes erroneously cited in support of the Restate-
ment's minority position on assignability.

**The Illinois Rule**

The remaining cases cited by the Restatement in support of its rule are
from Illinois.\(^{103}\) In *Wohl v. Yelen*,\(^{104}\) a residential apartment lease contained

\(^{100}\) FRIEDMAN, *supra* note 6, § 7.304a, at 188 n.4 (Supp. 1979).

\(^{101}\) The other cases are the Illinois cases discussed in notes 103-122 and accompanying text infra.

\(^{102}\) FRIEDMAN, *supra* note 6, § 7.303e1, at 188-89.

\(^{103}\) Two features of Illinois law support the Restatement rule. The first is the long estab-
lished principle that forfeitures of leases are not favored and that Illinois courts will readily find
circumstances that indicate an intent to waive a forfeiture. See Waukegan Times Theatre Corp.
v. Conrad, 324 Ill. App. 622, 59 N.E.2d 308 (2d Dist. 1945) (lessor who accepted rent from
assignee barred from asserting forfeiture of lease based on provision stating premises could not
be assigned without written consent of lessor); Famous Permanent Wave Shop, Inc. v. Smith,
302 Ill. App. 178, 23 N.E.2d 767 (1st Dist. 1939) (lessor who frequently accepted late monthly
payments barred from declaring forfeiture of lease based on "time is of the essence" provision);
Patterson v. Northern Trust Co., 132 Ill. App. 208 (1st Dist. 1907) (lessor's attempt to declare
forfeiture of lease and thus acquire title to land and buildings for non-payment of several rent
installments barred as unwarranted where simple proceeding to enforce lien for rent supplied
complete remedy). A second feature of Illinois law that supports the Restatement position is
that covenants against assignments are strictly construed against the landlord in order to pre-
vent forfeitures. See Postal Tel. Co. v. Western Union Tel. Co., 155 Ill. 335, 40 N.E. 587
(1895) (covenants in lease restraining power of alienation are construed with utmost strictness
and all doubts must be resolved in favor of free use of property); Chanslor-Western Oil & Dev.
Co. v. Metropolitan Sanitary Dist., 131 Ill. App. 2d 527, 266 N.E.2d 405 (1st Dist. 1970) (lease
covenant restricting lessee's freedom to sublet is construed most strongly against lessor);
Waukegan Times Theatre Corp. v. Conrad, 324 Ill. App. 622, 59 N.E.2d 308 (2d Dist. 1945)
(clause in lease prohibiting assignment without lessor's consent is for benefit of lessor only and
does not render an assignment without consent void, but only voidable).

a prohibition against subleasing. The landlord’s agent orally represented to tenant Yelen that if a substitute tenant could be found at the same rental, landlord Wohl would consent to a sublease. The agent then gave Yelen a “For Rent” sign to place on the premises, but when the tenant presented a prospective subtenant, the landlord’s agent responded that “he would think it over.”105 The landlord eventually refused permission to sublet, claiming a desire to sell the building and a belief that a vacant apartment would promote a sale.106 Yelen then vacated and Wohl brought suit for lost rents.107

Yelen asserted two legal theories: first, that the prohibition against subleasing in the lease had been waived when the landlord’s agent made the oral representation and furnished the sign and, second, that the landlord had a general duty to mitigate damages.108 On the first theory the court agreed with the tenant, holding that the landlord was estopped to deny the validity of the oral agreement and was bound to his waiver of the covenant against assignment.109 Acknowledging that the law in Illinois seemed somewhat unsettled on the second theory,110 the court indicated that as a general rule a

105. Id. at 458-59, 161 N.E.2d at 340-41.
106. Id. Courts applying Illinois law often examine the landlord’s basis for his refusal to allow the lessee to assign the lease. See Mowatt v. 1540 Lake Shore Drive Corp., 385 F.2d 135 (7th Cir. 1967) (lessor’s refusal on basis of insolvency of proposed assignees or their association with people of disreputable character held not “arbitrary or inconsequential”); Logan v. 3750 North Lake Shore Drive, Inc., 17 Ill. App. 3d 584, 308 N.E.2d 278 (1st Dist. 1974) (evidence that lessor denied approval of proposed sublease “in accord with long-established policy of the building” made prima facie case that refusal was arbitrary and unreasonable); Gelino v. Swannell, 263 Ill. App. 235 (2d Dist. 1931) (landlord’s refusal to consent to proposed assignment on basis of race and dislike of particular method of business held unreasonable).

107. 22 Ill. App. 2d at 458, 161 N.E.2d at 340.
108. Id. at 459, 161 N.E.2d at 341.
109. Id. at 461, 161 N.E.2d at 342. See Webster v. Nichols, 104 Ill. 160 (1882) (lessor’s acceptance of rent from assignee constituted waiver of lessor’s right of forfeiture on ground that assignment was made without lessor’s consent). See also Kaybill Corp. v. Cherne, 24 Ill. App. 3d 309, 320 N.E.2d 598 (1st Dist. 1974); Clark v. Hoering-Bucholz Co., 254 Ill. App. 60 (4th Dist. 1929).

110. 22 Ill. App. 2d at 461, 161 N.E.2d at 342. The Wohl court indicated that the Illinois Supreme Court passed on this issue by way of dictum in West Side Auction House Co. v. Connecticut Mut. Life Ins. Co., 186 Ill. 156, 57 N.E. 839 (1900). The West Side court stated:

Upon the abandonment of the leased premises by the tenant it was the right and the duty of the landlord to take charge of the premises, preserve them from injury, and, if it could, re-rent them, thus reducing damages for which the lessee was liable.

