The Right to Sublease in New York: Application of Real Property Law Section 226-B

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APPLICATION OF REAL PROPERTY LAW SECTION
226-B

Section 226-b can be understood best in the light of the history and development of the landlord and tenant relationship. As the medieval system of land tenure withered away, landlord and tenant relationships proliferated. Over the centuries which intervened, to the present, persisting feudal attitudes and the realities of economic power perpetuated those legal principles which favored landlords as against their tenants. The resultant imbalance in the construction and enforcement of lease provisions persisted long into this century.

Within a lifetime, the major wars, the consequences of industrialization, the gravitational pull of agricultural workers to the city, have resulted in urban congestion and a scarcity of residential housing. In New York, these factors and an increasing sensitivity on the part of law makers to the electorate (more tenants than landlords) tipped the scales of landlord and tenant law away from its historic bias. This shift in legal attitude has been evidenced by legislative adoption of rent controls, recognition of the warranty of habitability, imposition of multiple dwelling safeguards and a myriad of other laws designed to protect tenants.¹

In the ordinary course of events, New York Real Property Law section 226-b² would have been just one more bit of evidence of an accelerating trend toward landlord-tenant legal reform. On its face, the statute seems to confer a clear right upon tenants—the right to sublease in the absence of a reasonable refusal by a landlord—and simultaneously to restrain landlords with an equally clear prohibition against unreasonably withholding consent to a proposed sublease.³

3. Id. The section reads as follows:
   Right to sublease or assign.
   1. A tenant renting a residence in a dwelling having four or more residential units shall have the right to sublease or assign his premises, subject to the written consent of the landlord given in advance of the sublease or assignment. Such con-
Due in large part to careless drafting, however, section 226-b has instead become the focus of substantial litigation, with potentially serious ramifications for the rights of tenants in New York. Although the statute was originally applauded as a dilution of the hornbook certainty that a landlord's consent to a sublease or assignment "may be refused for any or even no reason," a recent series of court decisions, spawned under the statute, have called this optimistic evaluation into serious question. In view of the potentially wide purview of the statute, (affecting nearly one million apartments in New York City alone, and over three million rental units statewide), the resulting confusion over the statute's ultimate impact is a sent shall not be unreasonably withheld. If the landlord unreasonably withholds consent for such sublease or assignment, the landlord must release the tenant from the lease upon request of the tenant.

2. The tenant shall inform the landlord of his intent to sublease or assign by mailing a notice of such intent by registered or certified mail. Such request shall be accompanied by the written consent thereto of any co-tenant or guarantor of such lease and a statement of the name, business and home address of the proposed sublessee or assignee. Within ten days after the mailing of such request, the landlord may ask the sender thereof for additional information as will enable the landlord to determine if rejection of such request shall be unreasonable. Within thirty days after the mailing of the request for consent, or of the additional information reasonably asked for by the landlord, whichever is later, the landlord shall send a notice to the sender thereof of his consent or, if he does not consent, his reasons therefore. Landlord's failure to send such a notice shall be deemed to be a consent to the proposed subletting or assignment. If the landlord consents, the premises may be sublet or assigned in accordance with the request, but the tenant thereunder, shall nevertheless remain liable for the performance of tenant's obligations under said lease.

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

4. See text accompanying notes 46-118 infra.


8. See generally NEW YORK STATISTICAL YEARBOOK, 1979-1980, at 76 (indicating that there are three million rental units occupied statewide). Units situated in buildings with less than four separate apartments are not covered by section 226-b. N.Y. REAL PROP. LAW § 226-b(1) (McKinney Supp. 1980-1981).
regrettably (and avoidable) episode in the annals of New York landlord and tenant law. This note attempts to ascertain the scope of section 226-b in light of its foundation in the body of preexisting New York case law, its legislative history, and its interpretation by the courts. In addition, this note addresses the problems, both practical and theoretical in nature, which have arisen or might conceivably arise in connection with the statute's application, and sets forth suggestions for possible prevention or resolution of these issues.

THE STATE OF THE LAW PRIOR TO SECTION 226-B

In New York, at common law, a tenant for a definite term had an unrestricted right to sublet, absent an express statute or contract provision to the contrary. This basic rule was predicated on the common law's adherence to the principle of free alienation of land, and was intended to encourage maximum utilization of land in the public interest. The New York common law is consistent in this respect with that of other jurisdictions. At the other extreme, however, New York cases prior to the enactment of section 226-b also held that, where a lease contained an express prohibition against subletting without the landlord's prior approval, the landlord had the right to refuse consent arbitrarily for any reason whatsoever, or for no reason at all. This proposition, based on freedom-of-contract principles, was also in accord with the law in other jurisdictions.

9. See text accompanying notes 14-32 infra.
10. See text accompanying notes 33-45 infra.
11. See text accompanying notes 46-118 infra.
12. See text accompanying notes 119-153 infra.
13. See text accompanying notes 154-162 infra.
14. Eten v. Luyster, 60 N.Y. 252 (1875); Fleisch v. Schnaier, 119 A.D. 815 (1st Dep't 1907).
15. Cf. De Peyster v. Michael, 6 N.Y. 467, 493 (1852) (as applied to land held in fee).
In practice, a lease clause concerning subletting is likely to fall into a gray area between the two common law extremes. As Rasch notes: "Tenants usually try to get some modification of the arbitrary right to withhold consent to assignments and sublettings, if they cannot eliminate the restriction entirely." One common modification involves persuading the landlord to agree that he will not unreasonably withhold his consent to a proposed assignment or sublease. The language of this concession, however, must be carefully drafted so as to take the form of an express covenant by the landlord, rather than a mere qualification upon the tenant's right to sublease. In *Butterick Publishing Co. v. Fulton & Elm Leasing Co.* and in *Sarner v. Kantor,* the absence of such an express agreement by the landlord prevented plaintiffs from recovering damages for breach. As succinctly stated by Rasch, "[a] qualification of the tenant's covenant not to assign without consent by the addition of the phrase, 'but such consent will not be unreasonably withheld,' does not bind the landlord to anything.

In the case of an effectively drafted clause, in situations where a landlord in fact unreasonably withheld his consent, the common law provided the tenant with two distinct remedies. In the first instance, the tenant could disregard the negative covenant and "'deal with his property . . . as he [the tenant] would if no license were required,'” although this option was susceptible to certain procedu-

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21. Id.

22. 132 Misc. 366, 229 N.Y.S. 86 (Sup. Ct. N.Y. Cty. 1928). The subject clause provided: "The tenant agrees that it will not assign, mortgage, or alienate this lease . . . nor let, nor underlet . . . without the written consent of the landlord, but the consent to sublet will not be unreasonably withheld." Id. at 368, 229 N.Y.S. at 88 (emphasis in original).

23. 123 Misc. 469, 205 N.Y.S. 760 (Sup. Ct. N.Y. Cty. 1924). The clause read: "'[T]he tenant shall not assign or sublet this agreement, or underlet or underlease the premises *** without the landlord's written consent first had and obtained *** Nothing herein contained shall permit the landlord to unreasonably withhold his consent to any sublease.'" Id. at 470, 205 N.Y.S. at 760.


