

Chapter 7

Assignment, Subletting, and Mortgaging by Tenant

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§ 7:1 **Business and Practical Aspects of Tenant's Right to Assign and Sublet**

A tenant who signs a lease for a term of years assumes a heavy burden. He is liable for his obligations as tenant whether or not he remains in possession and even if he never took possession. If he moves out, these obligations continue and landlord need not, in many states,¹ seek a new tenant for the purpose of minimizing his damages, or even accept a new tenant submitted by the old tenant.² Death of a tenant gives no relief. His estate remains liable.

A tenant must, therefore, contemplate the likelihood that he will be liable for the full term of the lease though for one reason or another he may be unable to use the premises. Assignment or subletting does not release the tenant from this liability, absent a novation, but it does mean that somebody else will also be obligated to the tenant to discharge this liability in whole or in part.

If the tenant is an individual he must consider the possibility of death of himself or his wife, or of a disabling illness to either of them.³

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1. A complete analysis of the question of whether a landlord has a duty to mitigate when a tenant abandons during the lease term is set forth in chapter 16. Certainly a majority of the states now do require the landlord to mitigate in residential leases. About half the states have the same requirement as to commercial leases.
 2. See section 16:3. This assumes that surrender of possession was not because of actual or constructive eviction and that a failure to accept possession was not excused by physical conditions at the premises.
 3. For death or disability clause, see chapter 16, note 135.

If residential space is involved, his employer may shift him to a distant city.

If the tenant is a chain store, its execution of the lease was probably preceded by a traffic count and a study of the neighborhood. Opening the store—design, layout, installations, stock, and staff—is expensive. Thereafter the tenant may discover that circumstances that were assumed to exist never did exist or if they did changes have occurred, and that discontinuance of business at the premises makes sense. A merger or consolidation of a corporate tenant may result in overlapping facilities, ending the need for this space. Or it may result in the need for larger quarters that are not available at these quarters.

A tenant who wants to sell his business frequently learns that as a practical matter he cannot unless he can sell the lease as well. The lease must have an unexpired term of some length, possibly by right of renewal, and must be transferable.⁴ This is particularly true of a restaurant or a retail business but is not limited to them. The purchaser of a business who becomes an assignee of the lease, or a subtenant thereunder, should consider the possibility of a termination of the lease before its specified expiration, for some reason other than a tenant default. The reason may be bankruptcy,⁵ damage or destruction of the leased premises,⁶ or a taking in condemnation.⁷ Any such termination may deprive the purchaser, in whole or part, of the good will for which he paid when acquiring the business. If the seller is the owner of the property, and gives the purchaser a new lease in connection with the sale, it should be easier to provide for some refund or credit to the purchaser in case the lease should be terminated without tenant default. If the seller of the business is a tenant, and assigns his lease to the purchaser and takes back a purchase money mortgage on the lease as security for the unpaid purchase price, the seller must consider these matters as well as that of the status of a leasehold mortgage generally.⁸ The number of reasons a tenant may have for

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4. A form for this purpose appears in text *infra* before note 137.
 5. For bankruptcy, see text *infra* at note 194 and at note 570; text *infra* at note 657; chapter 16 at notes 51, 69; chapter 22 at note 158; chapter 29 at note 189.
 6. See generally chapter 9. For one example of the messy situation this may create, see *Mulett v. Peltier*, 31 Mass. App. 445, 579 N.E.2d 174 (1991) (tenant bought landlord's business and had purchase option).
 7. See generally chapter 13.
 8. See sections 7:8.1–7:8.3. It is common in the sale of a small business on deferred payments, which involves the assignment of a lease by the seller-tenant to the purchaser, for the assignor's lawyer to hold an unrecorded reassignment of the lease from the assignee-purchaser back to the

seeking to assign or sublet is virtually without limit.⁹ A tenant who waits until he needs his landlord's consent before seeking it may have to pay a heavy price.

A right to assign or sublet is of considerable practical value to a tenant, and the tenant should try to establish that it has such a right in some form or other when negotiating the lease.

§ 7:1.1 Landlord's Drafting Considerations

Because of the legal policy in favor of promoting alienability, tenants have the freedom to assign or sublet if the lease does not restrict their right. But leases prepared for landlords—which represent most lease forms—invariably forbid the tenant to assign, sublet, or mortgage, or otherwise encumber the lease.¹⁰

The landlord's attitude traditionally has been a determination to choose the tenants and decide what use they are to make of the landlord's property. The thought of a succession of occupants moving in and out without his permission is an anathema to the landlord. The landlord not only wants to choose the tenants, it wants to know at all times who the tenant is. Furthermore, if there is to be a transfer by the tenant, the landlord wants the successor tenant to be responsible for all the tenant obligations.^{10.1} Otherwise, the landlord's remedies may not be satisfactory, particularly against an occupant who is in and out of possession between the beginning and end of the term.¹¹ A covenant to surrender possession in good condition, for instance, is not actionable

tenant-assignor. The assignor may instead of this take back a purchase money mortgage on the lease, but the ordinary lease is not prepared to comply with the elaborate provisions for a leasehold mortgage as set forth in section 8:4, *infra*.

9. An owner of a stationery store in the writer's neighborhood gave up his store and moved to a remote part of the city where he believed more beaux would be available for his daughter.
10. "Lease which contained the usual clause, providing that assignment or subletting of the premises could not be made without the written assent of the landlord." *Dudley v. Rapanos*, 353 Mich. 237, 240, 91 N.W.2d 274, 276 (1958). *Accord* *Karbelnig v. Brothwell*, 244 Cal. App. 2d 333, 341, 53 Cal. Rptr. 335, 340 (2d Dist. 1966); *Rubenstein Bros. v. Ole of 34th St., Inc.*, 421 N.Y.S.2d 534, 536 (Cir. Ct. 1979); *Baron Bros. v. Nat'l Bank*, 83 S.D. 93, 107, 155 N.W.2d 300, 307 (1968). A form of non-assignment clause appears in section 7:3.3[E][1].
- 10.1. The master lease should prohibit waste expressly, making such activity a contractual violation, and not just a tort. Otherwise, waste carried out by a sublessee may not be the subject of an action against the sublandlord, even though equity jurisdiction might lie for an injunction.
11. *In Estate Prop. Corp. v. Hudson Coal Co.*, 139 Misc. 808, 249 N.Y.S. 418, *aff'd*, 237 A.D. 878, 261 N.Y.S. 978 (1st Dep't 1933), a landlord brought an action, during the term, against an assignee who had removed alterations from the premises. The action was dismissed as premature.

before expiration of the term, and for this reason, the landlord may have no responsible party to whom he may look for breach of this covenant.¹² Issues of simple economics also may trouble the landlord when faced with a proposed assignment or sublet. In a rising market the landlord may find it appalling to see the use of the landlord's property transferred at a good profit, no part of which is going to the landlord's pocket.¹³

In some leases to a corporate tenant, this non-assignment clause is relaxed to permit assignment or subletting to any corporation into or with which the tenant may be merged, and to related entities—an affiliate, parent, or subsidiary corporation (which requires these terms to be defined), or to a partnership composed of the corporate shareholders.¹⁴ In some leases the non-assignment clause is qualified by a provision for landlord not unreasonably to withhold his consent to assignment or subletting. What is “reasonable,” of course, will require construction. A requirement that a landlord be “reasonable” opens the possibility of his being liable in damages if he is deemed to be unreasonable,¹⁵ and may justify the tenant in terminating the lease entirely.

Some provisions relax the strictness of a non-assignment clause by giving the tenant certain limited rights to assign or sublet, but give the landlord a right to cancel the lease as an alternative. The effect of this may be to release the tenant from liability but to give the landlord any profit resulting from a switch in occupants. At this juncture a tenant might prefer to have a right to abandon the proposed assignment or sublease and preserve his lease.¹⁶

Inasmuch as no waste was involved the only possible wrong would be a failure to surrender possession in good condition on expiration of the term. This would not be actionable until the end of the term. Thereafter, landlord brought a new action against the same defendant, who had by this time assigned to another and given up possession. Inasmuch as the defendant had never assumed the lease his liability was predicated on privity of estate, not privity of contract, and, accordingly, his liability under the lease ended with his assignment and surrender of possession. 259 A.D. 546, 19 N.Y.S.2d 857, *aff'd*, 284 N.Y. 772, 31 N.E.2d 762 (1940). Compare generally discussion of privity in section 7:5.1. For tenant's obligation to surrender premises in good condition, see generally section 18:1. Compare *Hood v. Freemon*, 2007 WL 27121 (Tenn. Ct. App. 2007) (proposed excavation of dirt and construction of large flood project retention pond by sublessee constituted waste for which landlord might obtain an injunction).

12. See chapter 18 at note 72.
13. A striking example of this is cited in note 213, *infra*. A profitable sublease is no wrong to landlord. See note 252, *infra*.
14. A form for this purpose appears in section 7:3.3[E][3].
15. See section 7:3.4[D].
16. A clause for this purpose appears in section 7:3.3[E][3] (second clause).

Other provisions that give tenant a limited right to assign or sublet may permit the lease to continue but entitle landlord to all or a part of any gain these bring tenant. If the provision refers to “profit” from subletting, tenant may well claim that computing profit requires allowance for expenses of subletting, that is, necessary alterations to the premises, brokerage commissions, etc.¹⁷ Query: Whether this should entitle tenant to credit for rent paid while the premises were vacant. If, instead of “profit,” the clause entitles landlord to “excess rent” obtained in subletting (adjusted pro rata in accordance with the fraction of the space sublet), tenant will not receive these credits unless “excess rent” is appropriately defined. Furthermore, all the subrent may not be true rent if it includes services that tenant supplied subtenant. These may be secretarial services. In premises used for hat making, live steam may be supplied for working on felt. These examples may be multiplied. In case of assignment the lease may entitle landlord to all or a part of the consideration for the assignment.¹⁸ Some leases—with little apparent justification—make this consideration include sums paid for the sale or rent of tenant’s fixtures, installations, equipment, furniture, and other personal property.

Although it might be possible to establish a condition in a lease that the lease terminates automatically upon a prohibited assignment, this is not recommended for a number of reasons. First, the provision is a forfeiture restraint on alienation, which may strike some courts as unreasonable, notwithstanding the fact that it affects only a leasehold. Second, the landlord in fact may prefer that the leasehold not terminate, and the tenant might effectuate a termination by carrying out a prohibited assignment.^{18.1}

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17. A clause was enforced that entitled landlord to the net profits derived from a sublease, less costs and expenses. *KPC Corp. v. Book Press, Inc.*, 161 Vt. 145, 636 A.2d 365 (1993).
 18. Consider how such a broad clause might apply when a tenant exchanges the leasehold for another leasehold, such as where two chain retailers each believe that the other’s location best fits their business plan. Where the received lease has “bonus value,” should such “bonus value” be viewed as consideration flowing to the tenant when it exchanges its own lease? The author has so opined in a recent arbitration.
 - 18.1. *See, e.g., Middlebrook Tech., LLC v. Moore*, 197 Md. App. 40, 849 A.2d 63 (Md. Ct. Spec. App. 2004). Lease provided that it would terminate automatically upon assignment of lease to creditors. Lease was so assigned, and, when landlord sued guarantors, guarantors argued that they had no liability because lease had terminated. Court found that the “automatic termination,” although lease did not say so, was in fact an option available for landlord only. Landlord and its lawyer were very lucky here.

§ 7:1.2 Tenant's Drafting Considerations

A lease may be executed with an intention of assigning it once. It may be signed by an individual as tenant, with a right to assign to a corporation that he intends to form. In this situation the individual may be required to keep a controlling interest in the corporation and to manage its business. Similarly, a corporation may sign as tenant, with a right to assign to an affiliate corporation or to a corporation resulting from a merger or consolidation.

A provision permitting a tenant to assign his lease and thereafter be relieved of liability has been given effect.¹⁹ This has been true where the assignee was a "thin" corporation,²⁰ or even insolvent,²¹ where the lease so permitted. But courts have refused to relieve a tenant from liability in this situation where the tenant made a colorable assignment without giving up possession or the benefits of the lease.²²

If a tenant agrees to erect a building on leased premises the completion of this building will give the landlord a matchless security and will reduce or eliminate the landlord's need for other security.

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19. *Shadeland Dev. Corp. v. Meek*, 489 N.E.2d 1192 (Ind. Ct. App. 1986); *Clayton v. Sindeband*, 24 A.D.2d 565, 261 N.Y.S.2d 929 (2d Dep't 1965).
 20. *Tierman v. Sheldon*, 191 So. 2d 87 (Fla. Dist. Ct. App. 1966); *Carvel Corp. v. Rabey*, 135 Ga. App. 856, 219 S.E.2d 475 (1975); *Klager v. Robert Meyer Co.*, 415 Mich. 402, 329 N.W.2d 721 (1982) (landlord knew assignee capitalized at \$1,000).
 21. *O'Donnell v. Weintraub*, 260 Cal. App. 2d 352, 67 Cal. Rptr. 274 (1968); *Alexander v. Theatre Realty Corp.*, 253 Ky. 674, 70 S.W.2d 380 (1934); *Norcomo Corp. v. Franchi Constr. Co.*, 587 S.W.2d 311 (Mo. Ct. App. 1979). *Cf. Ramey v. Koons*, 230 F.2d 802 (5th Cir. 1956). In *Alexander*, landlord had received a security deposit of \$250,000. In *Tierman*, 191 So. 2d 87, a tenant had erected a building on the property at a cost of \$175,000. A cooperative apartment lease that permitted release of the tenant on assignment and assumption of the lease permitted release on assignment to a trust, without, assets for a grandson. 1165 Fifth Ave. Corp. v. Alger, 288 N.Y. 67, 41 N.E.2d 461 (1942).
 22. *Shea v. Leonis*, 14 Cal. 2d 666, 96 P.2d 332 (1939); *Cinderella Theatre Co. v. United Detroit Theatres Corp.*, 367 Mich. 424, 116 N.W.2d 825 (1962). *Cf. Norlen Inv. Co. v. Minskoff*, 251 Cal. App. 2d 534, 59 Cal. Rptr. 484 (2d Dist. 1967). In *Nutley v. Gregory*, 6 Wash. App. 576, 494 P.2d 1384 (1972), a lease permitted tenant to assign and be released from liability if the assignee delivered security to the landlord. Tenant assigned to a corporation of which he was a principal stockholder. Tenant was held still liable despite the delivery of the security and the court's recognition that an ordinary business transaction was involved. A comparable situation arises when an assignee of the lease, who is liable under the lease through privity of estate, and not privity of contract, makes a colorable assignment. *See text infra* at note 438. Another comparable situation arises when the landlord seeks to hold a subtenant liable for the prime tenant's obligations, on the ground that the latter is a thinly capitalized, wholly dominated subsidiary of the subtenant. *See text infra* at note 526.

This lease may provide that upon completion of the structure there will be a right to assign the lease with little limitation and, perhaps also, for a release of the tenant from any further personal liability under the lease.²³

A tenant may have an unconditional right to assign and sublet and yet find this right of little practical value in the face of other restrictions in the lease. This is true if the lease limits the use of the premises too narrowly for prospective occupants.²⁴

An assignee or subtenant may need alterations to fit the premises for his occupation. Absence of a right to make nonstructural alterations for this purpose may make assignment or subletting impossible. Absence of a right to have an assignee or subtenant listed in a lobby bulletin or floor bulletin is apt, by itself, to be fatal.

An insolvency clause, which formerly permitted a landlord to terminate a lease as against a tenant, assignee of a tenant, or subtenant, by reason of insolvency or comparable condition of the original or successor tenant, is no longer enforceable in bankruptcy.²⁵

Tenants contemplating an assignment must be cautious in noting exactly what rights they are surrendering. Where a tenant assigns the lease without reservation, the tenant also assigns option rights contained in that lease, including options to purchase.²⁶

A tenant with a right to assign and sublet may consider which of these to use. Assignment has an appeal, in that the assignee pays rent directly to the landlord and deals directly with the landlord otherwise.²⁷ However, the original tenant remains liable under the lease and may be called upon to pay the rent and perform other tenant obligations if the assignee does not. If this happens the original tenant will be entitled to reimbursement from the assignee, but in enforcing this right he will probably not have the effective remedy of eviction, which is available to a landlord against a defaulting tenant.²⁸ If a sublease is

23. That was true in *Shadeland Dev. Corp. v. Meek*, 489 N.E.2d 1192 (Ind. Ct. App. 1986) (citing text).

24. In *URS Rental Serv. Co. v. Dougieux*, 480 So. 2d 1034 (La. Ct. App. 1985), tenant's use was restricted to an oil service company's administrative office. Landlord had reason to limit parking. For the effect of restrictions on use on an assignment of a lease in the bankruptcy of tenant, see text *infra* at note 191. For the effect on value of the lease, see section chapter 15, note 11.

25. See chapter 16 at note 52.

26. *Singer v. Boychuk*, 599 N.Y.S.2d 680 (App. Div. 1993) (unqualified assignment of tenant's right, title and interest in a lease divests the assignor of all rights and obligations existing thereunder, including the option to purchase the property at a future date).

27. Section 7:5.1[C].

28. See text *infra* at note 457. *But cf.* text *infra* at note 498.

employed the original tenant becomes a landlord (though a sublandlord) with all of a landlord's possessory remedies. If the lease is assigned for a consideration, any deferred payment of this consideration may be secured by a purchase money leasehold mortgage²⁹ and, if no security is expressly bargained for, the tenant-assignor may in proper circumstances have a vendor's lien, which is an equitable lien, therefor.³⁰

In the jurisdictions where the common-law doctrine of holdover exists, a tenant may become a holdover for a full year if his subtenant remains in possession (perhaps for only a few days) after expiration of the prime lease.³¹ The prime tenant may avoid this result by an appropriate provision in the prime lease.³²

Any security deposited by a tenant with his landlord under the lease should be expressly included in an assignment of the lease, in return for reimbursement therefor from the assignee.

A tenant who contemplates the possibility of making a future assignment or a leasehold mortgage should endeavor to include in the lease a provision requiring the landlord to give the assignee or leasehold mortgagee an estoppel certificate indicating whether the lease is in good standing. If the landlord will not agree to give a full estoppel certificate he may be willing to certify some matters, such as whether or not rent or taxes have been paid to date, insurance has been supplied, etc.

Subletting from tenant to landlord, in whole or in part, or assignment from tenant to landlord, may offer business uses such as: providing tenant with expansion space,³³ the oil company "two party lease,"³⁴ and the "take-over lease."³⁵

§ 7:2 Tenant's General Right to Assign, Sublet, and Mortgage

As stated, unless the lease provides otherwise, with few exceptions, a tenant may transfer his interest in the lease in whole or in part. Tenant may do this by assigning, subletting, mortgaging, or hypothecating his lease in some way. Or tenant may give some third person a sign privilege or other license.³⁶ Sale of a tenant's assets includes

29. See generally section 7:8.

30. Section 7:5.3.

31. Section 18:4.

32. Section 18:5.

33. See chapter 39 at note 30 *et seq.*

34. See sections 15:1.1, 39:1.

35. See chapter 19.

36. *Joseph Bros. Co. v. F.W. Woolworth Co.*, 844 F.2d 369 (6th Cir. 1988) (under qualification of F.W. Woolworth lease); *McFadden-Deauville Hotel*,

tenant's interest in a lease.³⁷ Tenant is under no duty to use care in selecting an assignee.³⁸

The right to assign and sublet applies to a month-to-month lease, but this is not true where the month-to-month lease follows and is governed by the terms of a written lease.³⁹

A defect in an assignment may not be availed of by a third person unless the defect is such as to make the assignment void.

An assignment of lease is within the statute of frauds, and required to be in writing if its then unexpired term would be of such length as to bring a new lease within the statute.⁴⁰ The assignment must not leave any essential term open.⁴¹ The statute of frauds does not apply between tenant and assignee if they are willing to treat the assignment as enforceable. The statute is not available to a stranger to the transaction, including the landlord.⁴² A sublease, which is, of course, an actual lease between the tenant and subtenant, also is subject to the statute of frauds where the term so dictates. In the absence of a written sublease, a sublessee is nothing more than a tenant at will of the tenant.⁴³

Inc. v. Murrell, 182 F.2d 537 (5th Cir. 1950) (Fla. law); Valley Oil Co. v. Barberian, 344 Mass. 759, 183 N.E.2d 109 (1962); Presby v. Benjamin, 169 N.Y. 377, 380, 62 N.E. 430, 431 (1902); Randolph v. Koury Corp., 312 S.E.2d 759 (W. Va. 1984) (collecting cases); 2 R. POWELL, REAL PROPERTY § 17.04 (2002); 1 AMERICAN LAW OF PROPERTY § 3.58 (1952); 1 H. TIFFANY, REAL PROPERTY § 118 (3d ed. 1939); Annots., 23 A.L.R. 135 (1923); 70 A.L.R. 486 (1931); 51C C.J.S. *Landlord and Tenant* § 31 (1968); 49 AM. JUR. 2D *Landlord and Tenant* § 1082 (1995 rev.).

37. Pleasure Harbor Marina, Inc. v. Boyle, 282 Pa. Super. 8, 422 A.2d 649 (1980).
38. Shadeland Dev. Corp. v. Meek, 489 N.E.2d 1192 (Ind. Ct. App. 1986).
39. Bismarck Hotel Co. v. Sutherland, 175 Ill. App. 3d 739, 529 N.E.2d 1091, 125 Ill. Dec. 15 (1988).
40. Hyman Freightways v. Carolina Freight Carriers Corp., 942 F.2d 500 (8th Cir. 1991) (applying Illinois law); 72 AM. JUR. 2D *Statute of Frauds* § 98 (1974). This would not apply to a transfer by operation of law. See also text *infra* at note 430. This is discussed in greater length in "Contracts to Lease," section 34:3.
41. Hyman Freightways v. Carolina Freight Carriers Corp., 942 F.2d 500 (8th Cir. 1991) (effective date of transfer of possession left open). This is discussed at greater length in "Contracts to Lease," sections 34:2, 34.3.
42. *In re* Circle K Corp., 190 B.R. 370 (1995, amended 1996); *In re* Gatlinburg Motel Enters., Ltd., 119 B.R. 955, 962–63 (Bankr. E.D. Tenn. 1990); Garland v. Fleischman, 831 P.2d 107 (Utah 1982) (and cases cited); 10 S. WILLISTON, CONTRACTS, § 27:12 (4th ed. 1999); 71 AM. JUR. 2D *Statute of Frauds* §§ 576, 578 (1974).
43. Irving Oil v. Me. Aviation, 704 A.2d 872 (Me. 1988) (in absence of written sublease, sublessee of ground lease was tenant at will, and when ground lease rights were sold to third party, sublessee became tenant at sufferance who could be evicted by new ground lessee).

The facts that fraud, undue influence, or lack of consideration are involved or that the assignee occupied a fiduciary relation to the assignee are immaterial.⁴⁴

§ 7:3 Restrictions on Tenant's Right to Assign, Sublet, and Mortgage

Tenant may not assign a lease after it has been terminated or after accrual of landlord's right to forfeit the lease.⁴⁵

If the lease is for a periodic term, for example, month-to-month, landlord has in effect a right to bar assignment or subletting by election to terminate the lease.⁴⁶

An express right of tenant to assign only if he performed all the terms of the lease was held enforceable when tenant failed to so comply.⁴⁷

§ 7:3.1 Statutory Restrictions

There are some statutory limitations on a tenant's right to transfer his interest.^{47.1} A Texas statute forbids a tenant to assign or sublet without the landlord's consent.⁴⁸ A few other statutes are to the same effect with respect to short-term leases. In these jurisdictions a reference to a lease to the tenant "and assigns" is deemed sufficient consent by the landlord.⁴⁹

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44. *In re Holden*, 271 N.Y. 212, 2 N.E.2d 631 (1936); *Randolph v. Koury Corp.*, 312 S.E.2d 759, 764 (W. Va. 1984) (collecting cases).
45. *Edith Inv. Co. v. Fair Drug, Inc.*, 617 S.W.2d 567 (Mo. Ct. App. 1981); 51 C.J.S. *Landlord and Tenant* § 31 (1968).
46. *Stewart v. Furton*, 774 F.2d 706 (6th Cir. 1985). *Cf.* chapter 18 at note 184.
47. *Markowitz v. Landau*, 171 A.D.2d 564, 567 N.Y.S.2d 268 (1st Dep't 1991) (lease required tenant to give rent security as condition of assigning). A similar matter may be involved in a tenant's right to a renewal. *See* chapter 14 at note 17 *et seq.*
- 47.1. *Little Mountain Estates Tenants Ass'n v. Little Mountain Estates MHC LLC*, 2008 WL 4194488 (Wash. Ct. App. July 21, 2008) (lease provision shortening the term upon assignment invalid under Washington's Manufactured/Mobile Home Landlord Tenant Act).
48. TEX. PROP. CODE § 91.005 (1984). Former TEX. REV. CIV. STAT. art. 5237 was repealed and reenacted as Acts 1983, ch. 576, § 6, *discussed in* *Lawther v. Super X Drugs of Tex., Inc.*, 671 S.W.2d 591 (Tex. Civ. App. 1984).
49. *See* *Sooner Pipe & Iron Co. v. Bartholomew*, 207 Okla. 191, 248 P.2d 225 (1952); cases *discussed in* *Annots.*, 23 A.L.R. 135, 140 (1923); 70 A.L.R. 486, 487 (1931); 51C C.J.S. *Landlord and Tenant* § 32 (1968); 49 AM. JUR. 2D *Landlord and Tenant* § 1089 (1995 rev.).

