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Security Deposits in Residential Leases

NOTES

SECURITY DEPOSITS IN RESIDENTIAL LEASES

INTRODUCTION

"The complexities of city life, and the many problems of modern society in general, have blossomed into new problems for lessors and lessees."[1] Due to the limited financial resources of some and to the desire of others to escape the burdens and responsibilities of home ownership, the supply of potential lessees and the demand for rental housing are enormous.[2]

In anticipation of and in response to the great demand for rental housing, a steadily growing concentration of real estate ownership has emerged. A growing portion of rental housing is owned and managed by the professional lessor.[3] Since the lessor is generally heavily mortgaged, he must generate a profit from his high overhead budget.[4] All rents must be collected and sundry losses resulting from damage to the leasehold kept to a minimum if the lessor is to realize a satisfactory return on his investment.[5]

To insure the collection of rents and to avoid losses, the lessor has resorted to the standard inclusion of a security deposit clause in the lease contract. Mere ownership of realty does not warrant the use of the security deposit by the lessor. However, when the lessor has severely extended his own financial position in preparing the realty for the potential lessee's benefit and use, such investment sufficiently warrants added protection of the lessor's interests. The basic purpose of the security deposit clause is to free the lessor from the risk of losses through nonpayment of rents or by damages to the leasehold. Doubtless this is a proper purpose; but when it has been accomplished, or when the deposit becomes susceptible to unwarranted or improper uses by the lessor, protections for the lessee are required.

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1. 2 R. POWELL, REAL PROPERTY ¶ 221(1), at 179 (1967).
2. *See generally* A. WEIMAR, H. HOYT, G. BLOOM, REAL ESTATE (6th ed. 1965); THE PRESIDENT'S COMMITTEE ON URBAN HOUSING, A DECENT HOME, (1968) [hereinafter cited as KAISER COMMISSION REPORT].
3. A. WEIMER, H. HOYT, G. BLOOM, *supra* note 2, at 416-17.
4. S. MAISEL, FINANCING REAL ESTATE 357 (1956).
5. G. STERNLIEB, THE TENEMENT LANDLORD 121-22 (1966).

THE LESSOR'S DILEMMA

Upon premature termination of the lease by the lessee, the lessor has several legal remedies that he may pursue. Since the lessor must, out of financial necessity, generate revenue and profit from the leasehold, he must seek a guarantee that the unpaid rents and damages will be recovered. The lessor may legally bind the lessee to all payments due under the lease contract, but if the lessee disappears or simply becomes unable to pay, the lessor must bear the loss. A legal right to hold the lessee responsible is of little pragmatic value when there is no viable party to proceed against.[6] Nor can the lessor act in anticipation of a loss or damage since he has no idea who will be responsible for the loss suffered until the offender has made himself unavailable.

If the lessor is to realize continued benefit from additional rentals, the relative attractiveness of the premises must be maintained. Even upon successful payment of all rents and timely termination of the lease, the lessee remains legally responsible for waste he has caused and for failure to make ordinary and reasonable repairs to preserve the condition of the premises.[7] But in the case of the disappearing or delinquent lessee, such obligations are as hollow as the lessor's remedy for nonpayment of rent.

In dealing with these risks, lessors may rely on the lessee's personal integrity and financial resources. Often, however, the proposed lessee is a total unknown to the lessor. Little, if anything, is known of his financial status and personal background, and this anonymity is even greater in metropolitan areas where many lessees are basically transient.[8] For the lessor to investigate the integrity and solvency of each potential lessee, a certain amount of time and energy must be expended, and in some cases obtaining the pertinent information is impossible. The lessor confronts this uncertainty by seeking a more pragmatic hedge through the use of a readily accessible fund.

Most states provide creditor remedies for the lessor even though there is no mention of these remedies in the lease contract.[9] The lessor is given a security interest in the lessee's personality in the

6. KAISER COMMISSION REPORT, *supra* note 2, at 39.
7. Townshend v. Moore, 33 N.J.L. 284 (1869); Suydam v. Jackson, 54 N.Y. 450 (1873).
8. KAISER COMMISSION REPORT, *supra* note 2, at 39.
9. Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970).

form of common law right of distraint or statutory lien.[10] The lessor may unilaterally proceed under these creditor remedies when he feels losses are imminent. But these lessor remedies have proven to be a greater burden than benefit in many instances. The unscrupulous lessee is often gone and the economically depressed lessee has no collateral of significant value to levy upon. Then too, when personalty is seized, the lessor's interest in the goods may be subordinate to a security interest of the original seller.[11] Even when successful in seizing sufficient personalty, the obvious lack of liquidity necessitates additional efforts before a loss is satisfied completely.

Since the common law and statutory property remedies have not satisfied the lessor's need for a readily accessible security fund, the lessor has resorted to contractual protection through insertion of specific clauses and convenants in the lease contract. These clauses, in various forms and terms, have called for prepayment of a fund at the inception of the tenancy. These prepayments fall into four categories:[12]

1) advance payment of rent

2) bonus or additional consideration for the execution of the lease

3) liquidated damages

4) a security deposit to secure faithful performance of the lease by the lessee.

Advance payments of rent and bonus considerations pass full title to the lessor immediately. The lessor is entitled to keep the full deposit even though the lessee has faithfully complied with the terms of the lease. Under prepayment of rent the lessor merely keeps the deposit as the last installment of rent. A bonus consideration is a quasi-insurance premium the lessee is forced to pay. Liquidated contract clauses result in a total forfeiture of the prepayment upon breach of the lease by the lessee, regardless of actual damages. Because of the overtones of penalty and forfeiture, courts have been predisposed to hold liquidated damages as invalid.[13]

10. *Id.*

11. UNIFORM COMMERCIAL CODE § 9-301 (1972).

12. Werming v. Shapiro, 118 Cal. App. 2d 72, 75, 257 P.2d 74, 76 (1953).

13. Werming v. Shapiro, 118 Cal. App. 2d 72, 257 P.2d 74 (1953); Gitlin v. Schneider, 42 Misc. 2d 230, 247 N.Y.S.2d 779 (Sup. Ct. 1964).