25. 1 J. Rasch, supra note 20, § 125, at 119.

Although the direct relevance of the earlier common law approach to the ongoing litigation involving section 226-b has been questioned, the existence of the two distinct remedies available to tenants at common law is important from an historical perspective. The New York legislature, in enacting section 226-b, opted for a measure which effectively placed all subject leases into the uncharted legal terrain between a strict contractual prohibition against subletting on the one hand and a complete absence of any relevant language on the other. Had the legislature chosen instead to adopt one of the two common law extremes, the precedential value of the early New York case law would be undeniable. But the statute, as drafted, works to obstruct the landlord's absolute right to restrict transfers through a prohibition against the arbitrary withholding of consent, while at the same time vesting in the tenant an apparently somewhat-less-than-absolute right to sublet. As a result, courts confronted with the problem of the actual application of the statute have been forced to look in other directions for guidance.

LEGISLATIVE HISTORY

A number of courts have considered the legislative history of section 226-b, but the paucity and incongruity of recorded state-
ments by the legislators has made this an arduous task. In fact, New York Real Property Law section 226-b, in its current form,\textsuperscript{34} is the third version of a statute originally enacted in 1975\textsuperscript{35} and subsequently revised twice.\textsuperscript{36} The rapid succession of the revisions, one within two months of initial passage and the second within ten months of that, suggests that the legislature itself was less than pleased with its product.

On its face, section 226-b confers an important right on New York tenants. Both the first and second\textsuperscript{37} versions of the law provided that: "A tenant . . . shall have the right to sublease his premises, subject to the written consent of the landlord, given in advance of the sublease. Such consent shall not be unreasonably withheld."\textsuperscript{38} It is there that the similarities between the two bills end, however, for the first version of the statute provided in subdivision one that, "if the landlord unreasonably withholds consent for such sublease, he must agree to release the tenant from the lease or accept the sublessee."\textsuperscript{39} But the second version amended this sentence to read: "If the landlord unreasonably withholds consent for such sublease, the landlord must release the tenant from the lease upon request of the tenant."\textsuperscript{40} In the first instance, there were apparently two alternatives under the statute in the event of a landlord's unreasonable withholding of consent: Either the tenant would be released from the lease, or the landlord would accept the sublessee. It was unclear, however,

\begin{itemize}
\item 35. 1975 N.Y. Laws ch. 146 (current version at N.Y. REAL PROP. LAW § 226-b (McKinney Supp. 1980-1981)).
\item 37. 1975 N.Y. Laws ch. 146 (current version at N.Y. REAL PROP. LAW § 226-b (McKinney Supp. 1980-1981)); id. ch. 548 (current version at N.Y. REAL PROP. LAW § 226-b (McKinney Supp. 1980-1981)). The third version of the statute amends its predecessor simply by adding the words "or assign" or "or assignment" after the word "sublease" in every case. See 1976 N.Y. Laws ch. 198 (codified at N.Y. REAL PROP. LAW § 226-b (McKinney Supp. 1980-1981)). For purposes of comparison in this section, only the first two versions need be considered. \textit{But see} text accompanying notes 119-124 \textit{infra} (discussion of importance of final amendment).
\item 39. Id. ch. 146 (current version at N.Y. REAL PROP. LAW § 226-b (McKinney Supp. 1980-1981)) (emphasis added).
\item 40. Id. ch. 548 (current version at N.Y. REAL PROP. LAW § 226-b (McKinney Supp. 1980-1981)) (emphasis added).
\end{itemize}
who was to choose between these mutually exclusive remedies. This issue was important, for the two possible scenarios had widely diverse consequences. In one case, the tenant could force the landlord to accept his sublessee, and deprive the landlord of a substantial degree of control over the temporary disposition of his property. In the other case, the landlord could choose to release the tenant from the lease, rather than accept the sublessee, and thereby create a potentially serious financial problem for the tenant. The effect would have been to force an already overtaxed judicial system to decide, on a case-by-case basis, which remedy was appropriate.

On all but a theoretical level, however, this issue has become moot, for in both the second and final versions of the statute, only one remedy is expressly made available to tenants in the event of an unreasonable refusal by the landlord: release from the lease, this time clearly at tenant’s option. By way of a rather curious tradeoff, tenants won an unambiguous right to wield one remedy, while the language importing a second and more powerful remedy vanished completely. The speedy revision may have been prompted by a letter from the Secretary of State to the Governor’s Counsel, which read in part:

[T]hat provision with respect to the release of the tenant from the lease . . . is poorly drawn. If the landlord is found by a court—which only could determine the issue—that the landlord has unreasonably withheld consent [sic], it should have been simply provided that the tenant is released from the lease . . . rather than to call for the act of the landlord to agree to such release.

In a cryptic memorandum after the amendment’s approval, State Senator Donald M. Halperin, the Senate sponsor of both versions of the statute, commented only on the additions to the first version, avoiding any mention of the important deletion that had been made. Halperin remarked, “Chapter 146 of the Laws of 1975 added section 226 to the real property law and granting [sic] tenants

41. See text accompanying notes 119-127 infra.
44. Memoranda of Senator Donald M. Halperin, in 1975 NEW YORK STATE LEGISLATIVE ANNUAL 305. The additions so noted dealt mainly with the notice requirement changes involving section 226-b(2); section 226-b(1) is not mentioned specifically.
the right to sublease. The amendments would benefit both landlord and tenant by stating in clearer language the obligations of both parties. No litigation arose under the first version of section 226-b, and the issue of the true legislative intent behind both the original statute and its successors remained dormant for several years. Now that the statute has been invoked, however, courts have sifted through its legislative history for clues to its application, often arriving at very different conclusions.

**RECENT JUDICIAL INTERPRETATION OF SECTION 226-B**

Laboring under the dual burden of an unclear legislative intent and an absence of applicable common law, a number of recent decisions have struggled to determine what remedies are available to tenants under section 226-b. The majority of these cases, significantly, have involved nearly identical fact patterns. In the typical situation, a tenant, intending to sublease, complied with the notice requirements set forth under subdivision two of the statute, and the landlord responded with a prima facie unreasonable withholding of consent. Despite highly similar circumstances, however, different results were achieved, as the courts searched the common law and legislative history for a valid approach to the remedy issue. In the lower courts, final judgment was rendered for the landlord in *Pacer Realty Associates v. Lasky* and *39 Remsen Co. v. Braune*, while in *Kruger v. Page Management Co.* and *68th St. Co. v. Fyjis-Walker*, the tenant emerged victorious. At the appellate level, the