§ 7:3.2 Restrictions by Nature of Lease

[A] Tenancy at Will

A tenancy at will is an exception to the general rule that permits a tenant to assign, sublet, or mortgage. This relationship is deemed personal and terminable at the will of either party. It expires at the death of either, and neither may transfer his interest without the consent of the other.⁵⁰ Nevertheless, an assignment by a tenant at will is good as between assignor and assignee, though subject to the landlord's right of forfeiture.⁵¹ The same is true of a "statutory tenant," that is, a tenant who is given a right by statute to remain in possession after the expiration of his lease, by virtue of an emergency rent law. In this situation, the extraordinary protection given by statute, and without concurrence of the landlord, is deemed personal and not to be the subject of traffic.⁵² On the other hand, a month-to-month lease is assignable.⁵³

[B] Concessions

The general rule under the law of contracts that a contract involving some close relationship, skill, or trust is not assignable⁵⁴ is applied to some extent under leases.⁵⁵ It is applied to a department store concession, an arrangement under which a third party operates a department, though from outward appearances the operation may seem to be by the owner. Operation is under the name of the owner, through whom deliveries and charges are made and who has some control over the concessionaire's employees. Payment to the owner is based on the amount of sales by the concessionaire. The integrated activities of owner and concessionaire constitute a close relation of

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50. *Bellis v. Morgan Trucking, Inc.*, 375 F. Supp. 862 (D. Del. 1974) (not an asset subject to levy of execution by creditors of tenant); *Ferrigno v. O'Connell*, 315 Mass. 536, 53 N.E.2d 384 (1944); *Reckhow v. Schanck*, 43 N.Y. 448 (1871); Annot., 167 A.L.R. 1040 (1947); 49 AM. JUR. 2D *Landlord and Tenant* § 1085 (1995 rev.).
51. *Anderson v. Ries*, 222 Minn. 408, 24 N.W.2d 717, 167 A.L.R. 1033 (1946); 167 A.L.R. 1040, 1044 (1947). This is also applicable to an assignment in breach of an express restriction. See section 7:3.4[D].
52. *Emtico Assocs. v. Gabel*, 47 Misc. 2d 577, 262 N.Y.S.2d 885, *aff'd*, 25 A.D.2d 718, 269 N.Y.S.2d 675 (1st Dep't 1966); 52 C.J.S. *Landlord and Tenant* § 551.16 (1968).
53. *Dickens v. Hall*, 104 N.M. 173, 718 P.2d 683 (1986).
54. 4 A. CORBIN, CONTRACTS § 865 (1951).
55. See *Town of Hampton v. Hampton Beach Improvement Co.*, 107 N.H. 89, 94 *et seq.*, 218 A.2d 442, 447 (1966); *William Berland Realty Co. v. Hahne & Co.*, 26 N.J. Super. 477, 493, 98 A.2d 124, 132 (1953), *modified*, 29 N.J. Super. 316, 102 A.2d 686 (1954).

skill and trust. It may be concluded that a concession of this type may not be assigned without the consent of the owner.⁵⁶

[C] Hotels

The operation of a hotel under a percentage lease with its owner has some obvious resemblances to a department store concession in that a specialized experience and skill is necessary for operation. One case held such a lease personal to the tenant named and permitted cancellation because of assignment without the owner's consent.⁵⁷ Another case held the lease assignable, under the general rule that a tenant's right to assign is "incidental." There is little to distinguish these cases. In the latter, the court noted that tenant was a corporation and that nothing in the lease barred a transfer of its stock control and, further, that the lease required a substantial minimum rent that afforded protection to the landlord.⁵⁸

[D] Gallonage Leases

Cases involving gallonage leases are also split. These are leases of gasoline stations, with rent fixed at a cent or more per gallon sold. One case held that this feature did not bar assignment or subject a tenant's right to dispose of his business to a veto of his landlord.⁵⁹ Another held this did not forbid assignment to one not in the gasoline business, on the ground that the assignee might go into the gasoline business or might sell gasoline through others on the premises.⁶⁰ Another held the lease was non-assignable, on the ground that the landlord might not be as willing to rely on the honesty of a third party, in reporting sales as on the tenant named,⁶¹ a matter not considered in percentage leases.⁶²

56. Gerould Co. v. Arnold Constable & Co., 65 F.2d 444 (1st Cir. 1933), and *Marcelle, Inc. v. Sol & S. Marcus Co.*, 274 Mass. 469, 175 N.E. 83, 74 A.L.R. 1012 (1931), hold that concession agreements that omit mention of subletting may not be the subject of letting. In both cases the agreements forbade assignment, but the rule that a restriction against assignment does not preclude subletting (*see* section 7:3.3) was not applied. In *Gerould* the court deemed it immaterial whether the agreement constituted a lease or license.

57. *Nassau Hotel Co. v. Barnet & Barse Corp.*, 162 A.D. 381, 147 N.Y.S. 283, *aff'd*, 212 N.Y. 568, 106 N.E. 1036 (1914).

58. *McFadden-Deauville Hotel, Inc. v. Murrell*, 182 F.2d 537 (5th Cir. 1950).

59. *Cities Serv. Oil Co. v. Taylor*, 242 Ky. 157, 45 S.W.2d 1039, 79 A.L.R. 1374 (1932). The decision was also based on waiver by landlord's acceptance of rent for seven months after the assignment.

60. *Cummins v. Dixon*, 265 S.W.2d 386, 392, 47 A.L.R.2d 441 (Mo. 1954).

61. *Powerine Co. v. Russell's, Inc.*, 103 Utah 441, 135 P.2d 906 (1943).

62. *See* section 7:3.2[E].

[E] Percentage Leases

Percentage leases in general are assignable by tenants absent an express restriction.⁶³ The fact that assignment will deprive the landlord of percentage rent is not sufficient to take percentage leases out of the general rule under which a tenant may assign. Often overlooked by landlords and given little weight by courts is the fact that percentage payable by a high-volume tenant like a supermarket may be about 1% of gross sales, whereas the supermarket tenant may assign to a low-volume tenant who would ordinarily pay a percentage five or more times that of the supermarket.⁶⁴ Any reliable indication of

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63. Kroger Co. v. Bonny Corp., 134 Ga. App. 834, 836, 216 S.E.2d 341, 343 (1975); Crestwood Plaza, Inc. v. Kroger Co., 520 S.W.2d 93 (Mo. Ct. App. 1975) (subletting); Rowe v. Great Atl. & Pac. Tea Co., 46 N.Y.2d 62, 385 N.E.2d 566, 412 N.Y.S.2d 827 (1978); Brown v. Safeway Stores, Inc., 94 Wash. 2d 359, 617 P.2d 704 (1980) (same). See Tuttle v. W.T. Grant Co., 5 A.D.2d 370, 373, 171 N.Y.S.2d 954, 957 (4th Dep't), *aff'd*, 6 N.Y.2d 754, 159 N.E.2d 202 (1959); Landis, *Problems in Drafting of Percentage Leases*, 36 B.U. L. REV. 190, 214 *et seq.* (1956); 51C C.J.S. *Landlord and Tenant* § 31, at 74 (1968). *But see* William Berland Realty Co. v. Hahne & Co., 26 N.J. Super. 477, 493-94, 98 A.2d 124, 132-33 (1953), *modified*, 29 N.J. Super. 316, 102 A.2d 686 (1954). See also Rivera v. La Crosse, 490 F.2d 1380 (3d Cir. 1974), where a rent at the higher of \$100 a month or 6% of the average gross from the operation of a self-service laundry, and other factors, were deemed to indicate the premises would be used for no other purposes. Compare Branmar Theatre Co. v. Branmar, Inc., 264 A.2d 526 (Del. Ch. 1970).
64. Williams v. Safeway Stores, Inc., 198 Kan. 331, 424 P.2d 541 (1967), involved a lease to a supermarket at a small minimum rent, plus ¾% of gross sales above \$207,000 per annum. This produced \$52,000 in percentage rent over nineteen years. After the tenant assigned to a shoe merchant no percentage rent was earned. The lease entitled tenant to assign or sublet. Landlord's claim that there was an implied restriction to assign for a use that would yield a comparable rent was rejected by the court on the grounds that there could be nothing comparable to a tenant whose rent had fluctuated and that tenant's express rights precluded the implication of contradictory rights. See also Plaza Forty-Eight, Inc. v. Great Atl. & Pac. Tea Co., 817 F. Supp. 774 (E.D. Wis. 1993); Kroger Co. v. Chem. Sec. Co., 526 S.W.2d 468 (Tenn. 1975), discussed in chapter 6, note 242; Carter v. Safeway Stores, 154 Ariz. 546, 744 P.2d 458 (1987) (sublease). Compare chapter 6 at note 242 *et seq.* as well as note 252 in this chapter. "Under this provision the tenant could have subleased to any legitimate business which would have paid the fixed rental even though such subtenant's non-assignable prospects of exceeding the \$120,000 gross sales figure were not as good as or similar to defendant's." Tuttle v. W.T. Grant Co., 5 A.D.2d 370, 373, 171 N.Y.S.2d 954, 957 (4th Dep't), *rev'd*, 6 N.Y.2d 754, 159 N.E.2d 202, 186 N.Y.S.2d 655 (1959). The rule of these cases was held inapplicable, and the result *contra*, where landlord may reasonably forbid an assignment or sublease. Worcester-Tatnuck Square CVS, Inc. v. Kaplan, 33 Mass. App. 499, 601 N.E.2d 485 (1992). *But see* E. Fed. Corp. v. State Office Supply Co., 646 So. 2d 737 (Fla. Dist. Ct. App. 1994); chapter 6, note 154.

the intent of the parties will be followed.⁶⁵ References to “successors and assigns” are given little weight in this regard.⁶⁶ Many of these leases run to chain stores and similar groups and are on tenant forms that permit assignment and subletting without restriction. A landlord under a percentage lease cannot afford to leave the assignment and subletting clauses in this form.

It should be noted that restrictions on assignment and subletting are only part of the solution to protection of the landlord’s expectations in a commercial lease. Special care should be taken in the drafting of the use clause as well. “Continuous operation” in a percentage lease means little if the use can be altered. Further, since many leases impose standards of reasonableness on landlords in reviewing whether to approve a proposed lease or sublease, and a number of jurisdictions require reasonableness even where the lease is silent, the landlord will need lease language controlling use in order to support the argument that the proposed assignee’s or lessee’s activities are unacceptable.⁶⁷

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65. It was held inequitable to deny a landlord’s right to cancel based on a breach of a restriction against subletting. *Morrisville Shopping Ctr., Inc. v. Sun Ray Drug Co.*, 381 Pa. 576, 112 A.2d 183 (1955). In holding a gallonage lease non-assignable a court said it was trying to construe the intent of the parties. Its basis for this, in addition to construing against the tenant-drafter, was the deletion of printed clauses *prohibiting* subletting and assigning, as well as references to “executors, administrators and assigns.” It concluded the parties sought to avoid all references to assignment. *Powerine Co. v. Russell’s, Inc.*, 103 Utah 441, 135 P.2d 906 (1943). Landlord’s construction for tenant of tenant’s typical storefront was deemed immaterial. *Crestwood Plaza, Inc. v. Kroger Co.*, 520 S.W.2d 93 (Mo. Ct. App. 1975).
66. This phrase was cited in favor of assignability in *Cummins v. Dixon*, 265 S.W.2d 386, 47 A.L.R.2d 441 (Mo. 1954). *Accord*, as to subletting, *Crestwood Plaza*, 520 S.W.2d 93 (Mo. Ct. App. 1975), and as immaterial in *Nassau Hotel Co. v. Barnet & Barse Corp.*, 162 A.D. 381, 147 N.Y.S. 283, *aff’d*, 212 N.Y. 568, 106 N.E. 1036 (1914). Reference to gross income of the tenant and its concessionaires and subtenants, if any, was held not to override an express provision against subletting. *Morrisville Shopping Ctr.*, 381 Pa. 576. *See also Powerine*, 103 Utah 441.
67. In one case, a Utah court, in a questionable extension of the concept of good faith and fair dealing, found that where a percentage lease tenant had the right to use the premises for “any other lawful retail selling business not directly in conflict or competition with another major tenant in the shopping center,” the court still found an implied duty on the part of the tenant to use the premises for a high gross operation. This ruling would appear to limit as well the power of the tenant to lease to low-gross operation. At least one would assume that, under the authority of this case, a Utah landlord would be “reasonable” in resisting such an assignment of a percentage lease. *Olympus Hills Shopping Ctr. v. Smith’s Food & Drug Ctrs.*, 889 P.2d 445 (Utah Ct. App. 1994). *Compare* *Walton v.*

[F] Lease of Agricultural Land on Sharecropping Basis^{67.1}

A “lease of land upon shares, including the use of buildings, farm implements, stock, and other personal property, is regarded as a personal contract, and not assignable without the consent of the lessor, because the amount to be received by the lessor, and the care of the property depend upon the character, industry, and skill of the lessee. . . .”⁶⁸ But there is authority that when parties to a sharecrop farm lease agree that the terms of the contract shall apply to and be binding upon the heirs, successors, executors, and administrators of the parties, they express an intent that the contract is not a personal services contract.^{68.1}

[G] Rent-Controlled Property

In rent-controlled or rent-stabilized housing,^{68.2} subletting may not be permitted.⁶⁹ This may be true even where parties attempt to

Wal-Mart Stores, 1997 U.S. App. LEXIS 5032 (4th Cir. Mar. 18, 1997) (unreported opinion), where the court found that there had been no assignment, since the tenant had merely shifted from one corporate division to another, but clearly would have found no breach of the anti-assignment clause when the use clause required, at best, the operation of a “discount department store,” and the new operator also operated a discount department store, albeit one designed to generate a far lower gross rental than the prior occupant.

- 67.1. For a discussion of agricultural sharecrop agreements, see *supra* section 2:7[A].
68. Meyer v. Livesley, 45 Or. 487, 488–89, 78 P. 670, 671 (1894). *Accord* Lewis v. Sheldon, 103 Mich. 102, 61 N.W. 269 (1904); Randall v. Chubb, 46 Mich. 311, 9 N.W. 429 (1881).
- 68.1. Estate of David E. Sauder, 156 P.3d 1204 (Kan. 2007).
- 68.2. Counsel must wade through voluminous history and complex regulations to deal with rights of assignees in this area. *See, e.g.*, Bennett v. Hawthorne Village, LLC, 56 A.D.3d 706 (N.Y. App. Div. 2008), where relatively complex litigation ended when the parties discovered that the landlord had not consented to a tenant converting the loft space to residential use (three tenants earlier), even though that tenant had assigned the lease and sold the fixtures to the current tenant’s predecessor.
69. Manocherian v. Lenox Hill Hosp., 654 N.Y.S.2d 339 (App. Div. 1997), *aff’d*, 643 N.E.2d 479 (N.Y. 1994), is an analysis of a New York rent stabilization ordinance that in general prohibits subletting. The idea of the ordinance was that certain identified tenants—those with longer than two years’ tenure at the time of the ordinance—were protected as residents of their units but could not profit by subletting their rent-stabilized units to others. This is not an uncommon feature in rent-controlled and rent-stabilized areas. An interesting twist in this case was that the ordinance exempted certain described types of tenants, which in legalese meant Lenox Hill Hospital, which rented numerous housing units, which it then sublet to nurses. The ordinance permitted subletting in the *Lenox Hill Hospital* case, which in effect gave the hospital a permanent rent-stabilized lease. The New York court concluded that such an imposition on the landlords amounted to a taking. *Compare* In the Matter of 20 W. 76th

deregulate the apartment by contract so that tenant can profit on sublease of the apartment.⁷⁰

§ 7:3.3 **Express Restrictions—Construction of Express Restrictions—General**

Restrictions against assignment, subletting, and mortgaging are restraints on alienation and for this reason are construed against the restriction.⁷¹ A covenant against one form of alienation does not preclude another form. A covenant against assignment does not prevent subletting.⁷² Nor does it prevent pledging or mortgaging the lease, though the enforcement of the pledge or mortgage may vest title to the lease in a third person with the same effect as if it had been assigned.⁷³ It does not bar tenant's

St., LLC v. Div. of Hous. & Cmty. Renewal, 306 A.2d 6, 760 N.Y.S.2d 474 (App. Div. 1st Dep't 2003) (New York landlord may not avoid rent control laws by requiring tenant to execute lease in corporate capacity when lease is essentially for tenant's individual residential purposes).

70. 390 W. End Assocs. v. Baron, 711 N.Y.S.2d 176 (App. Div. 1st Dep't 2000).
71. "Such covenants are restraints which the courts do not favor. They are construed with the utmost jealousy, and very easy modes have been countenanced for defeating them." *Riggs v. Pursell*, 66 N.Y. 193, 201 (1878); *see also* 51C C.J.S. *Landlord and Tenant* § 33b (1968) (collecting authorities); 49 AM. JUR. 2D *Landlord and Tenant* § 1090 (1995 rev.); *see generally* Note, *Effect of Leasehold Provisions Requiring the Lessor's Consent to Assignment*, 21 HASTINGS L.J. 516 (1970). The New Jersey cases are cited in *Town of Kearny v. Mun. Sanitary Landfill Auth.*, 143 N.J. Super. 449, 453–54, 363 A.2d 390, 393 (1975), the Tennessee cases in *Kroger Co. v. Chem. Sec. Co.*, 526 S.W.2d 468 (Tenn. 1975). *See generally* *Kendall v. Ernest Pestana, Inc.*, 709 P.2d 837, 840–41, 220 Cal. Rptr. 818, 821–22 (1985); *In re Fashion World, Inc.*, 44 B.R. 754 (Bankr. D. Mass. 1984), text *infra* at note 222. Compare the effect of non-assignment clauses on tenants' purchase options. Section 15:3, particularly at note 96.
72. *Bd. of Comm'rs v. Lions Del. Cnty. Fair, Inc.*, 580 N.E.2d 280 (Ind. Ct. App. 1991); *Cities Serv. Oil Co. v. Taylor*, 242 Ky. 157, 45 S.W.2d 1039, 79 A.L.R. 1374 (1932); *Stark v. Nat'l Research & Design Corp.*, 33 N.J. Super. 315, 110 A.2d 143 (1954); *DeBaca v. Fidel*, 61 N.M. 181, 297 P.2d 322 (1956); *Smith v. Hegg*, 88 S.D. 29, 214 N.W.2d 789 (1974); *Burleson v. Blankenship*, 193 Wash. 547, 76 P.2d 614 (1938); 51C C.J.S. *Landlord and Tenant* § 33d(2) (1968); *see also* authorities *supra* in note 36.
73. *Chapman v. Great W. Gypsum Co.*, 216 Cal. 420, 14 P.2d 758, 85 A.L.R. 917 (1932); *Gould, Inc. v. Hydro-Ski Int'l Corp.*, 287 So. 2d 115 (Fla. Dist. Ct. App. 1973); *Great S. Aircraft Corp. v. Kraus*, 132 P.2d 608 (Haw. 1961); *Crouse v. Michel*, 130 Mich. 347, 90 N.W. 32 (1902); *Riggs v. Pursell*, 66 N.Y. 193 (1876); 49 AM. JUR. 2D *Landlord and Tenant* § 1095 (1995 rev.). *Chapman* was distinguished, and a leasehold mortgage forbidden where the lease forbade assignment by tenant "of any interest." *Airport Plaza, Inc. v. Blanchard*, 188 Cal. App. 3d 1594, 234 Cal. Rptr. 198 (1987). *City of Gainesville v. Charter Leasing Corp.*, 483 So. 2d 465, 467 (Fla. Dist. Ct. App. 1986), has another explanation: Florida being a lien state, a leasehold

assignment of a claim against the landlord.⁷⁴ A covenant against subletting does not bar assignment⁷⁵ and, under the majority rule, does not preclude subletting part of the premises.⁷⁶ Nor does it bar letting a furnished room⁷⁷ or giving a license,⁷⁸ easement,⁷⁹ grazing

mortgagee acquires no interest in the mortgaged land or lease. Therefore the leasehold mortgage is no breach of a non-assignment clause in a lease. *Becker v. Werner*, 98 Pa. St. 555 (1881), is *contra*, but it is not clear if the creation of the mortgage or its foreclosure constituted the breach of the non-assignment clause. *W. Shore R.R. Co. v. Wenner*, 70 N.J.L. 233, 57 A. 408 (1903), indicates that the enforcement, but not the creation of the mortgage, constituted a breach. A tenant's covenant not to assign was held not broken when the assignment was to a bank as security and the bank released the assignment after landlord claimed the assignment was a default under the lease. *Hasty, Inc. v. Inwood Buckhorn Joint Venture*, 908 S.W.2d 494 (Tex. Civ. App. 1995). *Cf. generally* section 7:8.2.

74. *Aldana v. Colonial Palms Plaza, Ltd.*, 591 So. 2d 953 (Fla. Dist. Ct. App. 1991) [assignment of construction allowance].
75. *Gagne v. Hartmeier*, 611 S.W.2d 194 (Ark. Ct. App. 1981); *Field v. Mills*, 33 N.J.L. 254 (1869); *Krasner v. Transcon. Equities, Inc.*, 70 A.D.2d 312, 420 N.Y.S.2d 872 (1st Dep't 1979); *Rogers v. Hall*, 227 N.C. 367, 42 S.E.2d 347 (1947); *Burleson v. Blankenship*, 193 Wash. 547, 76 P.2d 614 (1938). *See cases in Annot.*, 7 A.L.R. 249 (1920); 79 A.L.R. 1379 (1932); 51C C.J.S. *Landlord and Tenant* § 33d(2) (1968). *Contra* *Serio v. Stewart Invs., Inc.*, 427 So. 2d 692 (La. Ct. App. 1983). A printed portion of a lease forbade both assignment and subletting. A typewritten addition expressly permitted assignment. Tenant's subletting was held a breach that permitted landlord to terminate the lease. *Gordon Inv. Co. v. Jones*, 123 Colo. 253, 227 P.2d 336 (1951). A prohibition of subletting was held to bar assignment where the language of the clause indicated assignment was in mind. *First Am. Nat'l Bank v. Chicken Sys.*, 510 S.W.2d 906 (Tenn. 1974).
76. *See Drake v. Eggleston*, 123 Ind. App. 306, 108 N.E.2d 67 (1952); *Annot.*, 56 A.L.R.2d 1002 (1957); 51C C.J.S. *Landlord and Tenant* § 33b, nn.40.5, 69, 70 (1968). *Contra* *Minneapolis, St. Paul & Sault St. Marie R.R. v. Duvall*, 67 N.W.2d 593 (N.D. 1954).
77. *Simmons v. Weinsoff*, 58 A.2d 497 (D.C. Mun. Ct. App. 1948); *Bierman v. Katz*, 274 A.D. 1003, 84 N.Y.S.2d 355 (2d Dep't 1948) (collecting cases); *Farose Realty Corp. v. Shaff*, 117 N.Y.S.2d 375 (N.Y. Mun. Ct. 1952); *Note*, 64 YALE L.J. 391, 403 (1955); *Annot.*, 56 A.L.R.2d 1002 (1957); 51C C.J.S. *Landlord and Tenant* § 33b, nn.40.5, 69, 70.
78. *Lowell v. Strahan*, 145 Mass. 1, 12 N.E. 401, 1 Am. St. Rep. 422 (1887); *Annot.*, 56 A.L.R.2d 1002, 1009 (1957); 51C C.J.S. *Landlord and Tenant* § 33d(2) (1968). In a case denying a landlord under a percentage lease of a cafe the gross receipts of cigarette vending machines and juke boxes, and limiting landlord to a percentage of tenant's income from the owners of these machines, the court stated, *obiter*, that an inhibition of subletting was not designed to forestall the installation of these machines. *Herbert's Laurel-Ventura, Inc. v. Laurel Ventura Holding Corp.*, 58 Cal. App. 2d 684, 138 P.2d 43 (1943). A covenant against subletting may not be circumvented by denominating a situation a license. *Morrisville Shopping Ctr., Inc. v. Sun Ray Drug Co.*, 381 Pa. 576, 112 A.2d 183 (1955).
79. *Town of Kearny v. Mun. Sanitary Landfill Auth.*, 143 N.J. Super. 449, 363 A.2d 390 (1975).

rights,⁸⁰ or contract for maintenance of vending machines in tenant's premises.⁸¹ The corporate tenant may also, in most circumstances, transfer all its stock into another entity. This does not constitute a breach of non-assignment clause of the lease.⁸² A restriction against assignment, included in a prime lease, does not bar assignment by a subtenant.⁸³ The cases conflict on whether a covenant against assignment permits assignment by one cotenant to another.⁸⁴ The

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80. Hutton v. Janz, 387 N.W.2d 494 (N.D. 1986) (collecting cases); Frazier v. Kern, 18 Wash. App. 93, 566 P.2d 956 (1977); 71 A.L.R.3d 780 (1976). Grazing rights are also called agistments. But a transfer of rights to an entire pasture ranch for three years was held otherwise. Enders v. Wesley W. Hubbard & Sons, Inc., 95 Idaho 590, 513 P.2d 992, 71 A.L.R.3d 767 (1973).
81. Armendariz v. Mora, 553 S.W.2d 400 (Tex. Civ. App. 1977).
82. Dennis' Natural Mini-Meals, Inc. v. 91 Fifth Ave. Corp., 568 N.Y.S.2d 740 (App. Div. 1991). The court held that a landlord that enters a lease with a corporate tenant should be presumed to know that the stock of the tenant might one day be transferred, and that if the landlord wanted to prevent such a transfer it would have written such a prohibition into the lease, but such a prohibition will not be implied. *But see* Cellular Tel. Co. v. 210 E. 86th St. Corp., 2007 N.Y. Slip Op. 05662 (June 28, 2007). The lease provided that sale of more than 25% of the tenant's stock or interest in the case of a partnership would constitute a transfer requiring consent of the landlord. But this provision was subject to an exception that there was no need for landlord's consent to an assignment of the lease to an "affiliate, parent or successor of the Tenant." Another provision, however, stated that in the event of an assignment of the lease, the landlord had the right to recapture. Tenant at the time of signing the lease was a general partnership consisting of two corporate partners. Thereafter a parent company acquired ownership of all the stock of one of the corporate partners. The court held that this was not a transfer of the tenant's interest. But then that corporate partner acquired the other partner, thus terminating the existence of the partnership, and an entity resulting from various subsequent mergers under the control of the acquiring corporation became the tenant. Reversing the trial court, the appeals court ruled that this was a transfer of an interest in the tenant and justified the landlord's recapture of the premises under the lease. Effectively, the lease had been assigned to the new entity. Although no prior consent was required, since this was an assignment to an "affiliate," it was nevertheless an assignment. *See generally* section 7.3.3[C][1], *infra*.
83. Krasner v. Transcon. Equities, Inc., 70 A.D.2d 312, 420 N.Y.S.2d 872 (1st Dep't 1979). *Contra* Boston Props. v. Pirelli Tire Corp., 134 Cal. App. 3d 985, 185 Cal. Rptr. 56 (1982). *See also infra* notes 517–18 and connecting text.
84. Hoops v. Tate, 104 Cal. App. 2d 486, 231 P.2d 560 (1951) (collecting California cases) (assignment permitted); Nouri v. Wester & Co., 833 P.2d 848 (Colo. Ct. App. 1992) (assignment not permitted); Tober v. Collins, 130 Ill. App. 333 (1906); Borgen v. Wiglesworth, 190 Kan. 367, 375 P.2d 601 (1962) (upholding sale by one cotenant to another and formation of partner by latter); Heflin v. Stiles, 663 S.W.2d 131 (Tex. Civ. App. 1983) (forbids assignment from one partner to another); Coulos v. Desimone, 34 Wash. 2d 87, 208 P.2d 105 (1949); Annot., 17 A.L.R. 183, 185 (1922). 49

little relevant authority leaves somewhat uncertain whether a non-assignment clause bars reassignment to the original tenant.⁸⁵ One case permits reassignment on the ground that the landlord had agreed to accept the original tenant for the entire term.⁸⁶ But a landlord whose lease forbade “unreasonable and capricious” withholding of consent succeeded in enjoining reassignment to the original tenant who had admitted in writing his inability to pay the rent.⁸⁷ A non-assignment clause forbids a fiduciary tenant to assign to himself individually.⁸⁸ Tenant’s change of name is no breach of covenant against assignment.⁸⁹

A landlord’s right to cancel if the tenant’s interest should vest in a third person has been held not to permit cancellation after taking by eminent domain of a leasehold interest shorter than the tenant’s

AM. JUR. 2D *Landlord and Tenant* § 1093 (1995 rev.); 51C C.J.S. *Landlord and Tenant* § 33b (1968). Cf. section 7:3.3[B]. *Contra* Barnett v. Buchan Baking Co., 45 Wash. App. 152, 724 P.2d 1077 (1986) (under strict construction, forbidding partnership no bar to assignment by one partner). A right of one cotenant to assign to another, or any possible right of a tenant to assign a partial interest in a lease, may be barred by making a non-assignment clause apply to an assignment not only of the lease but of any interest therein. See section 7:3.3[E][1].