Because of judicial distaste for forfeitures without fault the device which residential lessors have come to rely upon is the security deposit. Under traditional contract principles, cases of doubt or confusion are to be resolved in favor of the party who did not participate in the construction of the lease. Without exception the residential lease is drawn up by the lessor, and consequently the prepayment provisions have usually been construed as security deposits.[14] The security deposit provides the lessor with a fund he may resort to in the event of any losses caused by a particular breach of covenant.[15] Under the security deposit interpretation, the party at fault suffers the loss.

CONTRACTUAL ALTERNATIVES

Freedom to contract guides and limits the obligations and liberties of the two parties. The lessee may agree to secure only a particular obligation; he may agree to secure payment of all rents, or he may agree only to cover repairs for damages to the premises. Contrariwise, the security deposit clause may guarantee in broad and all-inclusive terms the performance of all covenants present in the lease.[16] Whatever the extent of the obligations secured, the deposit may be applied for those purposes only.[17] The security deposit clause itself does not alter the legal rights and remedies of the two parties; rather it establishes which rights and remedies are to be secured by the deposit.

Upon the payment of the security deposit, the lessor is entitled to retain possession of the deposit until performance or discharge of all covenants assumed by the lessee and covered by the security deposit clause.[18] Where the security deposit clause calls for the fulfillment of the lease generally, the lessor may retain possession of the deposit until the termination of the lease, at which time he must return the deposit or account for the retention, whether partial or

14. Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970); Auker v. Gerold, 67 Ill. App. 2d 425, 214 N.E.2d 618 (1966).

15. State by Lefkowitz v. Parker, 67 Misc. 2d 36, 323 N.Y.S.2d 473 (Sup. Ct. Spec. T.), *rev'd on other grounds*, 38 App. Div. 2d 542, 327 N.Y.S.2d 277 (1971).

16. Washington Industrial Building Corp. v. National Bank of Commerce, 39 F.2d 842 (9th Cir. 1930); *In re* Hool Realty Company, 2 F.2d 334 (7th Cir. 1924); Chicago Investment Co. v. Hardtner, 167 Miss. 375, 148 So. 214 (1933).

17. People *ex rel* Belleci v. Klinger, 164 Misc. 530, 300 N.Y.S. 408 (Magis. Ct. 1938).

18. Kane v. Dune, 2 Ill. App. 2d 50, 118 N.E.2d 66 (1954); Maddox v. Hobbie, 228 Ala. 80, 152 So. 222 (1934).

complete.[19] When the deposit is to cover possible legal waste to the premises, the lessee has a continuing liability, not for rent, but for damages, and the lessor may retain the deposit for a reasonable time after the termination of the lease for purposes of determining the extent of damages.[20]

Nonperformance or breach of a lease covenant by the lessee does not vest full title to the deposit in the lessor.[21] The lessor is merely allowed the right to resort to the security deposit in the event that actual damages are sustained, and then, such application may only be made to the extent of actual indemnification for losses covered by the deposit.[22] Where the entire deposit is needed to satisfy losses suffered by the lessor, the lessee's ownership in the deposit is terminated.[23] The lessor may hold the lessee liable for damages sustained in excess of the security deposit and proceed against the lessee under a tort claim.[24]

During the life of the tenancy the lessor usually maintains possession of the deposit. In the absence of statutory modification or specific contractual agreement, the lessor is not restricted in his use of the funds and assumes no duty to pay interest.[25] He may use the funds for any purpose, including those of his own.[26] This liberty of use is found particularly when the lease provides for a stipulated payment of interest to the lessee, but has been found when no such provision is made.[27]

If the lessee is concerned about the management and use of the deposit during the tenancy, he may seek to limit the use of the funds by the lessor. He may require the lessor to segregate the funds and

19. Wald v. Gold, 1 Misc. 2d 756, 147 N.Y.S.2d 250 (Supt. Ct. 1955); Kane v. Dune, 2 Ill. App. 2d 50, 118 N.E.2d 66 (1954); Green v. Frahm, 176 Cal. 259, 168 P. 114 (1917).

20. United Cigar Stores of America v. Friend, 257 Ill. App. 359 (1930).

21. Prudential Westchester Corp. v. Tomasino, 5 App. Div. 2d 489, 172 N.Y.S.2d 652, *aff'd* 6 N.Y.2d 824, 188 N.Y.S.2d 214 (1958).

22. Peirson v. Llyods First Mortgage Co., 260 N.Y. 214, 183 N.E. 368 (1932).

23. State by Lefkowitz v. Parker, 67 Misc. 2d 36, 323 N.Y.S.2d 473 (Sup. Ct. Spec. T.), *rev'd on other grounds*, 38 App. Div. 2d 542, 327 N.Y.S.2d 277 (1971).

24. Zalonski v. McMahon, 3 Cir. 533, 220 A.2d 35 (Conn. 1966); Kapan v. Katz, 58 So. 2d 853 (Fla. 1952).

25. Matter of Cromwell, 102 Misc. 503, 169 N.Y.S. 204 (Sur. Ct. 1918).

26. Raurbach Heights Theatres, 239 App. Div. 203, 267 N.Y.S. 208 (1933); Jahmes v. Propper, 238 App. Div. 326, 264 N.Y.S. 219 (1933).

27. Levinson v. Shapiro, 238 App. Div. 158, 263 N.Y.S. 585 (1933), *aff'd* 263 N.Y. 591, 189 N.E. 713 (1933); Colantuoni v. Balene, 95 N.J.Eq. 748, 123 A. 541 (Ct. Err. & App. 1923).

keep them intact throughout the term of the lease.[28] However, such restrictive limitations are not often found in the lease, for a lessee will require the deposit to be put in the hands of a third party depositary if he is sufficiently concerned with the use and management of the deposit. Thus, when the deposit is left in the possession of the lessor, few, if any, restrictions are placed upon its use and management.

JUDICIAL APPROACH TO THE TRANSACTION

Because of the generality and vagueness in terms, the pertinent relationship of the parties with regard to the deposit is ill-defined. Many times the security deposit is simply an oral understanding. Whenever there is a transfer of property—in this instance money—from the owner to another party, any number of possible relationships may result.[29] In a given instance the nature of the relationship is dependent upon the intention of the parties involved in the transfer. In each of the possible legal relationships the physical act is identical.

