

CONCURRENCE IN SENATE AMENDMENTS

AB 2847 (Rubio)

As Amended June 19, 2018

Majority vote

ASSEMBLY: 77-0 (May 14, 2018) SENATE: 36-0 (June 25, 2018)

Original Committee Reference: **JUD.**

SUMMARY: Revises and recasts existing law on abandonment of the rental premises to be tailored specifically to commercial tenancy. Specifically, **this bill:**

- 1) Allows a landlord of commercial property to give notice of belief of abandonment if the rent has been due and unpaid for at least the number of days required for the lessor to declare a rent default under the terms of the lease, but in no case less than three days.
- 2) Reorganizes the above provision into a separately numbered section of the Civil Code.

The Senate amendments delete provisions that establish that, with respect to a commercial lease, the acceptance of a payment beyond the termination of a lease does not create a new lease term, but instead only mitigates any damage that the lessor may incur by reason of the lessee's failure to leave on time. Other amendments are purely technical.

FISCAL EFFECT: None

COMMENTS: Existing Civil Code provisions relating to leases are drafted in such a way that they potentially can be interpreted to extend to both residential and commercial real property, except in some sections that specifically distinguish them. In recent years, the Legislature has passed laws recognizing that commercial real estate and residential real estate are different, and that the laws that govern relationships between commercial landlords and their tenants should be different than those between residential landlords and their tenants. Beginning with AB 2025 (Silva), Chapter 161, Statutes of 2008, the Legislature has taken steps to separate the provisions of the Civil Code which extend to both residential and commercial transactions in order to take into account the different considerations that apply in residential and commercial contexts.

According to the author and sponsor of this bill, current law creates a number of issues for commercial property owners with respect to the abandonment of leased property. This bill enacts a separate new section of the Civil Code for commercial property only, pertaining to the time when a landlord may declare the property to be abandoned and serve notice of abandonment on the lessee. Amendments taken in the Senate delete provisions relating to the renewal of commercial lease terms.

This bill reduces the time necessary for a landlord to wait before sending a notice of abandonment from 14 days to three days. Under current law, a landlord may not give notice of abandonment until a payment of rent is 14 days past due. The notice must include the date when the lease terminates, which may not be less than 15 days from serving the notice personally, or 18 days from serving the notice by mail. These requirements are meant to be protective of the residential tenant and to conform with the public policy goal of ensuring that parties in a lesser bargaining position are guaranteed certain safeguards, especially when a basic necessity of life, such as housing, is involved.

According to the sponsor, commercial tenants are differently situated than residential tenants and should therefore have different timeframes for allowing landlords to re-let their spaces in the case of abandonment. For example, they contend that because a residential tenant rents their property for use as their home, they are less likely to walk away in the middle of the lease term. Additionally, in the instance that a residential tenant abandons their property in the middle of the lease, the property can be re-let in a much shorter time frame than a commercial space due to the flexibility and demand for residential accommodations in California.

Commercial leases are frequently negotiated by sophisticated parties, often with the involvement of attorneys. Due to the unique nature of commercial property, tenants also have more bargaining power in determining the terms of their leases, as the particular aspects of a commercial property are not suited to as many potential tenants as residential property would be. For all these reasons, it appears that commercial tenants have more power in the negotiation process than their residential tenant counterparts.

The California Business Properties Association provides the following example of how existing law on abandonment does not work well in the commercial context, stating:

Assume the commercial tenant paid the rent for the entire month, but disappears in the middle of the month. They are obviously gone, no workers, lights out, furniture abandoned, phones and computers removed, trash and papers strewn about from packing. Under the current statute, the property owner/manager must wait until the fifteenth of the following month to start the Notice of Abandonment and since we never know where the tenant went, it must be served by mail. We also post it at the property. Now we must wait eighteen days before we can go back in, so now we are two months' rent behind with the notice expiring no earlier than the second or third of the following month, (e.g. paid rent on June 1, abandoned mid-June, notice on July 15, notice expires on August 2).

Typical leases say that the tenant is in rent default after a failure to pay continues for three days, five days, five business days or at most, ten days. Using five days as most usual, this streamlined process would allow us to recover the property after fifteen days instead of thirty-two. We would still be in the first month after the abandonment and could begin our leasing process that much sooner, (e.g. paid rent on June 1, abandoned mid-June, notice on July 6, notice expires July 16), minimizing damage to the property owner/manager, and to tenant's advantage as well, since the tenant is liable for the remaining months of the lease anyway, less what property owner/manager mitigates and if we get a new tenant faster, the previous tenant benefits.

This bill allows a landlord of commercial property to give notice of belief of abandonment if the rent has been due and unpaid for at least the number of days required for the lessor to declare a rent default under the terms of the lease. Under the bill, a lessee can defeat a claim of abandonment by proving, at the time the notice of abandonment is served, that the rent was not due and unpaid for the time period necessary to declare a rent default under the lessee's lease. Finally, the bill clarifies that the critical "time period to declare a rent default under the lease" shall in no case be fewer than three days, as a safeguard to ensure that there is a minimum time in place to protect commercial tenants.

CONSENT

Bill No: AB 2847
Author: Rubio (D)
Amended: 6/19/18 in Senate
Vote: 21

SENATE JUDICIARY COMMITTEE: 7-0, 6/12/18
AYES: Jackson, Moorlach, Anderson, Hertzberg, Monning, Stern, Wieckowski

ASSEMBLY FLOOR: 77-0, 5/14/18 - See last page for vote

SUBJECT: Commercial real property: tenancy: abandonment

SOURCE: California Business Properties Association

DIGEST: This bill shortens the amount of time that commercial landlords must wait before posting a notice of belief of abandonment when the tenant has stopped paying rent and can no longer be found at the property.