85. Restriction against assignment bars reassignment to original tenant. *Italian Fisherman v. Middlemas*, 313 Md. 156, 545 A.2d 211 (Md. Ct. Spec. App. 1988). *Italian Fisherman* was a typical transaction: tenant sold his business and lease to assignee, taking back security for payment. The security included a conditional reassignment of the lease, which permitted the original tenant to resume possession and operation of the business in case of the assignee’s default. Barring the reassignment makes this transaction unworkable. For a clause covering this, see text after *supra* note 147.
86. *McCormick v. Stowell*, 138 Mass. 431 (1885); 49 AM. JUR. 2D *Landlord and Tenant* § 412 (1970). Although not mentioned in the opinion, the case could have been decided on the ground that the reassignment was a transfer of a half-interest to a cotenant. *Fashions Four Corp. v. Fashion Places Assocs.*, 681 P.2d 830 (Utah 1984), which reaches the same result, is based on the ground of (1) a clause that forbade assignment and provided that an attempted assignment would confer no rights on a *third* person, and (2) the continued liability of the original tenant should be balanced by this benefit, a reason that is rejected in case of a tenant’s death. *Accord* Coulos v. Desimone, 34 Wash. 2d 87, 208 P.2d 105 (1944); chapter 16 at note 108. *Contra Italian Fisherman*, 313 Md. 156. Any right to assign to a prior tenant may be expressly barred by a non-assignment clause. See section 7:3.3[E][1].
87. *McEacharn v. Colton*, 1902 A.C. 104, 2 B.R.C. 798.
88. *Joint Prop. Owners, Inc. v. Deri*, 113 A.D.2d 691, 497 N.Y.S.2d 658 (1st Dep’t 1986).
89. *Dennis’ Natural Mini-Meals, Inc. v. 91 Fifth Ave. Corp.*, 172 A.D.2d 331, 568 N.Y.S.2d 740 (1st Dep’t 1991).

unexpired term.⁹⁰ A provision permitting the tenant to assign to a subsidiary and be released from liability was held no prohibition of a right to assign generally without being released.⁹¹

[A] Agents, Servants in Possession

Despite a restriction against transfer the tenant may have a servant live in the premises,⁹² and the tenant may give a third party managerial powers over his business,⁹³ as by an arrangement under which the third party conducts the tenant's business for a share of the profits and losses.⁹⁴ Similarly, a farm tenant may contract to pay a third party a part of the crops for working the farm.⁹⁵ In all these permitted activities the relation of the third party to the tenant was that of employee, agent, or manager, or substantially such, and the tenant's retained interest was substantial. But if the retained right is little more than a contractual right to receive periodic payments of specific sums, the interest transferred is sufficient to constitute a prohibited assignment or subletting. It was so held in the case of a restaurant tenant under whose agreement with a third party the latter bought the food, hired the employees, paid the bills, and operated the business as his own, with no obligation except to pay the tenant \$150 a month and half the returns from the slot machines. The arrangement was deemed a prohibited assignment.⁹⁶ The same was held with respect to an operating agreement, a somewhat similar arrangement, under which a leased theatre was operated by a third party in conjunction with the

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90. Carlstrom v. Lyon Van & Storage Co., 152 Cal. App. 2d 625, 313 P.2d 645 (1957).
91. Lawrence v. Cooper Indep. Theatres, 177 Kan. 125, 276 P.2d 350 (1954).
92. Vincent v. Crane, 134 Mich. 700, 97 N.W. 34 (1903); Presby v. Benjamin, 169 N.Y. 377, 62 N.E. 430 (1902).
93. Note, *Amalgamation Transactions of Corporate Lessees as Breaches of Nonassignment Covenants: Another Plea for Substance Over Form*, 69 YALE L.J. 1292, 1293-94 (1960).
94. Whitmeyer v. Poche, 49 So. 2d 69 (La. Ct. App. 1950); City of Waterville v. Kelleher, 127 Me. 32, 141 A. 70 (1928); Snow v. Winn, 607 P.2d 678 (Okla. 1980) (also discussed *infra* note 96); Markowitz v. Greenwall Theatrical Circuit Co., 75 S.W. 74, 76, *rev'd on other grounds*, 97 Tex. 479, 79 S.W. 1069 (1904).
95. Stoner v. Markey, 63 Ohio App. 459, 27 N.E.2d 176 (1940). *Cf.* Vincent v. Crane, 134 Mich. 700, 97 N.W. 34 (1903). *But see* Sherwin v. Bogosian, 112 Cal. App. 359, 296 P. 641 (1931).
96. Lemons v. Knox, 72 Ariz. 177, 232 P.2d 383 (1951). *Accord* Major v. Hall, 251 So. 2d 444 (La. 1971); Duffy v. Clark Oil & Ref. Corp., 575 S.W.2d 888 (Mo. Ct. App. 1978); Rubico v. Fleetwood Baking Co., 279 A.D. 1026, 112 N.Y.S.2d 5 (2d Dep't 1952); Bedgisoff v. Morgan, 23 Wash. 2d 737, 745, 162 P.2d 238, 242 (1945) (and cases cited). *Snow*, 607 P.2d 678, *supra* note 94, is comparable in its facts to *Lemons*, and is distinguishable apparently only because of the tenant's reserved right to hire and fire the employees.

only other theatre in town.⁹⁷ An arrangement by which tenant made itself a naked trustee, the effect of which was to vest in a third party the beneficial interest in the lease, was held a prohibited assignment.⁹⁸

[B] Partnership Tenants

A change in the membership of a partnership may not be a violation of a non-assignment clause that is not expressly worded to control such changes.⁹⁹ Such situations involve the addition of a new partner

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97. *Cranston v. Bluhm*, 33 Wis. 2d 192, 147 N.W.2d 337 (1967). *Accord* *Mann Theatres v. Mid-Island Shopping Plaza*, 94 A.D.2d 466, 464 N.Y.S.2d 793 (2d Dep't 1983). *Contra* *Campanella Corp. v. Lyndon Realty Trust*, 611 F. Supp. 864 (D. Mass. 1985). *Mann Theatres* was distinguished in *In re Babylon Ltd. P'ship*, 76 B.R. 270 (Bankr. S.D.N.Y. 1987).
98. *Weintraub v. Weingart*, 98 Cal. App. 690, 277 P. 752 (1929).
99. *Borgen v. Wiglesworth*, 190 Kan. 367, 375 P.2d 601 (1962); *Miller v. Pond*, 214 Mich. 186, 183 N.W. 24; Annot., 17 A.L.R. 179 (1921); *Roosevelt v. Hopkins*, 33 N.Y. 81 (1865); *Madison 52nd Corp. v. Luxenberg*, 8 N.Y.2d 955, 168 N.E.2d 851, 204 N.Y.S.2d 185 (1960), *noted in* 7 N.Y.L.F. 118 (1961); *Glick v. Grubman*, 56 N.Y.S.2d 324 (Sup. Ct. 1945); 51C C.J.S. *Landlord and Tenant* § 33(6) (1968).

It is established . . . that a covenant against assignment in a lease is not broken by changes in the firm of the lessee incident to the admission of a new partner or by the withdrawal of an old partner or by the dissolution of a partnership and transfer of the rights under the lease with all the other assets of the partnership to one of the partners.

Trubowitch v. Riverbank Canning Co., 30 Cal. 2d 335, 344, 182 P.2d 182, 188 (1947). *Accord* *Fid. Trust Co. v. BVD Assocs.*, 196 Conn. 270, 492 A.2d 180 (1985) (limited partnership; under statute). The cases listed above are somewhat surprising in view of the common-law rule, changed to some extent, that:

Any change in the personnel of the partnership, whether by the death, admission or withdrawal of a partner, would dissolve the partnership by operation of law.

Fid. Trust Co., 196 Conn. 270 at 273, 492 A.2d at 183 (citing cases, brief history of partnership law). *See also* *Fairway Dev. Co. v. Title Ins. Co.*, 621 F. Supp. 130 (N.D. Ohio 1985) (title insurance policy insuring partnership unenforceable after change in partnership members). *See also* *Bonde v. Weber*, 6 Ill. 2d 365, 377-78, 128 N.E.2d 883, 890 (1955); *Tober v. Collins*, 130 Ill. App. 333 (1906); *Saxeney v. Panis*, 239 Mass. 207, 131 N.E. 331 (1921). In a comparable situation, withdrawal of some partners of a partnership mortgagor has been held no transfer of an interest so as to activate a due-on-sale clause in a deed of trust (mortgage). *Hodge v. DMNS Co.*, 652 S.W.2d 762 (Tenn. Ct. App. 1983). Assignment by one to his sole partner, in dissolution, was held a breach, in view of an anti-assignment clause and the statute mentioned *supra* in note 48. *Heflin v. Stiles*, 663 S.W.2d 131 (Tex. Civ. App. 1983). *Compare* *Cellular Tel. Co. v. 210 E. 86th St. Corp.*, discussed in note 82, *supra*. Although change in corporate ownership of one of two partners in tenant was not a sale of 25% of an interest in the tenant itself, triggering a requirement for landlord consent

or the withdrawal of one who was a partner at the time of the execution of the lease. Nevertheless, a lease to a partnership-tenant, or a lease that could conceivably be assigned to a partnership, ought to include express provision to this effect. Furthermore, it would be comforting to partners who contemplate withdrawal or retirement if the lease also included an express release of retiring partners from all liability under the lease accruing after the time of the withdrawal. A landlord may insist on limiting the number of parties to be released. Landlord may also want to limit the number of partners withdrawing without deeming this a forbidden assignment of the lease. Addition of a new partner, promptly followed by a withdrawal of the original partners, was held in a non-lease case as a transfer of partnership assets.¹⁰⁰

[C] Corporate Tenants¹⁰¹

[C][1] Change in Stock Control

The ordinary restriction against tenant transfer is aimed at transfers of the leasehold interest. It does not bar transfer of stock control of a corporate tenant. Thus, the ordinary non-assignment clause, no matter how well drawn otherwise, may be circumvented in the case of a corporate tenant by a change in stock control.¹⁰² Some leases plug

under the lease, subsequent acquisition of one partner by the other, and merger of resulting entity into other entities controlled by parent, was an "assignment" of the lease, triggering landlord's recapture right. *Cf.* text *supra* at notes 84–87.

100. *Dodek v. CF 16 Corp.*, 537 A.2d 1086, 1089, 1099 (D.C. 1988).

101. For the effect of non-assignment clauses on corporate mergers, see section 7:3.3[E][2].

102. *In re Ames Dep't Stores, Inc.*, 127 B.R. 744, 748–49 (Bankr. S.D.N.Y. 1991) (citing many Illinois and other cases; citing text); *Ala. Vermiculite Corp. v. Patterson*, 124 F. Supp. 441, 445 (D.S.C. 1954) (collecting cases); *Richardson v. La Rancherita La Jolla, Inc.*, 98 Cal. App. 3d 73, 159 Cal. Rptr. 285 (4th Dist. 1979); *Ser-Bye Corp. v. C.P.&G. Mkts.*, 78 Cal. App. 2d 915, 179 P.2d 342 (1947); *Branmar Theatre Co. v. Branmar, Inc.*, 264 A.2d 526 (Del. Ch. 1970) (collecting cases); *Posner v. Air Brakes & Equip. Corp.*, 2 N.J. Super. 187, 62 A.2d 711 (1948); *Brentsun Realty Corp. v. D'Urso Supermarkets, Inc.*, 182 A.D.2d 604, 582 N.Y.S.2d 216 (2d Dep't 1992) (merger of subordinate corporation into parent); *Burrows Motor Co. v. Davis*, 76 A.2d 163 (Mun. App. D.C. 1950); *Rubinstein Bros. v. Ole of 34th St., Inc.*, 421 N.Y.S.2d 534 (Civ. Ct. 1979); 69 YALE L.J. 1292, 1293, n.5 (1960); 12 A.L.R.2D 179, 181 (1950). In *Rubinstein*, an argument that the result would exalt form over substance evoked the judicial response: "[F]orm is what a corporate entity is all about, and Tenant has simply reaped the benefit of good lawyering." See also 29 W. 25th St. Parking Corp. v. Penn Post Parking, Inc., 105 A.D.2d 610, 481 N.Y.S.2d 346 (1st Dep't 1984). A similar question comes up in connection with tenants' right of refusal, chapter 15 at note 298 *et seq.*

the loophole by making a transfer of stock control the equivalent of a forbidden assignment of the lease. A clause to this effect has been enforced.¹⁰³ However, like other restraints on alienation this provision is construed strictly against the restriction.¹⁰⁴ A clause applicable literally to a stock transfer may not bar the creation of enough new stock, and its issuance to a third party, to change stock control with the same effect as if there had been a transfer of the original stock. For this reason, a landlord is better served by a clause for this purpose reading:

An assignment, forbidden within the meaning of this Article, shall be deemed to include one or more sales or transfers, by operation of law or otherwise, or creation of new stock, by which an aggregate of more than 50% of Tenant's stock shall be vested in a party or parties who are nonstockholders as of the date hereof. This paragraph shall not apply if Tenant's stock is listed on a recognized security exchange. For the purpose of this paragraph, stock ownership shall be determined in accordance with the principles set forth in Section 544 of the Internal Revenue Code of 1954 as the same existed on August 16, 1954.¹⁰⁵

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103. Associated Cotton Shops, Inc. v. Evergreen Park Shopping Plaza, 27 Ill. App. 2d 467, 170 N.E.2d 35 (1960). The clause read:

If Tenant is a corporation and if at any time during the term of this lease, any part or all of the corporate shares shall be transferred by sale, assignment, bequest inheritance, operation of law or other disposition so as to result in a change in the present control of said corporation by the person or persons now owning a majority of said corporate shares; Landlord may terminate this lease and the demised term at any time after such change of control by giving Tenant sixty days' prior written notice of such termination.

Compare the comment in the text on the shortcomings of this clause. Sade Shoe Co. v. Oschin & Snyder, 162 Cal. App. 3d 1174, 209 Cal. Rptr. 124 (1984), leaves open as a pleading matter whether landlord must show justification for refusing consent to a stock transfer.

104. In Lipsker v. Billings Boot Shop, 129 Mont. 420, 427-28, 288 P.2d 660, 664 (1955), the lease made a sale by the present stockholders of 50% or more of the stock a breach. Landlord had consented to one transfer but claimed a forfeiture after a second. Defendant prevailed on the ground of the specific wording of the lease and, also, the rule that a landlord's consent to assign, once given, discharges the covenant as to subsequent transfers unless the covenant is expressly made binding on subsequent assigns. As to the latter, see section 7:3.6. Landlord's rights were waived by collecting rent for several years after the stock transfer. Quinn v. Cardinal Foods, Inc., 20 Ohio App. 3d 194, 485 N.E.2d 741 (1984).
105. A stricter clause and one that many tenants would find objectionable makes a forbidden assignment consist of:

any issuance or transfer of stock in the Tenant, if the Tenant is a corporation (unless such issuance is to an existing holder of such

This type of restriction on tenant-transfer should be limited to corporations with limited assets or a small number of shareholders. If the stock is listed on an established exchange, or if it is unlisted but widely held, it is not feasible to bar its sale. Furthermore, if the corporation has substantial assets, one lease is probably a small part of these assets, and a controlling interest in its stock is not apt to be sold for the mere purpose of transferring the lease. This type of restriction should be limited to a corporation with a few stockholders, and has been made inapplicable to a corporate tenant where fifteen or more stockholders have owned 40% or more of its stock when the lease was executed. A corporate tenant may seek another exception to this restriction, that is, when a stock transfer is part of a transfer of the corporate business. There would then be excluded from this restriction a stock transfer if all the corporate stock were accompanied by a simultaneous transfer to the same party of all or a specified percentage of the corporate assets.

Notwithstanding the existence of many stockholders, a non-assignment clause may be circumvented in two steps if the clause permits assignment to an affiliate corporation.¹⁰⁶ In this situation the assignment is made to a wholly owned corporation with a few stockholders. This is followed by a transfer of the shares of the affiliate.

[C][2] Dissolution of Corporate Tenant

Dissolution of a corporate tenant does not terminate the lease.¹⁰⁷ Its effect is to vest the lease and other assets of the corporation in the

stock and in the same proportion as such holder previously owned in the corporation), or of any interest in the Tenant if the Tenant is a partnership or joint venture, whether by sale, exchange, merger, consolidation, or otherwise.

106. See, e.g., the form in section 7:3.3[E][3]. A change from the operation by one corporate division to another does not invoke the anti-assignment clause, even if the nature of the business conducted is thereby altered. *Walton v. Wal-Mart Stores*, 1997 U.S. App. LEXIS 5032 (4th Cir. Mar. 18, 1997) (unreported opinion), but a transfer to a corporate subsidiary by a parent has been held to be within the intentment of the clause and to require landlord's consent. *Reston Recreation Ctr. Assocs. v. Reston Prop. Investors Ltd. P'ship*, 238 Va. 419, 384 S.E.2d 607, 610 (1989).

107. *Shakey's, Inc. v. Caple*, 855 F. Supp. 1035, 1041 (E.D. Ark. 1994) (unless the leased premises are abandoned); *Kelly v. Alstores Realty Corp.*, 130 N.J. 313, 613 A.2d 1163 (1992) (collecting cases); *Perry v. Shaw*, 152 Fla. 765, 13 So. 2d 811, 147 A.L.R. 352 (1943); *Town of Hampton v. Hampton Beach Improvement Co.*, 107 N.H. 89, 218 A.2d 442 (1966) (and authorities collected); *Haddad v. Francis*, 40 Conn. Super. 567, 573, 537 A.2d 174, 177 (1986), *aff'd*, 13 Conn. App. 324, 536 A.2d 597 (1988); *People v. Nat'l Trust Co.*, 82 N.Y. 283 (1880); *Chiles v. Robertson*, 94 Or. App. 604, 635, 767 P.2d 903, 921 (1989) (citing text); *Nardis Sportswear v.*

stockholders.¹⁰⁸ The stockholders, or other persons equitably entitled to the property of the corporation, who accept the lease and an asset, succeed to the tenant's liability under the lease.¹⁰⁹ But a covenant against assignment is broken by a subsequent reincorporation.¹¹⁰ It is also broken by a transfer of the lease following a voluntary dissolution.¹¹¹ These cases apparently reflect the differences between a covenant not to assign voluntarily and a non-assignment clause broad enough to forbid transfer by operation of law. Under a provision making the devolution of the lease by operation of law upon any party other than the tenant a default, a forfeiture of the charter of a corporate tenant was held to constitute a default.¹¹² A provision permitting landlord to terminate a lease after liquidation of the tenant has been

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- Simmons, 147 Tex. 608, 218 S.W.2d 451 (1949), *rev'g* 213 S.W.2d 864 (Tex. Civ. App. 1948); 16A W. FLETCHER, CORPORATIONS § 8124 (1962); 49 AM. JUR. 2D *Landlord and Tenant* § 288 (1995 rev.); Annots., 147 A.L.R. 360 (1943), 12 A.L.R.2D 179 (1950). Dissolution or distribution of a corporate tenant's assets was held a breach of lease, on the ground that the corporation had voluntarily made itself incapable of performing its obligations. *Rauch v. Circle Theatre*, 374 N.E.2d 546 (Ind. Ct. App. 1978). No damages were shown. The lease had been assigned.
108. *Shadoin v. Sellars*, 223 Ky. 751, 4 S.W.2d 717 (1928); *Cumington Realty Assocs. v. Whitten*, 239 Mass. 313, 132 N.E. 53, 17 A.L.R. 527 (1921); *Town of Hampton*, 107 N.H. 89, 218 A.2d 442 (and authorities collected); *Conn v. Manchester Amusement Co.*, 79 N.H. 450, 111 A. 339 (1920); *Closset v. Portland Amusement Co.*, 134 Or. 414, 290 P. 556 (1930); *Capital Garage Co. v. Powell*, 96 Vt. 145, 118 A. 524 (1922).
109. *Middendorf v. Fuqua Indus., Inc.*, 623 F.2d 13 (6th Cir. 1980); *Abbot v. Fluid Pump Co.*, 112 Ill. App. 303, 251 N.E.2d 93 (1969); *Pepper v. Dixie Splint Coal Co.*, 165 Va. 179, 181 S.E. 406 (1935); Annot., 147 A.L.R. 360 (1943). It is immaterial that the successors had never taken possession. *Middendorf*, 623 F.2d 13.
110. *Gatley v. Schockley*, 215 Cal. 604, 12 P.2d 436 (1932); 58 YALE L.J. 1408, 1411-12 (1948). *Cf.* *S. Main Akron, Inc. v. Lynn Realty, Inc.*, 106 N.E.2d 324 (Ohio Ct. App. 1951) (voluntary dissolution of tenant after assigning lease; cancellation by landlord).
111. *Chiles v. Robertson*, 94 Or. App. 604, 635, 767 P.2d 903, 921 (1985); *Plotkin v. Milwaukee Metal Working Co.*, 255 Wis. 456, 39 N.W.2d 439 (1949); Annot., 12 A.L.R.2D 179 (1950). *But see* *Milmoe v. Sapienza*, 103 N.J. Eq. 101, 142 A. 360 (1928). An assignment of a lease by a wholly owned subsidiary, in dissolution, to its parent is a breach of covenant against assignment. *Lord Balt. Filling Stations, Inc. v. Hoffman*, 117 A.2d 397 (D.C. Mun. 1955).
112. *Messall v. Merlands Club, Inc.*, 244 Md. 18, 222 A.2d 627 (1966), *cert. denied*, 386 U.S. 1009 (1967). The lease in *Messall* gave the tenant a purchase option, the exercise of which was contingent on tenant's compliance with all its obligations. The option was exercisable only during a specified three-month period, a period during which the tenant's charter had been forfeited. A subsequent revival of the charter and a validation of the acts of the corporate officers during the period of the forfeiture was deemed immaterial.

enforced.¹¹³ As in comparable situations, a landlord may waive a breach of this nature by accepting rent after knowledge of the transfer.¹¹⁴

[D] Assignment by Operation of Law

In leases made, for the most part, in the early part of this century, one often finds non-assignment clauses reading:

Tenant shall neither assign nor sublet . . . under penalty of . . .

This clause bars an affirmative voluntary act. It does not bar an involuntary transfer such as a transfer by operation of law.¹¹⁵ Thus, under such a clause, if the tenant dies his executor takes the lease free of the restriction and may transfer the lease.¹¹⁶ The same rule permits passage of the lease to the tenant's legatee.¹¹⁷ Likewise, the tenant's trustee in bankruptcy¹¹⁸ and receiver¹¹⁹ take free of the restriction and may transfer the lease. The same applies to judicial sales.¹²⁰ In these situations the lease is an asset made available for the tenant's heirs, legatees, and creditors. It is possible to forbid transfers by operation of law,¹²¹ but to accomplish this the restriction must be drafted with

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113. Beard v. Ryder/P.I.E. Nationwide, Inc., 355 S.E.2d 872 (S.C. Ct. App. 1987). Note that a comparable clause based on insolvency of a tenant is no longer enforceable. Chapter 16, note 52.
114. Chestnut v. Master Lab., 148 Neb. 378, 27 N.W.2d 541 (1947).
115. *Milmoe*, 103 N.J. Eq. 101; *Miller v. Fredeking*, 101 W. Va. 643, 133 S.E. 375, 46 A.L.R. 842 (annot. at 847) (1926); *see also* authorities in 69 YALE L.J. 1292, 1296, n.25 (1960); 42 ILL. L. REV. 133, 134, n.5 (1947); 51C C.J.S. *Landlord and Tenant* § 33(3) (1968).
116. *Second Realty Corp. v. Fiore*, 65 A.2d 926 (D.C. 1949) (and cases collected); *Swan v. Bill*, 95 N.H. 158, 59 A.2d 346 (1948); *Francis v. Ferguson*, 246 N.Y. 516, 159 N.E. 416, 55 A.L.R. 982 (1927), *noted in* 41 HARV. L. REV. 927 (1928); 49 AM. JUR. 2D *Landlord and Tenant* § 420 (1970).
117. *Burns v. McGraw*, 75 Cal. App. 2d 481, 171 P.2d 148 (1946), *noted in* 42 ILL. L. REV. 133 (1947); *Squire v. Learned*, 196 Mass. 134, 81 N.E. 880, 11 L.R.A. (N.S.) 634 (1907); *Buddon Realty Co. v. Wallace*, 238 Mo. App. 900, 189 S.W.2d 1002 (1945); *Charlowsky v. Stahl*, 19 Misc. 2d 1096, 189 N.Y.S.2d 384 (App. Term 1st Dep't 1959).
118. *Gazlay v. Williams*, 210 U.S. 41 (1907); *see also* cases in *Second Realty Corp. v. Fiore*, 65 A.2d 926 (D.C. 1949); *Miller v. Fredeking*, 101 W. Va. 643, 133 S.E. 375, 46 A.L.R. 842 (1926); 49 AM. JUR. 2D *Landlord and Tenant* § 1102 (1995 rev.).
119. *In re Prudential Lithograph Co.*, 265 F. 869 (S.D.N.Y. 1920); 49 AM. JUR. 2D *Landlord and Tenant* § 1099 (1995 rev.).
120. *See* authorities *supra* note 115.
121. Examples are: *In re Geogalas Bros.*, 245 F. 129 (N.D. Ohio 1917); *Walker v. Wadley*, 124 Ga. 275, 52 S.E. 904 (1905) (lease voided by reason of assignment by executrix); *Parks v. Union Mfg. Co.*, 14 Ky. L. Rep. 206

sufficient clarity to run the gauntlet of very strict construction.¹²² A New York court has ruled that a residential co-op board has the right to approve transfer by the executrix of a decedent co-op tenant's premises, due to the special fiduciary obligation the board has to the other tenants in the building.^{122.1} A transfer by operation of law is not within the statute of frauds.¹²³

[E] Non-Assignment Clauses

[E][1] In General—Tenant's Covenant Against Assignment, Subletting, and Mortgaging

A non-assignment clause designed to protect a landlord against assignment, subletting, and mortgaging follows. It covers transfers by operation of law as well as voluntary transfers. In this form the clause may be circumvented, in the case of a corporate tenant, by a transfer or change in control of the stock of the tenant. Tenant assignment by way of stock changes is covered by the clause set forth in section 7:3.3[C][1]. The strictness of this clause generally may be qualified by the clause set forth in section 7:3.3[E][3]. These clauses should be accompanied in any lease by another clause, as set forth in note 330

(1892); *Clifford v. Androscoggin & Kennebec Co.*, 121 Me. 15, 115 A. 511 (1921). This is recognized in cases cited in the preceding notes. Forbidding transfer by operation of law barred acquisition by tenant's widow. *Smith v. Smith*, 617 S.W.2d 59 (1981).

122. In the absence of language giving the landlord rights upon tenant's death, the transfer of tenant's leasehold rights by operation of intestate succession does not constitute an "assignment" in violation of an anti-assignment clause, particularly in light of language in the lease stating that the leasehold covenants were binding upon "heirs, successors, executors and administrators of the parties hereto." *In re Estate of Sauder*, 124 P.3d 521 (Kan. Ct. App. 2005). To prohibit an assignment by the tenant's executor the language must be "very special." *Francis v. Ferguson*, 246 N.Y. 516, 518, 159 N.E. 416, 417, 55 A.L.R. 982 (1927), noted in 41 HARV. L. REV. 927 (1928); 51C C.J.S. *Landlord and Tenant* § 33(3) (1968); see also *Buddon Realty Co. v. Wallace*, 238 Mo. App. 900, 189 S.W.2d 1002 (1945). Compare N.Y. REAL PROP. LAW § 236 (McKinney 1989), discussed in chapter 16, note 108. A non-assignment clause, which made no reference to transfers by operation of law, was held inapplicable to sale of a lease as an asset of a dissolved corporation. *Milmoe v. Sapienza*, 103 N.J. Eq. 101, 142 A. 360 (1928). Compare section 7:3.3[C][2]. A non-assignment clause that prohibited assignments for benefit of creditors was held inapplicable to corporate reorganization. *In re Childs Co.*, 64 F. Supp. 282 (S.D.N.Y. 1944). Compare section 16:2.
- 122.1. *Cavanagh v. 133-22nd St., Jackson Heights*, 245 A.D.2d 481, 666 N.Y.S.2d 702 (2d Dep't 1997).
123. *Pleasure Harbor Marina, Inc. v. Boyle*, 282 Pa. Super. 8, 422 A.2d 649 (1980).

below, that no act or consent of the landlord, including collection of rent, will constitute a waiver of landlord's rights under the lease.