The more definite and exacting the security deposit clause the less creation of contractual intent need be done by the courts. In the case of residential leases the "written" intent of the parties is often unclear and vague. The intent of the parties becomes even more oblique when, as is the practice with many lessors, the security deposit comes about as a result of an oral "understanding." The courts are hard pressed to find an intent and thus affix legal meaning to the transaction. In struggling to define the security deposit transaction in cases where the lessor is to maintain possession of the deposit throughout the life of the lease, the courts have relied on three diverse theories: debt, pledge and trust.[30]

Debt

The relationship of debtor/creditor is created if it is found that

28. Atlas v. Moritz, 217 App. Div. 38, 216 N.Y.S. 490 (1926).

29. A. SCOTT, ABRIDGMENT OF THE LAW OF TRUSTS § 4A, at 27-28 (6th ed. 1960).

30. New York courts typify the confusion. New York courts have utilized all three theories. Goodman v. Schached, 144 Misc. 905, 260 N.Y.S. 883 (Nassau County Ct. 1932); Haskel v. 60 West Fifty-Third Street Corp., 138 Misc. 595, 246 N.Y.S. 698 (N.Y. Mun. Ct. 1929), *aff'd* 231 App. Div. 800, 246 N.Y.S. 875 (Sup. Ct. 1930); Atlas v. Moritz, 217 App. Div. 38, 216 N.Y.S. 490 (1926).

the title to the deposit should pass immediately to the lessor.[31] Such a relationship is generally found when interest has been promised to the lessee by the lessor,[32] but an agreement that interest will be paid is not necessarily determinative. The decisive inquiry is whether the lessor is able to use the deposit as his own. Under the debt theory the lessor is under no obligation to segregate the deposit into a separate fund, but is free to use the deposit as he pleases.[33] The lessor has no liability for misappropriation of funds during the lease term, but has the absolute duty to produce an equal amount upon the successful completion of the lease.[34] The lessee must rely solely upon the lessor's personal integrity and financial strength for the ultimate return of the deposit.[35]

The debtor/creditor approach to the security deposit reflects the lessor's tendency to view the deposit as an absolute transfer and the lessor's practice to use the deposit with unchecked discretion. Courts have reasoned that the parties are free to contract as they please and that the lessee has the right to restrict the lessor's use of the deposit if he so wishes. Therefore, the absence of any restrictions and limitations upon the lessor's use of the fund is viewed as an implied consent on the part of the lessee.[36] However, when the words "security deposit" are used, such terminology, absent any specific grants or concessions, smacks of a conditional intent. At most such terminology indicates a limited purpose and not a blanket authorization of use.[37] To interpret as intent the absence of any restrictive language concerning the use of the deposit would be creation of an intent through negative implication. It is a strained interpretation to say the lessee through his silence sanctioned full use of the deposit by the lessor.

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31. Jahmes v. Propper, 238 App. Div. 326, 264 N.Y.S. 219 (1933); Levinson v. Shapiro, 238 App. Div. 158, 263 N.Y.S. 585 (1933), *aff'd* 263 N.Y. 591, 189 N.E. 713 (1933); Mendelson-Siverman, Inc. v. Malco Trading Corp., 146 Misc. 215, 260 N.Y.S. 881 (App. T. 1932), *aff'd mem.* 238 App. Div. 852, 262 N.Y.S. 991 (1933), *aff'd mem.* 262 N.Y. 621 (1933); Goodman v. Schached, 144 Misc. 905, 260 N.Y.S. 883 (Nassau County Ct. 1932).

32. RESTATEMENT (SECOND) OF TRUSTS § 12g (1959).

33. Cases cited note 31 *supra*.

34. Levinson v. Shapiro, 238 App. Div. 158, 263 N.Y.S. 585 (1933), *aff'd* 263 N.Y. 591, 189 N.E. 713 (Sup. Ct. 1933); Goodman v. Schached, 144 Misc. 905, 260 N.Y.S. 883 (Nassau County Ct. 1932).

35. Cases cited note 34 *supra*.

36. *Id.*

37. Wilson, *Lease Security Deposits*, 34 COL. L. REV. 426, 459-60 (1934).

Pledge

Several courts have applied the pledge theory to the security deposit transaction.[38] Traditional pledge theory requires a pledgor to transfer personalty (deposit) to a pledgee who is to maintain possession of the personalty as security for some debt or obligation. The title to the fund must remain in the pledgor.[39] The lessor (pledgee) may become liable in conversion for misappropriation of the deposit during the term of the lease.[40] Pledge theory courts have not been so restrictive as to prohibit the use of the deposit by the pledgee/lessor during the life of the lease. The only real limitation upon the lessor is that he may not permanently dispose of the funds for his own purposes so as to deprive the lessee of its ultimate return.[41]

As with the debt theory, the pledge concept is difficult to apply to the security deposit transaction. Such a construction of the transaction is merely a creation of intent by the courts. The courts are forced to apply a negative implication and say that the pledgee may use the deposit for his own purposes in the absence of express limitation by the lessee. Again, it is just as reasonable to assume the lessee really was concerned with the management of the fund as to assume the lessee was not concerned.[43]

Trust

The trust theory has been applied mainly by New York courts. *Atlas v. Moritz*[43] first employed this mongrel trust theory. The lessor who maintains possession of the deposit is the trustee, but the title to the deposit remains in the lessee. Subsequent applications have narrowly applied the trust theory for the purpose of defining the

38. Rasmussen v. Helen Realty Co., 92 Ind. App. 278, 168 N.E. 717 (1929); Reed v. Bristol County Realty Co., 250 Mass. 284, 145 N.E. 455 (1924); Colantuoni v. Balene, 95 N.J.Eq. 748, 123 A. 541 (Ct. Err. & App. 1923); Kaufman v. Williams, 92 N.J.L. 182, 104 A. 202 (Ct. Err. & App. 1918). A similar approach has been offered under bailment theory. Green v. Fraham, 176 Cal. 259, 168 P. 114 (1917).

39. Union Trust Co. of Pittsburgh v. Long, 309 Pa. 470, 164 A. 346 (1932); City Investment Co. v. Pringle, 73 Cal. App. 782, 239 P. 302 (1925); Keeble v. Jones, 187 Ala. 207, 65 So. 384 (1914).