Id. at 161, 57 N.E. at 841. This dictum, however, was rejected by the court in Bau v. Baker, 118 Ill. App. 150 (1st Dist. 1905) (holding that there was no general duty to mitigate on mere abandonment by the lessee). Several cases have similarly rejected the duty to mitigate. E.g., Hirsch v. Home Appliances, Inc., 242 Ill. App. 418 (1st Dist. 1926); Harmon v. Callahan, 214 Ill. App. 104 (1st Dist. 1919) (dicta); Scanlon v. Hoerth, 151 Ill. App. 582 (1st Dist. 1909). Other cases recognize a duty on the part of the landlord to mitigate damages by using reasonable diligence to relet the premises. E.g., Marling v. Allison, 215 Ill. App. 224 (1st Dist. 1919); Contraeto v. Star Brewery Co., 165 Ill. App. 507 (4th Dist. 1911); Hinde v. Madansky, 161 Ill. App. 216 (4th Dist. 1911). A few other cases have been cited in support of a duty to mitigate. E.g., Levy v. Burkstrom, 191 Ill. App. 478 (1st Dist. 1915) (abstract); McCormick v. Loomis, 165 Ill. App. 214 (1st Dist. 1911); Reser v. Corwin, 72 Ill. App. 625 (2d Dist. 1897).
landlord need not seek out a new tenant after a defaulting tenant abandons; however, the court found that Wohl had a duty to mitigate damages by accepting the tendered sublessee. Some doubt remains regarding the precise nature of the Wohl holding. The court clearly rejected the theory that a landlord has a general duty to mitigate damages. The court was not clear, however, whether the duty to mitigate damages applies whenever a transferee is presented or just when the landlord waives a prohibition against assignment.

This uncertainty was eliminated in Scheinfeld v. Muntz TV, Inc. In Scheinfeld, the landlord consented to a sublease of a warehouse, conditioning further subletting upon the landlord’s written consent. Four years later, the subtenant proposed a new subtenant at a lower rental and offered to contribute the difference in rentals. The landlord refused consent and the subtenant vacated. In the suit that followed, the court ruled in favor of the subtenant, relying on Wohl v. Yelen. Significantly, the court made clear that the two possible interpretations of Wohl were alternate grounds. Thus, when a tenant tenders a suitable transferee, the landlord has a duty to “mitigate damages” by approving the transfer; otherwise a landlord has no general duty to mitigate damages. Moreover, although the Illinois rule was stated in terms of “mitigation of damages,” the Illinois courts have distinguished between the kind of “mitigation” rejected in Restatement section 12.1(3) and the kind favored in Restatement section 15.2(2)—imposing upon a landlord a duty not to unreasonably deny a proposed assignment or sublease under an assignment approval clause.

111. 22 Ill. App. 2d at 463-64, 161 N.E.2d at 342-43.
112. 67 Ill. App. 2d 8, 214 N.E.2d 506 (1st Dist. 1966).
113. Id. at 11, 214 N.E.2d at 508.
115. 67 Ill. App. 2d at 11, 214 N.E.2d at 511. See also Kelley v. Chicago Park Dist., 409 Ill. 91, 98 N.E.2d 738 (1951) (plaintiff has duty to mitigate damages in actions where recovery of money award is authorized); Hill v. Bell Discount Corp., 39 Ill. App. 2d 426, 188 N.E.2d 517 (1st Dist. 1963) (citing Kelley, court held that a broad no duty to mitigate damages principle has not been applied in Illinois).
116. 67 Ill. App. 2d at 11, 214 N.E.2d at 511. This “mitigation” phraseology may, however, be interpreted to impact certain applications of the Restatement rule. The Restatement rule is explained in terms of the tenant’s right to assign if the landlord’s consent is unreasonably withheld. In contrast, the Illinois rule expresses the landlord’s duty to mitigate in terms of the landlord’s approval of transfer. If the court’s genuine concern is mitigation, then that objective can be accomplished in several ways. So long as damages are mitigated, the landlord should not be obligated to accept the proposed transferee. The subtlety regarding profits from increased rental value (addressed in the text accompanying notes 48-50 supra) illustrates the impact of this interpretation of the Illinois rule. Under the Restatement rule, a tenant can assign the lease and thereby benefit from the increased rental value. In contrast, a landlord taking the Illinois mitigation language on its face should be able effectively to refuse the proposed assignment, wait for the tenant to vacate, and then terminate the lease and re-enter. By releting at a higher rent to a tenant of the landlord’s choice, the landlord should benefit from the increased value of the leasehold estate. Damages would be unambiguously mitigated, because there would be no damages. If this is not the desired result, viewing the Illinois rule in terms of “good faith”
Although the basic Illinois posture as established in Wohl and Scheinfeld coincides with the Restatement rules on mitigation and assignment, those cases did not set forth a standard for measuring the propriety of a landlord's refusal to consent to a transfer. Because the landlord in Wohl unsuccessfully offered a subjective reason for refusing permission, an objective standard would apparently apply. In the subsequent case of Reget v. Dempsey-Tegler & Co., the court, referring to Wohl and Scheinfeld for the rule of law, sustained the landlord's refusal of a proposed subtenant because the offered party was not "suitable." The court stated that to show an unreasonable rejection of a proposed transfer, a tenant must show that the transferee met reasonable commercial standards. The analysis rested on the tenant's creditworthiness and intended change in use of the premises. The court thus seems to have engaged in an objective analysis consistent with the Restatement test and akin to that used in cases involving an express covenant of reasonableness.