The general non-assignment clause reads:¹²⁴

Neither Tenant, nor Tenant's legal representatives or successors in interest by operation of law or otherwise, shall assign or mortgage this lease, or sublet the whole or any part of the demised premises or permit the demised premises or any part thereof to be used or occupied by others. This restriction against assignment, mortgaging, and subletting shall be applicable to and bar any assignment, mortgage, and any further subletting by or under any sublease, whether or not such sublease shall have been permitted by landlord. Any consent by Landlord to any act of assignment or subletting shall be held to apply only to the specific transaction thereby authorized. Such consent shall not be construed as a waiver of the duty of Tenant, or the legal representatives or assigns of Tenant, to obtain from Landlord consent to any other or subsequent assignment or subletting, or as modifying or limiting the rights of Landlord under the foregoing covenant by Tenant not to assign or sublet without such consent. Any violation of any provision of this lease, whether by act or omission, by any assignee, subtenant or under-tenant or occupant, shall be deemed a violation of such provision by the Tenant, it being the intention and meaning of the parties hereto that Tenant shall assume and be liable to Landlord for any and all acts and omissions of any and all assignees, subtenants, under-tenants and occupants. If this lease be assigned, Landlord may and is hereby empowered to collect rent from the assignee; if the demised premises or any part thereof be underlet or occupied by any person other than Tenant, Landlord, in the event of Tenant's default, may, and is hereby empowered to, collect rent from the undertenant or occupant; in either of such events, Landlord may apply the net amount received by it to the rent herein reserved, and no such collection shall be deemed a waiver of the covenant herein against assignment and underletting, or the acceptance of the assignee, undertenant or occupant as tenant, or a release of Tenant from the further performance of the covenants herein contained on the part of Tenant.¹²⁵

The term "assign," as used herein, shall include (i) an assignment of a part interest in this lease, as well as any assignment from one

124. For an addition to the following clause, which would make a change in stock control of a corporate tenant a forbidden assignment, see section 7:3.3[C][1].

125. *Cf.*, as to disclaimer of waiver, section 16:5.2.

cotenant to another; and (ii) an assignment to any prior owner of the tenant's interest herein or part thereof.¹²⁶

[E][2] Merger of Corporate Tenant

The effect of a non-assignment clause on a merger or consolidation of a corporate tenant is the subject of meager authority. This is surprising in view of the numerous mergers and consolidations constantly taking place. Several relevant appellate decisions involve leases under which the tenant agreed not to assign. These hold merger of the tenant is no breach of a covenant against assignment. They accomplish this by a two-step logic (which is almost a pun). They treat merger as an assignment by operation of law and then invoke the rule that a transfer by operation of law is no breach of a covenant not to assign.¹²⁷ However, the operation-of-law doctrine was based on the theories that non-assignment clauses are intended only to reach

126. The provisions of (i) are designed to counter the cases that permit assignment between cotenants despite a non-assignment clause. The provisions of (ii) are designed to bar reassignment by an assignee to the original tenant. *See text supra* at notes 84, 85.

127. *Dodier Realty Inv. Co. v. St. Louis Nat'l Baseball Club, Inc.*, 361 Mo. 981, 238 S.W.2d 321 (1951), *noted in Annot.*, 24 A.L.R.2d 683 (1952) (the annotation in 24 A.L.R.2d 683 has been superseded by Annot. 39 A.L.R.4th 880 (1985)); 37 VA. L. REV. 1003 (1951); 38 VA. L. REV. 496, 502 (1952); *Segal v. Greater Valley Terminal Corp.*, 83 N.J. Super. 120, 199 A.2d 48 (1964); *see also* discussion in Note, *Amalgamation Transactions of Corporate Lessees as Breaches of Nonassignment Covenants: Another Plea for Substance Over Form*, 69 YALE L.J. 1292, 1295 n.22 (1960). *Feeley v. Harwood Elec. Co.*, 22 Luzerne Leg. Reg. Rep. 314, 318 (Pa. 1923), said it saw no difference in principle between a transfer effected by merger and any voluntary act of a tenant. Whether this is a square holding is not certain because the non-assignment clause in issue applied to "every levy or execution or legal process and every act of bankruptcy or every assignment . . . under any other procedure or order of court." *Segal*, 83 N.J. Super. at 125, 199 A.2d at 51, states *Feeley* has been discredited, if not overruled, by *In re Berman's Estate*, 58 Pa. D. & C. 678 (Orphans' Ct. 1927), and *Pittsburgh Terminal Coal Corp. v. Potts*, 92 Pa. Super. 1 (1927). *Berman* holds merely that an ordinary non-assignment clause does not bar a transfer by the tenant's executor, a well-established rule. Section 7:3.3[D]. *Pittsburgh* upholds the right of a corporate landlord, after its merger, to exercise a right, given in the lease, to confess judgment against the tenant in an amicable action of ejectment. The tenant argued this right did not pass to an assignee. The court deemed the merger a transfer by operation of law. *Albermarle, Inc. v. Eaton Corp.*, 183 Ga. App. 80, 357 S.E.2d 887 (1987), accords in result with the cases, *supra*, in the first paragraph, but was based on language in the lease. Concurring judges relied on waiver.

A restriction against tenant's assignment was held to prevent a downstream merger of a tenant into its subsidiary because the result would create a new tenant. The court stated, *obiter*, that an upstream merger, *i.e.*, from the subsidiary to its principal, would have the opposite effect. *Pac. First Bank v. New Morgan Park Corp.*, 122 Or. App. 401, 837 P.2d 895

voluntary acts of the lessee and that “transfers by operation of law are always involuntary,” that is, death of the tenant, levy of execution, or involuntary bankruptcy.¹²⁸ This far-fetched if not false analogy brings these cases within the rule of strict construction of non-assignment clauses, to avoid forfeitures of leases. This result was characterized as not unreasonable on the ground of consistency with the provisions of merger statutes that no interest in property is to be impaired by merger.¹²⁹ This is hardly a reason for overruling a restriction against assignment, to the extent that a lease clearly imposes such restriction. If these leases had forbidden assignment by operation of law the mergers would presumably have been a breach.¹³⁰ But in a case following *Dodier*¹³¹ the same court saved a tenant from forfeiture by ruling a merger is no assignment by operation of law or otherwise.¹³² In view of the fact that most current well-drawn leases include non-assignment clauses broad enough to forbid transfers by operation of law, it is possible that a majority of corporate tenants violate their leases as an incident of merging¹³³ if the effect thereof is to transfer the lease to an entity other than that of the original tenant. It has been said, however, that outside a few special situations neither contractual nor statutory non-assignment provisions are applicable to corporate merger or consolidation.¹³⁴ Any doubt on this score would be avoided if the lease permitted the tenant to assign or sublet to any corporation into which the tenant should be merged or consolidated. The matter should be clarified in the lease. Otherwise it is conceivable that, on the one hand, the landlord may be empowered to veto essential changes in a corporate tenant and, on the other hand, the landlord may have foisted on him a tenant quite different from this original selection and of weaker financial responsibility.^{134.1}

(1993). *Pac. First Bank* was affirmed by a divided court on the ground that landlord’s refusal to consent to the transfer did not violate the reasonable expectations of the assignment consent clause. 319 Or. 342, 876 P.2d 761 (1994).

128. See Note, 69 YALE L.J. 1292, 1296 (1960).

129. *Id.* at 1296–97 (1960).

130. It was so held. *Citizens Bank & Trust Co. v. Barlow Corp.*, 295 Md. App. 472, 456 A.2d 1283, 39 A.L.R.4th 868 (annot. at 879) (1983) (citing text).

131. *Supra* note 127.

132. *Standard Operations, Inc. v. Montague*, 758 S.W.2d 442 (Mo. 1988), refusing to follow *Citizens Bank & Trust Co.*, 295 Md. App. at 472.

133. For a collection of merger legislation in this connection, see Note, 69 YALE L.J. 1292, 1296 *et seq.* (1960).

134. Note, *Effect of Corporate Reorganization on Nonassignable Contracts*, 74 HARV. L. REV. 393, 402 (1960).

134.1. *Compare Lakehill Assocs., Inc. v. 6077 Jericho Tpk. Realty Corp.*, 795 N.Y.S.2d 281 (App. Div. 2d Dep’t 2005). Landlord breaches an implied duty of good faith and fair dealing, notwithstanding lack of a duty to be

The problem may be anticipated in the lease on tenant's behalf by a clause of the nature set forth in the following section.

Under the Ohio law, merger of a corporate tenant transfers the lease by operation of law, not assignment, and imposes the tenant's liability under the lease on the surviving corporation.¹³⁵

[E][3] Modification of Non-Assignment Clause

A strict non-assignment clause may operate awkwardly for a corporate tenant if its effect is to bar assignment or subletting to corporate affiliates, subsidiaries, or parents, to a partnership the majority interest in which shall be owned by shareholders of the corporate tenant, or to a corporation with which the tenant may be merged or consolidated. These represent proper and normal transactions that are unlikely to prejudice the landlord provided their effect is not to dilute the landlord's security under the lease. An inability to carry through transactions of this nature may be embarrassing to a corporate tenant.

The clause set out below authorizes these transactions. The first paragraph of this clause is sufficient for this purpose. The two following paragraphs give tenant additional and broader rights, which are not necessary for the corporate transactions mentioned. These may be the subject of bargaining and negotiation. The rest of the clause explains the corporate terms used. They are desirable to avoid ambiguity but could be omitted if necessary.

Notwithstanding the foregoing provisions of this article, this lease may be assigned, or the demised premises may be sublet, in whole or in part, to any corporation into or with which Tenant may be merged or consolidated or to any corporation which shall be an affiliate, subsidiary, parent or successor of Tenant, or of a corporation into or with which Tenant may be merged or consolidated, or to a partnership, the majority interest in which shall be owned by stockholders of Tenant or of any such corporation. If there shall be an assignment or subletting, in whole or in part, to a corporation or partnership, referred to in the immediately preceding sentence, the foregoing provisions of this Article _____, with respect to assignment or subletting, shall then apply to such corporation or partnership.

"reasonable" (which is the New York rule), if the landlord refuses consent and claims default when tenant corporation dissolved and transferred its interest to an LLC with the same ownership that tenant alleged was an "alter ego" of the original corporate tenant. Note that the restriction on transfer provided specifically that "any sale or transfer of corporate stock by the tenant shall be considered an "assignment" under this lease." Tenant survived summary judgment for landlord, alleging that violation was merely "technical" and did not justify landlord's declaration of a breach.

135. Middendorf v. Fuqua Indus., Inc., 623 F.2d 13 (6th Cir. 1980).

Landlord will not unreasonably withhold or delay its consent to an assignment or sublease to a party other than one mentioned in the preceding paragraph.

If Tenant shall desire to make interior non-structural alterations in connection with an assignment or subletting which is permitted hereunder, Landlord shall not unreasonably withhold or delay its consent thereto.

For the purpose of this Article a “subsidiary” or “affiliate” or a “successor” of Tenant shall mean the following:

- (a) An “affiliate” shall mean any corporation which, directly or indirectly, controls or is controlled by or is under common control with Tenant. For this purpose, “control” shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such corporation, whether through the ownership of voting securities or by contract or otherwise.
- (b) A “subsidiary” shall mean any corporation not less than 50% of whose outstanding stock shall, at the time, be owned directly or indirectly by Tenant.
- (c) A “successor” of Tenant shall mean:
 - (i) A corporation in which or with which Tenant, its corporate successors or assigns, is merged or consolidated, in accordance with applicable statutory provisions for merger or consolidation of corporations, provided that by operation of law or by effective provisions contained in the instruments of merger or consolidation, the liabilities of the corporations participating in such merger or consolidation are assumed by the corporation surviving such merger or created by such consolidation, or
 - (ii) A corporation acquiring this lease and the term hereby demised and a substantial portion of the property and assets of Tenant, its corporate successors or assigns, or
 - (iii) Any corporate successor to a successor corporation becoming such by either of the methods described in (i) or (ii), provided that on the completion of such merger, consolidation, acquisition, or assumption, the successor shall have a net worth of no less \$____.¹³⁶

Acquisition by Tenant, its corporate successors or of a substantial portion of the assets, together with the assumption of all or

136. Some comparable clauses specify that the net worth of an acceptable corporate successor be no less than the original tenant’s worth

substantially all the obligations and liabilities of any corporation, shall be deemed a merger of such corporation into Tenant for purpose of this Article.

Reference has been made to an occasional relaxation of a strict non-assignment clause by giving tenant limited right to assign or sublet, but reserving to landlord an option to cancel the lease as an alternative.¹³⁷ Landlord is thus authorized to take over tenant's position if a prospective assignment or sublease promises to be profitable. A clause for this purpose follows:

[48] Article [11] non-assignment clause of this lease is modified to the following extent. If Tenant shall desire to assign this lease or sublet the leased premises, in whole or in part, Landlord will not unreasonably withhold or delay its consent thereto provided:

- A. Tenant shall give Landlord at least 30 days' prior written notice of its desire to assign or sublet, which notice shall include reliable information indicating that the proposed assignee or subtenant is reputable, financially responsible [and is engaged in the ____ business].¹³⁸
- B. Prior to delivery of Landlord's said consent, Tenant shall deliver to Landlord:
 - (1) A counterpart executed copy of any such assignment, which shall include an assumption by the assignee, from and after the effective date of such assignment, of the performance and observance of the covenants and conditions in this lease contained on Tenant's part to be performed and observed; or
 - (2) If a sublease be involved, a counterpart executed copy of the proposed sublease, which sublease shall specify that the premises to be sublet shall be used solely for [the ____ business],¹³⁹ that such sublease shall not be assigned, by operation of laws or otherwise, nor the premises further sublet [nor such use changed, without the prior written consent of the Landlord herein named]. No sublease shall be for a term which shall extend beyond one day prior to the expiration of this lease.¹⁴⁰

immediately prior to the merger, consolidation, acquisition, or assumption. If the original tenant is one with huge assets this language would bar most prospective successors though their net assets would ordinarily be deemed satisfactory.

137. See section 7:1.

138. Optional provision.

139. Optional provision.

140. For the effect of a sublease for the balance of the term of the prime lease, see section 7:4.3.

- C. If Tenant shall give Landlord notice of a desire to assign this lease, or to sublet 50% or more of the premises hereby leased, Landlord shall be entitled to cancel this lease on at least 30 days' prior written notice thereof, and this lease shall come to an end on the date in such notice specified, with the same force and effect as if such date were the date herein specified for the expiration hereof, and the rent, and additional rent, including any additional rent provided for under Articles [36] and [38] [escalation clauses] of this lease shall be apportioned and adjusted as of the effective date of such cancellation. [If Landlord shall give such notice of cancellation, Tenant shall have ten days thereafter to revoke its notice of desire to assign or sublet, as the case may be, and thereupon landlord's notice of cancellation shall be nullified. The provisions of this subdivision C shall nevertheless apply to any future notice or notice by Tenant of a desire to assign or sublet.]¹⁴¹
- D. Whenever Tenant shall claim, under this Article or any other part of this lease, that Landlord has violated a requirement that it not unreasonably withheld or delayed its consent to some request of Tenant, Tenant shall have no claim for damages by reason of such alleged withholding or delay, and Tenant's sole remedies therefore shall be a right to compel arbitration of the matter in dispute or to obtain specific performance or injunction, but in any event without recovery of damages.

If Tenant shall desire to make interior non-structural alterations in connection with an assignment or subletting which is permitted hereunder, Landlord shall not unreasonably withhold or delay its consent thereto.

Reference has been made to the considerable difficulty that may be encountered by a tenant seeking to sell the business conducted in the leased premises if he is unable to sell the lease as well.¹⁴² A proposed purchaser may be reluctant to proceed without assurance in advance that there will be no obstruction or delay in his obtaining an assignment or sublease. A requirement that landlord not be unreasonable may be regarded as insufficient. The following form provides the assurance by provision for landlord's affirmative consent, something akin to an estoppel certificate. The sales contract would be conditioned on landlord's prior delivery of this consent. Tenant-seller's choice of assignment versus sublease has been considered above.¹⁴³

141. Optional provision.

142. Text *supra* accompanying note 4.

143. Text *supra* after note 26.

If the sales contract provides for deferred payments, a sublease may be preferable by making a breach of the sales contract a breach of the sublease, thereby giving seller a possessory remedy for a default in payment under the sales contract. But an assignment may be used if the tenant assignor has a right to recover possession and resume operation of the business in case of the assignee's default. This is accomplished by the final paragraph in the following form.

A clause for this purpose follows:

Notwithstanding the foregoing provisions of this Article ____ [non-assignment clause], if Tenant shall enter a contract to sell its business at the leased premises; and Tenant shall furnish landlord with an executed counterpart copy of said sales contract and any further relevant information reasonably requested by Landlord, Landlord will not unreasonably withhold or delay its consent to an assignment of this lease, or a sublease of the leased premises, to the purchaser named in said contract of sale; and shall simultaneously give its written consent acknowledging that it has no legal objection to the assignment or sublease involved in the sale.

Prior to delivery of Landlord's said consent, Tenant shall deliver to Landlord:

- (1) An executed counterpart of any such assignment, which shall include an assumption by the assignee, from and after the effective date of such assignment, of the performance and observance of the covenants and conditions in this lease contained on Tenant's part to be performed and observed; or
- (2) If a sublease be involved, a counterpart executed copy of the proposed sublease, which sublease shall specify that the premises to be sublet shall be used solely for [the ____ business],¹⁴⁴ that such sublease shall not be assigned nor the premises further sublet [nor such use changed, without the prior written consent of the landlord herein named].¹⁴⁵ No sublease shall be for a term which shall extend beyond one day prior to the termination of this lease.¹⁴⁶

Whenever Tenant shall claim, under this Article or any other part of this lease, that Landlord has violated a requirement that it not unreasonably withhold or delay its consent to some request of Tenant, Tenant shall have no claim to damages by reason of such

144. Optional provision.

145. Optional provision.

146. For the effect of a sublease for the balance of the term of the prime lease, see section 7:4.3.

withholding or delay, and Tenant's sole remedies therefor shall be a right to compel arbitration of the matter in dispute or to obtain specific performance or injunction, but in any event without recovery of damages.

[If Tenant shall desire to make interior non-structural alterations in connection with an assignment or subletting which is permitted under this lease, Landlord shall not unreasonably withhold or delay its consent thereto.]¹⁴⁷

If this lease shall have been assigned in connection with a sale of Tenant's business, as hereinbefore provided, and Tenant shall for any reason reacquire said business and shall desire to resume its operation, this lease may be reassigned to Tenant without receipt of landlord's approval. Such reassignment shall create no right to a further assignment nor any right to sublet the demised premises.

The parties may agree more simply that regardless of other provisions of a non-assignment clause tenant may assign the lease, without qualification, to a party to whom it shall transfer its business and assets. A clause for this purpose may read:

Notwithstanding the foregoing provisions of this Article ____ [non-assignment clause] Tenant may assign this lease to a party who shall acquire all or substantially all of its business and assets, provided that such assignee shall assume the Tenant's obligations under this lease from and after the time of such assignment.

This clause permitted acquisition of the lease by a huge corporation into which the corporate tenant was merged.¹⁴⁸ It caused a problem, however, when the assignee spun off the property so acquired to a corporation whose assets compared to those of the original tenant were but a tiny proportion of those of the first assignee.¹⁴⁹

§ 7:3.4 Enforcement of Express Restrictions

[A] In General

The right of a landlord to restrict or bar a tenant from assigning or subletting is in a state of flux. Initially, the distinction should be noted between these rights of the tenant and landlord's duty, if any, to

147. Optional provision.

148. *Nat'l Distillers & Chem. Corp. v. First Nat'l Bank*, 804 F.2d 978 (7th Cir. 1986).

149. *Id.* The case was remanded to determine if the intention of the parties contemplated a second assignment of the kind mentioned in the text.

attempt to mitigate his damages and relet the premises after a tenant has vacated during the term. The two situations, specifically, are:

- (1) Tenant asks landlord for permission to assign or sublet to a party whom tenant has produced. Landlord has only to agree or disagree.
- (2) Tenant has moved out during the term and is sued for rent thereafter accruing. Tenant asserts landlord should have sought a new tenant in order to mitigate damages. In some cases both situations exist, that is, a tenant asks landlord to assign or sublet and is refused. Tenant then moves out and resists liability for rent thereafter accruing.¹⁵⁰

Some courts have confused these situations and it is not always clear whether the court is passing on landlord's right to forbid transfer or his alleged duty to mitigate damages.¹⁵¹

An absolute prohibition against assignment and subletting has traditionally authorized a landlord to refuse permission for any reason or no reason.¹⁵² The precise language of the restriction has not been

150. An example is *Marmont v. Axe*, 135 Kan. 368, 10 P.2d 826 (1932).

151. Note the discussion in *Gruman v. Investors Diversified Servs., Inc.*, 247 Minn. 502, 78 N.W.2d 377 (1956), discussed *infra* note 152.

152. *Dress Shirt Sales, Inc. v. Hotel Martinique Assocs.*, 12 N.Y.2d 339, 342, 190 N.E.2d 10, 11, 239 N.Y.S.2d 660 (1963), noted in 49 CORNELL L.Q. 346 (1964). *Accord Vaswani v. Wohletz*, 196 Ga. App. 676, 396 S.E.2d 593 (1990); 21 *Merchs. Row Corp. v. Merchs. Row, Inc.*, 412 Mass. 204, 587 N.E.2d 788 (1992) (citing text); *Truschinger v. Pak*, 513 So. 2d 1151 (La. 1987); *Owens v. Oglesby*, 123 So. 2d 521 (La. Ct. App. 1960); *Jacobs v. Klawans*, 225 Md. 147, 169 A.2d 677 (1961) (overruled by *Julian v. Christopher*, 320 Md. 1, 575 A.2d 735 (1990)); *Leonard, St. & Deinard v. Marquette Assocs.*, 353 N.W.2d 198 (Minn. Ct. App. 1984); *Segre v. Ring*, 103 N.H. 278, 170 A.2d 265 (1961); *F&L Ctr. Co. v. Cunningham Drug Stores, Inc.*, 19 Ohio App. 3d 72, 482 N.E.2d 1296 (1984); *Pac. First Bank v. New Morgan Park Corp.*, 122 Or. App. 401, 837 P.2d 895 (1993); *Herlou Card Shop, Inc. v. Prudential Ins. Co.*, 73 A.D.2d 562, 422 N.Y.S.2d 708 (1st Dep't 1908) (landlord entitled to condition on rent increase); *Isbey v. Crews*, 55 N.C. App. 47, 284 S.E.2d 584 (1981); *B&R Oil Co. v. Ray's Mobile Homes, Inc.*, 139 Vt. 122, 422 A.2d 1267 (1980). *Accord Dobyns v. S.C. Dep't of Parks, Recreation & Tourism*, 317 S.C. 353, 454 S.E.2d 347 (S.C. Ct. App. 1995) (past general acquiescence immaterial). See also cases in *Kendall v. Ernest Pestana, Inc.*, 40 Cal. 3d 488, 496, 709 P.2d 818, 822, 220 Cal. Rptr. 3d 822 (1985); Annot., 21 A.L.R.4TH 186 (1983); 1 AMERICAN LAW OF PROPERTY § 3.57, at 305 (1952); 51C C.J.S. *Landlord and Tenant* § 36(1) (1952); 49 AM. JUR. 2D *Landlord and Tenant* § 423 (1970).

An extreme case is *Gruman*, 247 Minn. 502, criticized in 55 MICH. L. REV. 1029 (1957), 41 MINN. L. REV. 355 (1957), and 24 U. CHI. L. REV. 567 (1957), where the tenant vacated the premises and sought permission to sublet to the government for a post office. The court upheld the landlord's

deemed vital. It has been immaterial whether the clause read "Tenant may not assign . . ." or "Tenant may not assign . . . without Landlord's

right to forbid the subletting and gave landlord judgment for about \$20,000 for rent accruing after tenant's vacation. 24 U. CHI. L. REV. states, at 568, that only one of twenty-five cases cited in *Gruman* is direct authority for its holding.

In *Dress Shirt Sales, Inc. v. Hotel Martinique Assocs.*, 12 N.Y.2d 339, 190 N.E.2d 10, 239 N.Y.S.2d 660 (1963), a tenant moved out. It offered landlord a prospective tenant, which landlord rejected. Tenant had paid landlord \$30,000 for a cancellation of the lease. About sixteen days later, landlord entered into a lease with the party proposed by the original tenant. In an action by the latter to recover the \$30,000, summary judgment was given the landlord. A landlord's right to forbid subletting of part of tenant's space was upheld, though he subsequently leased to the party proposed by the tenant. The court held that the landlord could bar multiple occupancy in a prestige building (Time-Life Building in the City of New York) and insist "that space in its building be rented in substantial blocs lest the premises be Balkanized so that it becomes generally known as a veritable rabbit-warren of 'holes-in-the-wall' and rented desk spaces." *Time, Inc. v. Tager*, 46 Misc. 2d 658, 659, 260 N.Y.S.2d 413, 415 (Civ. Ct. N.Y.C. 1965). *Compare Gamble v. New Orleans Hous. Mart, Inc.*, 154 So. 2d 625 (La. Ct. App. 1963), with respect to a landlord's right to reject a subtenant in one area and accept him elsewhere. *But see text infra* at notes 261, 262.

Landlord's grant of a new lease to a purchaser of his tenant's business conditioned on tenant's paying one-half the cost of a septic system was held no duress. *Barker v. Walter Hogan Enters., Inc.*, 23 Wash. App. 450, 598 P.2d 1359 (1979). *Accord Truschinger v. Pak*, 513 So. 2d 1151 (La. 1987) (landlord asked half of \$80,000 premium for sublease); *Healthco, Inc. v. E&S Realty Assocs.*, 400 Mass. 700, 511 N.E.2d 579 (1987) (landlord may condition consent in rent increase). *Cf. text infra* at notes 248, 249. But for the incipient effect of unconscionability and adhesion in the rule stated in the text, see *Ilkhchooyi v. Best*, 37 Cal. App. 395, 45 Cal. Rptr. 2d 766 (1995), at note 173, *infra*, and the connecting text. A landlord's use of this authority may violate antitrust laws. *See* section 28:8.3, at note 232. Subletting the entire premises, after permission to sublet half, permitted landlord to terminate the lease and recover damages. *Roth v. Morton's Chef Serv.*, 173 Cal. App. 3d 380, 218 Cal. Rptr. 684 (1985). A lease permitting assignment only if the tenant was not in default was enforced and assignment barred. *First Nat'l Bank v. Plitt Theatres, Inc.*, 730 F. Supp. 167 (W.D. Ill. 1990); *410 Sixth Ave. Foods, Inc. v. 410 Sixth Ave., Inc.*, 197 A.D.2d 435, 602 N.Y.S.2d 835 (1st Dep't 1993). Under Texas statutory law a tenant may not assign to another party without the consent of the landlord, unless the lease contains such a provision. Under this statute, absent a provision allowing the lessee to assign, the landlord may unreasonably withhold consent. The lease in question contained a provision that the landlord would withhold consent to assignment to any party that was not a "Qualified Person," a term defined in the lease as people or partnerships in good standing on the medical or dental staff of the medical center. The proposed assignees were professional real estate investors, and thus there was no duty on the part of the landlord to assent to an assignment to them. *Trinity Prof'l Plaza Assocs. v. Metrocrest Hosp. Auth.*, 987 S.W.2d 621 (Tex. Ct. App. Eastland 1999).

consent.”¹⁵³ Some cases cited as *contra* to this merely involve a landlord’s duty to minimize damages after a tenant’s breach and default and not tenant’s right to assign or sublet.¹⁵⁴ There is authority that an assignment without a landlord’s necessary consent is a nullity.¹⁵⁵ But probably the majority rule is otherwise, and such a transfer may create a right in the landlord to terminate the lease, but, prior to such termination, the transfer is valid.¹⁵⁶ The value of landlord’s right to bar assignment and subletting is limited if its ultimate result is to obligate him to look for a new tenant to mitigate his damages,¹⁵⁷ though probably not where there is a substantial rise in rental values.¹⁵⁸

153. In *Granite Trust Bldg. Corp. v. Great Atl. & Pac. Tea Co.*, 30 F. Supp. 77, 78 (D. Mass. 1940) (citing authorities), it was held:

It would seem better law that when a lease restricts the lessee’s rights by requiring consent before these rights can be exercised, it must have been in the contemplation of the parties that the lessor give some reason for withholding consent. Text books and digests state the law otherwise.