ANALYSIS:

Existing law:

- 1) Provides that real property shall be deemed abandoned by the lessee, and the lease shall terminate if the lessor gives written notice of his belief of abandonment and the lessee fails to give the lessor written notice, prior to the date of termination specified in the lessor's notice, stating that he does not intend to abandon the real property and stating an address at which the lessee may be served by certified mail in any action for unlawful detainer of the real property. (Civ. Code Sec. 1951.3 (a).)
- 2) Provides that the lessor may give a notice of belief of abandonment to the lessee pursuant to this section only where the rent on the property has been due and unpaid for at least 14 consecutive days and the lessor reasonably believes that the lessee has abandoned the property. It also requires that the lessor include the date of termination in the notice of abandonment and that that date of

termination shall be at least 15 days after the notice is served personally or, if mailed, at least 18 days after the notice is deposited in the mail. (Civ. Code Sec. 1951.3(b).)

- 3) Provides that the property shall not be deemed to be abandoned if the lessee proves any of the following: (a) the rent was not due and unpaid for 14 consecutive days at the time notice was given; (b) it was not reasonable for the lessor to believe that the lessee had abandoned the real property; (c) before the date specified in the notice, the lessee gave written notice to the lessor stating his intent not to abandon the real property and stating an address at which he may be served with an unlawful detainer lawsuit by certified mail; or (d) the lessee paid to the lessor all or a portion of the rent due and unpaid on the real property prior to the date the lease would have terminated. (Civ. Code Sec. 1951.3 (e).)

This bill:

- 1) Reorganizes and consolidates provisions pertaining to commercial property into separately numbered sections of the Civil Code.
- 2) Allows a landlord of commercial property to give notice of belief of abandonment if the rent has been due and unpaid for at least the number of days required for the lessor to declare a rent default under the terms of the lease, but in no case less than three days.
- 3) Requires a commercial landlord to include the date of termination in the notice of abandonment and still requires that date of termination to be at least 15 days after the notice is served personally or, if mailed, at least 18 days after the notice is deposited in the mail.

Background

In many cases, the current law and procedures governing residential and commercial tenancies remain one and the same. As the California courts have recognized, however, commercial tenancies and residential tenancies are quite different. (*Green v. Superior Court of San Francisco* (1974) 10 Cal.3d 616, 625.) The most obvious difference is that residential tenancies usually involve the tenant's primary place of shelter, whereas commercial tenancies do not. Losing a commercial tenancy may be extremely costly, but it does not generally render anyone homeless, at least not directly. There is also often a greater disparity in sophistication between residential landlords and their tenants, when compared with commercial landlords and tenants. The latter two, after all, are both business

entities. Many times both commercial landlords and tenants are represented by legal counsel. In the residential context, landlords frequently have attorneys while tenants almost never do.

Given all of these differences, the substantive and procedural legal protections for residential tenants are generally stronger than those for commercial tenants. Increasingly, the landlord-tenant statutes reflect those differences in the form of distinct provisions, one governing commercial tenancies while the other covers residential. This bill makes just such a split in relation to one aspect of existing landlord-tenant law: the procedure for terminating a tenancy in situations in which it appears that a tenant may have abandoned the property for good. It also alters the resulting commercial provisions to be more favorable to commercial landlords, while leaving the residential provisions as they are.

Under current law, when a tenant has not paid the rent and the landlord reasonably believes that the tenant has abandoned the property, both commercial and residential tenants must wait 14 days before delivering a notice of belief of abandonment. (Civ. Code Sec. 1951.3(b).) The notice of belief of abandonment must provide the tenant with further time to respond: 15 days, if the notice is personally served, or 18 days, if it is sent by mail. (*Ibid.*) If the tenant does not respond, then the landlord may deem the property abandoned and retake possession.

This bill maintains these same procedures for residential tenancies, but it enacts a new set of procedures applicable to commercial tenancies only. Under the changes proposed by the bill, if the commercial tenant's rent is unpaid and the commercial landlord believes the commercial tenant has abandoned the property, the commercial landlord would only have to wait until the end of any grace period or three days, whichever is longer, before delivering the notice of belief of abandonment. The commercial tenant would then still have 15 days to respond before the commercial landlord could deem the property abandoned.

Comments

What is commercial property to which this bill's proposed changes would apply?

Civil Code Section 1954.26 defines commercial property for the purposes of landlord-tenant law. In simplified terms, "commercial real property" is any unit that is not: (1) used as a home, residence, or sleeping place; (2) a hotel where 20 percent or more of the occupants live permanently; or (3) any space or dwelling in a mobilehome park.

Policy rationale for shortening the notice of belief of abandonment process in the commercial context

According to the author and sponsor of this bill, the current process for confirming abandoned tenancies, while appropriate for the residential context, is unnecessarily lengthy for the commercial context. To explain the problem, the sponsor offers the following hypothetical scenario:

Assume the commercial tenant paid the rent for the entire month, but disappears in the middle of the month. They are obviously gone, no workers, lights out, furniture abandoned, but phones and computers removed, trash and papers strewn about from packing. Under the current statute, the property owner/manager must wait until the fifteenth of the following month to start the Notice of Abandonment and since we never know where the tenant went, it must be served by mail. We also post it at the property. Now we must wait eighteen days before we can go back in, so now we are two months' rent behind with the notice expiring no earlier than the second or third of the following month, (e.g. paid rent on June 1, abandoned mid-June, notice on July 15, notice expires on August 2).