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45. *Id.*


52. Two other early lower court cases revolving around section 226-b are largely inapplicable to the present discussion. *Feldman v. Simon Bros. Management Co.*, N.Y.L.J., July 9, 1980, at 6, col. 6T (Sup. Ct. N.Y. Cty. 1980), was decided upon a different set of facts, involving an apartment "swap," rather than a true "sublet," and thus is not directly analogous, although here again the tenants received a judgment in their favor. *Id. Mince v. Jonas Equities, Inc.*, N.Y.L.J., Oct. 5, 1980, at 10, col. 5B (App. Term 1st Dep't 1980), involved a plaintiff-tenant who sued to recover her security deposit, retained by defendant-landlord after the plaintiff's attempt to sublease in spite of an arbitrary refusal to consent by the landlord.
conflict continued, with a judgment in favor of the landlord in *Lexann Realty Co. v. Deitchman*, and a judgment for the tenant in *Conrad v. Third Sutton Realty Co.*

**The Dispute in the Lower Courts**

Both *Remsen* and *Pacer* were actions commenced by the landlords in order to recover possession of the subject apartments after a tenant’s sublease in the face of the landlord’s refusal of consent. In *Remsen*, the lease contained an express clause requiring the prior written consent of the landlord to the sublease. In *Pacer*, no such clause was specifically noted or detailed. Yet outside of this slight variation, the decisions were substantially identical, with the court in *Pacer*, in fact, citing heavily from the *Remsen* opinion.

Both decisions focused on the legislative intent of the amended statute and on the deletion of the original language contained in the short-lived first version. Thus, Judge Cohen, in *Remsen*, held:

> [T]urning to the applicability of section 226-b . . . the tenants’ remedies are either to remain as tenant under the lease, or demand

The court, unfortunately, did not touch upon the disputed issue of whether the proposed subtenancy could have been created despite the landlord’s opposition, although the plaintiff did in fact recover her security deposit and gain release from her obligations under the lease. The *Mince* case is noteworthy in one respect, however: The plaintiff’s failure to supply the landlord with the names of the proposed sublessees, a technical violation of the notice requirements of 226-b(2), was deemed “not critical here in the face of the landlords’ stated position that any sublease was ‘totally out of the question.’” *Id.*


55. N.Y.L.J., July 17, 1980, at 11, col. 5M.

56. N.Y.L.J., June 18, 1980, at 11, col. 5M.

57. At least two cases have determined that a provision in a lease was of independent importance in determining whether a tenant could induce a landlord to accept his sublessee. In *Bendes v. Albert*, N.Y.L.J., June 3, 1981, at 6, col. 4B (Sup. Ct. N.Y. Cty. 1981), the court held that section 226-b “does not deprive Tenant of the benefits of Landlord’s covenant independent of the statute.” *Id.* at 6, col. 6M. In *O’Rourke v. Charles H. Greenthal & Co.*, Inc., N.Y.L.J., May 6, 1981, at 10, col. 7B (Sup. Ct. N.Y. Cty. 1981), the court held that “the Legislature, by enacting RPL section 226-b, did not intend to abrogate contractual rights resulting from agreements entered into between an owner and a tenant.” *Id.* at 11, col. 1B. The majority of courts ruling on section 226-b, however, have considered the statute to be controlling regardless of any clause in the lease. See, e.g., *Kruger v. Page Management Co.*, 105 Misc. 2d 14, 432 N.Y.S.2d 297 (Sup. Ct. N.Y. Cty. 1980).

58. See N.Y.L.J., June 18, 1980, at 11, col. 5M. Although *Pacer* was published first in time, the *Remsen* case was actually decided earlier. Judge Pellegrino, apparently more cognizant of the public interest in the decision, simply released his opinion to the press more rapidly. This explains the incongruity of the citation to *Remsen* (published July 17, 1980, see N.Y.L.J., July 17, 1980, at 11, col. 6M) in *Pacer* (published June 18, 1980, see N.Y.L.J., June 18, 1980, at 11, col. 5M).
that the landlord release the tenant from the lease. . . . [The Ten-
ant] asks this court to declare that the subtenancy created should remain in effect. However, the legislative intent of the statute requires a holding to the contrary. As originally enacted, section 226-b expressly required the landlord to accept the sublessee . . . . The intent here is quite clear and the respondent is limited to the aforementioned remedies.69

This passage is quoted with approval by Judge Pellegrino in Pacer.60

These decisions apparently placed a substantially greater emphasis upon the deletion of the coerced-acceptance remedy than did the statute’s Senate sponsor, who failed to note the remedy’s disappearance in any public record.61 Accordingly, the landlord in each case prevailed despite his unreasonable refusal in apparent violation of the law. Each subtenancy was terminated and each tenant was left with the option of either remaining as the tenant or being released upon request.62 The “right to sublease,” ostensibly conferred by section 226-b on subject tenants, is evidently not a right to sublease at all, but rather a right to request and obtain release from a lease in the event of an unreasonable withholding of consent to sublet by the landlord. This is certainly a far more limited right than that apparently vested in the tenant by the untested original version of the statute,63 or than that which the statute’s title would appear to indicate. Yet in Pacer the court was so confident of the validity of its approach that it was willing to state that “[a] careful reading of the statute is clear and unambiguous. . . . [T]here can be no other logical interpretation of this statute.”64

Within a very short period of time, however, there were two other interpretations of section 226-b.65 The first, embodied in a far more exhaustive opinion than that delivered in either Pacer or Rem-

59. N.Y.L.J., July 17, 1980, at 11, col. 5M (citation omitted).
60. N.Y.L.J., June 18, 1980, at 11, col. 5M.
61. See Memoranda of Senator Donald M. Halperin, supra note 44, at 305.
64. N.Y.L.J., June 18, 1980, at 11, col. 5M.
sen, was Kruger v. Page Management Co. Acting Justice Ryp, in Kruger, found that a tenant indeed had a right to sublet under the law, and exhibited few qualms about upholding this right. In this case, the action was instituted by the tenant to compel the defendant-landlord to consent to a proposed sublease. The lease involved the customary "No Sublet" clause, and the landlord’s response to the tenant’s notice of intent to sublease was found to be arbitrary and unreasonable. The tenant, acting as his own attorney in this instance, relied upon both section 226-b and prior New York case law to support his contention that his sublease should be effected.

The court stressed its belief that the law, through the courts and the legislature, has an interest in regulating private contracts, especially residential leases, "based upon the equitable belief [that] an enlightened society must to some extent protect its members from the harsh effect of an unchecked society." Citing case law to this effect, as well as numerous examples of statutory intervention in the realm of residential leases, the court sought to justify its willingness to intervene in this situation.