In Arrington v. Walter E. Heller International Corp., the Illinois Appellate Court for the First District stated in dicta that when a lease contains an
approval clause, "regardless of whether explicitly qualified to reasonable exercises of that power," a refusal to consent to a person acceptable by "reasonable commercial standards" is an unreasonable exercise.\textsuperscript{121} This statement alone would seem to certify the court's straightforward acceptance of the objective test of reasonableness. The court, however, clouded the issue with its next statement:

Where the lease contains provisions giving further meaning to the clause granting a person the power to withhold consent, then the standard by which reasonableness is judged is varied accordingly. \ldots A lease must be interpreted and construed as a whole in order to adduce the intent of the parties as to particular provisions since it will be presumed that everything in a lease was inserted deliberately and for a purpose.\textsuperscript{122}

By this, one might conclude that if any part of the lease contains language reflecting landlord's subjective preferences, this language could serve as a basis for refusal to consent to a proposed transfer, even though the objective reasonable commercial standard would yield a different result.

It is clear from the above discussion that the cases cited by the Restatement in support of its position that a landlord may not unreasonably withhold consent to assignment are less than persuasive precedent. Not only have some of these cases confused the mitigation and assignment issues, but they have been less than clear in articulating their precise holdings. Further, although the Illinois cases have more clearly adopted an assignment rule similar to that of the Restatement, these cases have not carefully delineated a standard for measuring the propriety of landlord's refusal to consent. It is thus apparent that the Restatement's position on assignment is not sustained by compelling precedent and that therefore the Restatement rule, as a departure from the common law, need be supported by some other persuasive authority or reasoning for it to be properly accepted by the courts.

\textbf{Critique of the Restatement Assignment Approval Clause Rule}

The confusion of the issues of mitigation and assignment has diminished the persuasiveness of the limited case law in support of Restatement section 15.2(2). The rejection of any long-standing rule of law should be preceded by a thorough and systematic analysis of the relevant issues; the minority cases relied upon by the Restatement display little if any such analysis. Further, a judicially mandated change in the law should be justified by a change in circumstances; yet, the only case discussions of changed circumstances have been with respect to the mitigation of damages issue.

The mitigation issue is crucially different from the approval clause issue. As already noted, proponents of a new rule on mitigation have emphasized that fundamental changes in the nature of the landlord and tenant rela-

\textsuperscript{121} Id. at 641, 333 N.E.2d at 58 (emphasis added).
\textsuperscript{122} Id.
tionship make the application of contract rules, rather than antiquated lease rules, suitable.\textsuperscript{123} That there are differences between the historic and contemporary leasehold relationships cannot be denied. Although the argument apparently did not persuade the American Law Institute to adopt the contract rule on mitigation of damages, it has received considerable favor. The number of jurisdictions that recognize the change, albeit a minority, has grown in number\textsuperscript{124} and many state legislatures have recently required that \textit{residential} landlords mitigate damages.\textsuperscript{125}

In contrast, the need for a new rule with respect to the assignment approval clause has not been clearly linked to any change in circumstances. The altered nature of the landlord and tenant relationship that lies at the heart of the mitigation of damages movement has never been offered as a justification for a new rule on the assignment issue. Paradoxically, those advocating a new interpretation for the approval clause seek a rationale in the time-honored property law rule that restraints on alienation should be disfavored. They ask for stricter adherence to this doctrine, and hence a construction that militates against an absolute and unqualified restriction. Although tenant-rights advocates may promote such reasoning, the arguments fail to clarify why a lease assignment provision that has heretofore escaped the anti-restraint construction should now come within its purview.

Two possible explanations for advocacy of the new Restatement rule arise, neither of which is entirely satisfactory. The first, which has emerged as the predominant theory, is that the approval clause no longer serves as a clear statement of intent. The second is that a change in our fundamental approach to legal relations has occurred such that every contemporary legal obligation should be construed to contain an implied covenant of good faith.\textsuperscript{126}

\begin{footnotesize}
123. See notes 23-25 and accompanying text supra.
126. This explanation has not generally been associated in the literature with the assignability issue, but is more apt to be found in discussions of the duty of mitigation of damages in a residential lease. The issues of assignability and mitigation have, as has been discussed in this Article, routinely been commingled. The combined posture found in §§ 15.2(2) and 12.1(3) of the Restatement presents a curious split of the good faith concept. The landlord must accept a proposed assignee in good faith, but need not use even minimal good faith efforts to relet abandoned premises.
\end{footnotesize}
Proponents of this first theory have asserted that the approval clause is unclear and therefore should be construed to disfavor the restraint. No evidence is offered, however, to show that the meaning of the approval clause is now unclear, and no explanation is given of what gave rise to this alleged new uncertainty, although the overlooked confusion of assignment and mitigation may be responsible. To the contrary, because over many years courts have consistently interpreted assignment approval clauses, the meaning would seem to have gained certainty.