Accord *Dobyns v. S.C. Dep’t of Parks, Recreation & Tourism*, 317 S.C. 353, 454 S.E.2d 347 (Ct. App. 1995). *But see* text *infra* at note 179 *et seq.* In a lease that required the landlord’s consent prior to assignment and did not contain the phrase, “consent will not be unreasonably withheld,” no duty was imposed on the landlord to act reasonably in withholding consent. Washington common law does not support the minority *Restatement* view that the implied covenant of good faith and fair dealing imposes upon a landlord the duty to act reasonably in refusing consent. *Johnson v. Yousoofian*, 930 P.2d 921 (Wash. App. Div. 1 1996). *Cf.* *Vaswani v. Wohletz*, 396 S.E.2d 593 (Ga. Ct. App. 1990) (if the assignment provision in a lease makes no mention of reasonableness, the landlord is under no duty to act reasonable in refusing consent to assignment).

154. *E.g.*, *Friedman v. Colonial Oil Co.*, 236 Iowa 140, 18 N.W.2d 196 (1945); *Galvin v. Lovell*, 257 Wis. 82, 42 N.W.2d 456 (1950); *see also* *First Fed. Sav. Bank v. Key Mkts., Inc.*, 532 N.E.2d 18, 22 (Ind. Ct. App. 1988). *Contra* *Vasquez v. Carmel Shopping Ctr. Co.*, 777 S.W.2d 532 (Tex. Ct. App. Corpus Christi 1989). The landlord is under no duty to consent to an assignment unless the lease states otherwise. The lease imposed no duty on landlord to mitigate damages prior to tenant’s breach. The tenants were arguing that they notified the landlord that they might default on the lease and that they had someone to purchase their business and assume the lease. All of these events occurred prior to breach and therefore the landlord was under no duty to mitigate possible damages.
155. *See* *Am. Cmty. Stores Corp. v. Newman*, 232 Neb. 434, 439, 441 N.W.2d 154, 158 (1989) (and cases cited); *Cascade Shopping Ctr. v. United Grocers*, 106 Or. App. 428, 808 P.2d 720 (1991).
156. *See infra* section 7:3.5.
157. *Bert Bidwell Inv. Corp. v. LaSalle & Schuffer, P.C.*, 797 P.2d 811 (Mo. Ct. App. 1990); *see* *Damper Assocs. v. Somersville Mills Sales Room, Inc.*, 182 Conn. 444, 438 A.2d 708 (1980); CAL. CIV. CODE §§ 1951.2, 1951.4 (1985).
158. *Cf.* *Stauffer Chem. Co. v. Fisher-Park Lane Co.*, 63 Misc. 2d 511, 312 N.Y.S.2d 243 (Sup. Ct. 1970); note 289, *infra*.

The combination of the two (majority) rules that a landlord may forbid the tenant to assign or sublet and that a landlord need not try to sublet after the tenant has vacated¹⁵⁹ may effect considerable hardship on a tenant who finds during the term that he has no further use for the demised premises.¹⁶⁰

The position of the *Restatement* on this is somewhat equivocal. Section 15.2(2) of the *Restatement (Second) of Property (Landlord and Tenant)* states:

(2) A restraint on alienation without consent of the landlord of the tenant's interest in the leased property is valid but the landlord's consent to an alienation by the tenant cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent.¹⁶¹

But comment g under this section, discussing alienation by either landlord or tenant, states that if the consent of either of these is unreasonable the other may proceed without regard to the restriction.

Despite all the foregoing, there is a minority to the effect that if the lease states "tenant may assign only with landlord's consent" or "tenant may not assign without landlord's consent" there is engrafted

159. See section 16:2.

160. See *Dress Shirt Sales, Inc. v. Hotel Martinique Assocs.*, 12 N.Y.2d 339, 190 N.E.2d 10, 239 N.Y.S.2d 660 (1963), and *Gruman v. Investors Diversified Servs., Inc.*, 247 Minn. 502, 78 N.W.2d 377 (1956), *supra* note 152.

161. The *Restatement* was followed in *Tucson Med. Ctr. v. Zoslow*, 147 Ariz. App. 612, 712 P.2d 459 (1985). Once courts follow a rule that a landlord may negate any duty to consent by a "freely negotiated" lease one may expect landlords' "standard form" leases to note this freedom. Whatever policy the rule stated in the text represents, it appears to be a strain on our language to rule that a bar to assignment "without landlord's consent" implies an affirmative obligation to consent (subject to some condition). The dissent in *Kendall v. Ernest Pestana, Inc.*, 40 Cal. 3d 488, 509, 228 Cal. Rptr. 818, 833, 709 P.2d 837, 852 (1985), suggests that this be left to a statute, as some states have done with respect to residential leases. This was so done in England in all cases (see the English statute, *infra* note 165). Nevertheless some recent cases rule that now "consent" is sufficient for this (see authorities in *Kendall* at 502-03, 228 Cal. Rptr. at 827-28, 709 P.2d at 846-47 and other cases cited *infra* in note 162) and that otherwise the lease would simply prohibit subleasing or assignment.

It may be noted that comparable language in a due-on-sale clause (permitting mortgagee to accelerate the mortgage debt on sale of property without the mortgagee's consent) is construed as one would expect, *i.e.*, mortgagee is under no obligation to consent but has an absolute right to accelerate on sale. *Eyde Bros. Dev. Co. v. Equitable Life Assurance Soc'y*, 697 F. Supp. 1431 (W.D. Mich. 1988); see generally *Quintana v. First Interstate Bank*, 105 N.M. 784, 737 P.2d 896 (1987); FRIEDMAN ON CONTRACTS § 3:3.1.

on this language by implication the phrase “which consent shall not be unreasonably withheld.”¹⁶² A comparable result follows when a landlord “who contractually retains the discretion to withhold his consent to the assignment” of a tenant’s lease must exercise that discretion in a manner consistent with good faith and fair dealing.¹⁶³ The proliferation of these cases should be a reminder to landlord to seek to limit his potential liability in this situation.¹⁶⁴ The minority rule is consistent with an English statute that applies to all leases.¹⁶⁵

It may be noted that the minority cases generally involve a demand by landlord from tenant for something in excess of the tenant’s lease

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162. Campbell v. Westdahl, 148 Ariz. 432, 715 P.2d 288 (Ariz. Ct. App. 1984); Tucson Med. Ctr. v. Zoslow, 147 Ariz. App. 612, 712 P.2d 459 (1985); Warmack v. Merchs. Nat’l Bank, 272 Ark. 166, 612 S.W.2d 733 (1981); Kendall v. Ernest Pestana, Inc., 40 Cal. 3d 488, 709 P.2d 459 (1985); Fernandez v. Vazquez, 397 So. 2d 1171, 1172–73, 21 A.L.R.4th 181 (annot. at 189) (Fla. 3d Dist. Ct. App. 1981); Golf Mgmt. Co. v. Evening Tides Waterbeds, Inc., 213 Ill. App. 3d 355, 571 N.E.2d 1000, 157 Ill. Dec. 536 (1991); First Fed. Sav. Bank v. Key Mkts., Inc., 532 N.E.2d 18, 22 (Ind. Ct. App. 1988); Julian v. Christopher, 320 Md. 1, 575 A.2d 735 (1990) (overruling Jacobs v. Klawans, 225 Md. 147, 169 A.2d 677 (1961) (lengthy discussion and citations of out-of-state cases)); Newman v. Hinky Dinky Omaha-Lincoln, 229 Neb. 382, 427 N.W.2d 50, 427 N.W.2d 382 (1988) (and cases cited); F&L Ctr. Co. v. Cunningham Drug Stores, Inc., 19 Ohio App. 3d 72, 76, 482 N.E.2d 1296, 1300 (1984) (dissenting opinion; collecting cases); see also Prestin v. Mobil Oil Corp., 741 F.2d 268 (9th Cir. 1984); chapter 14, note 1; see also cases in Johnson, *Correctly Interpreting Long-Term Leases, Pursuant to Modern Contract Law Toward a Theory of Relational Leases*, 74 VA. L. REV. 751, 761 *et seq.* (1988). Boss Barbara, Inc. v. Newhill, 97 N.M. 239, 638 P.2d 1084 (1982); for effect of overruling decisions, see chapter 5, note 88. A blatant attempt to circumvent the minority rule by means of a cancellation clause failed in Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc., 2 Cal. App. 4th 1147, 259 Cal. Rptr. 908 (1989), discussed in chapter 21, note 108. Carma was reversed, partly on the basis of legislation (discussed *infra* note 171), 2 Cal. App. 4th 342, 6 Cal. Rptr. 2d 467, 826 P.2d 710 (1992). Kendall, 40 Cal. 3d 488, said it was ruling only on commercial leases.
163. Warner v. Konover, 210 Conn. 150, 154–55, 553 A.2d 1138, 1140–41 (1989).
164. See text *infra* at note 288.
165. English Landlord & Tenant Act of 1927, 17 & 18 Geo. 5, § 19(1) provides:

In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against assigning, underletting, charging or parting with the possession of demised premises or any part thereof without license or consent, such covenant condition or agreement shall, notwithstanding any express provision to the contrary, be deemed to be subject—(a) to a proviso to the effect that such license or consent is not to be unreasonably withheld, but this proviso does not preclude the right of the landlord to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with such license or consent.

obligations, usually a rent increase or equivalent, which one court called “blood money.” In two of the cases landlords sought unsuccessfully to cancel a lease and obtain title to a new building erected by the tenant. There is no statement that a clear anti-assignment clause, with no reference to “consent” would not be enforced. This is consistent with the English statute. It is noteworthy that in *Kendall v. Ernest Pestana*,¹⁶⁶ the most detailed of the minority opinions, the court reviewed all the California precedents, including the older cases that follow the majority rule without expressly disavowing them. It may be concluded that the rule in this country is still that a clear anti-assignment clause, with no reference to “consent,” will be enforced. A few more “blood money” cases¹⁶⁷ could provoke a change.¹⁶⁸

Many landlords simply rely upon a limitation on the tenant’s assignment and sublet rights as a device to harvest these potential profits in the tenant’s estate (often referred to as the “bonus value”). Others negotiate for more express language requiring the tenant to share or actually forfeit to the landlord such proceeds. Although many of the cases, discussed *infra*, may actually be all about the “bonus value,” many are not express in this regard. For instance, in the famous case of *Kendall v. Ernest Pestana*,¹⁶⁹ the court, after pages and pages of decrying the evil in landlord having unrestricted discretion in determining whether to approve and assignment or sublet, included at footnote at the end preserving the landlord’s interest in the “bonus value”:

Amicus . . . request that we make clear that, “whatever principle governs in the absence of express lease provisions, nothing bars the parties to commercial lease transactions from making their

166. *Kendall v. Ernest Pestana, Inc.*, 40 Cal. 3d 488, 709 P.2d 459 (1985), *supra* note 162.

167. The current author has left intact Mr. Friedman’s statement of his views on the landlord’s collection of “bonus value” from the lease as the extortion of “blood money.” The current author takes a different view, and believes that the *Kendall* case in fact is consistent with his view, as the next few paragraphs indicate. In the current author’s view, there is nothing wrong with the parties negotiating in advance with respect to the “bonus value,” and in fact, in most modern leases, the parties at the time of negotiation understand that the negotiation concerning assigning and subletting is very much about “bonus value.” When the right to retain the bonus value is something on the table at the time of negotiation, the current author would not view the negotiation as one over “blood money.” The current author has discussed *Kendall* and other cases decided to the time of his article in a piece entitled “Coping with the New Rules on Assignability of Commercial Leases” (1992), *available at* <http://dirt.umkc.edu/files/assignar.htm>.

168. *See In re Office Prods., Inc.*, 136 B.R. 992 (Bankr. W.D. Tex. 1992), discussed in chapter 16, note 50.

169. *See* discussion in text *supra* at note 162 and thereafter.

own arrangements respecting the allocation of appreciated rentals if there is a transfer of the leasehold." This principle we affirm; we merely hold that the clause in the instant lease established no such arrangement. (709 P.2d at 848, n.17)

Another California court, addressing a lease in which there was a right of the landlord to share in assignment proceeds, was more circumspect. In *Ilkhchooyi v. Best*,¹⁷⁰ the landlord took the position that a clause giving it the right to participate in the transfer of the leasehold estate also gave it the right to participate in the sale of the business itself. The court held that the landlord's refusal to consent to a transfer of the leasehold unless it received a share of the profits from the sale of the business was not only outside any rights set forth in the lease, it was unconscionable.

This limited interpretation of *Kendall* has been codified in California by a group of statutes, applicable to non-residential property, which provide, inter alia, that a restriction on tenant's transfer, which requires consent of landlord, requires that this consent not unreasonably be withheld, but that this consent may be subject to express standards and conditions. The burden of proof of unreasonableness is on the tenant; and any ambiguity in a restraint is construed in favor of transferability. On the other hand, the statutes permit landlord to make an absolute restriction against transfer and to make any consent to this subject to landlord's receipt of additional consideration.¹⁷¹ However, it was subsequently determined in California that "consideration" be deemed payment for increased market value of the lease and that substantial demand for part of the purchase price of the business and for a covenant not to compete is unconscionable.¹⁷² This statutory restriction has authorized and has been applied to enforce a clause authorizing landlord to cancel a lease for a breach of the restriction.¹⁷³ But this is probably unenforceable in bankruptcy of a tenant.¹⁷⁴ But excessive consideration has been forbidden by a Texas bankruptcy court.¹⁷⁵ And query if even California would permit excessive consideration in its state court despite its statute.¹⁷⁶

170. *Ilkhchooyi v. Best*, 37 Cal. App. 4th 395, 45 Cal. Rptr. 2d 766 (Cal. Ct. App. 1995).

171. CAL. CIV. CODE §§ 1995.010–.270, added by Stat. 1989, c. 982, § 2. *But see In re Office Prods., Inc.*, 136 B.R. 992 (Bankr. W.D. Tex. 1992), discussed in chapter 16, note 56.

172. *See Ilkhchooyi*, 37 Cal. App. 4th 395, and its extended discussion.

173. *See In re Office Prods., Inc.*, 140 B.R. 407 (Bankr. W.D. Tex. 1992), discussed in chapter 16, note 50.

174. *In re Office Prods., Inc.*, 136 B.R. 992 (Bankr. W.D. Tex. 1992).

175. *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 6 Cal. Rptr. 2d 467, 826 P.2d 710 (1992).

176. *Cf. In re Office Prods., Inc.*, 136 B.R. 992 (Bankr. W.D. Tex. 1992).

A tenant's assignment to a corporation wholly owned by the tenant—amounting in substance to an incorporation of his business—has been held in a few cases to constitute no breach of a non-assignment clause.¹⁷⁷ This result disregards the corporate entity but, more important, disregards the possibility thus enabled of transferring the lease to a third party by transfer of the corporate stock.¹⁷⁸

An Illinois statute requiring landlord to take reasonable measures to mitigate damages recoverable against a defaulting tenant overrules a line of Illinois cases that had put landlord under no affirmative duty to mitigate but required him to accept a suitable assignee or subtenant tendered by the tenant.¹⁷⁹

A New York statute permits a tenant of residential space to sublet or assign, subject to prior consent of the landlord. Under the statute a landlord may withhold consent to an assignment, without cause, in which event the only remedy of the tenant is release from the lease. In the case of a residential unit in a dwelling with four or more dwelling units, tenant may sublet with landlord's consent, but if landlord withholds consent without good reason the tenant may sublet.¹⁸⁰

177. *Sexton v. Nelson*, 228 Cal. App. 2d 248, 39 Cal. Rptr. 407 (4th Dist. 1964); *Aiello v. Austrian*, 2 Conn. App. 465, 479 A.2d 1234 (1984); *Liberty Nat'l Bank v. Pollack*, 337 Ill. App. 385, 85 N.E.2d 855 (1949). Forbidding tenant to "grant use or possession to any other party" did not bar incorporation by two cotenants, relinquishment by one to the other, or merger with another corporation. *Giaise v. Cuccia*, 420 So. 2d 700 (La. Ct. App. 1982).

178. See section 7:3.3[C][1].

179. 735 ILL. COMP. STAT. 5/9-213.1. See also *MBC, Inc. v. Space Ctr. Minn., Inc.*, 177 Ill. App. 3d 226, 237, 532 N.E.2d 255, 263, 126 Ill. Dec. 570 (1988). The earlier Illinois cases are reviewed in *Vranas & Assocs., Inc. v. Family Pride Finer Foods, Inc.*, 147 Ill. App. 3d 995, 1002, 498 N.E.2d 333, 339, 101 Ill. Dec. 151 (1986).

180. N.Y. REAL PROP. LAW § 226b (McKinney 1989); *Blum v. W. End Assocs.*, 64 N.Y.2d 939, 488 N.Y.S.2d 635, 477 N.E.2d 1089 (1985). In case of a requested sublease the statute entitles landlord to information to determine reasonableness and requires consent of any covenant or guarantor. It does not apply to cooperative or certain public housing. Compare N.Y. REAL PROP. LAW § 236, discussed in chapter 16, note 108. The statute has been held to be for tenant's benefit. If landlord fails to reply to tenant's request, or unreasonably withholds his consent, tenant may sublet. *Conrad v. Third Sutton Realty Co.*, 81 A.D.2d 50, 439 N.Y.S.2d 376 (1st Dep't 1981). Section 226b was substantially amended and enlarged by 1983 N.Y. Laws, ch. 403, § 37, to which reference is made. *In re Pyramid Operating Auth., Inc.*, 144 B.R. 795, 813 (Bankr. W.D. Tenn. 1992) (and cases cited); 11 U.S.C. § 365(c)(3). For when a lease is expired for this purpose, see chapter 16, note 57; see also the discussion on relief from forfeiture in chapter 16, note 40.

[B] Bankruptcy Treatment of Restrictions on Assignment

The Bankruptcy Code of 1978 permits a trustee to assume or reject an unexpired lease, that is, one not completely terminated or subject to reversal of the termination.¹⁸¹ According to 11 U.S.C. § 365(d)(4), the trustee is entitled to 120 days to decide whether to assume or reject a lease.¹⁸² When the estate assumes the lease, it frequently will do so for purposes of reassigning the lease to a third party in consideration for value that the estate will use for purposes of reorganization or dealing with the estate's creditors. The Bankruptcy Code voids the effect of absolute prohibitions on assignment¹⁸³ and permits the trustee to assign the lease if the trustee assumes the lease as described above and there is adequate assurance of performance of the lease by the assignee.¹⁸⁴ To facilitate assumption, the Code will void specific use clauses whose purpose is to circumvent the policy of the Bankruptcy Code and bar an assignment.¹⁸⁵

Shopping center developers have argued successfully to the Congress that the interest of their overall business, including the interests of other tenants within the center, suffer specially when bankrupt tenants are able to assign their rights free of use restrictions. Thus, the Code provides specific protection for shopping centers insuring that no assignment can occur without assurance that use clauses and other provisions vital to the operation of a center will continue to be performed.¹⁸⁶

181. For a complete discussion of tenant bankruptcy outside of issues concerning assignments of the tenant's lease, see chapter 19A, *infra*.

182. *Id.*

183. 12 U.S.C. § 365(f).

184. 12 U.S.C. § 365(f)(2).

185. *In re* U.L. Radio Corp., 19 B.R. 537 (Bankr. S.D.N.Y. 1982) (appliance store to small bistro); *In re* Peterson's Ltd., Inc., 31 B.R. 524 (Bankr. S.D.N.Y. 1983); *In re* Evelyn Byrnes, Inc., 32 B.R. 825 (Bankr. S.D.N.Y. 1983) (elegant dress shop to "Labels for Less" discounter). But lifting a restriction to plastics manufacturing was denied despite this reduced value of lease from \$119,400 to \$5,500. *In re* Black Enters., Inc., 39 B.R. 253 (Bankr. D. Guam 1982). *Cf.* text *infra* at note 260.

186. Bankruptcy Reform Act of 1978, § 365(b)(3)(C). *But see In re* Tobago Bay Trading Co., 112 B.R. 463 (Bankr. N.D. Ga. 1990), which held unenforceable a clause in a shopping center lease that forbade a "real or fictitious 'going-out-of-business' auction, distress, fire or bankruptcy sale." *Tobago* ruled that its decision did not violate a use clause (*i.e.*, what a tenant may sell), but related merely to tenant's method of operation. *Tobago* is also discussed in chapter 16, note 53.

A form of "going out of business" clause reads:

Tenant will not conduct any auction, distress, fire bankruptcy, "going out of business" sale, and shall not conduct or permit the

Before the 1984 amendments the assignment was not to “breach substantially” any provision, such as radius, location, use, or exclusiveness provisions, in any other lease, financing agreement, or master agreement relating to the shopping center.¹⁹⁴ By deleting “substantially” an assignment of a shopping center lease may or may not be subject to strict enforcement of such provisions even when contrary to bankruptcy policy. Another amendment bars assignment of a shopping center lease that would be prejudicial to the tenant mix.¹⁹⁵ A debtor will not be allowed to assign lease where the assignment would disrupt tenant balance at shopping center.¹⁹⁶ In one case, the court was willing to grant strict enforcement of the lease provisions because of the damage that would occur from a dramatic change in the direction of this “going concern.”

Despite the Bankruptcy Code language protecting the landlord’s rights under the lease following assignment, several recent bankruptcy court decisions have found lease provisions in shopping center leases to be per se restraints on alienation and have invalidated them even though they were of a character that should have been protected under the shopping center protective provisions described above. An example of a case in which there is a reasonable argument that such an approach is warranted is one in which the lease specifically provided that the property could only be used for a “Trak Auto store.” Trak Auto Corporation declared bankruptcy and proposed to discontinue business at many locations and to transfer the leases at those locations to others. The restriction to a “Trak Auto store” was held to be invalid.¹⁹⁷ Other cases, however, raise much closer questions as to whether the provision in question should be regarded as a per se restraint on alienation. In *In re Rickels Home Ctrs., Inc.*,¹⁹⁸ a court invalidated

type of business commonly called a “discount house or store,” surplus store, second hand store, temporary outlet, or any similar business or activity.

187.–193. [Reserved.]
 Taken from *Callis v. Colonial Props., Inc.*, 597 So. 2d 660, 669 (Ala. 1992).

194. Former Bankr. Code § 365(b)(3)(D).

195. 11 U.S.C. § 365(b)(3)(D); *In re Federated Dep’t Stores, Inc.*, 135 B.R. 941 (Bankr. S.D. Ohio 1991). B. Roswick & S. Eivity, *Use Clauses in Shopping Center Leases: The Effect of a Tenant’s Bankruptcy*, 14 REAL PROP. PROB. & TR. J. 3 (1985).

196. *See In re Federated Dep’t Stores, Inc.*, 135 B.R. 941 (Bankr. S.D. Ohio 1991).

197. *LaSalle Nat’l Trust v. Trak Auto Corp.*, 288 B.R. 114 (D. Va. 2003), *rev’d sub nom. In re Trak Auto Corp.*, 367 F.3d 237 (4th Cir. 2004). For discussion of grounds for reversal, see *infra* notes 199.1 to 199.4. It is uncertain whether the court reached the issue of whether the requirement that the assignee be a “Trak Auto store” was valid.

198. *In re Rickels Home Ctrs., Inc.*, 240 B.R. 826 (D. Del. 1998). *See also In re Paul Harris*, 49 P.3d 710 (Bankr. S.D. Ind. 1992) (provision in women’s

provisions in shopping center leases prohibiting subdivision of the leased space, remodeling, and repainting, even though the landlords argued that the contemplated changes to be made in connection with a bankrupt tenant's assignment would lead to the retail spaces "going dark" for six months or more and even though the smaller retail units arguably were inconsistent with the landlord's "big box" concept for the center.^{198.1}

The statutory protection for "tenant mix" ought to support landlord decisions not to approve proposed assignments, even in bankruptcy, but recent cases have demonstrated that the landlord would be wise to document carefully its plan of tenant mix, revising it on a regular basis as marketing needs demand, so that the court actually will credit the landlord's expressed concerns. In the *Trak Auto* case discussed above, the landlord was denied the right to refuse to an assignment of the auto parts location to a clothing retailer, despite the landlord's argument that if the retailer moved in the percentage of its center given over to clothing would exceed recommended levels. The court concluded that the landlord was unable to show that it in fact had adequate control over the relevant market of retail spaces (the center was a "downtown grouping," not an enclosed mall) and in any event had not shown any particular reluctance to exceed recommended levels for clothing retail in the past. The landlord had the burden of demonstrating that the "tenant mix" concerns were genuine, and the court found that it had not met that burden.¹⁹⁹

Although, as indicated, some lower courts have use clauses and similar restrictions as de facto anti-assignment clauses, in a recent

apparel store lease requiring assignee to operate under same name and for same purpose held that to be "anti-assignment" clause and invalid); compare *In re Sun TV & Appliances, Inc.*, 234 B.R. 356, 370 (Bankr. D. Del. 1999) (decided in the same district as *Rickels*) (restriction on use as home electronics store upheld when landlord made argument that there would be a significant impact on identifiable tenant mix); *In re E-Z Serve Convenience Stores, Inc.*, 289 B.R. 45, 51–52 (Bankr. M.D.N.C. 2003) (landlord's right of first refusal to purchase the buildings and permanent improvements constructed on the leased land by the debtor-tenant is not avoidable as a restriction on assignment when the bankrupt tenant assigns the lease).

198.1. *Rickels* was criticized in the 2004 Fourth Circuit decision in *Trak Auto*, cited in note 197, *supra*.

199. See also *Double K. Props. v. Aaron Rents, Inc.*, 2003 U.S. Dist. LEXIS 11940 (D. W. Va. July 14, 2003) (unpublished opinion) (extension option that is stated in lease to be personal only to original tenant will nevertheless permit extension by assignee of tenant's rights in bankruptcy following assumption of the lease, since to apply the "personal" restriction would constitute a restriction on assignment that is invalid under § 365(f)(1), notwithstanding fact that lease relates to property in a shopping center).

decision the only federal circuit court of appeals panel to rule on the issue, *In re Trak Auto Corporation v. West Town Center*,^{199.1} has rejected the broadest reach of such arguments and held that restriction that the leasehold estate be used for the sale of auto parts was enforceable and not a de facto anti-assignment clause even though, as a practical matter, there was no economic value in reopening an auto parts store in this location due to the nearby presence of several competitors. The court noted a conflict with prior lower court cases in the interpretation and application of two apparently contradictory provisions in the bankruptcy code. Under section 365(b)(3),^{199.2} a debtor tenant may assign the lease so long as the assignee provides adequate assurance of future performance and adequate assurance that the assignment is subject to all the provisions of the lease, including but not limited to, use restrictions. Section 365(f)(1),^{199.3} however, contains a general provision that prohibits “anti-assignment” clauses, therefore allowing debtor to assign the lease, notwithstanding a provision which prohibits, restricts, or conditions assignment.

The court, after examining legislative intent, held that when such a conflict arises, the more specific provisions of the former, which protects shopping center owners, should trump the more general provisions of the latter, which protects the debtor tenant.^{199.4} It is important to note that on appeal, landlord did not seek to enforce a provision in the lease requiring assignee to operate under the same trade name since that would have constituted a larger issue for the court, as the statute was not intended to enforce operation under a specific trade name.^{199.5}

In response to the cases refusing to protect shopping center landlords as Congress apparently intended, Congress in 2005 amended these provisions again to make the intent even more clear. The changes are small, but significant. The subsection of the Act that authorized courts to avoid a restriction that “prohibits, restricts, or conditions the assignment” of a bankrupt tenant’s lease^{199.6} has been made expressly subject to the subsection requiring that any assignment provide adequate assurance for the continued performance of “all provisions” in a shopping center lease, including expressly those

199.1. *In re Trak Auto Corp.*, 367 F.3d 237 (4th Cir. 2004).