The court also found, ultimately, that Mr. Kruger was free to sublet his apartment, in complete contrast to the Remsen and Pacer decisions. In fact, the landlord in this case relied almost entirely on those two decisions, and the Kruger court rejected the argument outright. Yet the Kruger court itself failed to identify which of the various approaches it analyzed—common law doctrine, legislative history, statutory interpretation, or public policy—was the overriding factor in its decision. Despite the attention devoted by the court to the preenactment cases, the bearing of these precedents upon the case at hand was never clearly established. The prior law was not mentioned at all in the court’s "Findings of Fact and Conclusions of Law." Similarly, the muddled state of the legislative history pre-

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.67. Id. at 15-16, 432 N.Y.S.2d at 298.
.68. Id. at 34, 432 N.Y.S.2d at 308.
.70. 105 Misc. 2d at 20, 432 N.Y.S.2d at 300 (citing Rowe v. Great Atl. & Pac. Tea Co., 46 N.Y.2d 62, 68 (1978)).
.71. Id.
.72. Id. at 20, 21, 432 N.Y.S.2d at 300, 301.
.73. Id. at 31-32, 432 N.Y.S.2d at 307.
.74. Id. at 33-35, 432 N.Y.S.2d at 308-09. In fact, Judge Cohen, the court in Remsen, terms any consideration of prior case law to be "completely irrelevant." Interview with the Honorable Jerome D. Cohen, New York Civil Court Judge, in Brooklyn, N.Y. (Oct. 24, 1980)
vented the court from reaching any firm determination on this ground, although the opinion noted and then virtually ignored a published statement by the bill's Assembly sponsor, Charles Schumer, which clearly supported the landlord's contentions.76

Even in the Kruger court's discussion of section 226-b itself, it is difficult to discern the governing principles. The court noted that "a clear and specific or explicit legislative intent is required to override the common law."77 Yet, failing to discover the requisite clear intent, the court hedged by finding that the original and amended versions of the statute both override and confirm the common law.78 A great deal of emphasis was placed upon an intricate semantic argument founded, surprisingly, not upon section 226-b(1), but rather upon section 226-b(2). Subdivision two deals generally with the technical notice requirements with which both landlords and tenants must conform, and with a tenant's continued liability after a consensual sublease.79 The section also provides that:

Within thirty days after the mailing of the request for consent, or of the additional information reasonably asked for by the landlord, whichever is later, the landlord shall send a notice to the sender thereof of his consent or, if he does not consent, his reasons therefore. Landlord's failure to send such a notice shall be deemed to be a consent to the proposed subletting or assignment.80

This language differs somewhat from that contained in the original statute, which stated that, after receipt of the notice, the "landlord must notify the tenant of his consent or lack thereof . . . If . . . no such notice is mailed, the landlord is deemed to have consented to the sublease."81 The court, in noting this difference, proceeded to apply an established principle of statutory construction, namely, that "[t]he word, 'such' when used in a statute must, to be intelligible, [hereinafter cited as Interview].

75. 105 Misc. 2d at 27, 432 N.Y.S.2d at 304. The court attributed the statement to an article in the New York Times by Charles Kaiser. The article quoted Schumer as saying that "'[t]he intent, and I think the effect, of the law is not to allow tenants to hang on to their apartments but rather to help the tenant who is hard pressed to get out. *** It puts the obligation on the tenant to find a sublessee but it doesn't require the landlord to take him.'"

76. Id. at 24, 432 N.Y.S.2d at 303 (citing Hechter v. New York Life Ins. Co., 46 N.Y.2d 34, 39 (1978)).
77. Id. at 32, 432 N.Y.S.2d at 307.
79. Id. (emphasis added).
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refer to some antecedent usually the last in context unless some compelling contrary reason appears." Thus, the court found that, while the original statute required only notice of "consent or lack thereof," the amended version placed a far greater burden upon the landlord. Specifically, the landlord must now send a notice containing not only his refusal to consent (if he so chooses) but also stating his reasons for refusal. The *Kruger* landlord's blunt refusal ("We do not grant you permission to sublet the apartment. We do not choose to have apartments passed from hand to hand."

82) contained no rational explanation for the refusal. The landlord's failure in this case to deliver his reasons for refusal was to be his downfall, for the court held that the "landlord's said response . . . shall be deemed, as a matter of law under section 226-b, as amended, a consent to tenant's request for a sublease to the proposed sublessees."83

Subdivision two could be the key to the correct interpretation of section 226-b; but it is difficult to believe that a single word slipped into the technical notice provisions of a statute whose basic purpose is spelled out in a separate section could be construed to control the entire application of the law. Senator Halperin's memorandum again fails to call attention to any possible significance of the altered language in question,84 and Judge Cohen, the presiding judge in *Remsen*, dismissed the entire matter out of hand, complaining that Justice Ryp had "tortured the English language."85

It is at least conceivable that the *Kruger* decision does, in fact, turn upon this esoteric distinction involving the word "such." It is more likely, however, that policy considerations favoring a broad right to sublease, while perhaps lacking in precedent, were sufficiently convincing to induce the court to arrive at any legal argument to support them. The shortage of residential apartments in the New York metropolitan area has been well publicized,86 and section 226-b was explicitly passed to help alleviate this problem by granting

82. Id. at 17, 432 N.Y.S.2d at 298.
83. Id. at 34, 432 N.Y.S.2d at 308.
84. See Memoranda of Senator Donald M. Halperin, supra note 44, at 305.
85. Interview, supra note 74.
some advantage to New York tenants.\textsuperscript{87} And the Kruger court hints that this may indeed have been the overriding concern, stating:

\begin{quote}
[T]he right to, or [to] restrict, a sublease is a valuable right to both landlord and tenant. . . . Moreover, this court takes judicial notice of the fact . . . that in New York County, generally, . . . there has been and still is a serious shortage of well-maintained residential apartments at reasonable rents. . . . Surely, subject rent-stabilized apartment is a valuable asset as well as a right in inflationary 1980.\textsuperscript{88}
\end{quote}

The Kruger decision is notable for one final twist, for the court placed an important limitation on the tenant. The proposed sublease, allowed by the court, could only be executed at a rent “not to exceed the rent required to be paid under tenant’s subject lease,”\textsuperscript{89} the court declaring that it, “in the interests of justice and equity, will not allow either party to profit from this declaratory action. . . . This would be contrary to the true purposes of section 226-b as amended.”\textsuperscript{90} This limitation is remarkable, if only for its complete lack of legal support. Nothing in the statute, its legislative history, or the prior case law, for that matter, indicates that a tenant should be prohibited from subletting for an amount either higher or lower than his own rent. In an astounding feat of legal \textit{legerdemain}, the Kruger court created this limitation out of thin air.

A subsequent case, \textit{68th St. Co. v. Fyjis-Walker},\textsuperscript{91} clearly delineated the developing rift between the literal interpretation of the statute under Remsen and Pacer, and the more creative construction utilized in the Kruger decision. Decided once again on similar facts, Fyjis-Walker unequivocally supported the Kruger court’s determination of the availability of not one, but two, options reserved to the tenant under the statute: “Where a landlord unreasonably withholds permission to sublet, tenant has the option of treating this as a consent to sublet or of notifying landlord that he/she chooses to be released from the lease.”\textsuperscript{92} In following the Kruger lead, the Fyjis-Walker court interestingly cited only Kruger and Feldman v. Simon

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\textsuperscript{87} See Conrad v. Third Sutton Realty Co., 81 A.D.2d 50, 439 N.Y.S.2d 376, 380 (1st Dep't 1981); Memoranda of Senator Donald M. Halperin, \textit{supra} note 44, at 305.