The parties' intent must be ascertained in the construction of any lease because a cardinal principle of interpretation is to give effect to intent. Intent is of special concern in considering the assignability issue because application of the doctrine against restraints on alienation is dependent upon some flawed expression of intent. That is, the doctrine is properly invoked only if a clause is ambiguous. If the clause is clear and unambiguous, the alienation doctrine should not be applied and the restraint on alienation should be given its intended effect. Although rules of interpretation and construction are easily stated, they are not so easily applied; in practice intent is always difficult to ascertain. When intent of parties to a contract is in question, the parole evidence rule greatly reduces the scope of the inquiry; attention is therefore directed to the intrinsic meaning of the words. If words are doubtful in meaning or susceptible to more than one interpretation, they are to be construed against the drafter, usually the lessor, and against the restraint. This rule of construction is deceptive, however, because it assumes that words either have or do not have a clear and certain intrinsic meaning. Nearly any use of words is subject to multiple interpretation. "Whether or not words . . . are clear is itself not always clear." Established meaning must therefore be emphasized and language acquires established meaning through custom, usage and convention.

127. See Thompson, supra note 2, § 1211, at 63-65.
132. See Weill v. Centralia Serv. & Oil Co., 320 Ill. 397, 51 N.E.2d 345 (1943). In Weill, the Illinois Supreme Court stated that when a lease is unambiguous on its face, the parties may not argue that the words used have a meaning different from their ordinary meaning. Id. at 402-03, 51 N.E.2d at 347. In that case, the court decided that the word "terminate" means a conclusion of the landlord-tenant relationship prior to the expiration of the term of the lease and cited for
In legal analysis, case precedent establishes meaning or certifies otherwise established meaning. Not only is there considerable precedent evidencing the meaning of the approval clause, but numerous secondary sources identify that clause as an absolute and unqualified prohibition which affords landlords the right to refuse consent to a proposed transfer for any reason or for no reason whatsoever. A commonly used legal form book typifies the certainty expressed on this matter:

Often, covenants restricting assignment or subletting of leasehold interests by their terms require the consent of lessor to such a transfer. CAUTION: In the absence of anything expressed to the contrary in a provision requiring the lessor's consent, he may withhold such consent arbitrarily, irrespective of the character of the proposed assignee or sublessee or of the other circumstances of the transfer. The lessee may find desirable a clause that consent shall not be unreasonably refused or shall not be withheld if the proposed assignee or sublessee is a responsible tenant. 

Other form books, encyclopedias, and similar basic sources are unanimous on this interpretation of the approval clause language.

its definition an earlier supreme court decision. ld. Clearly, in this case the court relied upon the established meaning of a legal term of art and would not accept the argument that a legal term used in a printed lease had a different meaning than that ascribed to it by the law. See also Pedro v. Ohio Cas. Ins. Co., 95 F. Supp. 59 (S.D. Cal. 1950) (where parties to a contract are dealing with words of art, presumption is that they are used in the same sense in which they are used in that art—the "art" being the branch of human activity with which the contract deals); Speir v. Wheeler, 194 A.D. 769, 185 N.Y.S. 769 (1921) (court would not be persuaded that "heir or heirs at law according to the statutes of the State of New York then in force per stirpes" described the hereditable quality of the estate, stating rather that the words described a class). See generally Young v. Illinois Athletic Club, 310 Ill. 75, 141 N.E. 369 (1923) (rule of practical construction has no place in the construction of a lease containing no ambiguity); European & N. Am. Ry. v. Maine Cent. R.R., 135 Me. 338, 196 A. 642 (1938) (same); Sky Harbor Air Serv. v. Airport Auth., 174 Neb. 243, 117 N.W.2d 383 (1962) (same).

Contract and property law authorities are in agreement with this view. According to Williston:

There are some technical words and phrases that have acquired so definite a meaning in law that it would be difficult to induce a court to give a contrary interpretation to the words, especially in a formal instrument, though from the whole document and from surrounding circumstances it was highly improbable that the parties attached to their words their technical signification.

4 S. Williston, A Treatise on the Law of Contracts § 890A, at 590-91 (3d ed. 1962). In the same vein, another commentator stated: "The construction given a lease by the parties . . . will have a great weight with the court in case of doubt as to its meaning, but an unambiguous lease will be given effect in accordance with its language regardless of the construction put on it by the parties." 3 Thompson, supra note 2, § 1052, at 190 (repl. 1980).

133. Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960). According to that court: "Stare decisis is a principle of adherence, for the sake of certainty and stability, to precedents once established. But it applies primarily to decisions . . . which invite reliance and on the basis of which men order their affairs, e.g., in the field of contract or property rights." ld. at 361, 157 A.2d at 501.

134. See note 8 supra.

135. 11 Am. JUR. Legal Forms 2d Leases of Real Property § 161.641 (1972).

136. See sources cited in notes 5 & 8 supra.
In construing a lease, each word or phrase should be given its established meaning at the time the lease was made and, logically, a legal instrument prepared by an expert should be presumed to have been drawn with knowledge of pertinent judicial decisions that serve to establish the instrument’s meaning. Because the assignment approval clause has enjoyed a well established meaning, one must seriously question whether it may be properly characterized as ambiguous. If the questioned language has an established meaning, then the intent of the parties is clear and should be given effect. If an unqualified restraint on alienation is part of the bargain, then that restraint should be fully honored, possibly subject only to a duty of good faith.