Under the approach proposed by this bill, the process would become a little bit shorter. (Committee staff notes that, as the notice of belief of abandonment still has to last 15 days under this bill, the following passage appears to provide the wrong date for the expiration of the notice. It should be July 21, rather than July 16.)

Typical leases say that the tenant is in rent default after a failure to pay continues for three days, five days, five business days or at most, ten days. Using five days as most usual, this streamlined process would allow us to recover the property after fifteen days instead of thirty-two. We would still be in the first month after the abandonment and could begin our leasing process that much sooner, (e.g. paid rent on June 1, abandoned mid-June, notice on July 6, notice expires July 16), minimizing damage to the property owner/manager, and to tenant's advantage as well, since the tenant is liable for the remaining months of the lease anyway, less what property owner/manager mitigates and if we get a new tenant faster, the previous tenant benefits.

In the commercial context, the danger that a landlord might mistakenly believe the premises to be abandoned seems lower. Unlike a residential tenant who might go away on vacation or get hospitalized for a couple of weeks, commercial businesses are less likely to completely disappear from a property. Moreover, the stakes are lower: in the event that a shortened process caused a landlord to conclude

erroneously that a commercial tenancy was abandoned, the tenant's business might be disrupted. It does not diminish that problem to say that losing a primary source of shelter, possibly for an entire family, represents a greater risk.

Related/Prior Legislation

AB 2173 (Santiago, 2018) seeks to set a higher threshold for landlords to dispose of abandoned property in commercial properties, separating it from the current residential threshold. The bill is on the Senate Floor.

AB 2831 (McAlister, Chapter 332, Statutes of 1974) enacted the current notice and waiting period procedure by which a landlord may lawfully retake possession of rental property upon the tenant's abandonment of tenancy.

FISCAL EFFECT: Appropriation: No Fiscal Com.: No Local: No

SUPPORT: (Verified 6/18/18)

California Business Properties Association (source)

OPPOSITION: (Verified 6/18/18)

None received

ARGUMENTS IN SUPPORT:

According to the author:

Some sections of the Civil Code lump commercial and residential real estate together even though the underlying intent of the law is focused on individual residential tenants and not the companies in the business-to-business nature of commercial real estate.

Over time, and where it makes sense, an effort is being made to clarify and/or separate areas of law where it doesn't make sense to treat commercial and residential transactions/leasing in the same manner. Assembly Bill 2847 is a technical measure which would continue that trend of clarification.

As sponsor of the bill, the California Business Properties Association writes:

AB 2847 (Rubio)... continues the effort to separate commercial and residential sections in the Civil Code where it does not make sense to have them together... [...]

AB 2847 clarifies that the current section 1951.3 pertains to residential real estate and create a new section mirroring the original to deal with commercial. The current statute provides certain protections written for residential tenants without a parallel in commercial context. The section requires that when property is deemed “abandoned” the property owner/manager must wait until the fifteenth of the following month to start the Notice of Abandonment. This waiting period does not make sense on the commercial side as there are strict contractual obligations guiding a property owner/manager’s actions.

The bill also extracts commercial contracts from Civil Code Sections 1945 and 1946 and puts them into their own sections. The current sections clearly only apply to residential property because of their location in a Chapter that says it is for residential property only. These sections don’t specifically say “residential,” and almost all the other sections in this area do, so they have been cautiously interpreted by commercial property as applying to both to avoid a violation.

ASSEMBLY FLOOR: 77-0, 5/14/18

AYES: Acosta, Aguiar-Curry, Travis Allen, Arambula, Baker, Berman, Bigelow, Bloom, Bonta, Brough, Burke, Caballero, Calderon, Carrillo, Cervantes, Chau, Chávez, Chen, Chiu, Choi, Chu, Cooley, Cooper, Cunningham, Dahle, Daly, Eggman, Flora, Fong, Frazier, Friedman, Gallagher, Eduardo Garcia, Gipson, Gloria, Gonzalez Fletcher, Gray, Grayson, Harper, Holden, Irwin, Jones-Sawyer, Kalra, Kamlager-Dove, Kiley, Lackey, Levine, Limón, Low, Maienschein, Mathis, Mayes, McCarty, Medina, Melendez, Mullin, Muratsuchi, Nazarian, Obernolte, O'Donnell, Patterson, Quirk, Quirk-Silva, Reyes, Rodriguez, Rubio, Salas, Santiago, Steinorth, Mark Stone, Thurmond, Ting, Voepel, Waldron, Weber, Wood, Rendon

NO VOTE RECORDED: Cristina Garcia

Prepared by: Timothy Griffiths / JUD. / (916) 651-4113
6/20/18 15:07:43

**** END ****

SENATE JUDICIARY COMMITTEE
Senator Hannah-Beth Jackson, Chair
2017-2018 Regular Session

AB 2847 (Rubio)
Version: May 7, 2018
Hearing Date: June 12, 2018
Fiscal: No
Urgency: No
TSG

SUBJECT

Commercial real property: tenancy: abandonment

DESCRIPTION

This bill would make changes to two aspects of the law governing commercial tenancies. First, the bill would shorten the amount of time that commercial landlords must wait before posting a notice of belief of abandonment when the tenant has stopped paying rent and can no longer be found at the property. Second, the bill would make it so that, with respect to commercial tenancies, rent payments accepted after expiration of the lease would not renew the lease term, but could be used in mitigation of the landlord's damages. Neither change would impact existing law as it relates to residential tenancies.