\textsuperscript{88} 105 Misc. 2d at 33, 432 N.Y.S.2d at 308 (citations omitted).

\textsuperscript{89} \textit{Id.} at 34, 432 N.Y.S.2d at 309.

\textsuperscript{90} \textit{Id.} at 33, 432 N.Y.S.2d at 308.


\textsuperscript{92} \textit{Id.}
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Bros. Management Co., 9 to the notable exclusion of the conflicting Remsen and Pacer decisions, in upholding the subtenancy already created. In sharp contrast to Kruger, however, the Fyjis-Walker decision failed to place the express restriction on the ability of the tenant to increase the rent to the subtenant which is contained in the prior decision.

The Dispute on Appeal

At the appellate level, the Remsen/Pacer answer to the question of which remedies were available to tenants under section 226-b was adopted by the appellate term in Lexann Realty Co. v. Deitchman. 94

The Lexann court reasoned:

We believe that a careful textual analysis of section 226-b of the Real Property Law points ineluctably to one and only one acceptable interpretation of the remedies available to a tenant when a landlord unreasonably withholds consent to sublet, that is: the tenant may decide to forego the subletting and remain in occupancy or may elect to be released from further leasehold obligations. It may be contended that the law gives but only to take away . . . . 95

In addition, the Lexann court delivered what might be construed as a mild rebuke to the creative interpretation given to the statute by the Kruger court: "'[W]here a statute is framed in language so plain as to make an explanation superfluous, one will not be attempted . . . . The function of the courts is to enforce statutes, not to usurp the power of legislation . . . ."96

While affirming the end result achieved in Remsen and Pacer, however, the Lexann court fashioned an interpretative approach of its own, relying heavily upon the perceived similarity of section 226-b to an earlier statute, New York Real Property Law section 236,97 as the basis for its decision. The court reasoned:

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94. 107 Misc. 2d 74, 437 N.Y.S.2d 835 (App. Term 1st Dep't 1980).
95. Id. at 77-78, 437 N.Y.S.2d at 837.
96. Id. at 79, 437 N.Y.S.2d at 838 (quoting McKinney's Statutes § 71, at 138-39 (1971)).
97. N.Y. Real Prop Law § 236 (McKinney 1980) provides as follows:

Assignment of lease of a deceased tenant

Notwithstanding any contrary provision contained in any lease hereafter made which affects premises demised for residential use, or partly for residential and partly for professional use, the executor, administrator or legal representative of a deceased tenant under such a lease, may request the landlord thereunder to consent
Section 236 of the Real Property Law . . . is an obvious forerunner of section 226-b. The intent of the earlier statute is to protect the estate of a deceased tenant from a residential leasehold liability when the landlord unreasonably refuses consent to a sublet. It gives no right to foist a new and different tenant on a landlord, regardless of his unreasonable refusal to accept the proposed subtenant. Section 226-b similarly bestows no such right.98

The analogy drawn between sections 236 and 226-b is questionable. The fact that a situation has arisen where section 236 may be invoked necessarily implies that the original tenant will not be returning to the apartment. Therefore, the availability of only one remedy for the decedent’s estate—release from the lease—represents adequate protection. In the case of a section 226-b tenant wishing to return to his apartment after expiration of the sublease, however, the single remedy of release is often unsatisfactory and may result in

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98. 107 Misc. 2d at 79, 437 N.Y.S.2d at 838. The court offered no concrete evidence, and this author has not located any, to support the contention that section 226-b was formulated with 236 in mind.
THE RIGHT TO SUBLLEASE

The right to sublease in the area of New York subleasing law was tempered by a strong dissent, which maintained that the majority incorrectly interpreted the statute as having the effect of merging all prior remedies (both common law and statutory) into a single right to terminate the lease. Concluding a particularly eloquent public-policy argument in favor of relatively unfettered freedom to sublease, the dissent argued:

Long before this exhibition of legislative solicitude for the rights of tenants, one area in which the common law had been quite protective of the tenants' rights was with respect to the assignment or subletting of the leasehold. Even in the formative days of the landlord and tenant law, the public policy supporting the free alienation of land was seen as stronger than the policy protecting landlords. In the absence of a clear directive from the legislature that its amendment of § 226-b of the Real Property Law was designed to curtail the common law and the statutory rights of the tenant to assign or sublet rented premises, it is my view that the section provides additional remedies rather than limits those alternatives previously in existence. The tenants in the instant matter therefore, in my opinion, have the option of either terminating the lease or subletting the premises upon the recalcitrance of the landlord, in accordance with the provisions of the lease.

The Lexann decision was greeted in the lower courts with decidedly mixed reviews. In Grayshaw v. New Amsterdam Apartments Co., the court indicated its agreement with the single-remedy principle laid down in Lexann, noting that "[h]ad the Legislature intended that landlords be required to consent to subleases and assignments it need merely have said just that and nothing more." Groban v. Yorkshire Towers Co. was also decided in accordance with Lexann, although the court there had misgivings, stating: "The statute's obvious legislative purpose is to enhance not curtail the rights of tenants, and the last sentence of its first paragraph should be interpreted as adding a remedy not available under common law

99. See text accompanying notes 124-127 infra.
100. 107 Misc. 2d at 80-81, 437 N.Y.S.2d at 838-39 (Asch, J., dissenting).
101. See text accompanying note 1 supra.
102. 107 Misc. 2d at 81, 437 N.Y.S.2d at 839 (Asch, J., dissenting).
104. Id. at 940, 436 N.Y.S.2d at 806 (emphasis in original).
rather than as constituting the sole remedy.\textsuperscript{106} Pacer was affirmed on the basis of Lexann,\textsuperscript{107} and Fyjis-Walker was reversed.\textsuperscript{108}

In other cases, however, the lower courts resisted the Lexann interpretation. In granting a subtenant's motion for an injunction against landlord interference with her possession, the court in Gilbert v. Glenwood Management Co.\textsuperscript{109} observed: "The determination of the Appellate Term is still in a state of flux. . . . The dissenting opinion of Justice Asch in the Lexann case may very well be a basis for reversing or modifying the Appellate Term decision."\textsuperscript{110} Another decision, O'Rourke v. Charles H. Greenthal & Co.,\textsuperscript{111} also granted a plaintiff-subtenant's motion for a preliminary injunction in the face of Lexann.\textsuperscript{112}

In June, 1981, the appellate division confirmed the suspicions of the Groban and Gilbert courts that Lexann might not be upheld, and provided new evidence of the tension between the courts advocating a single remedy for tenants under the statute and those in favor of multiple remedies. Conrad v. Third Sutton Realty Co.,\textsuperscript{113} in what is clearly the most significant decision involving section 226-b to date, resurrected the notion first advanced in the Kruger decision that the additional remedy the tenants sought could be constructed with reference to subdivision two of the statute, rather than subdivision one. The court held that "under subdivision one, the automatic release is at the tenant's option and only covers the question of surrender of the lease and vacating the premises, while subdivision two gives the tenant an additional remedy by requiring the landlord's refusal to consent to a sublease to contain reasons therefor."\textsuperscript{114}

The argument that subdivision two provides the powerful remedy allowing tenants to force landlords to accept reasonable sublessees was no less "creative" in Conrad than it was in Kruger.\textsuperscript{115} But, as in Kruger, there were indications that a multifaceted approach, applied to the section 226-b problem, led the Conrad court to infer the remedy from a combination of common law, legislative history,
and public policy support. The Conrad court noted that at common law, the tenant had an unrestricted right to sublease. The court also expressly adopted many of the arguments made by Justice Asch, dissenting in Lexann, with regard to the legislative intent, observing that "this legislation was passed to increase a tenant's right and provide him with a modicum of negotiating capacity during a period of housing shortages. . . To deny such bona fide subleasing right would indeed make a mockery of the statute."