Recognition of an implied covenant of good faith is a second explanation for a new interpretation of the approval clause. In transactions governed by the Uniform Commercial Code (UCC), a duty of good faith in the performance and enforcement of all agreements is now imposed. Further, the UCC binds merchants to a standard of commercial reasonableness in regard to sales contracts. This “good faith” or “reasonableness” is not implied in fact, but in law; that is to say, the parties to the agreement did not necessarily intend to be bound by “good faith” duties, but are so bound because in a civilized commercial world parties should intend such duties and will therefore be held to them. Although the UCC does not govern real property leases, many UCC concepts have been extended beyond its scope. In an advanced commercial society, to ask that all parties to transactions deal with one another in good faith is certainly no revolutionary matter regardless of the context. This rationale therefore presents ample justification for a new interpretation of the assignment approval clause—an interpretation that

137. See note 132 supra.
140. Id. § 2-103(b).
141. See U.C.C. § 1-102, Comment 1. Comment 1 states that the UCC may be applied to matters not expressly within its scope. The Comment cites with approval cases extending the application of other uniform acts: Commercial Nat’l Bank of New Orleans v. Canal-La. Bank & Trust Co., 239 U.S. 520 (1916) (Uniform Warehouse Receipts Act extended to case not within its scope); Agar v. Orda, 264 N.Y. 248, 190 N.E. 479 (1934) (Uniform Sales Act similarly extended). Cases decided subsequent to states’ adoption of the UCC have also applied the UCC to matters not expressly covered. See In re Yale Express Sys., Inc., 370 F.2d 433 (2d Cir. 1966) (in secured transaction matter covered by federal law, the Second Circuit nevertheless applied the UCC), rev’d on other grounds, 40 N.J. 97, 190 A.2d 844 (1963). See also Gilbride, The Uniform Commercial Code: Impact on the Law of Contracts, 30 Brooklyn L. Rev. 177, 203 (1964) (analyzing contract law changes made by the UCC and questioning whether the UCC will be applied generally to contract law outside of its scope); Note, The Uniform Commercial Code as a Premise for Judicial Reasoning, 65 Colum. L. Rev. 880, 887 (1965) (arguing that policy of modernizing the law will be constricted if courts continue to refuse to apply the UCC to situations in which it is applicable only by analogy).
would impose a requirement of good faith dealings. The problem, however, lies in the Restatement's use of an objective standard of reasonableness as an expression of this duty.

American courts have not set forth with specificity what constitutes objectively unreasonable conduct on the part of a landlord in withholding consent to a transfer of a leasehold interest.\(^{142}\) A review of the relevant cases concerning the express covenant of reasonableness reveals, however, that the financial responsibility of the proposed transferee typically has been controlling.\(^{143}\) If the proposed transferee is financially able to perform the covenants in the lease, other reasons are unlikely to justify a landlord's refusal. If the original tenant guarantees the payment of rent and performance of the other lease obligations, the landlord is met with an even greater burden to sustain a refusal.\(^{144}\) 

Positing an extreme, one commentator raised the question of whether a landlord should even be able to require an assignee or subtenant to be financially responsible and qualified to operate his business, arguing that "inasmuch as neither assignment nor subletting releases the original tenant from his lease obligations, it may be argued that landlord has all he bargained for regardless of the wealth or skill of the assignee or subtenant."\(^{145}\) Other factors that have been given some weight in the

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142. The frequently cited case of American Book Co. v. Yeshiva Univ. Dev. Foundation, Inc., 59 Misc. 2d 31, 297 N.Y.S.2d 156 (Sup. Ct. 1969), offers the most thorough delineation of what constitutes objective criteria sufficient to render a refusal to consent reasonable. That court distinguished the objective from the subjective standard by indicating that objective considerations are those that are readily measurable criteria of acceptability from the point of view of any landlord. Four such objective criteria were identified: (1) financial responsibility of the transferee; (2) "identity" or "business character" of the transferee; (3) legality of the proposed use; and, (4) nature of the proposed occupancy. Id. at 33, 297 N.Y.S.2d at 160.


145. Friedman, supra note 6, § 7.304c, at 197.
reasonableness determination are the character of the proposed transferee and the nature of the proposed use and occupancy of the premises. Under an objective reasonableness standard a landlord is not permitted to refuse consent on religious or moral grounds, because of genuine ideological and philosophical differences between the landlord and the proposed transferee, or because of any other personal considerations of taste, sensibility, convenience or preference. For example, it has been held objectively unreasonable for a landlord to refuse a consent to a sublease on the ground that the prospective sublessee was a business competitor of the landlord or of another tenant. Courts have also held that a landlord cannot base a refusal on extraneous matters such as the effect of the refusal on other properties of the landlord that are not physically interconnected with the property in question.

146. Mowatt v. 1540 Lake Shore Drive, Corp., 385 F.2d 135 (7th Cir. 1967).
149. Id. Cf. Roundup Tavern, Inc. v. Pardini, 66 Wash. 2d 513, 413 P.2d 820 (1966). In this case, the landlord refused consent claiming that conversion of a retail business into a tavern was detrimental to the leasehold. The court held for the tenant and found, first, that the landlord did not consider the financial stability of the proposed assignee and, second, that the lease did not restrict the nature of the allowed business activity.