BACKGROUND

In many cases, the current law and procedures governing residential and commercial tenancies remain one and the same. As the California courts have recognized, however, commercial tenancies and residential tenancies are quite different. (*Green v. Superior Court of San Francisco* (1974) 10 Cal.3d 616, 625.) The most obvious difference is that residential tenancies usually involve the tenant's primary place of shelter, whereas commercial tenancies do not. Losing a commercial tenancy may be extremely costly, but it does not generally render anyone homeless, at least not directly. There is also often a greater disparity in sophistication between residential landlords and their tenants, when compared with commercial landlords and tenants. The latter two, after all, are both business entities. Many times both commercial landlords and tenants are represented by legal counsel. In the residential context, landlords frequently have attorneys while tenants almost never do.

Given all of these differences, the substantive and procedural legal protections for residential tenants are generally stronger than those for commercial tenants. Increasingly, the landlord-tenant statutes reflect those differences in the form of distinct provisions, one governing commercial tenancies while the other covers residential. This bill would make just such a split in relation to two aspects of existing landlord-tenant

law. It would also alter the resulting commercial provisions to be more favorable to commercial landlords, while leaving the residential provisions as they are.

The first proposed change relates to situations in which it appears that a tenant may have left the property for good. Under current law, when a tenant has not paid the rent and the landlord reasonably believes that the tenant has abandoned the property, both commercial and residential tenants must wait 14 days before delivering a notice of belief of abandonment. (Civ. Code Sec. 1951.3(b).) The notice of belief of abandonment must provide the tenant with further time to respond: 15 days, if the notice is personally served, or 18 days, if it is sent by mail. (*Ibid.*) If the tenant does not respond, then the landlord may deem the property abandoned and retake possession.

This bill would maintain these same procedures for residential tenancies, but it would enact a new set of procedures applicable to commercial tenancies only. Under the changes proposed by the bill, if the commercial tenant's rent is unpaid and the commercial landlord believes the commercial tenant has abandoned the property, the commercial landlord would only have to wait until the end of any grace period or three days, whichever is longer, before delivering the notice of belief of abandonment. The commercial tenant would then still have 15 days to respond before the commercial landlord could deem the property abandoned.

The second change proposed by the bill relates to what happens when a lease has expired but the tenant is still in possession of the property, and the landlord accepts further rent payments. Under existing law, such a situation results in a renewal of the lease, usually on a month-to-month basis, in both the residential and commercial contexts.

This bill would maintain this same rule for residential tenancies, but it would enact a new provision addressing these same circumstances in the commercial context. Under the changes proposed by this bill, where a commercial tenant overstays the lease, the commercial landlord would be able to accept additional rental payment without that act resulting in a renewal of the lease. Instead, the commercial landlord would be able to apply the payments toward mitigating damages for the tenant's holdover.

CHANGES TO EXISTING LAW

Existing law provides that if a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month when the rent is payable monthly, nor in any case one year. (Civ. Code Sec. 1945.)

Existing law provides that hiring of real property, for a term not specified by the parties, is deemed to be renewed as stated in Section 1945, at the end of the term implied by law unless one of the parties gives written notice to the other of his or her

intention to terminate the same, at least as long before the expiration thereof as the term of the hiring itself, not exceeding 30 days. (Civ. Code Sec. 1946.)

Existing law provides that for month-to-month tenancies, either party may terminate the tenancy by giving at least 30 days' written notice at any time. (Civ. Code Sec. 1946.)

Existing law permits the parties to agree at the time the tenancy is created that a notice intent to terminate the tenancy may be given at any time not less than seven days before the expiration of the term thereof. (Civ. Code Sec. 1946.)

Existing law provides that real property shall be deemed abandoned by the lessee, and the lease shall terminate if the lessor gives written notice of his belief of abandonment and the lessee fails to give the lessor written notice, prior to the date of termination specified in the lessor's notice, stating that he does not intend to abandon the real property and stating an address at which the lessee may be served by certified mail in any action for unlawful detainer of the real property. (Civ. Code Sec. 1951.3 (a).)

Existing law provides that the lessor may give a notice of belief of abandonment to the lessee pursuant to this section only where the rent on the property has been due and unpaid for at least 14 consecutive days and the lessor reasonably believes that the lessee has abandoned the property. It also requires that the lessor include the date of termination in the notice of abandonment and that that date of termination shall be at least 15 days after the notice is served personally or, if mailed, at least 18 days after the notice is deposited in the mail. (Civ. Code Sec. 1951.3(b).)

Existing law provides that the property shall not be deemed to be abandoned if the lessee proves any of the following: (a) the rent was not due and unpaid for 14 consecutive days at the time notice was given; (b) it was not reasonable for the lessor to believe that the lessee had abandoned the real property; (c) before the date specified in the notice, the lessee gave written notice to the lessor stating his intent not to abandon the real property and stating an address at which he may be served with an unlawful detainer lawsuit by certified mail; or (d) the lessee paid to the lessor all or a portion of the rent due and unpaid on the real property prior to the date the lease would have terminated. (Civ. Code Sec. 1951.3 (e).)

This bill would reorganize and consolidate provisions pertaining to commercial property into separately numbered sections of the Civil Code.

This bill would establish that under a commercial lease, the acceptance of a payment beyond the termination of a lease does not create a new lease term, but instead only mitigates any damage that the lessor may incur by reason of the lessee's failure to leave on time.

This bill would allow a landlord of commercial property to give notice of belief of abandonment if the rent has been due and unpaid for at least the number of days

required for the lessor to declare a rent default under the terms of the lease, but in no case less than three days.