40. Atlas v. Moritz, 217 App. Div. 38, 216 N.Y.S. 490 (Sup. Ct. 1926); Colantuoni v. Balene, 95 N.J.Eq. 748, 123 A. 541 (Ct. Err. & App. 1923). Courts following *Atlas v. Moritz* have spoken of the lessor's misuse as a breach of trust rather than conversion. Frost v. Paulster Realty Co., 138 Misc. 794, 798, 247 N.Y.S. 808, 812 (Westchester County Ct. 1930).

41. Colantuoni v. Balene, 95 N.J.Eq. 748, 123 A. 541 (Ct. Err. & App. 1923).

42. Harris, *A Reveille to Lessees*, 15 S. CAL. L. REV. 421 (1942).

43. Atlas v. Moritz, 217 App. Div. 38, 216 N.Y.S. 490 (1926).

lessor's (trustee's) duties.[44] The thrust of the trust theory in *Atlas* is the fiduciary position the lessor assumes when he takes possession of the deposit.

The lessor may become liable in conversion for misuse of the deposit, but his misuse of the deposit during the lease term does not give the lessee the power to treat his obligations under the lease as ended since the property obligations of the tenancy continue separate and distinct from this contractual obligation. Courts have been lenient in imposing fiduciary duties upon the lessor. Commingling of deposits, investment for the lessor's benefit and lack of adequate records all have been tolerated by the courts.[46] The lessor's conversion of the deposit, if it continues until the termination of the lease, prohibits the application of the deposit against damages sustained.[47] But the lessor is allowed to retain possession of the deposit and apply it against damages if he subsequently segregates the deposit.[48] Such concession to the lessor leaves the lessee with no real defense against the misuse of the deposit by the lessor.

Perhaps the real flaw in applying trust theory to the security deposit transaction is the conflict of interests it creates in the trustee.

> True, the landlord holds the money for the tenant and may have to return it intact, but his holding is coupled with an interest, an interest that may ripen into a right upon the happening of certain contingencies specified in the lease. In the ordinary relation of trustee and cestui que trust the former has no interest, contingent or otherwise.[49]

A true trustee's duty is to manage the fund solely for the benefit of

44. Madison Realty Co. v. Weiss, 133 Misc. 318, 232 N.Y.S. 43 (App. T. 1928); Ulmour Garage Inc. v. Stivers Inc., 128 Misc. 400, 218 N.Y.S. 683 (N.Y. Mun. Ct. 1926).

45. *In re* Tru-Seal Aluminum Products Corp., 170 F. Supp. 902 (E.D.N.Y. 1959), *aff'd* 278 F.2d 143 (2d Cir. 1960); Tow v. Maidman, 56 Misc. 2d 468, 288 N.Y.S.2d 837 (1968); Euclid Holding Co. v. Kermacoe Realty Co., 131 Misc. 466, 227 N.Y.S. 103 (N.Y. Mun. Ct. 1928).

46. Abrahamson v. Brett, 143 Ore. 14, 21 P.2d 229 (1933); Watzler v. Patterson, 73 Cal. App. 527, 238 P. 1077 (1925); Dutton v. Christie, 63 Wash. 372, 115 P. 856 (1911).

47. *In re* DeGregorio, 219 F. Supp. 783 (S.D.N.Y. 1963); *In re* Perfection Technical Services Press Inc., 22 App. Div. 2d 352, 256 N.Y.S.2d 166, *aff'd* 18 N.Y.2d 644, 273 N.Y.S.2d 71, 219 N.E.2d 424 (1965).

48. Cases cited note 45 *supra*.

49. People v. Horowitz, 138 Misc. 794, 798, 247 N.Y.S. 365, 370 (Magis. Ct. 1931).

the beneficiary.[50] This limited application of the trust to the security deposit is more akin to pledge theory, since both the *Atlas* trustee and the true pledgee hold the deposit in a fiduciary capacity.[51]

Inequities and Weaknesses of the Present Situation

Although freedom to contract exists in the security deposit transaction, determining the amount, conditions and restrictions generally resolves itself into a one-sided bargaining process. The relative bargaining strength of the lessor, which determines to a great degree the amount of the deposit and the conditions imposed in the lease, is complete in the residential lease.[52]

> On the other hand, tenants have little leverage to enforce demands [in leases]. Various impediments to competition in the rental housing market, [such as severe shortages of adequate housing], racial and class discriminations, and standardized form leases have left the residential tenant in a take it or leave it situation.[53]

As a result of this strategic advantage, the lessor has been able to reap benefits beyond the original scope of the security deposit.

The use of third parties is not favored by lessors for two basic reasons. During the term of the lease, possession of the deposit by the lessor provides valuable investment opportunities.[54] If a cash deposit were deposited with a trust company or other financial depositary, the lessee would be entitled to any and all income that is earned on the deposit.[55] In addition to the investment opportunity, the deposit may be applied as working capital.[56] The lessor, who receives a considerable number of individually small deposits under several leases, nets a substantial fund for investment or working capital. All the lessor need do is maintain a small percentage of the total deposits on hand to handle the normal tenancy turnover.

Such a windfall of cost-free capital is unique in the American

50. A. Scott, *supra* note 29, at 319.
51. Wilson, *supra* note 37, at 462.
52. Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970).
53. 2 R. Powell, *supra* note 1, at 183.
54. Wilson, *supra* note 37, at 433.
55. Stuarco, Inc. v. Slafbro Realty Corp., 30 App. Div. 2d 80, 289 N.Y.S.2d 883 (1968); Bobb v. Frank L. Talbot Theatre Co., 221 S.W. 372 (Mo. App. 1920).
56. Hanson, *Current Interest Areas of Landlord Tenant Law in Iowa*, 22 Drake L. Rev. 376 (1973).

business world. The cost of capital is that charge exacted upon the use of money for the benefit derived therefrom. "It is not natural for anyone to agree to pay interest on money unless he is entitled to use the money as his own."[57] Conversely, in business affairs a person normally will not allow another to use his capital without some charge or consideration. Only the lessor's dominant bargaining position has freed him from the price normally exacted upon the use of another's money. Lessors appear to be in a unique position in American business in having such a source of free capital.[58]

At the termination of the lease an even greater advantage inures to the benefit of the lessor. The inconvenience and nonliquidity that the lessor's right of distraint represented is effectively avoided by the use of a security deposit.