Plaintiff Conrad was permitted to sublease her apartment, less because subdivision two of the statute allowed her to do so, than because any other interpretation would have rendered the statute meaningless, and the prohibition against unreasonable refusal by the landlord ineffective.

The controversy over whether section 226-b affords tenants a single remedy, as the Remsen, Pacer, and Lexann opinions suggest, or multiple remedies, as perceived in Kruger and Conrad, is likely to continue. Faced with a weak common law foundation and an ambiguous legislative history, some courts, in resolving the remedy issue, have opted for a literal interpretation of the statutory language, while others have adopted a less literal view by relying on a multiplicity of factors external to the statute itself. Even if Conrad proves to be the final word on remedies available to a tenant in the event of a landlord's unreasonable refusal to accept a proposed sublease, the litigation concerning section 226-b may well continue on several other fronts. These potentialities are discussed in detail in the following sections.

THEORETICAL PROBLEMS IN THE APPLICATION OF SECTION 226-B

The continuing litigation involving 226-b has focused primarily on the question of remedies available to tenants under the statute. Even assuming arguendo that Conrad is the final word on the question of remedies, however, there remain other complex issues, which have been left largely unaddressed by the courts, but which could inject substantial controversy into the already confused arena of residential subleasing in New York. First is the problem of the disparate impact of the statute's operation (inextricably tied to the question of available remedies) on prospective assignors on the one hand, and

116. 81 A.D.2d at 53, 439 N.Y.S.2d at 378.
117. Id. at 57, 439 N.Y.S.2d at 380.
118. Id. at 55-56, 439 N.Y.S.2d at 379-80.
prospective sublessors on the other. Second is the issue of the development of a uniform standard of reasonableness specifically suited to section 226-b transfers. Finally, there is the problem of determining the policy underlying the statute (a task that has evidently been delegated to the judiciary by the legislature), in light of current realities in the housing market and, in particular, New York City's complicated rent-control structure. Each of these issues is discussed herein, hypothetically where necessary, with an eye towards the comprehensive recommendations which follow.

Inherent Inequity

The most outstanding defect of section 226-b, the apparently unintentional division of tenants into two distinct classes under the statute—sublessors and assignors—may be incurable except through legislative action. In order to demonstrate the unbalanced effect of the statute on prospective sublessors as compared to prospective assignors, it is necessary to examine in detail precisely what right is conferred on tenants under the statute, keeping in mind that the "Right to sublease," (and later, "Right to sublease or assign"), so often referred to in the statute may prove to be quite elusive.

As a prerequisite to any such examination, however, the distinction between a sublease and an assignment must be considered. Although a notion prevails that the two terms are virtually synonymous,119 the majority rule is that a sublease is a grant by a tenant of an interest in the demised premises less than his own, retaining to himself a reversion,120 while an assignment is a grant by a tenant of his entire interest in the demised premises.121 Thus, it would appear that the statute entitled "Right to sublease"122 would be a grant of a single right to tenants, while the amended statute entitled "Right to sublease or assign"123 would bestow two distinct and separate rights.

119. Halper, Assignment and Subletting by Tenants, N.Y.L.J., Sept. 7, 1977, at 1, col. 2B. Many businessmen, in fact, believe the terms are identical except as to whom the rent is tendered. Id. at 6.


121. See cases cited note 120 supra.


Under Conrad and Kruger, no distinction was drawn between an assignment and a sublease. This approach has been followed in Brager v. Berkeley Associates. Under the Remsen, Pacer and Lexann decisions, however, only a right to assign has really been granted. The right to sublease has vanished: a curious anomaly which bears close scrutiny.

It is beneficial to consider two hypothetical New York City tenants. Ted, a business executive, has just been permanently transferred to San Francisco. Tina, a schoolteacher, has just purchased a share in a Southampton cottage for the months of July and August. Both have located unobjectionable subtenants, Ted agreeing to assign the remainder of his lease term, and Tina agreeing to sublease for the two months in question, planning to return in September. Notifying their respective landlords, both Ted and Tina receive unreasonable refusals. Under Conrad, of course, both transactions would be upheld by the court. Under the Lexann interpretation of the statute, however, Ted would be off to San Francisco in no time, while Tina would be stuck paying for two dwellings for the summer. In other words, Ted, the prospective assignor, after the unreasonable refusal, will be satisfied to request and be granted a release from his obligation to tender rent. Tina, the prospective sublessor, wishing to retain her reversion, will be both unwilling to request a release and unable to sublease, and will incur a financial loss in the end.

Prior to the Lexann and Conrad decisions, no court had even alluded to the existence of this inequity. Even in Lexann, the court for the most part glossed over this pitfall, on the one hand stating, "RPL 226-b affords protection to a tenant who, for one reason or another must, of necessity, either temporarily or permanently give up his or her apartment," while in almost the next breath concurring:

For certain tenants who wish to or must absent themselves from their apartments for protracted periods of time, but who intend to return prior to the termination of their leases, our construction of RPL 226-b may constitute a hardship. In such a case, if a landlord unreasonably withholds his consent to sublet, the tenant will have to elect whether to fulfill his obligation under the lease, without offsetting the expense by income derived from subletting the apart-

125. 107 Misc. 2d at 78, 437 N.Y.S.2d at 837.
ment, or request a termination of his obligations under the lease and surrender the apartment.128

This cannot have been the logically intended effect of a statute expressly enacted to protect tenants from the vagaries of the existing housing crunch. Such a result goes only half way towards a solution to the apartment shortage, since only the assignors under the statute will be permitted to turn over their units. Sublessors, i.e., those tenants unwilling to accept release, will be left occupying two units for the term of the proposed sublease, however, thereby actually contributing in a major way to the shortage. If this is truly the valid interpretation of the statute entitled, "Right to sublease or assign," and only a right to assign has been granted, the statute would have been meaningless when it was entitled "Right to sublease" in its first and second versions. It was this inequity to which the Conrad court objected.127

The Rule of Reason

Another foreseeable problem with the application of section 226-b is the lack of a residential standard of reasonableness to be used by the courts in evaluating a landlord's response to a tenant's notice of his intent to sublease. Clearly, statements such as "We do not choose to have apartments passed from hand to hand"128 fall short of any definition of reasonableness. And mere general objections to assignments that do not relate to the individual proposed assignee may not meet such a standard.129 Yet it is all too easy to envision an instance where the unreasonableness of a landlord's withholding of consent is far less obvious, and where the ultimate determination of reasonableness is a much more difficult matter. Such cases have arisen in the area of commercial leases,130 though the question has not yet been ruled upon with regard to section 226-b. Thus, any discussion of the reasonableness standard as it currently applies to residential leases under section 226-b must necessarily rely

126. Id.
127. 81 A.D.2d at 56-57, 439 N.Y.S.2d at 380.
on principles extrapolated from the realm of commercial lease law.

