



St. John & Associates

2115 West Street

Berkeley, CA 94702-1947

510.845.8928 – Fax 510.845.1813

www.stjohnandassociates.net

THE SUBLET ISSUE AND THE COBB DECISION

Michael St. John, PH. D.

October 2006

The Costa-Hawkins Act established the principle that "original tenants" – those in residence at the beginning of a tenancy – have continuing rent control rights, but that substitute or replacement tenants do not. The original tenants, in other words, get only the Annual Adjustments, but once all remaining original tenants have left, the rent can go to market, even if there are substitute or replacement tenants in residence. This provision was key to preventing the development in California of "the New York problem" – serial substitutions or sub-tenancies that prevented New York rents from going to market for decades or even generations.

The system worked well in Berkeley for several years. Owners learned to pay careful attention to who lived in their units because they knew that they could impose a vacancy increase when the last remaining original tenant left. There were abuses, of course. Some tenants concealed the fact that they had left, thus preventing decontrol from being imposed on their subtenant friends. But for the most part the system worked. When all original tenants had left, owners imposed rent increases and remaining tenants then had clear choices – pay the increase as noticed, bargain with the owner, or move out.

Unfortunately, the language in Costa Hawkins that set up this system – like convoluted language elsewhere in the Act - was imperfect. It mentioned "subtenants" when establishing that substitute or replacement housemates did not have the same rights as "original tenants". A recent decision in a San Francisco case – Cobb v. San Francisco Residential Rent Stabilization & Arbitration Board – took the subtenant language literally, and made a distinction between subtenant and substitute tenant that, in practice, didn't exist previously. Subtenants, according to the Cobb decision, didn't have the same rights as original tenants, but substitute or replacement tenants did.

The Berkeley Rent Board jumped on the band wagon. They didn't have to. The decision was not binding on Berkeley. The facts of the Cobb case were not simple or general. But the Board, in its wisdom, decided to follow Cobb instead of following the clear intent of Costa-Hawkins. The Board published an advisory making the subtenant / substitute tenant distinction, thus alerting substitute tenants to the possibility that they could claim that they had "stepped into the shoes" of departing original tenants and that they should therefore claim rights to continuing rent protections that Costa Hawkins reserved to original tenants.

Owners in Berkeley, understandably, felt that the rug was being pulled from under them. A system that we had grown to rely on was suddenly changed drastically. Berkeley property owners were in danger of falling prey to "the New York Problem" despite Costa-Hawkins.

Happily, there is a solution. Like so many things in this legalistic world, you have to say it right. In the document that commemorates the change in tenancy, make sure that you say that the substitute tenant is a subtenant or assignee of the original tenant(s). Make sure that you don't simply put the substitute tenant on the rental agreement in parallel with original tenants, making no distinction as to categories. Keep the distinction clear. Tell substitute tenants, in writing, that they don't have the same rights to continuing rent protections as original tenants, so that they will not be shocked by rent increases imposed when the original tenants leave. If you didn't make these distinctions at the inception of a substitute tenancy, make them now, in writing. If your rental agreement was unclear in this regard, amend it now if you can. Put replacement tenants on notice that when the last remaining original tenant leaves, the replacement tenants will face vacancy decontrol.

What will happen to these cases is unclear. No doubt there will be litigation, first at the Rent Board, eventually in court. Perhaps Cobb will someday be overruled. Perhaps the legislature will pass an amendment that clarifies the original intent. In the meantime, language is important, clarity is important, and, as always, tenant relations are important.

.....

Michael St. John, Ph.D., is a rent control consultant who has been advising Berkeley property owners since 1984. Call 510-845-8928 for a consultation about any issues involving rental property in Berkeley or Oakland.