COMMENT

1. Stated need for the bill

According to the author:

Some sections of the Civil Code lump commercial and residential real estate together even though the underlying intent of the law is focused on individual residential tenants and not the companies in the business-to-business nature of commercial real estate.

Over time, and where it makes sense, an effort is being made to clarify and/or separate areas of law where it doesn't make sense to treat commercial and residential transactions/leasing in the same manner. Assembly Bill 2847 is a technical measure which would continue that trend of clarification.

As sponsor of the bill, the California Business Properties Association writes:

AB 2847 (Rubio)... continues the effort to separate commercial and residential sections in the Civil Code where it does not make sense to have them together... [...]

AB 2847 clarifies that the current section 1951.3 pertains to residential real estate and create a new section mirroring the original to deal with commercial. The current statute provides certain protections written for residential tenants without a parallel in commercial context. The section requires that when property is deemed "abandoned" the property owner/manager must wait until the fifteenth of the following month to start the Notice of Abandonment. This waiting period does not make sense on the commercial side as there are strict contractual obligations guiding a property owner/manager's actions.

The bill also extracts commercial contracts from Civil Code Sections 1945 and 1946 and puts them into their own sections. The current sections clearly only apply to residential property because of their location in a Chapter that says it is for residential property only. These sections don't specifically say "residential," and almost all the other sections in this area do, so they have been cautiously interpreted by commercial property as applying to both to avoid a violation.

2. What is commercial property to which this bill's proposed changes would apply?

Civil Code Section 1954.26 defines commercial property for the purposes of landlord-tenant law. In simplified terms, "commercial real property" is any unit that is not: (1) used as a home, residence, or sleeping place; (2) a hotel where 20 percent or more of the occupants live permanently; or (3) any space or dwelling in a mobilehome park.

3. Policy rationale for shortening the notice of belief of abandonment process in the commercial context

According to the author and sponsor of this bill, the current process for confirming abandoned tenancies, while appropriate for the residential context, is unnecessarily lengthy for the commercial context. To explain the problem, the sponsor offers the following hypothetical scenario:

Assume the commercial tenant paid the rent for the entire month, but disappears in the middle of the month. They are obviously gone, no workers, lights out, furniture abandoned, but phones and computers removed, trash and papers strewn about from packing. Under the current statute, the property owner/manager must wait until the fifteenth of the following month to start the Notice of Abandonment and since we never know where the tenant went, it must be served by mail. We also post it at the property. Now we must wait eighteen days before we can go back in, so now we are two months' rent behind with the notice expiring no earlier than the second or third of the following month, (e.g. paid rent on June 1, abandoned mid-June, notice on July 15, notice expires on August 2).

Under the approach proposed by this bill, the process would become a little bit shorter. (Committee staff notes that, as the notice of belief of abandonment still has to last 15 days under this bill, the following passage appears to provide the wrong date for the expiration of the notice. It should be July 21, rather than July 16.)

Typical leases say that the tenant is in rent default after a failure to pay continues for three days, five days, five business days or at most, ten days. Using five days as most usual, this streamlined process would allow us to recover the property after fifteen days instead of thirty-two. We would still be in the first month after the abandonment and could begin our leasing process that much sooner, (e.g. paid rent on June 1, abandoned mid-June, notice on July 6, notice expires July 16), minimizing damage to the property owner/manager, and to tenant's advantage as well, since the tenant is liable for the remaining months of the lease anyway, less what

property owner/manager mitigates and if we get a new tenant faster, the previous tenant benefits.

In the commercial context, the danger that a landlord might mistakenly believe the premises to be abandoned seems lower. Unlike a residential tenant who might go away on vacation or get hospitalized for a couple of weeks, commercial businesses are less likely to completely disappear from a property. Moreover, the stakes are lower: in the event that a shortened process caused a landlord to conclude erroneously that a commercial tenancy was abandoned, the tenant's business might be disrupted. It does not diminish that problem to say that losing a primary source of shelter, possibly for an entire family, represents a greater risk.

4. Policy rationale for changing legal effect of accepting of rental payments after expiration of the lease in commercial contexts

Under existing law, if a lease expires but the tenant is still occupying the property, the landlord cannot accept rent from the tenant without renewing the lease as a result. (Civ. Code Sec. 1945.) The underlying concept behind the law appears to be something very similar to reliance or estoppel: a tenant can reasonably conclude from the landlord's acceptance of the rent that the landlord consents to the continuing occupation of the premises on the existing terms.

Civil Code Section 1945 sits within a Chapter of the Civil Code that applies to residential property per Civil Code Section 1940. However, Civil Code Section 1940 also makes clear that a provision within the Chapter is not exclusively applicable to residential tenancies unless it is "so limited by its specific terms." Since Civil Code Sections 1945 and 1946 do not expressly limit themselves to residential properties, they do appear to apply to commercial tenancies under existing law.

The author and sponsor claim that Civil Code Sections 1945 and 1946 are not relevant to the commercial rental context, though they do not explain *why* that is so. The sponsor writes:

These codes say how leases can be renewed simply by accepting additional rent from the tenant past the lease term. This is only something that would happen in residential leasing and is not something that would happen on commercial. Most commercial leases draft around this, but some do not know how to do so.

At the same time, the sponsor has suggested that a change is needed because sneaky commercial tenants utilize the existing renewal provision to stay past the lease term even when the commercial landlord wants them out on time. Arguably, existing law includes an easy way for landlords to avoid being taken advantage of this way: do not accept the rent payment. If the tenant is tendering the rent payment through a drop box

or other automatic payment system, the landlord can still refuse to accept the rent by promptly returning the payment to the tenant.