A classic example of a morality-based refusal of consent would be where a landlord refuses consent to a proposed assignment by the operator of a movie theatre to the operator of a chain of successful pornography theatres who intends to show the same fare at the leased premises. A morally-biased but sophisticated commercial lessor might draft around the anticipated problem by carefully restricting the permitted use of the premises. When the unanticipated occurs, however, the law should fill the gap pursuant to a rule that supplies the result that the parties would most likely have desired had they had better foresight. As the example illustrates, this process requires some consideration of personal sensibilities. Viewed in this manner, the test stated by Shaker Bldg. Co. v. Federal Lime & Stone Co., 28 Ohio Misc. 246, 277 N.E.2d 584 (Shaker Heights Mun. Ct. 1971), might prove most fair and sensible, that is, whether the assignee is acceptable is determined “using the same standards applied in the acceptance of the original lessee.” Id. at 250, 277 N.E.2d at 587.

A Comment to section 15.2 summarizes the modern approval clause dilemma:

The preservation of the values that go into the personal selection of the tenant justifies upholding a provision in the lease that curtails the right of the tenant to put anyone else in his place by transferring his interest, but this justification does not go to the point of allowing the landlord arbitrarily and without reason to refuse to allow the tenant to transfer an interest in the leased property. Hence the rule of this section recognizes the restraint on the tenant as valid but allows tenant to alienate, in spite of the restraint, if the landlord unreasonably withholds his consent to a transfer. ...  

The key concerns addressed in the Comment are the "personal selection of the tenant" and the refusal that is made "arbitrarily and without reason." These concerns can best be balanced by imposing a good faith requirement on the transaction. The imposition of a subjective standard of good faith serves both to satisfy the legitimate concern of the landlord in choice of tenant and to eliminate abuse of the tenant. The Restatement, however, employs an objective standard as a reasonableness test. This objective reasonableness standard, which was derived from case law consideration of express covenants not to unreasonably withhold consent, imposes a burden on landlords substantially in excess of what would be required by mere good faith. While a good faith standard clearly eliminates the abuses of arbitrary, capricious or malicious conduct, it does not deprive the landlord of bona fide expressions of personal taste and convenience, or of honest intention. In contrast, an objective reasonableness standard does not permit consideration of genuine concerns peculiar to the particular landlord.  

v. Rossford Indus. Corp., 25 Ohio Misc. 43, 261 N.E.2d 355 (C.P. 1969) (reasonable to withhold consent where the assignment did not require a business compatible with building's design and construction). For a discussion of these and similar cases, see Todres & Lerner, supra note 15, at 204-07.  

155. Restatement, supra note 11, § 15.2, Comment a.  

156. Because historically the general rule has permitted even arbitrary and capricious refusals to consent, very little discussion has arisen of subjective reasonableness in connection with the approval clause. One older case treating a somewhat unusual example of approval clause language did touch on the matter, however. In Kendis v. Cohn, 90 Cal. App. 41, 265 P. 844 (1928), the lease in question, after prohibiting assignment without the prior written consent of lessors, provided that "said lessees may, with the written consent of the said lessors, assign said lease to any person or persons of good character and repute and satisfactory to lessors, upon furnishing good and sufficient security to be approved by said lessors." Id. at 49, 265 P. at 846-47 (emphasis added). The trial court found that the proposed assignee was of good character and repute and that the lessor had "arbitrarily and unreasonably refused to accept him as assignee." Id. at 66, 67-68, 265 P. at 854. The court of appeals treated the lease provision in much the same manner as suggested by this Article. Drawing on the law of personal satisfaction contracts, the court stated that

the party to be satisfied is the sole judge of his own satisfaction, subject only to the limitation that he must act in good faith. ... If an assignee were presented who was of good character and repute and was in fact satisfactory to the lessor, but such lessor in bad faith and in order to prevent the lessee from effecting an assignment
Where the landlord and tenant expressly agree that the landlord’s consent shall not be unreasonably withheld, courts have sanctioned refusals only where justified by objective criteria. In an effort to introduce a good faith duty in the lease, the Restatement has extended this analysis to the unqualified approval clause. This extension is excessive. The Restatement erroneously equates implied good faith with an express covenant of reasonableness failing to appreciate that an approval clause that has been qualified by an express covenant of reasonableness differs from an unqualified approval clause. That is, the intentions of the parties who have negotiated qualified and unqualified approval clauses differ. The difference is that parties to a qualified approval clause intended what the clause states—that consent shall not be withheld unreasonably—and the term the parties used has an established meaning and concomitant objective test: unreasonable to the “reasonably prudent man,” 157 or, alternatively, to “any” landlord. 158 On the other hand, parties to an unqualified approval clause had no such intent. Therefore, the standard for measuring the propriety of a landlord’s refusal should differ depending on whether the approval clause has or has not been qualified by an express covenant of reasonableness. 159

without additional benefits to himself withheld his consent, the lessee would be at liberty to assign and would be relieved from the obligation of the covenant.  

Id. Another case construing similar language suggested much the same approach. In Millers Mut. Gas Co. v. Insurance Exch. Bldg. Corp., 218 Ill. App. 12 (1st Dist. 1920), the lease provided that the lessee could sublet provided the proposed sublessee was in all respects satisfactory to lessor. Id. at 14. The court rejected the notion that “satisfactory” was to be judged by what would satisfy a reasonable person. Discussing the law of personal satisfaction contracts, the court held that lessor could refuse for any reason satisfactory to it.