199.2. 11 U.S.C. § 365(b)(3).

199.3. 11 U.S.C. § 365(f)(1).

199.4. The court noted that Congress regarded shopping centers as “carefully planned enterprises” where “tenant mix” was just as important to shopping center owners as rental payments under a lease and that the practice of avoiding use restrictions was creating problems with tenant mix and adversely affecting shopping centers.

199.5. 11 U.S.C. § 365(b)(3)(C).

199.6. 12 U.S.C. § 365(f)(1).

dealing with (among other things) “radius, location, use or exclusivity” and also requiring protection of any rights arising under exclusive use provisions between the landlord and other tenants.^{199.7} Will this language require courts even to uphold restrictions requiring that premises be continued to be used as a “Trak Auto store”? The answer is probably yes if, emerging from the bankruptcy, there will be any stores anywhere that can operate under such a name, even if it would be financially unfeasible for a store at a given location to so operate. Basically, the tenant would have to reject the lease at such a location and the landlord could recapture the space.

Assignment by the trustee relieves the trustee and the bankrupt estate of liability for breach occurring after such assignment.²⁰⁰ An exception to the foregoing forbids the trustee to assume or assign a lease that entitles landlord to personal performance by tenant.²⁰¹ A debtor may not exercise a renewal option without assumption of the lease.²⁰² Otherwise landlord would not know if his tenant intended to remain.

199.7. 12 U.S.C. § 365(b), especially § 365(b)(3).

200. Bankruptcy Reform Act of 1978 § 365(a), (f)(1), (f)(3), (k). Trustee’s assignment to a corporation with net assets of \$660 million was deemed adequate assurance of future performance. *In re Taylor Mfg., Inc.*, 6 B.R. 370 (Bankr. N.D. Ga. 1980). If there had been a default in the lease, “adequate assurance of future performance” in a shopping center lease includes adequate assurance—

- (A) of the source of rent and other consideration due under such lease;
- (B) that any percentage rent due under such lease will not decline substantially;
- (C) that assumption or assignment of such lease will not breach substantially any provision, such as radius, location, use, or exclusivity provision, in any other lease, financing agreement, or master agreement relating to such shopping center; and
- (D) that assumption or assignment of such lease will not disrupt substantially any tenant mix or balance in such shopping center.

Bankruptcy Reform Act of 1978 § 365(b)(3). (But assignment may not be conditioned on preservation of a tenant mix where no such requirement is in the lease. *In re Ames Dep’t Stores, Inc.*, 127 B.R. 744 (Bankr. S.D.N.Y. 1991).)

But see landlord’s additional rights under the 1984 amendments considered *supra* notes 186–93, and connecting text. There is no general definition of “adequate assurance of future performance” in the Act except with reference to shopping centers. But subletting to a shell corporation was held sufficient where the circumstances presaged commercial success. *In re Lafayette Radio Elecs. Corp.*, 9 B.R. 993 (E.D.N.Y. 1981). Pro rata assignment of a lease was permitted a tenant’s trustee. *In re Brentano’s, Inc.*, 29 B.R. 881 (S.D.N.Y. 1983).

201. Bankruptcy Code of 1978 § 365(c). *Cf.* section 7:3.2 and subsequent subsections.

202. *In re Cook United, Inc.*, 53 Bankr. 342 (N.D. Ohio 1985).

At least one bankruptcy court has invalidated lease provisions creating a landlord's interest in the proceeds of an assignment. The lease is an asset of the tenant, and the ability to assign the lease also is a right accruing to the trustee. A provision requiring that the proceeds be turned over to the landlord was not viewed as giving the landlord "ownership" of the lease, and therefore could not preempt the interest of the trustee.²⁰³

[C] Landlord's Rights Under Non-Assignment Clause

Landlord's most practical remedy for tenant's breach of covenant not to assign or sublet is to forfeit the lease. Tenant's breach does not terminate the lease per se because a non-assignment covenant is not ipso facto a condition.²⁰⁴ This is an example of a covenant as distinguished from a condition. But when a lease includes a proper foundation landlord may forfeit the lease for tenant's breach.²⁰⁵ Landlord may enforce landlord's rights without entry, by obtaining an

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203. See *In re Office Prods., Inc.*, 136 B.R. 992 (Bankr. W.D. Tex. 1992). See also *In re Standor Jewelers W., Inc.*, 129 B.R. 200 (B.A.P. 9th Cir. Cal. 1991) (provisions requiring the lessee to remit to the landlord 75% of appreciation in value of the lease as condition to the landlord's consent to any assignment, even if valid under state law, constituted a restriction on the transfer of lease that was preempted by and invalid under the Bankruptcy Code); *In re David Orgell, Inc.*, 117 B.R. 574 (Bankr. C.D. Cal. 1990) (holding that a lease provision calling for rent increase on transfer is invalid when transfer occurs in bankruptcy context).
204. *Spear v. Fuller*, 8 N.H. 174, 28 Am. Dec. 391 (1835); *Magill v. Weschler*, 41 Erie Co. L.J. 59 (Pa. 1957); *Shropshire v. Prahalis*, 309 S.C. 40, 419 S.E.2d 829 (Ct. App. 1992) (lease contained forfeiture clause); see also section 7:3.4[D]. A tenant's violation of a covenant in the lease requiring tenant to notify landlord within ten days of subletting a portion of the leased premises was not sufficient cause for landlord to deny option to extend lease term because breach of the duty to notify landlord is immaterial to the lease. *Holytrent Props. v. Valley Park Ltd.*, 32 S.W.3d 27 (Ark. Ct. App. 2000).
205. *Hamilton v. Dixon*, 168 Cal. App. 3d 1004, 214 Cal. Rptr. 839 (1985); *Sexton v. Nelson*, 228 Cal. App. 2d 248, 39 Cal. Rptr. 407 (4th Dist. 1964); *Robinson v. Weitz*, 171 Conn. 545, 370 A.2d 1066 (1976); *Deal v. Cockrell*, 111 Idaho 127, 721 P.2d 726 (1986); *Burch v. Hickman*, 330 Ill. App. 155, 70 N.E.2d 421 (1947); *Healthco, Inc. v. E&S Realty Assocs.*, 400 Mass. 700, 511 N.E.2d 579 (1987); note 269, *infra*. *Clasen v. More Bros. Realty Corp.*, 413 S.W.2d 592 (Mo. Ct. App. 1967); *Pergament Home Ctrs., Inc. v. Net Realty Holding Trust*, 171 A.D.2d 736, 567 N.Y.S.2d 292 (2d Dep't 1991); *Morrisville Shopping Ctr., Inc. v. Sun Ray Drug Co.*, 381 Pa. 576, 112 A.2d 183 (1955); *Keystone Props. v. Batey Moving & Storage Co.*, 505 S.W.2d 472 (Tenn. 1974); *Howe v. Prof'l Manifest, Inc.*, 829 P.2d 160 (Utah Ct. App. 1992); 51C C.J.S. *Landlord and Tenant* § 105 (1968). Equity may relieve from this forfeiture. See text *infra* note 210. An

injunction.²⁰⁶ Landlord also is entitled to actual damages for the breach, without necessarily ending the lease.²⁰⁷ The measure of damages is not ordinarily clear, with the result that nominal damages are usual.²⁰⁸ Greater damages are recoverable where there is a demonstrable causal connection between tenant's breach and landlord's loss.

In an English case, for example, tenant's breach consisted of a sublease made for a dangerous use, resulting in destruction by fire. Tenant was held liable for this damage.²⁰⁹ The court observed that if

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- unlawful detainer action, following landlord's election to terminate for breach of a non-assignment clause, was defeated under a Washington statute that requires notice to the tenant in the alternative to perform or surrender. Landlord's election was held insufficient under the statute. Forfeiture was avoided by treating the assignment as void. *Shoemaker v. Shaug*, 5 Wash. App. 700, 490 P.2d 439 (1971). The court also noted that in Washington reassignment to a tenant is no breach of a non-assignment clause. *Coulos v. Desimone*, 34 Wash. 2d 87, 208 P.2d 105 (1949).
206. *Godfrey v. Black*, 39 Kan. 193, 17 P. 849, 7 Am. St. Rep. 544 (1888); *Wertheimer v. Hosmer*, 83 Mich. 56, 47 N.W. 47 (1890); *Clasen v. More Bros. Realty Corp.*, 413 S.W.2d 592 (Mo. Ct. App. 1967); *Morrisville Shopping Ctr., Inc. v. Sun Ray Drug Co.*, 381 Pa. 576, 112 A.2d 183 (1955); 1 AMERICAN LAW OF PROPERTY § 3.58 (1952); 51C C.J.S. *Landlord and Tenant* § 35 (1968); 49 AM. JUR. 2D *Landlord and Tenant* § 1091 (1995 rev.).
207. *Artesia Med. Dev. Co. v. Regency Assocs., Ltd.*, 214 Cal. App. 3d 957, 266 Cal. Rptr. 657 (2d Dist. 1989) (under Cal. statute); *Food Pantry, Ltd. v. Waikiki Bus. Plaza, Inc.*, 58 Haw. 606, 575 P.2d 869 (1978); *Haack v. Great Atl. & Pac. Tea Co.*, 603 S.W.2d 645 (Mo. Ct. App. 1980). *See also* chapter 16 at notes 381–85.
208. The following cases state, usually *obiter*, that landlord may recover damages without indicating their measure. *Nw. Pac. R.R. v. Consumers Rock & Cement Co.*, 50 Cal. App. 2d 721, 123 P.2d 872 (1942); *S. Liebmann's Sons Brewing Co. v. Lauter*, 73 A.D. 183, 184, 76 N.Y.S. 748, 749 (1st Dep't 1902); *Lane v. Spiegel*, 117 N.Y.S. 262 (App. Term 1909); *Magill v. Weschler*, 41 ERIE CO. L.J. 59 (Pa. 1957); *Hazlehurst v. Kendrick*, 6 S. & R. 446 (Pa. 1821). *See also* 1 AMERICAN LAW OF PROPERTY § 3.58 (1952); 51C C.J.S. *Landlord and Tenant* § 35 (1968). *Imps. & Traders Ins. Co. v. Christie*, 28 N.Y. Super. 169 (1867), said it was difficult to lay down the measure of damages. *Packard-Bamberger & Co. v. Maloof*, 83 N.J. Super. 273, 199 A.2d 400 (1964), *rev'd on other grounds*, 89 N.J. Super. 128, 214 A.2d 45 (1965), said the measure of damages was "the amount lost for rent" without further explanation. In landlord's action for an accounting for the proceeds of subletting, the complaint was dismissed on the ground that landlord could proceed at law, with examination before trial, to determine the amount tenant had received. There was no indication whether landlord's recovery would be tenant's gross or net proceeds. *Long Bldg., Inc. v. Buffalo Anthracite Coal Co.*, 190 Misc. 97, 74 N.Y.S.2d 281 (Sup. Ct. 1947).
209. *Lepla v. Rogers*, [1893] 1 Q.B. 31. In *Rouiaine v. Simpson*, 84 N.Y.S. 875 (App. Term 1903), tenant improperly sublet for a carpenter shop. Landlord recovered the amount of the increased insurance premiums caused by this use. Landlord's acceptance of rent was held a waiver of a right to forfeit but not a right to damages.

the breach had consisted of a sublease to a responsible tenant for a dwelling, followed by accidental fire, tenant's breach would not be the proximate cause because the fire would not have been in contemplation of anybody. In another case tenant improperly assigned and sublet at a time when the rental value of the premises exceeded the rent. Landlord sought forfeiture, though it had previously offered to consent if the rent were increased. Equity relieved this tenant from forfeiture on condition that tenant rescind the transaction or pay the amount of the rental value to the landlord. The court noted that landlord was not entitled to rental value during the existence of the lease, but awarded its equivalent as a condition of relieving from forfeiture.²¹⁰

[D] Landlord's Express or Implied Duty to Be Reasonable in Consenting to Transfer

[D][1] In General

Although landlords rarely agree expressly to be "reasonable" in evaluating whether to consent to a proposed assignment or sublet, anything is possible given the right tenant, and such clauses are seen. In addition, as set forth above, a minority, but still a substantial number, of courts have concluded that the landlord has an implied duty to be reasonable whenever the parties provide that the landlord has the right to consent prior to any assignment or sublet.

A covenant by landlord to consent is not excused by a default in the lease unless the lease so specifies. This is an example of the independence of lease covenants.²¹¹ Tenant's request that landlord's consent include a statement that the lease was in good standing was held to include a factual issue.²¹²

A right to sublet, provided tenant first offered the space to existing tenants in the building, was held the equivalent of a right of first refusal. Tenant was not required to make the first approach to existing tenants; it was sufficient that after having an outside offer tenant invited existing tenants to match the offer.²¹³

210. Food Pantry, Ltd. v. Waikiki Bus. Plaza, Inc., 58 Haw. 606, 575 P.2d 869 (1978). See also Sharp v. Sentry Drugs, 505 So. 2d 618 (Fla. Dist. Ct. App. 1987); chapter 16, note 40, second paragraph.

211. F.H.R. Auto Sales, Inc. v. Scutti, 144 A.D.2d 956, 534 N.Y.S.2d 266 (4th Dep't 1988). See Index, Independent covenants.

212. *Id.* Should landlord be required to give an estoppel certificate without an express requirement for this? Too many factors for landlord to determine offhand at his peril might be involved.

213. Stauffer Chem. Co. v. Fisher-Park Lane Co., 312 N.Y.S.2d 243 (Sup. Ct. 1970). The sublease involved four of tenant's seven floors. This and another sublease of two floors, each for twenty years, promised the tenant an aggregate profit of \$20 million.

Landlord is not in default for failure to consent to an assignment or sublease unless tenant produces a candidate ready, willing, and able to fulfill obligations.²¹⁴ In some cases, this may amount to the submission of an assignment agreement executed by the assignee, showing the assignee's willingness to proceed.^{214.1}

[D][2] Historical Analysis

A clause providing that a tenant may not assign or sublet without landlord's consent "which consent shall not be unreasonably withheld" has at times been given a strict grammatical construction. Under the English rule and followed a bit in some of our states, this language was deemed no agreement by landlord to consent for breach of which landlord could be liable for damages, but merely a qualification of tenant's covenant not to assign. It followed that landlord could unreasonably refuse without liability for damages. This put tenant in an awkward situation. He could abide by landlord's decision, and thereby give up his rights. Or he could disregard landlord's decision and assign nevertheless.²¹⁵ If in so doing tenant

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214. *Darin, LLC v. Stratedge Corp.*, 2008 WL 1699450 (Mass. App. Ct. 2008). In *Darin*, the state court of appeals affirmed the trial court's holding that the landlord was reasonable in refusing the sublease request of tenant. The burden is on the tenant to demonstrate that the subtenant is capable of performing its financial obligations. The tenant and the prospective subtenant failed to meet this burden: they did not provide landlord with adequate financial information about the subtenant; the subtenant lacked significant operating capital and a business plan; and the subtenant could demonstrate only a poor rental history. *See also* *Golf Mgmt. Co. v. Evening Tides Waterbeds, Inc.*, 213 Ill. App. 3d 355, 572 N.E.2d 1000, 157 Ill. Dec. 536 (1991); *WHTR Real Estate Ltd. P'ship v. Venture Distrib.*, 825 N.E.2d 105 (Mass. App. Ct. 2005).
- 214.1. In *Shreeji Krupa, Inc. v. Leonardi Enters.*, No. 07-3221 (7th Cir. Nov. 13, 2008), the tenant sent an assignment agreement executed only by the tenant as assignor, and the landlord did not respond. Later, in an action for damages for the tenant's failure to act reasonably in approving assignments (as the lease required), the court held that the landlord had no duty to respond when it was unclear that the assignee in fact was "willing and able." Some communication short of a signed assignment might have been acceptable here, but the landlord apparently had "slow footed" the negotiations and the parties had not all come together. The case was complicated by the fact that the tenant's lease had a mutual sixty-day termination clause, which likely should have been limited only to the occupancy by the assigning tenant (who was ill), but was not. Hence, the court started with the realization that any assignment was essentially valueless and, therefore, with great skepticism about the willingness of the proposed assignee to agree.
215. *Treloar v. Bigge*, L.R. 1873-74 Ex. 151; *Sear v. House Prop. & Inv. Soc.*, 1880-81 16 Ch. D. 387; *Magna Inv. & Dev. Corp. v. Brooks Fashion Stores, Inc.*, 137 Ariz. 247, 669 P.2d 1024 (1983); *Butterick Pub. Co. v. Fulton & Elm Leasing Co.*, 132 Misc. 366, 229 N.Y.S. 86 (Sup. Ct. 1928);

misjudged his rights he might put himself into an incurable default under the lease, and his assignee might be evicted. As an alternative, tenant could bring an action for a declaratory judgment. All this could be discouraging and unattractive to both tenant and his prospective assignee.

New Jersey refused to follow the English rule, which it regards as placing nicety of expression above the manifest intention.²¹⁶ The lower New York courts had followed the English rule but their overruling is foreshadowed in a strong dictum.²¹⁷

**[D][3] Landlord's Duty to Be Reasonable in
Consenting—Construction**

The qualification of non-assignment restrictions, by a requirement that landlord be “not unreasonable” in consenting to assignment or subletting, or that the prospective occupant be of “good character” or the like, was considered sooner and more frequently in England than in this country.²¹⁸ The rule that restrictions against assignment are construed

31 A.L.R.2d 831, 835 (1953); *see also* Hedgecock v. Mendel, 146 Wash. 404, 412, 263 P. 593, 596 (1928); *and* discussion in Singer Sewing Mach. Co. v. Eastway Plaza, Inc., 5 Misc. 2d 509, 158 N.Y.S.2d 647 (Sup. Ct. 1957), *noted in* 26 FORDHAM L. REV. 352 (1957).

216. Broad & Branford Place Co. v. J.J. Hockenjos Co., 132 N.J.L. 229, 39 A.2d 80 (1944). This was followed in Passaic Distribs., Inc. v. Sherman Co., 386 F. Supp. 647 (S.D.N.Y. 1974) (applying N.J. law), holding landlord's withholding of consent under this clause was a breach of an affirmative covenant to consent. Landlord was held liable in damages for the difference between the reasonable rental value and the rent obtained by tenant in mitigation of damages, with future installments discounted to their current value. Other claims by tenant, *e.g.*, seven months' vacancy, maintenance of premises, cost of advertising, etc., failed for lack of proof. Tenant's failure to execute a sublease with its prospective subtenant was held unaffected by the statute of frauds, on the ground this statute is not available to third parties. *Accord*, as to statute of frauds with respect to third persons, *In re Gatlinburg Motel Enters., Ltd.*, 119 B.R. 955, 962–63 (E.D. Tenn. 1990); 73 AM. JUR. 2D *Statute of Frauds* §§ 576, 578 (1974).
217. After approving the rationale of *Broad & Branford Place Co.*, 132 N.J.L. 229, the court in *Arlu Assocs., Inc. v. Rosner*, 14 A.D.2d 272, 275, 220 N.Y.S.2d 288, 291, *aff'd*, 12 N.Y.2d 693, 185 N.E.2d 913, 233 N.Y.S.2d 477 (1962), wrote:

The view that the tenant's remedy is to make the assignment despite the absence of the landlord's consent has little to recommend it in light of present day business conditions. Purchasers of large commercial leases are interested in buying businesses, not lawsuits.

218. H. UNDERHILL, LANDLORD AND TENANT § 632 (1909); 104 L.J. (London) 582–83 (Sept. 10, 1954); 105 L.J. (London) 518 (Aug. 19, 1955); Lewis, N.Y.L.J., Aug. 2, 3, 1933, at 380, 394. By statute in England a covenant against assignment without landlord's consent is deemed to provide that landlord's consent is not unreasonably to be withheld. Landlord and Tenant Act of 1927 § 19. The statute is quoted *supra* in note 165.

most strongly against a landlord have been applied to this situation.²¹⁹ It is a safe if general conclusion that “arbitrary considerations of personal taste, sensibility, or convenience are not criteria of the landlord’s duty. . . .”²²⁰

Whenever a landlord may restrict assignments absolutely (see section 7:3.4[A]), he may qualify the qualification that he not unreasonably withhold his consent to assignment. An example is a provision that any assignment be to substantially the same type, class, and quality of business.²²¹

The policy in construing against a restriction on alienation was acutely manifest in a case where landlord was not to refuse consent unreasonably and had a right to cancel on tenant’s request to assign or sublet. The right to cancel was ruled out in this situation.²²²

A restriction against assignment or subletting without landlord’s consent entitles landlord to notice and request, though landlord may have no valid reason to object. Tenant’s failure to give such notice is a breach of the lease.²²³ A landlord need not permit an assignment without knowledge of the assignee’s proposed use.²²⁴ But tenant’s request for

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219. *Golf Mgmt. Co. v. Evening Tides Waterbeds, Inc.*, 572 N.E.2d 1000 (Ill. App. Ct. 1991) (maintaining the pro-tenant view by holding that the landlord may not unreasonably withhold assignment if the tenant provides a subtenant who is ready, willing and able to take over the lease); *Chanslor-W. Oil & Dev. Co. v. Metro. Sanitary Dist.*, 131 Ill. App. 2d 527, 266 N.E.2d 405 (1970).
220. *Broad & Branford Place Co. v. J.J. Hockenjos Co.*, 132 N.J.L. 229, 232, 39 A.2d 80, 82 (1944); *Logan & Logan, Inc. v. Audrey Lane Laufer, LLC*, 34 A.D.3d 539 (N.Y. App. Div. 2006).
221. *Whitman v. Pet, Inc.*, 335 So. 2d 577 (Fla. Dist. Ct. App. 1976) (restaurant tenant assigned to party that failed to qualify under this provision).
222. *In re Fashion World, Inc.*, 44 B.R. 754 (D. Mass. 1984). The fact that tenant’s bankruptcy was involved is perhaps significant. *Accord* *Petrou v. Wilder*, 557 So. 2d 617 (Fla. Dist. Ct. App. 1990).
223. RESTATEMENT (SECOND) OF PROPERTY (Landlord and Tenant) § 15.2 cmt. g (1977). One case found that, although failure to request consent in advance may be a breach, it may be a *de minimus* breach where the proposed assignee is otherwise suitable and landlord has a duty to consent reasonably. *Ponderosa Manufactured Homes, LLC v. EZ Ventures, Inc.*, 2008 WL 4853604 (Ariz. Ct. App. Nov. 6, 2008) (*see infra* note 248.1). Thus, the failure to make an advance request would not justify a refusal to consent. Note, however, that the lease may prohibit assignments or sublease when the tenant is in default, and this circumstance may lead to a different outcome. *See also* *Healthco, Inc. v. E&S Realty Assocs.*, 511 N.E.2d 579 (Mass. 1987).
224. Space in a shopping center was built and used as a food store, under a lease with no restrictions on use. The proposed assignment forbade use as a food store and left landlord wholly in the dark with respect to the new use. *Kroger Co. v. Rossford Indus. Corp.*, 261 N.E.2d 355 (Ohio Com. Pl. 1969).

permission to assign need not be accompanied by a formal document.²²⁵ The burden of proving landlord's unreasonableness,²²⁶ as well as that of furnishing information sufficient to determine reasonableness,²²⁷ is on the tenant. Landlord need not seek out such information. In the absence of such information, landlord may refuse consent,²²⁸ and landlord must reasonably process the information given to it in a reasonably timely fashion so as not to injure tenant's transaction.^{228.1}

"Personal satisfaction is not the sole determining factor."²²⁹ One court concluded that the reasons for and against consent fall into two categories, subjective and objective, that objective standards are those that are readily measurable criteria of acceptability from the point of view of any landlord and that these do not change when landlord conveys to another. The criteria listed were:

- (a) financial responsibility;
- (b) the "identity" or "business character" of the subtenant—his suitability for the particular building;

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225. Ernst Home Ctr. v. Sato, 80 Wash. App. 473, 910 P.2d 486 (1996). But the advantage of submitting a form of assignment while negotiations with the assignee are pending is illustrated in the form in the text *supra* after note 143. *But compare* WHTR Real Estate Ltd. P'ship v. Venture Distrib., Inc., 825 N.E.2d 105 (Mass. App. Ct. 2005). Landlord is not in breach of a lease for unreasonable failure to consent to a sublease where the tenant has not produced a ready, willing, and able subtenant. Tenant was in negotiation with proposed subtenant and argued that landlord was unreasonably in refusing to give a "reading" on acceptability of subtenant until an actual sublease agreement was presented. *See also* Shreeji Krupa, Inc. v. Leonardi Enters., No. 07-3221 (7th Cir. Nov. 13, 2008), at *supra* note 214.1.
226. Fahrenwald v. LaBonte, 103 Idaho 751, 653 P.2d 806 (1982); Funk v. Funk, 102 Idaho 521, 524, 633 P.2d 586, 589 (1981). Vranas & Assocs., Inc. v. Family Pride Finer Foods, Inc., 147 Ill. App. 3d 995, 498 N.E.2d 333, 101 Ill. Dec. 151 (1986). *But see* Speare v. Consol. Assets Corp., 350 F.2d 882, 885 (2d Cir. 1966); First Am. Bank v. Woods, 781 S.W.2d 588 (Tenn. Ct. App. 1989). The purchaser of property, subject to a lease of this nature, was precluded from ousting an assignee of the tenant without showing a reason for landlord's withholding consent. F&F Rest. Corp. v. Wells, Goode & Benefit Ltd., 61 N.Y.2d 496, 463 N.E.2d 23, 474 N.Y.S.2d 707 (1984).
227. D'Oca v. Delfakis, 130 Ariz. 470, 636 P.2d 1252 (1981).
228. *Id.*; RESTATEMENT (SECOND) OF PROPERTY (Landlord and Tenant) § 15.2 cmt. g (1977).
- 228.1. Cement Shoes, Inc. v. Mak, 51 A.D. 3d 600, 859 N.Y.S.2d 65 (1st Dep't 2008) (landlord liable in damages to defendant as a result of its delay in providing consent to assignment that caused prospective assignee to back out of transaction with tenant); Parr v. Triple L&J Corp., 107 P.2d 1104 (Colo. Ct. App. 2004) (exemplary damages recoverable against landlord).
229. Broad & Branford Place Co. v. J.J. Hockenjos Co., 132 N.J.L. 229, 232, 39 A.2d 80, 82 (1944); RESTATEMENT (SECOND) OF PROPERTY (Landlord and Tenant) § 15.2 cmt. g (1977). *See generally* Note, *Effect of Leasehold Provisions Requiring the Lessor's Consent to Assignment*, 21 HASTINGS L.J. 516 (1970); Annot., 54 A.L.R.3d 679 (1973).