As a general matter, in situations in which communications between the commercial landlord and tenant have not been clear, it seems unfair to the commercial tenant if the landlord can both accept a rental payment and say that the tenant must nonetheless get out. The more logical approach, it would seem, is to put the onus on the landlord to make it clear that the lease will not be renewed and not to confuse the issue by accepting rent. If the tenant nonetheless does remain past the lease term, the landlord remains entitled to recover damages for the holdover, once the tenant has been evicted. Since this is how the existing law works, it is not clear that an urgent change is needed.

With this in mind, the Committee may wish to consider whether it makes sense to press ahead with this component of the bill at this time.

5. Proposed Amendments

In order to address the issues set forth in the analysis, above, the author has offered to incorporate amendments into the bill that would:

- remove proposed changes to existing law regarding the legal effect of a landlord's acceptance of rent after the expiration of a lease;
- remove proposed changes to existing law regarding automatic renewal of a lease at the end of a term implied by law and subsequent notice requirements for terminating the tenancy; and
- remove gender-based pronouns from the law.

The specific amendments are as follows:

Amendment 1

On page 2, strike out lines 16 to 23, inclusive

Amendment 2

On page 2, in line 24, strike out "SEC. 2" and insert:
SEC. 1

Amendment 3

On page 2, in line 25, strike out "(a)"

Amendment 4

On page 2, in line 26, strike out "subdivision (a)"

Amendment 5

On page 3, in line 1, strike out "of"

Amendment 6

On page 3, in line 2, strike out "his or her" and insert:
that party's

Amendment 7

On page 3, strike out lines 31 and 32

Amendment 8

On page 3, in line 33, strike out "SEC. 3" and insert:
SEC. 2

Amendment 9

On page 4, in line 16, strike out "his" and insert:
the lessee's

Amendment 10

On page 5, in line 28, strike out "his or her" and insert:
the lessee's

Amendment 11

On page 5, in lines 29 and 30, strike out "he or she" and insert:
the lessee

Amendment 12

On page 6, in line 9, strike out "SEC. 4" and insert:
SEC. 3

Support: None known

Opposition: None known

HISTORY

Source: California Business Properties Association

Related Pending Legislation: AB 2173 (Santiago, 2018) seeks to set a higher threshold for landlords to dispose of abandoned property in commercial properties, separating it from the current residential threshold. AB 2173 is currently pending consideration before the Senate Committee on Judiciary and is scheduled to be heard on June 12, 2018.

Prior Legislation: AB 2831 (McAlister, Ch. 332, Stats. 1974) enacted the current notice and waiting period procedure by which a landlord may lawfully retake possession of rental property upon the tenant's abandonment of tenancy.

AB 2847 (Rubio)

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Prior Vote:

Assembly Floor (Ayes 77, Noes 0)

Assembly Judiciary Committee (Ayes 10, Noes 0)

ASSEMBLY THIRD READING

AB 2847 (Rubio)

As Amended May 7, 2018

Majority vote

Committee	Votes	Ayes	Noes
Judiciary	10-0	Mark Stone, Cunningham, Chau, Chiu, Gonzalez Fletcher, Holden, Kakra, Kiley, Maienschein, Reyes	

SUMMARY: Revises and recasts existing law on renewal of lease and abandonment of the rental premises to be tailored specifically to commercial tenancy. Specifically, **this bill:**

- 1) Establishes that under a commercial lease, the acceptance of a payment beyond the termination of a lease does not create a new lease term, but instead only mitigates any damage that the lessor may incur by reason of the lessee's failure to leave on time.
- 2) Allows a landlord of commercial property to give notice of belief of abandonment if the rent has been due and unpaid for at least the number of days required for the lessor to declare a rent default under the terms of the lease, but in no case less than three days.
- 3) Makes technical changes to reorganize and consolidate provisions pertaining to commercial property into separately numbered sections of the Civil Code.

FISCAL EFFECT: None

COMMENTS: Existing Civil Code provisions relating to leases are drafted in such a way that they potentially can be interpreted to extend to both residential and commercial real property, except in some sections that specifically distinguish them. In recent years, the Legislature has passed laws recognizing that commercial real estate and residential real estate are different, and that the laws that govern relationships between commercial landlords and their tenants should be different than those between residential landlords and their tenants. Beginning with AB 2025 (Silva), Chapter 161, Statutes of 2008, the Legislature has taken steps to separate the provisions of the Civil Code which extend to both residential and commercial transactions in order to take into account the different considerations that apply in residential and commercial contexts.

According to the author and sponsor of this bill, current law creates a number of issues as relates to the abandonment of leased property as applied to commercial leases. This bill makes two key changes to the Civil Code relating to real property leased for commercial purposes. The first pertains to the renewal of lease terms. The second relates to the time when a landlord may declare a property to be abandoned and serve notice of abandonment on the lessee.

This bill establishes that commercial leases do not automatically renew upon acceptance of rent. Under current law, a new monthly lease is automatically created where the landlord accepts payment for rent from a tenant beyond the date when the lease has ended. The author contends, however, that this rule makes little sense in the commercial real estate context, stating: "These codes say how leases can be renewed simply by accepting additional rent from the tenant past the lease term. This is only something that would happen in residential leasing and is not something

that would happen on commercial. Most commercial leases draft around this, but some do not know how to do so."