157. Restatement, supra note 11, § 15.2, Reporter’s Note 7. According to the Restatement, “[a]s to what constitutes reasonableness, most courts [in the context of a clause which provides that consent shall not be unreasonably withheld] look to the standard of the reasonably prudent man, and leave no room for considerations of personal taste and convenience.” Id.

158. The court in American Book Co. v. Yeshiva Univ. Dev. Foundation, Inc., 59 Misc. 2d 31, 297 N.Y.S.2d 156 (Sup. Ct. 1969), indicated that “objective” standards are readily measurable criteria of a proposed subtenant’s or assignee’s acceptability from the point of view of any landlord. Id. at 33, 297 N.Y.S.2d at 159-60. Accord, Homa-Goff Interiors, Inc. v. Cowden, 350 So. 2d 1035, 1038 (Ala. 1977) (landlord’s rejection was judged applying a “reasonable commercial standard”).

159. While implying a convenant of reasonableness into an approval clause which does not provide a standard for judging the propriety of the landlord’s consent, the Restatement rule does not completely ignore the difference between an express and an implied convenant:

If the lease specifically provides that the landlord or the tenant will not withhold his consent to a proposed transfer by the other party unreasonably, the other party has options not available if such obligation is merely imposed by operation of law. Such specific provision in the lease is a promise and upon its breach the other party will be entitled to all the remedies available for a breach of a promise (see §§ 7.1 and 13.1), including the right to terminate the lease. When a party to the lease must rely solely on the rule of this section, he is simply free to alienate if the other party withholds consent unreasonably, but cannot obtain damages.

Restatement, supra note 11, § 15.2, Comment h. Although such a distinction may give tenants reason to negotiate an express convenant, in practice the qualifying language is probably viewed
CONCLUSION

The overwhelming authority indicates that an assignment approval clause is to be treated as an absolute, unqualified prohibition of assignment giving a landlord the right to withhold consent for any or for no reason. Even an arbitrary and capricious refusal of consent is usually deemed legitimate. Restatement section 15.2(2), however, rejects this position and imposes on the landlord an implied duty to act with objective reasonableness. An examination of the cases purportedly supporting the Restatement position indicates, however, that there is considerable confusion of the two related issues of a landlord’s right to withhold consent to transfer and a landlord’s duty to mitigate damages. Although the assignment issue is of independent significance, it has been the subject of little meaningful independent analysis.

In interpreting a lease, the overriding concern should be the intent of the parties. When a particular meaning is commonly attributed to standard form book language, use of this standard language should establish that meaning as the expressed intent of the parties. In the contemporary transaction, giving a new construction to the long established meaning by imposing a duty of good faith upon the parties to the transaction is appropriate and even desirable. This good faith requirement eliminates a landlord’s ability to withhold consent in an arbitrary and capricious manner, while honest personal reasons continue to serve as justification for a denial of consent. Our changing perceptions of the rights and abilities of private individuals to agree to binding obligations justifies the imposition of a subjective standard of good faith in dealings between landlords and tenants. The objective standard advocated in the Restatement, however, exceeds any such justification and serves to change the fundamentals of the actual bargain. A change in the interpretation of commonly used language of the magnitude suggested by the Restatement’s standard is therefore best accomplished through prospective legislation, of which there has been a considerable amount with respect to the residential lease. Changing a deeply entrenched interpretation of commonly used language by judicial fiat disregards the realities of the bargain and can work an unnecessary hardship.

The greatest injustice caused by the adoption of the Restatement rule will fall upon those to whom the rule is retroactively applied; also affected will

by tenants and their lawyers as securing the right to assign to a financially able transferee. There is some authority contrary to the above quoted Restatement position. See, e.g., Sarner v. Kantor, 123 Misc. 469, 205 N.Y.S. 760 (Sup. Ct. 1924).

160. See note 8 and accompanying text supra.

161. E.g., ALASKA STAT. § 34.03.060 (1975) (setting forth a detailed rule of assignment and consent); HAWAII REV. STAT. § 516-63 (repl. 1976) (lessor may not require payment of any money for his consent except a service charge, nor withhold such consent unreasonably—applicable only to long-term leases of residential lots); N.Y. REAL PROP. LAW § 226-b (general circumstances), § 236 (assignment of lease of deceased tenant) (McKinney 1968 & Supp. 1980). See also MODEL RESIDENTIAL LANDLORD-TENANT CODE § 2-403 (Tent. Draft 1969). Delaware has provided a statutory rule applicable to residential, commercial and farm leases. DEL. CODE ANN. tit. 25, § 5512 (1975). See appendix.
be those who do not take immediate note of this changing area of the law. The lease specialist who does take note will attempt to secure the desired bargain in future transactions by rewording the approval clause in order to indicate clearly that the lease gives the landlord an *absolute right* to withhold consent. If the courts adopt the rule of section 15.2(2), however, there will be a period of uncertainty regarding the precise choice of language required to effectuate this intention. Further, skepticism and doubt is likely concerning whether the “established meaning” of any such new combination of words will continue to be honored throughout the full term of any lease then in effect.