- (c) the legality of the proposed use; and
- (d) the nature of the occupancy—that is, office, factory, clinic, or whatever.²³⁰

230. It should be considered beyond peradventure that a landlord would be justified in refusing consent to a new tenant that proposed to conduct an activity that was prohibited under the lease. *Sayed v. Rapp*, 10 A.D.3d 717 (N.Y. App. Div. 2d 2004), so holds, but in doing so goes into so much independent analysis of the landlord's decision that the reader is left wondering whether the simple fact that prohibition under the lease alone would have been enough, or whether some independent justification would be necessary. In *Van Sloun v. Agans Bros.*, 778 N.W.2d 174 (Iowa 2010), tenant proposed a financially viable sublessee, which operated a foodstore, including a food service. Court held that landlord was justified in refusing to consent because of concerns about new vents going through the roof, cooking smells invading other parts of premises, and protection of another restaurant against competition. For other cases dealing with landlord's rejection of a tenant based upon the tenant's proposed use of the premises, see *Amjems, Inc. v. F.R. Orr Constr. Co.*, 617 F. Supp. 273 (S.D. Fla. 1985); *John Hogan Enter., Inc. v. Kellogg*, 231 Cal. Rptr. 711 (Cal. Ct. App. 1986); *Jack Frost Sales, Inc. v. Harris Trust & Sav. Bank*, 433 N.E.2d 941, 950 (Ill. App. Ct. 1982) (reviews authorities); *Maxima Corp. v. Cystic Fibrosis Found.*, 568 A.2d 1170 (Md. Ct. Spec. App. 1990); *Brigham Young Univ. v. Seman*, 672 P.2d 15, 18 (Mont. 1983); *Am. Book Co. v. Yeshiva Univ. Dev. Found., Inc.*, 59 Misc. 2d 31, 33 (N.Y. Sup. Ct. 1969); *First Am. Bank v. Woods*, 781 S.W.2d 588 (Tenn. Ct. App. 1989). *See also Fernandez v. Vazquez*, 397 So. 2d 1171, 1174 (Fla. Dist. Ct. App. 1981). *See generally Kendall v. Ernest Pestana, Inc.*, 709 P.2d 837, 842 (Cal. 1985); *Stern's Gallery of Gifts, Inc. v. Corporate Prop. Investors, Inc.*, 337 S.E.2d 29, 36–37 (Ga. Ct. App. 1985); *Ernst Home Ctr. v. Sato*, 910 P.2d 486 (Wash. Ct. App. 1996) (collecting authorities); RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 15.2, at 122 (1977) (same). "Tone" and "image" have been considered and regarded as objective. In *Ernst*, 910 P.2d at 493, it was deemed unreasonable to object to sale of used clothes in a shopping center. Query if the result would be the same when applied to a sale of this business or a discount store in an elegant hotel with a few stores selling very good merchandise at high prices and with a snob appeal. A dissenting opinion in *Pac. First Bank v. New Morgan Park Corp.*, 876 P.2d 761, 773 (Or. 1994), states:

A fact-specific analysis is necessary to determine whether, in refusing to consent, Landlord has complied with the implied duty of good faith and fair dealing. Several factors are involved in that analysis, including, but not limited to, (1) the overall financial responsibility of the new tenant, (2) whether the use of the premises would lead to waste of the landlord's interests in the property, (3) the legality of the proposed use, (4) the nature and extent of alterations needed by the proposed new tenant, (5) the proposed new tenant's suitability to use the property, and (6) the expected economic feasibility of the proposed new tenant to meet rent obligations based on the intended use.

Likely the “fit” of the tenant with other tenants on the premises can be considered, and perhaps the landlord can also consider strictly whether the proposed new tenant would compete with existing tenants, even when there is no exclusive use clause to raise concern.²³¹

Pertinent to an assignee’s or sublessee’s financial responsibility under the lease may be past revenue received by the assignee or sublessee and, insofar as demonstrable or ascertainable, prospective receipts in relation to rent based on gross receipts from the business conducted or to be conducted on the leased premises.²³²

In a case not squarely on point a landlord was held justified in objecting to assignment to a corporation whose name could mislead the public. *Mitchell v. Rockefeller Ctr., Inc.*, 174 Misc. 441, 20 N.Y.S.2d 755 (App. Term 1940) (assignee named “Rockefeller Purchasing Corp.”). A stock transfer, which would bring the original tenant back, was held unobjectionable despite landlord’s prior unsatisfactory relations with the original tenant. *29 W. 25th St. Parking Corp. v. Penn Post Parking, Inc.*, 105 A.D.2d 610, 481 N.Y.S.2d 346 (1st Dep’t 1984). Tenant’s failure to seek landlord’s consent may relate to reasonableness of landlord’s refusal. *See Thrifty Oil Co. v. Batarse*, 174 Cal. App. 3d 770, 220 Cal. Rptr. 285 (1985). Giving landlord one day’s notice was unreasonable. Subletting immediately thereafter was a tenant breach. *Losurdi Bros. v. Arkin Distrib. Co.*, 125 Ill. App. 3d 267, 465 N.E.2d 139, 80 Ill. Dec. 348 (1984). For the application of this point to a leveraged buyout, see *Chiles v. Robertson*, 94 Or. App. 604, 767 P.2d 903 (1989).

231. In *Kenny v. Eddygate Park Assocs.*, 34 A.D.3d 1017 (N.Y. App. Div. 2006), the landlord refused consent to assignment of the lease to a Korean restaurant because of concern that it would be sued by a Chinese restaurant already operating on the premises. The landlord similarly refused to consent to transfer to Vietnamese restaurant operators. The court does not indicate whether the Chinese restaurant operated under an exclusive use clause. Some years later, the landlord did permit a Korean restaurant onto the premises, and the party injured by the prior refusals sued for damages. The court noted that in the most recent instance of approval, the assignor had agreed to defend and indemnify the landlord from any legal challenge by the Chinese restaurant. The court also indicated that the Asian population in the neighborhood had increased dramatically, decreasing the likelihood of competition. In a very similar case, a landlord that already had a tenant operating a Sudanese restaurant was held justified in refusing consent to a sublet to an Indian grocer (that would also serve food), in part because of competition concerns. Court even ignored fact that, during discussions over such sublet, landlord negotiated with the Indian grocer to have it locate to another building owned by landlord.

232. *Worcester-Tatnuck Square CVS, Inc. v. Kaplan*, 601 N.E.2d 485 (Mass. App. Ct. 1992) (landlord reasonably withholds consent to a sublease when the lease is a percentage lease and there is a likelihood that the proposed sublessee will produce lower percentage return in the future than the current tenant, even when the lease does not require continuous operation and there is a substantial base rent); *Norville v. Carr-Gottstein Foods, Co.*, 84 P.2d 996 (Alaska 2004) (*semble*—grocery store with percentage lease attempted to transfer to bank). *But see* *21 Merchs. Row Corp. v. Merchs.*

The foregoing factors are neither exhaustive nor components in an arithmetical formula for reasonableness. None of the factors is weighted so that more or less weight is attributable or assigned to any particular factor utilized in evaluating a lessor's good faith or reasonableness in withholding consent to a commercial lease assignment or subletting. Additional factors may be deduced in future situations involving a lessor's withholding consent in cases similar to that now reviewed by this court.²³³ Landlord's refusal is not unreasonable unless he is supplied with evidence that the proposed assignee or subtenant is ready, willing, and able to perform.²³⁴ A landlord may be able to withhold consent without judicial review of reasonableness if a clause exists requiring the tenant to comply with covenants before as signing the property and the tenant has not complied with those covenants.²³⁵

The reasonableness of landlord's objection may depend to some extent on whether the original landlord is involved or a subsequent owner of the property. Where hospital acquired a nearby existing shopping center for purposes of future expansion, the hospital was unreasonable when it later withheld consent to a proposed sublease by a tenant that had leased from the prior landlord when the grounds for refusal was that the subtenant would compete with the landlord hospital's business.²³⁶ Similarly, a religious institution that acquired a downtown building from a commercial landlord could not object when a preexisting tenant sought to sublease to a Planned Parenthood Society, where the objection was on the grounds that this activity would interfere with the religious principles of the new landlord.

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- Row, Inc., 587 N.E.2d 788 (Mass. 1992) (holding that the landlord is not obliged to act reasonably in withholding its consent to assignment of tenant's interest in commercial lease that contained a requirement that tenant obtain landlord's approval of any such assignment).
233. Newman v. Hinky Dinky Omaha-Lincoln, 229 Neb. 382, 388, 427 N.W.2d 50, 54 (1988), *later decision*, 2 Neb. App. 555, 512 N.W.2d 410 (1994). "If the reasons for withholding consent have nothing to do with the intended transferee or the transferee's use of the property the motivation may be suspect." Julian v. Christopher, 320 Md. 1, 10, 575 A.2d 735, 739 (1990).
234. Golf Mgmt. Co. v. Evening Tides Waterbeds, Inc., 213 Ill. App. 3d 355, 571 N.E.2d 1000, 157 Ill. Dec. 536 (1991).
235. Lecir Corp. v. S&E Realty Co., 577 N.Y.S.2d 106 (App. Div. 1991). This case has somewhat of a special twist, in that the tenant lost the right to assign by being in default. The case participates in what has been proven to be a rather stubborn majority view that commercial landlords can contract to avoid judicial review of the reasonableness of their decision not to approve a proposed sublease or assignment. The "bottom line," even in those cases, such as Maryland's and California's that favor the tenant position, is that there is room for the landlord to contract to protect the landlord's discretion.
236. Tenet v. Jefferson Parish Med. Ctr., 426 F.3d 738 (5th Cir. 2005).

Although these cases suggest that in every case the tenant is entitled to rely upon the nature of the existing landlord in assessing what constitutes a reasonable decision to approve a proposed sublease or assignment, it should be kept in mind that the decisions depart from the usual business model because the new landlords in these cases were not traditional landlords at all. They had clearly defined special interests that properly should not have been posed on the tenant after the leases had been signed. On the other hand, particularly in long-term leases, the parties should be held to anticipate that the landlord's business model will go through some normal evolution, and a new landlord should not be held to the standard of the landlord as it existed at the time of the lease. If a new landlord is within a general range of development consistent with the original landlord's predictable growth, the new landlord should be able to exercise decisions regarding proposed subleases or assignments based upon its present business model.²³⁷

Another court wrote that normally the right to withhold consent is governed by acceptable standards, but that where the lease gives further meaning to the clause that authorizes the withholding of consent, the standard of reasonableness is varied accordingly. The court gave as an example the right to bar business competition, in which event consent may be withheld despite acceptability by reasonable commercial standards.²³⁹ One court assumed that a shopping center tenant, with an exclusive right to sell shoes, could sublet only to a similar tenant.²⁴⁰ May landlord reasonably withhold consent where a change of use is contemplated?²⁴¹

237. In another case an owner of a shopping center who conducted a broad-based business there, and who had acquired title thereto from the original landlord, succeeded in blocking a sublease to a party who would compete with it to some extent. Presumably this would not be true, or objectionable, to the original landlord. *See Pay 'N Pak Stores, Inc. v. Superior Court*, 210 Cal. App. 3d 1404, 258 Cal. Rptr. 816 (1989). The fact that plaintiff was a grantee of the original landlord was apparently not deemed significant by the court. If these matters are to be taken seriously, one who buys the property after a lease is executed, or one who signs a lease before the property is sold, should contemplate the possibility that interpretation and construction of the lease may be affected by some matter occurring before the sale or after the lease is signed.

238. [Reserved.]

239. *See Arrington v. Walter E. Heller Int'l Corp.*, 30 Ill. App. 3d 631, 639, 333 N.E.2d 50, 58 (1975); *see also* text *infra* note 282.

240. *Maurin-Ogden-1978 Pinhook Plaza v. Wiener Corp.*, 430 So. 2d 747 (La. Ct. App. 1983).

241. Landlord's objection was upheld in *Leonard, St. & Deinard v. Marquette Assocs.*, 353 N.W.2d 198 (Minn. Ct. App. 1984), where the use clause specified a law office and required assignee to assume the tenant's obligations. Compar-

A landlord has been held unjustified in refusing consent for racial reasons,²⁴² because a proposed subtenant was a widow,²⁴³ or because of a dislike of a particular business or method of conducting business, assuming no restrictions against them were included in the lease.²⁴⁴ A landlord has also been held unjustified in refusing consent to a party who would compete with a business of landlord being conducted a block away²⁴⁵ or because landlord wanted the leased quarters for itself or one of its corporate officers.²⁴⁶ But the landlord of a shopping center, operating its own store within the center, could reasonably object to a

able cases were distinguished. As to this, see also chapter 6, note 243. Landlord's offer to lease to the proposed assignee, a bank, was deemed irrelevant. *Cf.*, as to this, *Arrington v. Walter E. Heller Int'l Corp.*, 30 Ill. App. 3d 631 (1975). A shopping center landlord could not reasonably object to an assignee proposing a use other than that required in the lease when this did not compete with any use in the center and landlord had previously indicated no objection to other uses. *Sandor Dev. Co. v. Reitmeyer*, 498 N.E.2d 1020 (Ind. Ct. App. 1986). *Sandor* was said to be based on a landlord's duty to mitigate damages. *First Fed. Sav. Bank v. Key Mkts., Inc.*, 532 N.E.2d 18, 22 (Ind. Ct. App. 1988). *Cf. text supra* at notes 193–206.

242. *Cent. Bus. Coll. v. Rutherford*, 47 Colo. 277, 107 P. 279, 27 L.R.A. (n.s.) 637 (1910); *List v. Dahnke*, 638 P.2d 824 (Colo. Ct. App. 1981) (dictum); *Gelino v. Swannell*, 263 Ill. App. 235 (1931).
243. *Stern v. Taft*, 49 Ohio App. 2d 405, 361 N.E.2d 279 (1976).
244. *Gelino v. Swannell*, 263 Ill. App. 235 (1935) (chain store); *Brigham Young Univ. v. Seman*, 206 Mont. 440, 672 P.2d 15 (1983); *Broad & Branford Place Co. v. J.J. Hockenjos Co.*, 132 N.J.L. 229, 39 A.2d 80 (1944) (dressed poultry store); *Roundup Tavern, Inc. v. Pardini*, 68 Wash. 2d 513, 413 P.2d 820 (1966) (tavern); *Ernst Home Ctr. v. Sato*, 80 Wash. App. 473, 910 P.2d 486 (1996) (sale of used clothes). In *Brigham Young*, 206 Mont. 440, the court disregarded objections of other tenants that were instigated by a biased questionnaire.
245. *Edelman v. F.W. Woolworth Co.*, 252 Ill. App. 142 (1929). *Edelman* was distinguished on the ground that the purpose of the *Edelman* lease was unrelated to the landlord's business and was merely to accumulate rent. Where a hospital-landlord leased space primarily to provide offices for doctors and dentists who would use landlord's facilities, landlord could properly object to an assignee who would compete with landlord. *Medinvest Co. v. Methodist Hosp.*, 359 N.W.2d 714 (Minn. Ct. App. 1984). *Medinvest* indicates that "unreasonable" may be ambiguous. *But compare Tenet v. Jefferson Parish Med. Ctr.*, 2005 U.S. App. LEXIS 20283 (5th Cir. Sept. 21, 2005). Landlord's refusal to consent was unreasonable in part because the landlord (a public hospital which had bought a shopping center for possible expansion) was attempting to protect business interests at a nearby hospital, rather than on other property within the shopping center of which the involved lease was a part. The *Tenet* case is further discussed at note 236 and accompanying text.
246. *Bates v. Donaldson*, 1896 2 Q.B. 241; *Cedarhurst Park Apartments, Inc. v. Milgrim*, 55 Misc. 2d 118, 284 N.Y.S.2d 300 (Dist. Ct. 1967).

subtenant who would compete with the landlord.²⁴⁷ A recent lower court New York decision held that a landlord could not object retroactively to the assignment of a lease when, after the assignment, the assigning tenant filed for bankruptcy, even when the lease had a specific anti-bankruptcy clause.^{247.1}

It is reasonably clear that a landlord may not make his consent conditional on receipt of payment of some kind²⁴⁸ or upon an increase

247. Pay 'N Pak Stores, Inc. v. Superior Court, 216 Cal. App. 3d 1404, 258 Cal. Rptr. 816 (1989). The decision was also based on the fact that the lease forbade the proposed use, the court noting that landlord was enforcing the terms of the lease.

247.1. Staples, Inc. v. Moses, 2005 N.Y. Slip Op. 51376 (Sup. Ct. July 13, 2005).

248. Magna Inv. & Dev. Corp. v. Brooks Fashion Stores, Inc., 137 Ariz. 247, 669 P.2d 1024 (1983); Campbell v. Westdahl, 148 Ariz. 432, 715 P.2d 288 (Ct. App. 1985); Kendall v. Ernest Pestana, Inc., 40 Cal. 3d 488, 220 Cal. Rptr. 818, 709 P.2d 837 (1985) (“and other more onerous terms”); McCoy v. Riley, 771 P.2d 26 (Colo. Ct. App. 1989); 1010 Potomac Assocs. v. Grocery Mfrs., Inc., 485 A.2d 199 (D.C. 1984); Natural Kitchen, Inc. v. Am. Transworld Corp., 449 So. 2d 855 (Fla. Dist. Ct. App. 1984); Golf Mgmt. Co. v. Evening Tides Waterbeds, Inc., 213 Ill. App. 3d 355, 572 N.E.2d 1000, 157 Ill. Dec. 536 (1991); Julian v. Christopher, 320 Md. 1, 575 A.2d 735 (1990); D.L. Dev., Inc. v. Nance, 894 S.W.2d 258 (Mo. Ct. App. 1995); Econ. Rentals v. Garcia, 112 N.M. 748, 818 P.2d 1306 (1991); Ernst Home Ctr. v. Sato, 80 Wash. App. 473, 910 P.2d 486 (1996) [\$25,000, plus repairs and other reasons]. Cf. Warner v. Konover, 210 Conn. 150, 156, 553 A.2d 1138, 1141 (1989). Ringwood Assocs., Ltd. v. Jack’s of Route 23, Inc., 153 N.J. Super. 294, 379 A.2d 508 (Super. Ct. 1977), *aff’d*, 166 N.J. Super. 36, 398 A.2d 1315 (App. Div. 1979); Collis v. Baker, 285 Or. 417, 591 P.2d 363 (1979) (facts in record on appeal). Compare Hochman v. Zigler’s, Inc., 139 N.J. Eq. 139, 50 A.2d 97 (N.J. Ch. 1946).

In *McCoy*, 771 P.2d 26, the proposed assignee agreed to assume tenant’s debts. These debts were subsequently discharged in tenant’s bankruptcy. Tenant nevertheless recovered against landlord on the ground the damages were established at the time of landlord’s breach. The fact that landlord could get a higher rent from a third person is no excuse for denying consent. See *In re Fashion World, Inc.*, 44 B.R. 754 (D. Mass. 1984). In *D.L. Dev., Inc.*, 894 S.W.2d 258, landlord refused to consent to a ten-year sublease unless the head lease was renegotiated. Tenant recovered no damages for one year’s lost subrent. The court indicated recovery might have been for ten years’ subrent.

A landlord was held unreasonable in objecting until completion of a reappraisal of the property and the establishment of a “new and realistic schedule of rent payments.” *Chanslor-W. Oil & Dev. Co. v. Metro. Sanitary Dist.*, 131 Ill. App. 2d 527, 266 N.E.2d 405 (1970). See also *Catalina, Inc. v. Biscayne Ne. Corp.*, 296 So. 2d 580 (Fla. Dist. Ct. App. 1974); *Polk v. Gibson Prods. Co.*, 257 So. 2d 225 (Miss. 1972), discussed in chapter 6, note 243. Refusing consent unless arrears are paid was held unreasonable. *Rudd v. Larsen*, 392 N.W.2d 62 (N.D. 1986) (dictum). *Chrysler Capital Corp. v. Lavender*, 934 F.2d 290 (11th Cir. 1991), holds in accord where landlord insisted assignee assume tenant’s arrears. This is the bankruptcy

in rent,^{248.1} and that to do so is duress.²⁴⁹ Nor may landlord insist on changes in the terms of the lease.²⁵⁰ But if tenant's right to assign is conditioned on tenant's good standing, landlord may object to assignment if tenant is not in good standing.²⁵¹ The fact that

rule. *See In re Office Prods., Inc.*, 140 B.R. 407 (W.D. Tex. 1992), discussed in chapter 16, note 48. *But cf.* *Food Pantry, Ltd. v. Waikiki Bus. Plaza, Inc.*, 56 Haw. 606, 575 P.2d 869 (1978) (lease permitted landlord to withhold consent "in its discretion").

- 248.1. *Ponderosa Manufactured Homes, LLC v. EZ Ventures, Inc.*, 2008 WL 4853604 (Ariz. Ct. App. Nov. 6, 2008). Tenant assigned to an assignee that took possession, and tenant simultaneously sought landlord's consent, which could not be unreasonably withheld under the lease. Landlord objected on the grounds that tenant had not first requested consent, which the court found to be a default, but a *de minimus* one not supporting a refusal to consent to an otherwise acceptable assignee. Landlord, during the disputation, sent the assignee a new lease with a much higher rent, unfortunately (for landlord) indicating that the assignee was not otherwise objectionable. Landlord found in breach of duty to consent.
249. *Equity Funding Corp. v. Carol Mortgage Corp.*, N.Y.L.J., Apr. 26, 1971, at 2, cols. 3–4 (Sup. Ct.) (refuses to dismiss complaint in action to declare void tenant's consent to rent increase for duress and lack of consideration, and that landlord's consent to subletting was valid notwithstanding). *Cf.* *Barker v. Walter Hogan Enters., Inc.*, 23 Wash. App. 450, 596 P.2d 1359 (1979).
250. *B.B.M. Corp. v. McMahon's Valley Stores*, 869 F.2d 865, 860 (5th Cir. 1989).
251. *Leeirv Corp. v. S&E Realty Co.*, 178 A.D.2d 403, 577 N.Y.S.2d 106 (2d Dep't 1991). It may be reasonable for a landlord to place conditions on the landlord approval of an assignment. In *Wright v. Rub-A-Dub Car Wash, Inc.*, 740 So. 2d 891 (Miss. 1999). The property in question involved a "LUST" (leaking underground storage tank), which was installed by the original tenant. The current tenant seeking to assign the lease was the assignee of the original tenant who had purchased their business. The ownership of the LUST was in question. The landlord's consent was conditioned upon either the current tenant/assignee or his assignee's remediation of the site. The court found that regardless of the ownership of the LUST, conditional approval upon remediation was reasonable. *Contra* *F.H.R. Auto Sales, Inc. v. Scutti*, 534 N.Y.S.2d 266 (App. Div. 1988). The lease in question allowed the tenant to sublease upon landlord's approval which would not be unreasonably withheld. Landlord refused to consent to sublease because tenant failed to adequately maintain the premises. Court held that these were not dependent covenants and keeping the premises in good repair was not a condition precedent to the granting of permission. It is reasonable for the landlord to withhold consent to assignment if the tenant is in default on rent payments, and if the tenant and the proposed assignee do not provide adequate disclosure of financial information. *NNA Rest. Mgmt. LLC v. Eshaghian*, 29 A.D.3d 384, 815 N.Y.S.2d 499 (1st Dep't 2006). Where the landlord agrees not to unreasonably withhold consent, it will be liable for failing to do so. *See text infra* at note 284.1.

an assignment or sublease gives tenant a profit is no wrong to landlord.²⁵²

Where the master lease contains a provision by which tenant must share profits from subletting with landlord, landlord cannot, in order to maximize the return, condition consent upon subletting at market rate.²⁵³ Landlord's unreasonable refusal is indicated by his subsequent lease to a party he rejected when offered by his original tenant.²⁵⁴ A landlord may not refuse consent because he prefers to rent other space to this prospect or is reluctant to see him move out of landlord's other space.²⁵⁵ It would also seem reasonably clear that landlord may object to a grocer if an existing tenant has the exclusive right to operate a grocery in the same building and, even, absent such exclusive right, to avoid subjecting the existing tenant to competition.²⁵⁶ If the grocer's rent were based on the amount of his sales there would be more reason to object to competition. Landlord may object to any transaction that would disrupt his "tenant mix or balance."²⁵⁷

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252. See *Carter v. Safeway Stores*, 154 Ariz. 546, 744 P.2d 458 (1987); *Stauffer Chem. Co. v. Fisher-Park Lane Co.*, 63 Misc. 2d 511, 312 N.Y.S.2d 243 (Sup. Ct. 1970); note 213, *supra*.
253. *Nat'l Union Fire Ins. Co. v. Rose*, 760 N.E.2d 791 (Mass. App. Ct. 2002). Here the tenant sublet to an important customer at a less than market rate. The lease gave the landlord the right, upon tenant's sublease, to participate in any increase in rent over the tenant's rent. The case does not address the question of whether the landlord could require in the original consent clause that any sublet be at market rate or that landlord share in any benefits, tangible or intangible, of any kind or character.
254. *Cowan v. Chalamidas*, 98 N.M. 14, 644 P.2d 528 (1982). The facts were similar but the result different in *Dress Shirt Sales, Inc. v. Hotel Martinique Assocs.*, 12 N.Y.2d 339 (1963), note 152, *supra*. In *Brigham Young Univ. v. Seman*, 206 Mont. 440 (1983), *supra* note 244, landlord had previously approved the proposed subtenant for the same space.
255. *Gamble v. New Orleans Hous. Mart, Inc.*, 154 So. 2d 625 (La. Ct. App. 1963) (landlord desired to rent other space to proposed subtenant); *Krieger v. Helmsley Spear, Inc.*, 62 N.J. 423, 302 A.2d 129 (1973) (proposed subtenant an occupant in another building of landlord). *Accord* *Assocs. Commercial Corp. v. Bayou Mgmt., Inc.*, 426 So. 2d 672 (La. Ct. App. 1982). *But see* *Fourchon Docks, Inc. v. Milchem, Inc.*, 849 F.2d 1561, 1564 (5th Cir. 1988) (prospects termination of other lease from landlord, among reasons).
256. *Brookings Mall, Inc. v. Captain Ahab's, Ltd.*, 300 N.W.2d 259 (S.D. 1981) (landlord need not violate exclusive right of another tenant).
257. *Warmack v. Merchs. Nat'l Bank*, 272 Ark. 166, 612 S.W.2d 733 (1981) (commercial bank in shopping center may not sublet to savings and loan association). See *Brookings Mall, Inc. v. Captain Ahab's, Ltd.*, 300 N.W.2d 259 (S.D. 1981); note 194, *supra*. An owner who leased to a budget shoe store, in a shopping center designed for upper middle class patronage, could not object to a sublease to another budget shoe store despite objections from other tenants. *Maurin-Ogden-1978 Pinhook Plaza v. Wiener Corp.*, 430 So. 2d 747 (La. Ct. App. 1983).

It follows that what is “reasonable” at one time may not be at another.²⁵⁸

There are other situations where objectivity is less clear. A percentage tenant with an unqualified right to assign or sublet may do either regardless of its effect in reducing or eliminating the amount of percentage rent.²⁵⁹ But if landlord has a right to object to these on reasonable grounds he may refuse his consent in this situation.²⁶⁰ A landlord who approved parties, as evidenced by subsequently leasing space to them, was held justified in objecting to them as subtenants of part of demised premises, in order to avoid multiple tenancies in a prestige building.²⁶¹ But a prospective subtenant is not barred, per se,

258. See *supra* note 245 and accompanying text. *But note In re Federated Dep’t Stores, Inc.*, 135 B.R. 941 (Bankr. S.D. Ohio 1991), where an anchor lease in such a shopping center was not permitted to prejudice a tenant mix by assignment to a “cost conscious,” *i.e.*, high-grade discounter, tenant.

259. Chapter 6, notes 242, 243; note 58, *supra*.

260. *Worcester-Tatnuck Square CVS, Inc. v. Kaplan*, 33 Mass. App. 499, 601 N.E.2d 485 (1992). It was held not unreasonable to object to an assignment by a supermarket to a furniture company that had no reasonable prospect of earning percentage rent at the rate charged to the supermarket. *Haack v. Great Atl. & Pac. Tea Co.*, 603 S.W.2d 645 (Mo. Ct. App. 1980). This, despite that the original tenant had earned no percentage rent. The same was true in *Kroger Co. v. Chem. Sec. Co.*, 526 S.W.2d 468 (Tenn. 1975); chapter 6, note 242. *But see E. Fed. Corp. v. State Office Supply Co.*, 646 So. 2d 737 (Fla. 1994); chapter 6, note 154. *Jones v. Andy Griffith Prods., Inc.*, 35 N.C. App. 170, 241 S.E.2d 140 (1978), holds it reasonable for a landlord under a percentage lease to object to an assignment by a restaurant tenant to one in the radio and television business. The court noted the expensive construction for the former (air conditioning and electrical service) as against the latter and the likely reduction in percentage rent. It stated that change of business is not always determinative. (As to change of business, *cf.* chapter 16, at notes 271–72.) The lease specified landlord would not be unreasonable in withholding approval of a transfer to one duplicating any business conducted in an adjoining shopping center. This was hardly mentioned in the opinion.