> Lessors who are engaged in making a great number of leases do not favor the use of the third party depositary, especially where the term is short and the deposit amounts to only a few hundred dollars. A principal reason for demanding the deposit form of security is the readiness with which such security can be applied in satisfaction of defaults. If the lessor holds the deposit himself this advantage exists to the fullest degree. Upon occurrence of a default he can make his own determination of the amount he is entitled to withdraw from the deposit, provided the fund is sufficient, no delays or difficulties are usually encountered in obtaining the sum required. On the other hand, the convenience of application is likely to be considerably decreased by placing the deposit in the hands of a third party. In such a case, in order to reach the deposit it is ordinarily incumbent upon the lessor to satisfy the depositary of the existence of a breach by the lessee and the extent of the loss sustained. If the lessor's rights seem doubtful or are contested by the tenant, the depositary, for his own protection, will probably refuse to turn the deposit over to the lessor until there has been adjudication on the matter. . . .[59]

With the security deposit in the lessor's hands the potential for

57. A. SCOTT, *supra* note 29, at 45.

58. Utility companies, for example, require comparable deposits for their services, yet are required to pay interest on such deposits. *See, e.g.*, BURN'S IND. ADMINISTRATIVE RULES AND REGULATIONS (54-201)-C42 (Supp. 1973).

59. Wilson, *supra* note 37, at 437.

unchecked discrimination and arbitrariness is greatest. Even though he has only a contingent interest in the deposit, this interest may become vested simply at the lessor's discretion. There is no practical accountability for his action, for seldom does a lessee challenge the lessor's retention.

In the event the lessee seeks to challenge a retention of the deposit by the lessor, he must sustain the burden of proof for all allegations made.[60] He must show the lessor's duty to preserve the deposit and his own satisfactory compliance with the lease.[61] However, when the lessor's retention is based on alleged damages to the leasehold, a strong implication against the lessee exists since he is the party in control and possession of the premises. By the time the issue reaches court, the lessee is no longer in possession of the premises and the premises have often been repaired and/or relet to a subsequent lessee. Thus the lessee has no concrete evidence to rebut the lessor's claim for damages as evidenced by sales receipts for materials, expenditures or contracts to repair.

Lack of initiative and perseverance often prevent pursuit of time consuming and costly litigation for a relatively small deposit. Ignorance of the law, limited financial resources and a desire to "close-out" affairs quickly all tend to discourage such an endeavor by the lessee. Consequently, the lessee is forced to abdicate to the lessor's decision which often is unfair either as a result of conscious effort or as a result of subconscious bias.

The lessor must be guided by and limited to the norm of compensation.[62] The security deposit may be relied upon only for those losses which are covered by the security deposit clause.[63] But the lessor's determination of excessive wear and tear to the premises may include a "penalty" under the guise of damages. Friction may develop between the lessor and lessee during the lease and may have even caused a premature surrender of the lease. Such friction may unfairly influence the lessor in his evaluation of the leasehold's

60. Kaufman v. Williams, 92 N.J.L. 182, 104 A. 202 (Ct. Err. & App. 1918); Goldberg v. Freeman, 92 N.Y.S. 237 (Sup. Ct. 1905).

61. Kaufman v. Williams, 92 N.J.L. 182, 104 A. 202 (Ct. Err. & App. 1918); Reznick v. South Side Construction Co., 166 N.Y.S. 748 (Sup. Ct. 1917).

62. Prudential Westchester Corp. v. Tomasino, 5 App. Div. 2d 489, 172 N.Y.S.2d 652, *aff'd* 6 N.Y.2d 824, 188 N.Y.S.2d 214 (1958); Sedlitz v. Auerbach, 230 N.Y. 167, 129 N.E. 461 (1920).

63. People *ex rel* Bellici v. Klinger, 164 Misc. 530, 300 N.Y.S. 408 (Magis. Ct. 1938).

physical condition. An even more subtle overcharge occurs when, in fact, actual repairs are warranted. When the lessor applies the deposit to these repairs, his concern is not for the best bargain in materials and services.[64] There is no need to be economical so long as the deposit covers the cost.

The security deposit should represent collateral for potential damage or loss caused by the lessee, and not summary process for the lessor. The lessor's claim as a creditor is no more deserving than that of other creditors who enjoy considerably less advantage.[65] The summary power which the lessor presently enjoys is contrary to all modern notions of due process.[66] In this adversary decision, the lessor is both judge and jury. The validity, or probable validity, of the lessor's claim should be conclusively established before he can deprive the lessee of his property permanently.

CONSTITUTIONALITY

Other lessor self-help remedies have come under heavy constitutional attack as a result of *Sniadach v. Family Finance Corp.*[67] and its progeny. Because the security deposit is a substitute for the common law and statutory lessor distraint remedies, suspicion is cast upon the constitutional soundness of the security deposit itself. A pre-forfeiture hearing on the relative merits appears to be fundamental to due process and basic fairness.[68]

Any due process argument necessitates a finding of state action.[69] The courts have differed widely on the issue of state action.[70] Courts have found that a lessor acting unilaterally against lessee's property is sufficient grounds for state action, reasoning that state action has been interpreted to cover private individuals acting in

64. KAISER COMMISSION REPORT, *supra* note 2, at 108-09.

65. Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Finance Corp., 394 U.S. 337 (1969).

66. Gross v. Fox, 349 F. Supp. 1164 (E.D. Pa. 1972).

67. 394 U.S. 337 (1969).

68. Mihans v. Municipal Court of Berkeley-Albany Judicial District, 7 Cal. App. 3d 479, 488, 87 Cal. Rptr. 17, 23 (1970).