The standard of reason now in force generally with regard to commercial leases in New York state was originally set forth in *American Book Co. v. Yeshiva University Development Foundation, Inc.* In that case, a four-point objective test for a proposed subtenant's acceptability was laid down, the criteria consisting of the subtenant's financial responsibility, the identity or business character of the subtenant, the legality of the proposed use, and the nature of the occupancy. These standards were considered to be readily measurable by any landlord, and in fact, the *American Book Co.* standard has found its way into the case law of at least two other jurisdictions. These so-called objective standards were further placed in juxtaposition to subjective criteria—a category including the landlord's supposed needs, dislikes, personal taste, sensibility, or convenience—which courts will generally find objectionable and therefore irrelevant.

Even in view of this now-accepted rule of reason, however, the standard of reasonableness required under section 226-b remains mysterious. It is evident that the *American Book Co.* standard is a peculiarly commercial standard, rather than the residential standard that would appear to be necessitated by the statute; and while the first objective criterion of the *American Book Co.* standard—subtenant's financial responsibility—makes the transition from commercial applicability to residential applicability rather easily, the same cannot be true of the remaining criteria, which are relevant only to the business sublessee. In fact, the potential for abuse inherent in the application of the remaining criteria, even in a commercial-lease situation, has been duly noted in cases where a discriminatory refusal by a landlord has been based on the identity of the proposed

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131. 59 Misc. 2d 31, 297 N.Y.S.2d 156 (Sup. Ct. N.Y. Cnty. 1969). The case deals with a commercial lease, but the reasonableness test set forth is nowhere specifically limited to commercial leases. *Id.*

132. *Id.* at 33, 297 N.Y.S.2d at 159-60.

133. *Id.*


135. 59 Misc. 2d at 34-35, 297 N.Y.S.2d at 160-61.

In spite of the commercial nature of the *American Book Co.* reasonableness test, the standard has been relied on expressly in cases arising under section 226-b. The *Remsen* court noted that the reasonableness of the landlord’s refusal was the “threshold issue to be determined,” and proceeded to find the landlord’s refusal to be unreasonable under the *American Book Co.* standard. The *Kruger* court cited the reluctance of appellate courts to delineate such a standard fully and clearly, and then applied the *American Book Co.* test anyway, finding the landlord’s refusal to be likewise unreasonable. In so doing, each failed to consider the commercial/residential distinction, possibly because in both cases the refusal was clearly unreasonable under any standard.

Inevitably, similar cases will arise under section 226-b in which the question of unreasonableness of a landlord’s refusal is open to interpretation. Since several of the *American Book Co.* criteria will be difficult or impossible to apply (legality of the proposed use, for example, will be the same in all residential cases), courts may be forced to develop their own criteria—a situation that might easily lead to a range of conflicting results. Yet the courts are not without guidance should they be obliged to evolve their own standard.

In an attempt to arrive at a viable residential standard of reasonableness, The Model Residential Landlord-Tenant Code set a seven-point test, which provided grounds for refusal if the landlord...
was able to show that the proposed subtenant would not be as favorable to him as the original tenant. This test was embraced by the state of Alaska in drafting its own sublease statute, and is favorable to the tenant in that the burden of proof is placed squarely on the landlord. New York State, however, has not adopted the pertinent sections of this model code.

The lack of a strictly residential standard of reasonableness can lead only to uncertainty for both landlords and tenants as to their respective rights under section 226-b, especially in close cases. The nebulous American Book Co. standard is unwieldy in a residential situation and lends itself to landlord discrimination. A more narrowly defined standard of reasonableness would limit the litigation on this issue to only the most borderline refusals and would additionally protect tenants (and subtenants) against unfairly discriminating landlords.

**Housing Market Realities and Section 226-b**

One final note concerning the technical economic effect of section 226-b is necessary. The housing shortage in New York, as noted, continues to be a troublesome situation. It is conceivable that this situation will someday change, but, unfortunately, it is often impossible, or at best impracticable, to alter a statute to meet changing economic realities, especially when such changes occur suddenly and without notice. When the market variable—i.e., the possibility that the housing market may be rising or falling—is factored into the section 226-b equation, it can be seen that the statute, which was designed to aid tenants, may actually work to give the landlords an advantage in coping with cyclical shifts.

Essentially, in a falling market, the landlord is protected from substantial risk of income interruption or diminution by the lease provisions rendering the tenant liable to tender rent for the remainder of the term. The tenant, on the other hand, bears the risk that

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144. *Id.*; see Note, supra note 136, at 317 n.66.
145. *See Alaska Stat.* § 34.03.060 (1975).
147. *See 7 New York City, N.Y., Charter and Code* § Y51-1.0 (1975); *id.* § YY51-1.0 (describing the existing situation as an emergency, and outlining the need for legislation).
his rent may become too high relative to the decreasing price similar units command as they re-enter the deteriorating market. As the drop in comparable prices occurs, the tenant may desire to vacate his dwelling unit in favor of one whose rental more closely reflected the changing pricing environment. In this case, the same lease provision that serves to protect the landlord—one that prohibits subletting without consent—will severely limit the tenant’s mobility, in effect forcing him to retain the now-expensive apartment until the expiration of the lease. Thus, in this falling market situation, a tenant’s ability to avail himself of a section 226-b sublease would depend on his ability to locate a prospective sublessee willing to pay a rent higher than that being asked for a comparable apartment.

Conversely, in a rising market, it is the landlord who finds himself locked into an increasingly less profitable agreement, while the tenant discovers his leasehold becoming a more and more valuable asset. A tenant may wish to sublease for personal reasons, or he may simply wish to capitalize on his good fortune by means of a sublease or assignment at a higher rental. Under the Lexann interpretation of the statute, the landlord, by his unreasonable refusal to consent to the proposed sublease or assignment, may deny the tenant the opportunity for financial gain. Carrying this analysis a step further, if the tenant then, out of necessity, requests a release from the lease (as Ted, the hypothetical assignor, did), the landlord may actually rerent to the same proposed sublessee or assignee at the higher rental, thereby netting a profit for himself at the expense of the original tenant, who is frozen out of the transaction. Indeed, the landlord will also have obtained a service from the tenant for free: that of rental agent for the landlord, successfully locating a free-spending subtenant agreeable to the higher rental.