Accordingly, under this bill the acceptance of a payment by the landlord is deemed to be a mitigation of the damages to the landlord for the inability to re-let the space, rather than an automatic renewal of the monthly lease. The California Business Properties Association (CBPA) asserts that this proposed change reflects industry practice, acknowledging that the renewal of terms by continued payment is something only practiced in residential leases. Finally, the bill revises and recasts these new provisions into an independent section of the Civil Code in order to avoid confusion with existing law on residential property transactions.

This bill reduces the time necessary for a landlord to wait before sending a notice of abandonment from 14 days to three days. Under current law, a landlord may not give notice of abandonment until a payment of rent is 14 days past due. The notice must include the date when the lease terminates, which may not be less than 15 days from serving the notice personally, or 18 days from serving the notice by mail. These requirements are meant to be protective of the residential tenant and to conform with the public policy goal of ensuring that parties in a lesser bargaining position are guaranteed certain safeguards, especially when a basic necessity of life, such as housing, is involved.

According to the sponsor, commercial tenants are differently situated than residential tenants and should therefore have different timeframes for allowing landlords to re-let their spaces in the case of abandonment. For example, they contend that because a residential tenant rents their property for use as their home, they are less likely to walk away in the middle of the lease term. Additionally, in the instance that a residential tenant abandons their property in the middle of the lease, the property can be re-let in a much shorter time frame than a commercial space due to the flexibility and demand for residential accommodations in California.

Commercial leases are frequently negotiated by sophisticated parties, often with the involvement of attorneys. Due to the unique nature of commercial property, tenants also have more bargaining power in determining the terms of their leases, as the particular aspects of a commercial property are not suited to as many potential tenants as residential property would be. For all these reasons, it appears that commercial tenants have more power in the negotiation process than their residential tenant counterparts.

CBPA provides the following example of how existing law on abandonment does not work well in the commercial context, stating:

Assume the commercial tenant paid the rent for the entire month, but disappears in the middle of the month. They are obviously gone, no workers, lights out, furniture abandoned, phones and computers removed, trash and papers strewn about from packing. Under the current statute, the property owner/manager must wait until the fifteenth of the following month to start the Notice of Abandonment and since we never know where the tenant went, it must be served by mail. We also post it at the property. Now we must wait eighteen days before we can go back in, so now we are two months' rent behind with the notice expiring no earlier than the second or third of the following month, (e.g. paid rent on June 1, abandoned mid-June, notice on July 15, notice expires on August 2).

Typical leases say that the tenant is in rent default after a failure to pay continues for three days, five days, five business days or at most, ten days. Using five days as most usual, this streamlined process would allow us to recover the property after fifteen days instead of thirty-two. We would still be in the first month after the abandonment and could begin our leasing process that much sooner, (e.g. paid rent on June 1, abandoned mid-June, notice on July 6, notice expires July 16), minimizing damage to the property owner/manager, and to tenant's advantage as well, since the tenant is liable for the remaining months of the lease anyway, less what property owner/manager mitigates and if we get a new tenant faster, the previous tenant benefits.

Finally, this bill allows a lessee to defeat a claim of abandonment by proving, at the time the notice of abandonment is served, that the rent was not due and unpaid for the time period necessary to declare a rent default under the lessee's lease. Recent amendments to the bill clarify that the critical "time period to declare a rent default under the lease" shall in no case be fewer than three days, as a safeguard to ensure that there is a minimum time in place to protect commercial tenants.

Analysis Prepared by: Anthony Lew / JUD. / (916) 319-2334

FN: 0002918

Date of Hearing: May 1, 2018

ASSEMBLY COMMITTEE ON JUDICIARY

Mark Stone, Chair

AB 2847 (Rubio) – As Amended March 22, 2018

PROPOSED CONSENT (As Proposed to be Amended)

SUBJECT: COMMERCIAL REAL PROPERTY: TENANCY: ABANDONMENT

KEY ISSUE: SHOULD CIVIL CODE PROVISIONS RELATING TO LEASE RENEWAL AND ABANDONMENT OF THE PREMISES, WHICH NOW APPLY TO BOTH RESIDENTIAL AND COMMERCIAL TENANTS, BE REVISED TO BETTER REFLECT CIRCUMSTANCES THAT DISTINGUISH THE TWO TYPES OF TENANTS?

SYNOPSIS

Under existing law, if a lessee of real property remains in possession of the premises after the expiration of the lease, and the landlord accepts rent from him, the parties are presumed to have renewed the lease on the same terms and for the same time. Additionally, when real property is deemed abandoned by the lessee, the lease shall terminate if the landlord gives written notice of his or her belief of abandonment and the lessee fails to give the lessor written notice, prior to the date of termination specified in the lessor's notice, stating that he does not intend to abandon the property. The landlord may not send the notice to the lessee until payment is 14 days past due, and may not set the date of termination sooner than 15 days from the date of personal service or 18 days from the date of mailing. According to the sponsor of the bill, the California Building Properties Association (CBPA), existing law on renewal of lease and abandonment does not work well in the commercial context.

To address these two issues, this bill amends existing law relating to lease renewals and timeframes for notice requirements for abandonment in commercial leases. First, this bill creates a new section under the Civil Code that separates commercial lease renewals from those for residential leases. Under the new section, acceptance of a payment beyond the termination of the lease serves to mitigate the damage to the landlord but does not create a new lease under the same terms as the old lease. Additionally, the bill shortens the time frame by which a commercial landlord may consider a property to be abandoned so that the landlord may send the notice of abandonment documents to the lessee and reduce the losses incurred from the abandonment. Proposed amendments to the bill clarify that the time frame at issue may not be less than three days, and make other technical and reorganizational changes to the statute in order to consolidate provisions dealing solely with commercial tenancy, rather than with residential tenancy. This bill has no known opposition.