69. Shelley v. Kraemer, 334 U.S. 1 (1948).

70. Hall v. Garson, 430 F.2d 430 (5th Cir. 1970); Collins v. Viceroy Hotel Corporation, 338 F. Supp. 390 (N.D. Ill. 1972); Holt v. Brown, 336 F. Supp. 2 (W.D. Ky. 1971); Sellers v. Contino, 327 F. Supp. 230 (E.D. Pa. 1971); Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970). *Contra*, McGuane v. Chernango Ct., Inc., 431 F.2d 1189 (2d Cir. 1970); Kerrigan v. Boucher, 326 F. Supp. 647 (D. Conn. 1971); Wheeler v. Adams Co., 322 F. Supp. 645 (D. Md. 1971).

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support or in concert with state officials, and also to cover private individuals acting under authority granted by state statute.[71]

Thus in *Santiago v. McElroy*[72] state action was found both because the statutory distraint law required state officials to perform the sale of lessees' property, and because it was only as a result of statutory authorization that lessors could distrain lessees' property at all. In *Hall v. Garson*[73] state action was found in the functional role the lessor performed.

> In this case the alleged wrongful conduct was admittedly perpetrated by a person who was not an officer of the state or an official of any state agency. But the action taken, the entry into another's home and the seizure of another's property, was an act that possesses many, if not all, of the characteristics of an act of the State. The execution of a lien, whether a traditional security interest or a quasi writ of attachment or judgment lien has in Texas traditionally been the function of the sheriff or constable. Thus [Texas' distraint remedy] vests in the landlord and his agents authority that is normally exercised by the state and historically has been a state function.[74]

These findings of state action have not been accepted universally. *Kerrigan v. Boucher*[75] held that in the distraint situation the lessor was not an agent of the state and the fact that distraint was made possible through specific statutory grant was not enough to constitute state action. Indeed acceptance of the *Santiago* and *Hall* interpretation of state action may well carry the concept of state action too far.[76] To go this far in finding state action would be to forsake the concept of state action entirely, a proposition which has attracted some scholarly support.[77] Presently, however, a finding of state action is still required.

The *Santiago* and *Hall* view of state action does have the com-

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71. Collins v. Viceroy Hotel Corporation, 338 F. Supp. 390, 393 (N.D. Ill. 1972).
72. Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970).
73. Hall v. Garson, 430 F.2d 430 (5th Cir. 1970).
74. *Id.* at 439.
75. Kerrigan v. Boucher, 326 F. Supp. 647 (D. Conn. 1971).
76. McGuane v. Chernango Ct., Inc., 431 F.2d 1189 (2d Cir. 1970) (finding no state action in the New York distraint statute).
77. Black, *"State Action", Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967).

mendable quality of getting to the merits of the case. Having resolved the concept of state action, courts following the *Santiago* and *Hall* view easily find a lack of procedural safeguards in the lessor distraint remedies.

> It is fair to conclude that due process generally requires the kinds of 'notice' and hearing which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use.[78]

The lessee is deprived of any such notice or hearing before the lessor takes his property under distraint procedures.[79]

In upholding *Santiago, Sellers v. Contino*[80] noted a different type of constitutional defect. Plaintiffs in *Sellers* claimed that the lessor's distraint procedures represented a chilling effect upon their rights to organize and their freedom of expression. With the leverage of the distraint remedies facing them, lessees felt hesitant to report housing code violations, or to take advantage of other legal rights such as repair and deduct statutes.[81]

One would have to forsake the state action concept—or construe it quite liberally—to find state action in the security deposit transaction. But dealing with the relative merits, as the *Santiago* and *Hall* courts were willing to do, one cannot ignore the same basic unfairness found in the security deposit practice as is found in the distraint remedies. The possession of the security deposit by the lessor represents a chilling effect on the lessee's rights during the term of the lease. And, at the termination of the lease, the lessee is denied, contrary to all modern notions of fairness, any opportunity to be heard. Although the state action requirement prohibits constitutional grounds for change, certainly such inequities should warrant legislative involvement.

Statutory Modifications

Several state legislatures have addressed themselves to the se-

78. Santiago v. McElroy, 319 F. Supp. 284, 293 (E.D. Pa. 1970); Mihans v. Municipal Court of Berkeley-Albany Judicial District, 7 Cal. App. 3d 479, 488, 87 Cal. Rptr. 17, 23 (1970).

79. State *ex rel* Payne v. Walden, 190 S.E.2d 770, 778 (Ct. App. W. Va. 1971).

80. Sellers v. Contino, 327 F. Supp. 230 (E.D. Pa. 1971).

81. Roche v. Lamb, 26 N.Y.2d 538, 311 N.Y.S.2d 903 (1970).

curity deposit problem. The New York legislature has initiated some changes.[82] The lessor in New York is under an affirmative duty to place the deposit in a separate account bearing interest.[83] The statute is not subject to waiver, but upon specific agreement the interest earned on behalf of the lessee may be applied to rent as credit.[84] The effect of the New York statute is to make the lessor a trustee by operation of law.[85] As trustee the lessor must keep the funds segregated, and if he has commingled the funds, the lessee is entitled to immediate return of the deposit in full and the lessor can no longer avail himself of the deposit.[86] The statute severely limits the lessor's opportunity for investment of the deposit since he must notify the lessee of the institution where the funds are deposited.[87]

Several other states have effected minor changes. Some states require the lessor to specifically enumerate all claims against the deposit.[88] The lessor is thereby compelled to affirmatively justify his retention of the deposit, but the impartiality of this determination still remains suspect. The only legitamacy added to the lessor's retention of the deposit is the minor deterrence that explaining one's actions has on that individual.

An interesting change in the very substance of the relationship created by the security deposit transaction is a Colorado statute,[89] which shifts the ultimate burden of proof to the lessor. The lessor must persuasively show that any partial or total retention of the deposit was in fact not wrongful, but warranted by actual losses or damages covered in the security deposit clause. A penalty clause in the statute for willful or wrongful retention of any portion of the deposit is aimed at producing a more accurate assessment of dam-

82. N.Y. GEN. OBLIG. LAWS § 7-103 (McKinney Supp. 1972). *See also* ILL. ANN. STAT. ch. 74, § 91 (Smith-Hurd 1973); MASS. ANN. LAWS ch. 186, § 15B (Supp. 1970); N.J. REV. STAT. § 46: 8-19 to 8-23 (Supp. 1972).