Thus, in a purely free-market housing economy, section 226-b would allow the landlord, already well-protected against a falling market, to retain all the opportunity for financial gain inherent in a

148. See 107 Misc. 2d at 78, 437 N.Y.S.2d at 837. The Lexann court held that, “we do not perceive [226-b] to sanction what would amount to a form of trafficking in apartments by tenants, an inevitable consequence of permitting a tenant to insist upon subletting where the landlord has refused to consent thereto, albeit ‘unreasonably,’ ” Id. The Conrad court, however, held that the Lexann court ignored the legislature’s intent in reaching this conclusion. 81 A.D.2d at 57, 439 N.Y.S.2d at 380.

149. Even under the most favorable (to tenants) decision, the tenant was prevented from making a profit, although there the landlord was likewise prohibited from reaping any financial reward. See Kruger v. Page Management Co., 105 Misc. 2d 14, 33, 432 N.Y.S.2d 297, 308 (Sup. Ct. N.Y. Cty. 1980).
rising market. Conversely, the tenant would continue to bear the en-
tire risk of being locked into an inflexible position during his tenancy
in a falling market, while being effectively excluded from any poten-
tial profit to be garnered from a buoyant housing environment.

In New York City, where a majority of the section 226-b cases
have arisen, however, it is clear that a truly free housing market does
not exist, for various rent-control programs have been in effect since
1943. And, in a very real sense, the present rent-control program
provides a final incentive for New York City landlords to refuse to
consent to a proposed sublease unreasonably. Simply stated, a sub-
tenant in a rent-controlled building effectively steps into the shoes of
the original tenant under section twenty-one of the Code of the Real
Estate Industry Stabilization Association of New York, Inc., and
is therefore entitled to a renewal lease at the controlled level. In-
stallation of a totally new tenant, on the other hand, will enable the
landlord to raise the maximum rent, thereby increasing his profit
margin to the allowable limit. The rationale behind a rent-stabilized
landlord's refusal to consent to a proposed sublease is purely eco-
nomic: A section 226-b release of the tenant is an almost certain
money-maker in a tight housing market.

RECOMMENDATIONS

It would be shameful to allow so potentially progressive a mea-
sure as section 226-b to become indefinitely mired in a legal mo-
rass due solely to careless drafting. Regardless of the outcome of any
pending or future litigation, the statute should be amended or rewritten.
A statute worded more clearly in favor of the tenant, however,
would set off a howl of landlord protest. Therefore, a major consideration must be the balancing of landlord and tenant interests into a cohesive bill that protects both sides against inequitable application. With this consideration in mind, the following recommendations for an equitable statute are offered, together with explanations of their underlying rationales:

1. Any new statute should clearly state that the tenant "shall have the right to sublease or assign in any event other than that of a reasonable refusal to consent by the landlord." It should state further: "In the event of an unreasonable refusal by the landlord, the tenant shall have the right, at the tenant's option, to request and be granted release from the lease, or to proceed with or continue the sublease."

This paragraph simply sets forth the rights of the tenant in unambiguous language, adopting the Conrad/Kruger view of the true purpose of section 226-b, and supports public-policy considerations favoring free alienation of property.

2. A new and comprehensive residential standard of reasonableness, identical or similar to that contained in the Model Residential Landlord-Tenant Code and the Alaska statute should be explicitly included in any New York enactment.

Although a serious question of reasonableness has not yet arisen under the recent section 226-b decisions, directly incorporating a residential standard within the statute itself will present an improvement over the nebulous American Book Co. commercial standard, and will serve to limit or prevent future litigation on this issue in all but borderline cases.

3. Any new statute should unequivocally place the burden of proof as to the reasonableness of any contested refusal upon the landlord.

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155. See Brakel & McIntyre, The Uniform Residential Landlord and Tenant Act (URLTA) In Operation: Two Reports, 1980 AM. B. FOUND. RESEARCH J. 555, 573-74 (1980). Commenting on general landlord reaction to the adoption of portions of the URLTA in Oregon and Ohio, the authors observed: "Landlords or their representatives can hardly be expected to be enthusiastic about pro-tenant legislation." Id. at 573. The URLTA is the successor to the Model Residential Landlord-Tenant Code. Id. at 560.

156. See, e.g., De Peyster v. Michael, 6 N.Y. 467, 493 (1852).


158. ALASKA STAT. § 34.03.060 (1975).

159. 59 Misc. 2d at 33, 297 N.Y.S.2d at 159-60.
This would be in keeping with a presumption of validity of a proposed sublease, and would deter landlords from raising unreasonable objections solely in the hope that the offending tenant will surrender in the face of a protracted and costly legal skirmish. Landlords as a class will be better able to expend the resources necessary to rebut any presumption of reasonableness, and will likewise be better situated to pass through any increased litigation costs to tenants. A similar provision is included in the Alaska subleasing statute.160

4. Any new statute should provide that the landlord may require his or her tenant to submit a document stating the terms of the sublease, including rental. If this rental represents an increase over the amount of the original lease, the landlord should be entitled to two-thirds of any increase.

This provision would offer an incentive to the landlord to consent to any proposed sublease, allowing the tenant, in effect, to serve as a rental agent for the landlord in return for a 33% commission. The landlord, for his part, will retain a healthy portion of any rent increase, and, in addition, will avoid many of the advertising and investigative costs involved in finding a suitable tenant. This provision would work in conjunction with subdivision two of the current statute,161 which provides for the original tenant's continued liability to the landlord for rent, encouraging the tenant to find a truly suitable subtenant, while at the same time protecting the landlord against cash flow interruption in the event the subtenant turns out to be financially irresponsible. Subdivision two would be retained in its current form under this proposal.

5. The New York City Rent Stabilization Law162 should be amended to allow landlords to increase the rent to the sublessee by the maximum amount permitted on a vacancy lease, but only at the expiration of the original tenant's lease term.

This amendment to the New York City Code would eliminate a major impetus for landlords to refuse to consent to a proposed sublease, actually placing the landlord in a better position than if the original tenant had remained in the apartment and requested a renewal lease. Assignees would be the eventual losers here, subject to vacancy increases upon the expiration of the original tenant's term.

160. ALASKA STAT. § 34.03.060 (1975).
Yet, section 226-b was passed to protect tenants-in-fact, not prospective transferees; automatically to entitle assignees to renewal leases would invite fraud by vacating tenants, who could (for a fee) enter into an assignment just prior to vacating, depriving landlords of the allowable increase.

**CONCLUSION**

Section 226-b of the New York Real Property Law has contributed in a major way to an increasingly uncertain environment in the area of New York residential subleasing law. Problems have already appeared with the interpretation of the measure regarding the availability of the tenant's remedy of implementation or continuation of the sublease. The statute also appears susceptible to several foreseeable problems involving its disparate effect on sublessors and assignors, the lack of an applicable reasonableness standard, and the failure to provide for the idiosyncracies of a government-controlled housing market. The hope for a resolution to these problems lies in amendments to the statutory scheme that will balance the competing interests of landlords and tenants.

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