SUMMARY: Revises and recasts existing law on renewal of lease and abandonment of the rental premises to be tailored specifically to commercial tenancy. Specifically, **this bill:**

- 1) Establishes that under a commercial lease, the acceptance of a payment beyond the termination of a lease does not create a new lease term, but instead only mitigates any damage that the lessor may incur by reason of the lessee's failure to leave on time.

- 2) Allows a landlord of commercial property to give notice of belief of abandonment if the rent has been due and unpaid for at least the number of days required for the lessor to declare a rent default under the terms of the lease, but in no case less than 3 days.
- 3) Makes technical changes to reorganize and consolidate provisions pertaining to commercial property into separately numbered sections of the Civil Code.

EXISTING LAW:

- 1) Provides that if a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month when the rent is payable monthly, nor in any case one year. (Civil Code Section 1945. All further references are to this code unless otherwise stated.)
- 2) Provides that hiring of real property, for a term not specified by the parties, is deemed to be renewed as stated in Section 1945, at the end of the term implied by law unless one of the parties gives written notice to the other of his or her intention to terminate the same, at least as long before the expiration thereof as the term of the hiring itself, not exceeding 30 days. Further provides that for month-to-month tenancies, either party may terminate the tenancy by giving at least 30 days' written notice at any time. (Section 1946.)
- 3) Allows the parties to provide by an agreement at the time the tenancy is created that a notice of the intention to terminate the same may be given at any time not less than seven days before the expiration of the term thereof. (Section 1946.)
- 4) Provides that real property shall be deemed abandoned by the lessee, and the lease shall terminate if the lessor gives written notice of his belief of abandonment and the lessee fails to give the lessor written notice, prior to the date of termination specified in the lessor's notice, stating that he does not intend to abandon the real property and stating an address at which the lessee may be served by certified mail in any action for unlawful detainer of the real property. (Section 1951.3 (a).)
- 5) Provides that the lessor may give a notice of belief of abandonment to the lessee pursuant to this section only where the rent on the property has been due and unpaid for at least 14 consecutive days and the lessor reasonably believes that the lessee has abandoned the property. Requires that the lessor include the date of termination in the notice of abandonment and that that date of termination shall be at least 15 days after the notice is served personally or, if mailed, at least 18 days after the notice is deposited in the mail. (Section 1951.3 (b).)
- 6) Provides that the property shall not be deemed to be abandoned if the lessee proves any of the following: (a) the rent was not due and unpaid for 14 consecutive days at the time notice was given; (b) it was not reasonable for the lessor to believe that the lessee had abandoned the real property; (c) before the date specified in the notice, the lessee gave written notice to the lessor stating his intent not to abandon the real property and stating an address at which he may be served by certified mail; or (d) the lessee paid to the lessor all or a portion of the rent due and unpaid on the real property prior to the date the lease would have terminated. (Section 1951.3 (e).)

FISCAL EFFECT: As currently in print this bill is keyed non-fiscal.

COMMENTS: Existing Civil Code provisions relating to leases are drafted in such a way that they potentially can be interpreted to extend to both residential and commercial real property, except in some sections that specifically distinguish them. In recent years, the Legislature has passed laws recognizing that commercial real estate and residential real estate are different, and that the laws that govern relationships between commercial landlords and their tenants should be different than those between residential landlords and their tenants. Beginning in 1998 with AB 2025 (Silva), Chap. 161, Stats. 2008, the Legislature has taken steps to separate the provisions of the Civil Code which extend to both residential and commercial transactions in order to take into account the different considerations that apply in residential and commercial contexts.

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This bill establishes that commercial leases do not automatically renew upon acceptance of rent. Under current law, a new monthly lease is automatically created where the landlord accepts payment for rent from a tenant beyond the date when the lease has ended. (Section 1945.) The author contends, however, that this rule makes little sense in the commercial real estate context, stating:

These codes say how leases can be renewed simply by accepting additional rent from the tenant past the lease term. This is only something that would happen in residential leasing and is not something that would happen on commercial. Most commercial leases draft around this, but some do not know how to do so.

Accordingly, under this bill the acceptance of a payment by the landlord is deemed to be a mitigation of the damages to the landlord for the inability to re-let the space, rather than an automatic renewal of the monthly lease. The California Business Properties Association (CBPA) asserts that this proposed change reflects industry practice, acknowledging that the renewal of terms by continued payment is something only practiced in residential leases. Finally, **proposed author's amendments** to the bill revise and recast these new provisions into an independent section of the Civil Code in order to avoid confusion with existing law on residential property transactions.

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As currently in print, this bill allows a lessee to defeat a claim of abandonment by proving, at the time the notice of abandonment is served, that the rent was not due and unpaid for the time period necessary to declare a rent default under the lessee's lease. ***Proposed author's amendments*** to the bill clarify that the critical "time period to declare a rent default under the lease" shall in no case be fewer than three days, as a safeguard to ensure that there is a minimum time in place to protect commercial tenants.

Recent Pending Legislation: AB 2173 (Santiago) seeks to set a higher threshold for landlords to dispose of abandoned property in commercial properties, separating it from the current residential threshold. This bill is awaiting hearing in the Senate Judiciary Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California Business Properties Association (sponsor)

Opposition

None on file

Analysis Prepared by: Allison Adey & Anthony Lew / JUD. / (916) 319-2334