83. State by Lefkowitz v. Parker, 67 Misc.2d 36, 323 N.Y.S. 2d 473 (Sup. Ct. Spec. T.), *rev'd on other grounds*, 38 App. Div. 2d 542, 327 N.Y.S.2d 277 (1971); 1971 N.Y. OP. ATT'Y GEN. 21.

84. N.Y. GEN. OBLIG. LAW § 7-103(3) (McKinney Supp. 1972).

85. *In re* Pal-Playwell, Inc., 334 F.2d 389 (2d Cir. 1964); State by Lefkowitz v. Parkchester Apts. Co., 61 Misc. 2d 1020, 307 N.Y.S.2d 741 (Sup. Ct. 1970).

86. *In re* Perfection Technical Services Press Inc., 22 App. Div. 2d 352, 256 N.Y.S.2d 166, *aff'd* 18 N.Y.2d 644, 273 N.Y.S.2d 71, 219 N.E.2d 424 (1965).

87. 1970 N.Y. OP. ATT'Y GEN. 17, 163.

88. *See* FLA. STAT. ANN. § 83.261 (Supp. 1972); MINN. STAT. ANN. § 504.19 (Supp. 1973); N.J. REV. STAT. § 46: 8-19 (Supp. 1972).

89. COLO. REV. STAT. ANN. § 58-1-28 (1971).

ages. The pragmatic situation of the lessee, however, still limits the benefits of the shift of the burden of proof. To challenge alleged discriminatory or arbitrary action by the lessor, the lessee must still resort to costly litigation, a practical impossibility in many cases.

AN ALTERNATIVE

The lessor's interest as a potential creditor is not sufficient to justify a summary power forfeiture of a lessee's deposit.[90] The possibility of a lessee skipping rent or damaging the premises is present, but not persuasive enough to warrant a blanket denial of the lessee's basic right to protest or defend before his property is taken away.[91] The lessor should not be allowed to proceed summarily on the tenuous presumption that all lessees are potential rent-skippers or apartment-wreckers. States have denied even a prejudgment attachment or garnishment of an individual's property where the claim against him is in tort, reasoning that such claims do not represent a liquidated amount and, until judgment, remain too tenuous.[92] How much more tenuous is a lessor's claim against a lessee when compared to that of a plaintiff in a tort suit? The tort action is based on an alleged factual happening already consummated rather than on the presumption that the particular lessee might commit a tort (*i.e.*, excessive wear and tear to the premises) at sometime in the future.

A possible solution in line with recent debtor/creditor developments would be enactment of legislative guidelines and standards which would enumerate circumstances sufficient to warrant prejudgment creditor protection for the lessor. Even *Sniadach v. Family Finance Corp.*, recognized certain instances which warrant abandonment of a pre-attachment hearing.[93] Certainly the transient and financially weak lessee represents a potentially great risk to the lessor.[94] But it would appear not to be an excessive burden on the lessor to require him initially to establish the potential lessee as a risk. For example; if the lessee did not have a job in the locale for the previous year, if the lessee showed a pattern of transient living,

90. Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970); State *ex rel* Payne v. Walden, 190 S.E.2d 770, 778 (Ct. App. W. Va. 1972).

91. Cases cited note 90 *supra*.

92. Cleveland v. San Antonio Building & Loan Ass'n, 148 Tex. 211, 223 S.W.2d 226 (1949). *See also* Annot., 12 A.L.R. 2d 787 (1950).

93. Sniadach v. Family Finance Corp., 394 U.S. 337 (1969).

94. *See* note 6 *supra*.

or if a check on the lessee's bank accounts (or charge cards) shows a degree of financial irresponsibility, then a security deposit would be defensible. It would not require much effort to telephone the prospective lessee's employer, bank or previous lessor. Statutory authorization of the use of security deposits upon the finding of specific credit hazards (*i.e.*, no job, no bank account, etc.) would legitimize the lessor's requirement of a security deposit.

With the need for a security deposit established, the deposit would be placed in a responsible financial institution, bearing interest.[95] The lessee would notify the lessor of the location of the deposit and the fund would remain intact through the duration of the lease. Upon termination of the lease, settlement of the ultimate disposition of the deposit by the parties themselves would be encouraged. Both legal notions of fairness and common sense dictate an opportunity for confrontation of the lessor's claims. Participation in the assessment and evaluation of damages and an opportunity to explain or defend would be essential to the fairness of the system and, in addition, would appease much of the lessee's feeling of being unfairly treated when his deposit is retained.

If a dispute reaches an impasse, then the parties would resort to an impartial arbiter. The use of a third party has been discouraged by individuals other than lessors, however:

> Apart from the lessor's reasons, another factor which has probably tended to discourage the use of the depositary for small deposits is the reluctance of banks and trust companies to accept such special deposits when the compensation forthcoming is not adequately proportioned to the risks and inconveniences involved.[96]

The use of such depositaries and financial institutions would meet with further resistance if these institutions were saddled with the additional arbitration burden.

A very logical party to act as trustee of the fund and arbiter of the dispute would be the various housing code enforcement agencies found throughout urban America.[97] These agencies are qualified to determine the habitability and conditions of the premises. An excel-

95. N.Y. GEN. OBLIG. LAW § 7-103(2a) (McKinney Supp. 1972).
96. Beaty v. Armstrong, 95 Okla. 109, 218 P. 516 (1923).
97. Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 805 (1965).

lent procedure—far superior to complete absence of any procedural standards—would be to confront the lessee through such an agency with a summary of claims made against the deposit with provision for him to respond in any manner he chooses, whether by denial, explanation or supporting witnesses.[98] A few quick phone calls, or a five minute inspection of the premises by an agency official would provide a modicum of procedural safeguards "aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use."[99] The disposition of the deposit would then be directed according to the agency official's findings.