Ironically, Restatement section 15.2(2) may be a self-fulfilling prophesy. The Restatement, depending upon the alleged but unproved uncertainty of the assignment approval clause for its new interpretation of that clause, has by its new interpretation injected just such heretofore nonexistent uncertainty into the clause’s meaning. In short, the restatement has made the assignment approval clause suddenly ambiguous and it is this ambiguity which may ultimately justify the Restatement’s construction of the approval clause.
Although in a majority of states the landlord's right to withhold consent to assignment is determined by case law and the Restatement may influence courts in deciding which assignment rule to apply, a number of states have addressed the matter by statute. In these states, however, with the exception of Delaware, the statutes apply only to residential leases. These statutes typically propound a detailed formula for distinguishing reasonable from unreasonable withholding of consent. The statutes of Alaska and New York are representative of these recently enacted statutes and are set forth below. Delaware's statute, also set forth below, is of interest because it applies to leases of residential, commercial and farm property.

**Alaska Stat. § 34.03.060 (1975).** This provision sets forth a detailed rule regarding the matter of assignment and consent:

*Sublease and assignment.* (a) Unless otherwise agreed in writing, the tenant may not sublet his premises or assign the rental agreement to another without the landlord's consent.

(b) The tenant's right to sublease his premises or assign the rental agreement to another shall be conditioned on obtaining the landlord's consent, which may be withheld only upon the grounds specified in (d) of this section; no further restrictions on sublease or assignment are enforceable.

(c) When the rental agreement requires the landlord's consent for sublease or assignment, the tenant may secure one or more persons who are willing to occupy the premises. Each prospective occupant shall make a written offer signed and delivered by him to the landlord, containing the following information on the prospective occupant:

1. name, age and present address;
2. marital status;
3. occupation, place of employment, and name and address of employer;
4. number of all other persons who would normally reside with the prospective occupant;
5. two credit references, or responsible persons who will confirm the financial responsibility of the prospective occupant; and
6. names and addresses of all landlords of the prospective occupant during the prior three years.

(d) Within 14 days after the written offer has been delivered to the landlord, the landlord may refuse consent to a sublease or assignment by a written rejection signed and delivered by him to the tenant containing one or more of the following reasonable grounds for rejecting the prospective occupant:

1. insufficient credit standing or financial responsibility;
2. number of persons in the household;
3. number of persons under 18 years of age in the household;
(4) unwillingness of the prospective occupant to assume the same terms as are included in the existing rental agreement;
(5) proposed maintenance of pets;
(6) proposed commercial activity; or
(7) written information signed by a previous landlord, which shall accompany the rejection, setting out abuses of other premises occupied by the prospective occupant.

(e) In the event the written rejection fails to contain one or more grounds permitted by (d) of this section for rejecting the prospective occupant, the tenant may consider the landlord’s consent given or at his option may terminate the rental agreement by a written notice given without unnecessary delay to the landlord at least 30 days before the termination date specified in the notice.

(f) If the landlord does not deliver a written rejection signed by him to the tenant within 14 days after a written offer has been delivered to him by the tenant, the landlord’s consent to the sublease or assignment shall be conclusively presumed.

**Del. Code Ann. tit. 25 § 5512 (1975)**. Delaware has provided a statutory rule applicable to residential, commercial and farm leases.

**Sublease and Assignments.**
(a) Unless otherwise agreed in writing, the tenant may sublet his premises or assign the rental agreement to another.

(b) The rental agreement may restrict the tenant’s right to assign the rental agreement in any manner. The tenant’s right to sublease the premises may be conditioned on obtaining the landlord’s consent, which shall not be unreasonably withheld. No consideration of race, creed, sex, marital status, religion, political opinion or affiliation or national origin may be relied on by the landlord as reasonable grounds for rejection. The fact that the tenant is a welfare recipient shall not be grounds for rejection. In any proceeding in which the reasonableness of the landlord as rejection shall be in issue, the burden of showing reasonableness shall be on the landlord.

**N.Y. Real Prop. Law § 226-b (McKinney Supp. 1980)**. Although New York has provided special rules for different assignment problems, it has also enacted a general statutory rule.

**Right to sublease or assign.**
1. A tenant renting a residence in a dwelling having four or more residential units shall have the right to sublease or assign his premises, subject to the written consent of the landlord given in advance of the sublease or assignment. Such consent shall not be unreasonably withheld. If the landlord unreasonably withholds consent for such sublease or assignment, the landlord must release the tenant from the lease upon request of the tenant.
2. The tenant shall inform the landlord of his intent to sublease or assign by mailing a notice of such intent by registered or certified mail. Such request shall be accompanied by the written consent thereto of any co-tenant or guarantor of such lease and a statement of the name, business and home address of the proposed sublessee or assignee. Within ten days after the mailing of such request, the landlord may ask the sender thereof for additional information as will enable the landlord to determine if rejection of such request shall be unreasonable. Within thirty days after the mailing of the request for consent, or of the additional information reasonably asked for by the landlord, whichever is later, the landlord shall send a notice to the sender thereof of his consent or, if he does not consent, his reasons therefore. Landlord’s failure to send such a notice shall be deemed to be a consent to the proposed subletting or assignment. If the landlord consents, the premises may be sublet or assigned in accordance with the request, but the tenant thereunder, shall nevertheless remain liable for the performance of tenant’s obligations under said lease.

3. The provisions of this section shall not apply to leases entered into or renewed before the effective date of this section, nor to public housing and other units for which there are constitutional or statutory criteria covering admission thereto nor to a proprietary lease, viz.: a lease to, or held by, a tenant entitled thereto by reason of ownership of stock in a corporate owner of premises which operates the same on a cooperative basis.