The use of the housing code enforcement agencies does present some problems. Housing code enforcement agencies are already strained by lack of funds and staff.[100] Several considerations, however, make the use of the housing code enforcement agency more feasible than the use of banking and similar financial institutions. Financing can be partially accomplished through the administrative expense allowance found in statutory modifications already enacted.[101] Additional thrift in the administration of the fund can be achieved through proper commingling of numerous individual deposits. Normally the duty of the trustee is to prevent commingling of deposits.[102] However,

> where the trustee holds the funds of numerous beneficiaries, and it would be unreasonable and not subserve any purpose in protecting the interests of the beneficiaries of the several trusts to require him to keep the funds of the different trusts, it may be proper for the trustee to mingle the funds of the different trusts by deposit thereof in a common bank account. Thus, ordinarily a trust company can properly deposit in a single trust account in another bank the funds of several trusts, provided it keeps an accurate record of contributions of the separate trusts.[103]

98. K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.07, at 169 (3rd ed. 1972).

99. Santiago v. McElroy, 319 F. Supp. 284, 293 (E.D. Pa. 1970).

100. *See* Note, *supra* note 97, at 804. Defining department functions and roles would eliminate much of the present overlapping and inefficiencies in the programs. Elimination of some departments and reorganization of others would economize many agencies. *Id.* at 809.

101. N.J. REV. STAT. § 46: 8-19 (Supp. 1972); N.Y. GEN. OBLIG. LAW § 7-103(2) (McKinney Supp. 1972).

102. Sommers v. Timely Toys, Inc., 209 F.2d 342 (2d Cir. 1953); *In re* DeGregorio, 219 F. Supp. 783 (S.D.N.Y. 1963).

103. RESTATEMENT (SECOND) OF TRUSTS § 179c (1959).

Allowing proper commingling of the separate deposits would make management of the fund easier and provide a comparatively greater return through economies of size. This larger amount could be invested at higher interest rates and produce a greater absolute return on the money.

Probably the most attractive consequence of placing the security deposit burden upon housing code enforcement agencies is that it compliments the existing statutory duties of these agencies. The management of security deposits through such a program would provide additional justifications for the security deposit device. These deposits would become a supplemental tool in aiding the enforcement of a wide range of housing code regulations. In effect lessors would bring housing code enforcement upon themselves when they make a claim against the security deposit. The individual housing code agencies would have the aid of legions of quasi-inspectors in the person of each and every lessee.

The administrative agent's decision would have one basic purpose: to produce an initial unbiased determination of the validity of the claim against the deposit. The administrative agent's decision would not be determinative of the merits of the claims involved and the decision would be subject to judicial review.[104] However, because of the modest amounts involved, the relative high cost of judicial review, and the judicial tendency to give a character of finality to an administrative decision, the agency decision may well be determinative in all but a very few cases.[105]

Either party may be prejudicially bound by an erroneous determination by the agency, but such a decision would at least be a product of an unbiased origin.

> The question in one aspect is whether we should sometimes increase the procedural protections we now provide, for when we are limited to choosing between all and none, we sometimes choose none, if we had a choice among all, some and none, we might sometimes choose some instead of none.[106]

Presently the lessee has the benefit of no procedural safeguards;

104. K. DAVIS, *supra* note 98, at 174-75.
105. *Id.* at 175.
106. *Id.* at 169.

perhaps a modicum of procedural safeguards will help to equalize the interests involved.

CONCLUSION

Use of the security deposit by lessors as protection against possible damages and rent skips arose as a result of the unwieldy nature of the original lessor remedies. Neither the right of distraint nor the statutory lien proved readily adaptable to the lessor's needs. Resort was then made to contractual protection through the standard inclusion of security deposit clauses. As this practice has developed, several economic and social factors have worked to put the lessee in a take-it-or-leave-it situation.

The typical security deposit clause, couched in vague, all-inclusive language, calls for the satisfactory performance of all the terms of the lease contract. The vagueness of the security deposit transaction becomes even more acute when the lease is formed through an oral understanding. In an attempt to give form and definition to the security deposit transaction, courts have employed debt, pledge and trust theories. The difficulty with such labeling, however, is that each of these legal relationships involve precisely the same physical act, and any distinction arises out of the intent of the parties. Normally no exact definition and status is given to the security deposit by the parties themselves, and consequently the courts are forced to guess whether debt, pledge or trust was intended.

Because of the superior bargaining position the lessor enjoys, he benefits from the physical possession of the deposit throughout the term of the lease. Possession of the lease during the life of the lease affords the lessor an opportunity for personal investment. And at the termination of the lease, the discretion of the lessor usually determines the ultimate disposition of the deposit. This decision almost always stands because of the relatively high cost of challenging the decision of the lessor through the legal process.

The present practice tends to "harden lines" between the parties involved and eventually the landlord-tenant relationship degenerates into extra-legal retaliations typified by rent skips and vandalism by the lessee and large deposits and summary retention of the entire deposit by the lessor.[107] The security deposit thus becomes

107. Comment, *Tenant Unions: Collective Bargaining and the Low Income Tax*

self-defeating: lessees simply skip the last month's rent and allow the lessor to keep the entire deposit as that month's rent.

Arguably the public interest in providing a fund that is available for collection of debts before such a debt is conclusively liquidated is only marginally advanced by the requirement of a security deposit.[108] The basic unfairness of denying one an opportunity to defend his position before an unbiased arbiter has led several courts to rule state distraint statutes unconstitutional. After meeting the original obstacle of state action, courts have no difficulty in finding a lack of procedural safeguards in such a pre-hearing confiscation of the lessee's money.

Requiring the deposit to be placed with a third party and requiring the lessor to legitimize his claims against the deposit through an unbiased determination would eliminate the interest free loan aspect of the present system and prevent a dishonest or biased disposition of the deposit at the termination of the lease. By placing the task of managing and ultimately disposing of the deposit with the various housing code enforcement agencies, the security deposit would supplement existing housing code enforcement. Such a procedure would undoubtedly create some burden and expense for the lessor, but the possibility of "honest error or irritable misjudgment" by the lessor is too great to allow the present security deposit practice to stand. Development of procedures for prompt determinations and skillful management of funds will prevent much of the strain on fiscal and administrative resources,[109] and will at the same time introduce into the security deposit transaction the impartial fairness so sorely lacking today.

Tenant, 77 YALE L.J. 1368, 1374 (1968).

108. Note, *Attachment and Garnishment—Constitutional Law—Due Process of Law*, 68 MICH. L. REV. 986 (1970).

109. Goldberg v. Kelly, 397 U.S. 254, 266 (1970).