In *Polk v. Gibson Prods. Co.*, 257 So. 2d 225 (Miss. 1972), a tenant that earned a substantial percentage rent was permitted to sublet, which terminated all percentage rent. The fact that tenant could do this only with landlord’s consent, which consent was not unreasonably to be withheld, was not mentioned. But in *M.B.M. Corp. v. McMahan’s Valley Store*, 869 F.2d 865 (5th Cir. 1989), where landlord was expressly obligated to be reasonable, it was held unreasonable to object to an assignment of a percentage lease. This, despite the unlikelihood of percentage rent from the assignee, on the ground the lease did not require a maximization of sales. Where landlord who was required to be reasonable objected to sublease of percentage lease for belief that the resulting percentage rent would be inadequate, subtenant was obliged to show landlord was unreasonable. *Newman v. Hinky Dinky Omaha-Lincoln*, 2 Neb. App. 555, 512 N.W.2d 410 (1994).

261. *Time, Inc. v. Tager*, 46 Misc. 2d 658, 260 N.Y.S.2d 413 (Civ. Ct. 1965) (*Time Life Building in City of New York*). Landlord expressed fear of having

because he rents other space in the same building from landlord.²⁶² Query: If a landlord may require an assignee or subtenant to be financially responsible and qualified to operate his business. Inasmuch as neither assignment nor subletting releases the original tenant from his lease obligations,²⁶³ it may be argued that landlord has all he bargained for regardless of the wealth or skill of the assignee or subtenant. The little relevant authority indicates that a landlord is entitled to a responsible assignee and possibly to a skillful one as well.²⁶⁴ The same, as to financial responsibility, was held to justify

the building "balkanized" by a "rabbit-warren of holes in the wall." The precise holding in *Time, Inc.* is not certain because the lease contemplated a possible subletting of the entire demised premises, whereas the issue was tenant's desire to sublet a part. Compare *Gamble v. New Orleans Hous. Mart, Inc.*, 154 So. 2d 625 (La. Ct. App. 1963), *supra* note 255. In a case otherwise overruled, it was said that tenant's existence in another part of the building is of no significance and that landlord may not want to increase the relation. *Millers Mut. Cas. Co. v. Ins. Exch. Bldg.*, 218 Ill. 12 (1920).

262. *Catalina, Inc. v. Biscayne Ne. Corp.*, 296 So. 2d 580 (Fla. Dist. Ct. App. 1974).

263. See section 7:5.1[B].

264. Landlord was held justified in refusing to consent until receipt of evidence of financial stability of assignee. *Nat'l Distillers & Chem. Corp. v. First Nat'l Bank*, 804 F.2d 978, 981 (7th Cir. 1986) ("a chose in action is not a substitute for a good tenant"); *Johnson v. Jaquith*, 189 So. 2d 827 (Fla. Dist. Ct. App. 1966); *Fahrenwald v. LaBonte*, 103 Idaho 751, 653 P.2d 806 (1982) (collecting cases); *Kazarimov v. L.B. Kaye Assocs.*, 445 N.Y.S.2d 915 (Sup. Ct. 1981); *Gehnrich Assocs., Inc. v. Madison 52d Corp., N.Y.L.J.*, Apr. 29, 1969, at 17, cols. 1-2 (Sup. Ct.); *McKeon v. Williams*, 104 Or. App. 106, 799 P.2d 198 (1990). A refusal to permit transfer to a thin corporation was deemed good business practice. *Kahili, Inc. v. Yamamoto*, 54 Haw. 267, 506 P.2d 9 (1973), *petition for reh'g denied*, 54 Haw. 267, 506 P.2d 9 (1973). Refusal was justified when the principle of a weak tenant and also of a thin assignee refused to give a personal guaranty. *Packwood Indus., Inc. v. John Galt Assocs.*, 219 Ga. App. 527, 466 S.E.2d 266 (1996). Refusal to consent to assignment of a restaurant lease was held justified where the assignee was inexperienced and undercapitalized, had previously taken an assignment of the same lease, failed, and closed the restaurant. *Five Fifty Rest. Corp. v. Furer*, N.Y.L.J., Feb. 19, 1969, at 18, cols. 5-6 (Sup. Ct.). *Accord* *First Am. Bank v. Woods*, 781 S.W.2d 588 (Tenn. Ct. App. 1989). An express condition that the assignee be financially responsible is not fulfilled by the assignee's amateurish and arbitrary appraisal of its mortgaged properties. *Robinson v. Weitz*, 171 Conn. 545, 370 A.2d 1066 (1976). Withholding consent to a sublease of a large publicly held financially responsible corporation was held unreasonable. *Owens Ill., Inc. v. Lake Shore Land Co.*, 457 F. Supp. 896 (W.D. Pa. 1978). See generally *Jack Frost Sales, Inc. v. Harris Trust & Sav. Bank*, 104 Ill. App. 3d 933, 946, 433 N.E.2d 941, 950, 60 Ill. Dec. 703 (1982).

refusal to approve a prospective subtenant.²⁶⁵ The fact that the original tenant was insolvent was held to give landlord no power to bar subleasing generally.²⁶⁶ A landlord was held justified in rejecting a subtenant whose business would reduce rental value, increase fire hazard, and require substantial alterations.²⁶⁷ A landlord may refuse to consent when the assignment or sublease would impair or injure landlord's interest in the premises by devaluing it, but not where landlord seeks to improve his economic position.²⁶⁸ In an interesting opinion it was held that "doctrinal anathema" was no ground for objecting to office use by a planned parenthood organization.²⁶⁹

One court, which enjoined the owner of a large office building from continuing to withhold consent, was impressed in part by landlord's regular course of dealing with other tenants in denying consent.²⁷⁰ Landlord is justified in refusing consent to a sublease for a purpose that is forbidden by the head lease.²⁷¹ In bankruptcy, however, there is a growing tendency to the contra, except in shopping center leases

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265. *Caplan v. Latter & Blum, Inc.*, 462 So. 2d 229 (La. Ct. App. 1984). A dissent noted the continuing liability of the head tenant. Of course, a skilled landlord's attorney will make the case for landlord easier by explicitly providing that landlord may refuse to sublease based on the subtenant's financial instability. *Darin, LLC v. Stratedge Corp.*, 2008 WL 1699450 (Mass. App. Ct. 2008) (lease expressly provided that landlord's refusal to consent to sublease is reasonable if based on subtenant's financial instability).
266. *United States v. Toulmin*, 253 F.2d 347, 349 (D.C. Cir. 1958):
- To hold that insolvency of a tenant bars subletting would be equivalent to holding that insolvency is a breach authorizing the landlord to terminate the lease. So long as the tenant does not default, his insolvency does not affect his tenancy.
267. *Lemley v. Bozeman Cmty. Hotel Co.*, 651 P.2d 979 (Mont. 1982) (plus pornography business); *Apex Co. v. Grant*, 276 S.W. 445 (Tex. Civ. App. 1925).
268. *See Econ. Rentals v. Garcia*, 112 N.M. 748, 758–59, 819 P.2d 1306, 1316–17 (1991) for examples.
269. *Am. Book Co. v. Yeshiva Univ. Dev. Found., Inc.*, 59 Misc. 2d 31, 37, 297 N.Y.S.2d 156, 163 (Sup. Ct. 1969):
- Even proponents of unpopular ideas are entitled to a roof over their heads. Landlords are not censors—their dominion is over realty, not ideas. Their ownership of property does not confer upon them the right to reject subtenants merely because their ideas differ from their own.
270. *Kronish, Lieb, Shainswit, Weiner & Hellman v. John J. Reynolds, Inc.*, N.Y.L.J., Oct. 7, 1969, at 2, cols. 3–5 (Sup. Ct.), *modified*, 33 A.D.2d 366, 307 N.Y.S.2d 725 (1st Dep't 1969). *Accord Stern's Gallery of Gifts, Inc. v. Corporate Prop. Investors, Inc.*, 176 Ga. App. 586, 594–95, 337 S.E.2d 29, 36–37 (1985). *But see Vaswani v. Wohletz*, 196 Ga. App. 676, 396 S.E.2d 593 (1990).
271. *Van Geffen v. Herbert*, 439 So. 2d 1257 (La. Ct. App. 1983) (lease for general dentistry; forbids sublease for orthodontist).

where the law is codified otherwise.²⁷² Landlord may have other reasons for objecting to an assignment or sublease.²⁷³ Tenant's desire to mortgage the lease may be unreasonable in some circumstances.²⁷⁴ Landlord may also reasonably object to a transfer that will be accompanied by a dissolution of a corporate tenant that is liable on the lease.²⁷⁵

Query if what is reasonable for landlord in this situation does not virtually coincide with landlord's objections in those situations where landlord is under a duty to mitigate damages.²⁷⁶

Cases have involved landlord's refusal to an assignment because of some honest misperception by landlord. In one case landlord was held not unreasonable in objecting to an assignment because of a mistaken fear that the assignment would prejudice a guaranty of the lease.²⁷⁷ In another case landlord's misunderstanding of a restrictive covenant made his objection unreasonable but not malicious.²⁷⁸

Tenant's claim that landlord's refusal to consent to a sublease was a tortious interference with a contract, and a prospective business advantage was dismissed before the reasonableness of landlord was determined. This was on the ground that a landlord's efforts to control his property was not a tort.²⁷⁹

A restriction against assignment or subletting without landlord's consent entitles landlord to notice and request though landlord may have no valid reason to object. Tenant's failure to give such notice is a breach of the lease.²⁸⁰

A comparable question arises when a landlord, who reenters by reason of his tenant's breach, claims against his tenant for damages accruing after the reentry. This claim is in contract, as distinguished

272. *Id.*; see also *In re Black Enters., Inc.*, 39 B.R. 253 (D. Guam 1982), discussed *supra* in note 192.

273. *Amjems, Inc. v. F.R. Orr Constr. Co.*, 617 F. Supp. 273 (S.D. Fla. 1985) (tenant sought to sublease for term of twenty-six years beyond term of headlease). A landlord who has given quite favorable terms to a tenant to induce him to lease may apparently object to an assignment. RESTATEMENT (SECOND) OF PROPERTY (Landlord and Tenant) § 15.2 cmt. g, illus. 7, at 105 (1977).

274. *Airport Plaza, Inc. v. Blanchard*, 188 Cal. App. 3d 1594, 234 Cal. Rptr. 198 (1987).

275. *Id.*

276. See chapter 16 at notes 266–92.

277. *Fahrenwald v. LaBonte*, 103 Idaho 751, 653 P.2d 806 (1982). *Contra Tucson Med. Ctr. v. Zoslow*, 147 Ariz. 612, 615, 712 P.2d 459, 462 (Ariz. Ct. App. 1985). For reasonableness in assignment and subletting situations, see Annot., 21 A.L.R.4TH 188, 198 *et seq.* (1983).

278. *Tucson Med. Ctr.*, 147 Ariz. App. 612.

279. *Toys "R" Us, Inc. v. NBD Trust Co.*, 904 F.2d 1172 (7th Cir. 1990).

280. *Healthco, Inc. v. E&S Realty Assocs.*, 400 Mass. 700, 511 N.E.2d 579 (1987); RESTATEMENT (SECOND) OF PROPERTY (Landlord and Tenant) § 15.2 cmt. g (1977).

from one for rent, and is conditioned on landlord's effort to minimize his damages by reletting. Arbitrary rejection of prospective occupants precludes landlord's recovery of damages. Cases considering a landlord's "reasonableness" in that connection should be relevant to the discussion in this section.²⁸¹

In one case the "lead" tenant of a new forty-two-storey office building reserved the right to veto occupants of the two or three lowest levels of the building, lest the image of the building adversely affect the reputation and good will of this tenant, which right was not unreasonably to be exercised. After tenant vetoed a leading bank, which was admittedly a first-class tenant, it was held that landlord failed to prove tenant's action was unreasonable.²⁸²

Some landlords have provided in the lease for reimbursement from tenant for expenses incurred in checking the qualifications of proposed assignees and subtenants and for preparation and passing on documentation necessary in this connection.

From the foregoing one may conclude that there are situations where landlord's objection is clearly unreasonable; others where it is reasonable; and still others where a particular situation may tip the result, for example, a grocer might be ordinarily reasonable but not if there is another grocer in the same building. There is a fourth class where prediction is more difficult, if not impossible.²⁸³ For this reason a landlord may well consider a provision that relieves him from liability for damages if he makes a bona fide but wrong decision.²⁸⁴

[E] Consequences of Landlord's Unreasonable Withholding of Consent

If a landlord affirmatively agrees not unreasonably to withhold his consent to an assignment his liability is clear.^{284.1} Landlord has undertaken to permit assignment unless the tenant can demonstrate just cause for the contrary.²⁸⁵ The cases are divided on tenant's right to terminate the lease by reason of landlord's breach of covenant. Some

281. *E.g.*, *Fitch v. Armour*, 53 Super. 413, 14 N.Y.S. 319 (1891) (unreasonable to refuse to rent to actress). *See generally* section 16:3.4.

282. *Arrington v. Walter E. Heller Int'l Corp.*, 30 Ill. App. 3d 631, 333 N.E.2d 50 (1975).

283. *See Arrington v. Walter E. Heller Int'l Corp.*, 30 Ill. App. 3d 631, 333 N.E.2d 50 (1975); *Medinvest Co. v. Methodist Hosp.*, 359 N.W.2d 714 (Minn. Ct. App. 1984).

284. *See text infra* at notes 286–88.

284.1. *See Darin, LLC v. Stratedge Corp.*, 2008 WL 1699450 (Mass. App. Ct. Apr. 4, 2008) (landlord not liable to tenant as a result of landlord's reasonable refusal to consent to sublease because of concerns of financial stability of subtenant).

285. Note 226, *supra*.

cases hold that the tenant may terminate the lease;²⁸⁶ others are *contra*.²⁸⁷ But the tenant may obtain specific performance.²⁸⁸ And tenant may also recover damages.²⁸⁹ Damages can be substantial,

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286. Chrysler Capital Corp. v. Lavender, 934 F.2d 290 (11th Cir. 1991) (landlord's refusal unreasonable); Maurin-Ogden-1978 Pinhook Plaza v. Wiener Corp., 430 So. 2d 747 (La. Ct. App. 1983); Assocs. Commercial Corp. v. Bayou Mgmt., Inc., 426 So. 2d 672 (La. Ct. App. 1982); Adams, Harkness & Hill, Inc. v. Nw. Realty Corp., 361 Mass. 552, 281 N.E.2d 262 (1972); Ringwood Assocs., Ltd. v. Jack's of Route 23, Inc., 153 N.J. Super. 294, 379 A.2d 508 (Super. Ct. 1977), *aff'd*, 166 N.J. Super. 36, 398 A.2d 1315 (App. Div. 1979); *see also* cases collected in Ernst Home Ctr. v. Sato, 80 Wash. App. 473, 910 P.2d 485, 495 (1996). RESTATEMENT (SECOND) OF PROPERTY (Landlord and Tenant) § 15.2, at 106, cmt. h (1977). Tenant's liability for rent ceases. Vranas & Assocs., Inc. v. Family Pride Finer Foods, Inc., 147 Ill. App. 3d 995, 1001, 498 N.E.2d 333, 338, 101 Ill. Dec. 151 (1986); *Ernst*, 80 Wash. App. 473. Landlord's refusal to consent except on conditions may constitute duress. *See text supra* at note 249.
287. Brigham Young Univ. v. Seman, 206 Mont. 440, 672 P.2d 15 (1983); 601 W. 26 Corp. v. John Wiley & Sons, Inc., 32 A.D.2d 522, 298 N.Y.S.2d 1018 (1st Dep't 1969); Rock Cnty. Sav. & Trust Co. v. Yost's, Inc., 36 Wis. 2d 360, 153 N.W.2d 594 (1967); Ernst Home Ctr. v. Sato, 80 Wash. App. 473, 910 P.2d 486 (1996). *Brigham Young* stated, *obiter*, that a tenant might have a right to cancel in this situation "where a breach of the lease constituted an unjustified interference with the leasehold estate" of the tenant. *See also* Dutt's Enters., Inc. v. B.F. Saul Real Estate Inv. Trust, 170 Ga. App. 9, 316 S.E.2d 21 (1984). *Halper v. Demeter*, 34 Mass. App. 299, 610 N.E.2d 332 (1993). *Rock County* denies tenant the right to terminate the lease on the historical ground that covenants of a lease are independent. (*See* Index: Independent covenants; Covenant to repair.) But landlord's performance of this covenant might well be deemed sufficiently essential to warrant application of the contracts view rather than the traditional view. *See* chapter 1 at note 122 *et seq.*; Ringwood Assocs., Ltd. v. Jack's of Route 23, Inc., 153 N.J. Super. 294, 310, 379 A.2d 508, 516 (Super. Ct. 1977), *aff'd*, 166 N.J. Super. 36, 398 A.2d 1315 (App. Div. 1979). *Halper* in preceding paragraph also excused tenant from rent thereafter.
288. Hedgecock v. Mendel, 146 Wash. 404, 263 P. 593 (1928).
289. Cohen v. Ratinoff, 147 Cal. App. 3d 321, 195 Cal. Rptr. 84 (1983); United Unions, Inc. v. Webster & Sheffield, 521 A.2d 273 (D.C. 1987); 1401 Brickell Assocs., Ltd. v. Stinson, Lyons, Schuette, 522 So. 2d 459 (Fla. 3d Dist. Ct. App. 1988); Natural Kitchen, Inc. v. Am. Transworld Corp., 449 So. 2d 855 (Fla. Dist. Ct. App. 1984); Fahrenwald v. LaBonte, 103 Idaho 751, 653 P.2d 806 (1982) (collecting authorities); Brigham Young Univ. v. Seman, 206 Mont. 440, 672 P.2d 15 (1983); Arlu Assocs., Inc. v. Rosner, 14 A.D.2d 272 (1962); Singer Sewing Mach. Co. v. Eastway Plaza, Inc., 5 Misc. 2d 509, 158 N.Y.S.2d 647 (Sup. Ct. 1957), *noted in* 26 FORDHAM L. REV. 352 (1957); Collis v. Baker, 285 Or. 417, 591 P.2d 363 (1979) (lost bargain); Mitchell's, Inc. v. Nelms, 454 S.W.2d 809 (Tex. Civ. App. 1970) (and cases collected). *See* May's Family Ctr., Inc. v. Goodman's, Inc., 571 F. Supp. 1012 (N.D. Ill. 1983). Damages were measured by the excess of

for example, value of a lost bargain.²⁹⁰ For this reason some landlords insist on the inclusion in a lease of a general clause covering not only this situation but any other that may arise during the operation of the lease in which a landlord's consent or approval is to be "reasonable."²⁹¹

subrents, under a proposed sublease, over the prime rent. *United Unions, Inc.*, 521 A.2d 273; *Catalina, Inc. v. Biscayne Ne. Corp.*, 296 So. 2d 580 (Fla. Dist. Ct. App. 1974). *See also* *Passaic Distribs., Inc. v. Sherman Co.*, 386 F. Supp. 647 (S.D.N.Y. 1974); *D.L. Dev., Inc. v. Nance*, 894 S.W.2d 258 (Mo. Ct. App. 1995); note 248, *supra*. Tenant may recover for loss of profits. *Campbell v. Westdahl*, 148 Ariz. 432, 715 P.2d 288 (Ariz. Ct. App. 1985); *Vranas & Assocs., Inc. v. Family Pride Finer Foods, Inc.*, 147 Ill. App. 3d 995, 498 N.E.2d 333, 101 Ill. Dec. 151 (1986). Loss of profits could be anticipated within the rule of *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854) (*see* chapter 18, note 143 and connecting text; chapter 34, note 192) because the lease provided for assignment. *Vranas*, 147 Ill. App. 3d 995. *See also* Index, Damages and destruction of leased premises. One case has held that exemplary damages were appropriate where landlord, in possession of all relevant information, delayed giving consent so that tenant's sublessee abandoned the deal.

290. *Campbell v. Westdahl*, 148 Ariz. 432, 715 P.2d 288 (Ct. App. 1985). *Compare* *F & D Bagel Corp. v. Wald Realty Inc.*, 41 A.D.3d 778, N.Y.S.2d 530 (2007). Although landlord may unreasonably have opposed tenant's attempted assignment by demanding a service charge, in fact evidence showed that proposed assignee would not have completed the deal anyway had it been given the opportunity to complete its due diligence before the problem with landlord arose. Tenant subsequently assigned to another. Thus it could show no damages. The landlord may reach the same unfortunate result by a less direct route than an outright refusal to consent to assignment. In *Cement Shoes, Inc. v. Mak*, 51 A.D. 3d 600, 859 N.Y.S.2d 65 (1st Dep't 2008), the court affirmed the trial court's award of damages to a tenant where the landlord's delay in consenting to the assignment caused the prospective assignee to abandon its transaction with the tenant.

291. A form for this purpose reads:

SECTION 33.01 (A) Where any provision of this lease requires the consent or approval of Landlord, Landlord agrees that Landlord will not unreasonably withhold or delay such consent or approval. Where any provision of this lease requires Tenant to do anything to the satisfaction of Landlord, Landlord agrees that Landlord will not unreasonably refuse to state Landlord's satisfaction of such action by Tenant.

(B) If Tenant shall request Landlord's consent, approval or statement of satisfaction with respect to any matter hereunder, a failure of Landlord to reply to such request within twenty business days thereafter shall be deemed a consent, approval or statement of satisfaction as the case may be.

SECTION 33.02 Notwithstanding anything contained in Section 33.01 hereof or elsewhere contained in this lease, Tenant shall have no claim, and hereby waives the right to any claim, against

A clause of this nature bars the tenant from any right to damages against landlord for his discretionary decisions of this nature and limits the tenant to an action for a declaratory judgment, injunction, or, possibly, arbitration, or proceeding (at his peril) without landlord's consent. These clauses in essence restore the English rule. They subject tenant to a delay, which is apt to be unacceptable to any proposed assignee or subtenant, and to a liability to rent in two locations should tenant choose to relocate. The impracticability of this has been noted.²⁹²

Landlord's malicious interference with tenant's attempt to sublet, by fraudulent statements, is a tort.²⁹³ A landlord's unreasonable refusal to consent to an assignment or sublease, however, was held no intentional interference with contractual relations between tenant and his proposed subtenant.²⁹⁴

§ 7:3.5 Effect of Assignment or Sublease Made in Breach of Restriction

It is generally said that a restriction against assignment or subletting is for the landlord's benefit and may be waived by him. A breach of the restriction does not terminate the lease²⁹⁵ (but may be made the basis for forfeiture),²⁹⁶ and an assignment made in breach of the restriction vests good title to the lease in the assignee, subject to

Landlord for money damages by reason of any refusal, withholding or delaying by Landlord of any consent, approval or statement of satisfaction, and in such event, Tenant's only remedies therefor shall be an action for specific performance or injunction to enforce any such requirement or to compel arbitration thereof pursuant to Article [27] hereof. If the result of any such action or arbitration shall be adverse to Landlord, Landlord shall be liable to Tenant for Tenant's reasonable expenses and attorney's fees thereby incurred.

For enforceability of denying a tenant the right to damages, see *Leet v. Totah*, 329 Md. 645, 661, 620 A.2d 1372, 1380 (1993). For more on this, see chapter 29, notes 194, 195, and connecting text.

292. See *Ringwood Assocs., Ltd. v. Jack's of Route 23, Inc.*, 153 N.J. Super. 294, 311, 379 A.2d 508, 516-17 (Super. Ct. 1977), *aff'd*, 166 N.J. Super. 36, 398 A.2d 1315 (App. Div. 1979).

293. *Homa-Goff Interiors, Inc. v. Cowden*, 350 So. 2d 1035 (Ala. 1977).

294. *Chrysler Capital Corp. v. Lavender*, 934 F.2d 290 (11th Cir. 1991).

295. *Karbelnig v. Brothwell*, 244 Cal. App. 2d 333, 53 Cal. Rptr. 335 (2d Dist. 1966); *Cities Serv. Oil Co. v. Taylor*, 242 Ky. 157, 45 S.W.2d 1039, 79 A.L.R. 1374 (1932); *Chessport Millworks, Inc. v. Solie*, 86 N.M. 265, 522 P.2d 812 (1974). See also text *supra* at note 188. The restriction is for the benefit of the landlord and his successors and may be availed of only by them. *Stark v. Nat'l Research & Design Corp.*, 33 N.J. Super. 315, 110 A.2d 143 (1954); 51C C.J.S. *Landlord and Tenant* § 33c (1968).

296. Text *supra* at note 162.

whatever rights the landlord may have for the breach.²⁹⁷ There is authority that the landlord has the option of simply voiding the transfer and leaving the original lease in effect, and landlord can bring an unlawful detainer action against the unlawful occupant, who holds without color of title once landlord takes action to void the transfer.^{297.1} The same applies to subletting.²⁹⁸ A landlord may recover rent from the assignee despite the breach. Landlord's bringing the action is

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297. Klee v. United States, 53 F.2d 58 (9th Cir. 1931); Chapman v. Great W. Gypsum Co., 216 Cal. 420, 14 P.2d 758, 85 A.L.R. 917 (1932); Fink v. Montgomery Elevator Co., 161 Colo. 342, 421 P.2d 735 (1966); Woods v. N. Pier Terminal Co., 131 Ill. App. 3d 21, 475 N.E.2d 568, 86 Ill. Dec. 354 (1985). Stark v. Nat'l Research & Design Corp., 33 N.J. Super. 315, 110 A.2d 143 (1954); Annot., 148 A.L.R. 1361 (1944); 49 AM. JUR. 2D *Landlord and Tenant* §§ 1088, 1091, 1103, 1110 (1995 rev.); 51C C.J.S. *Landlord and Tenant* §§ 1088, 1091, 1103, 1110 (1995 rev.). Cf. text *infra* at notes 311–13. Conversely, the holder of a lease may effectively surrender it to the owner despite the former's agreement with a third person not to surrender. Leshay v. Tomashoff, 267 A.D. 635, 47 N.Y.S.2d 538 (App. Div. 1st Dep't), *aff'd sub nom.* Leshay v. Gresham Realty Co., 293 N.Y. 797, 59 N.E.2d 34 (1944). The same rule is applicable to an assignment in breach of a statutory restriction against assignment. Casto v. Johnson, 392 S.W.2d 591 (Tex. Civ. App. 1965). Where lessor did not initially consent to the lessee's assignment of a lease, but lessor's subsequent conduct fully implied acceptance of the assignment, lessor waived right to object to the assignment. Am. Nat'l Trust Co. v. Ky. Fried Chicken, 719 N.E.2d 201 (Ill. App. Ct. 1999).
- 297.1. See David Caron Chrysler Motors, LLC v. Goodhall's, Inc., 43 A.2d 164 (Conn. 2012). In *David Caron Chrysler Motors*, the tenant leased property to serve as a car dealership and service center. The lease contained an anti-assignment provision that stated that no part of the lease may "be assigned . . . without the prior written consent of [the] [l]andlord, which consent shall not be unreasonably withheld." The lease specifically provided that a transfer of a majority ownership or shares of the tenant would be deemed an assignment. Notwithstanding this provision, the tenant sold a majority interest without obtaining consent of the landlord. The court held that the assignment was not void per se, and but rather was voidable by the landlord. The anti-assignment provision was deemed a covenant like any other promise in a lease, absent express language rendering the lease automatically terminated upon transfer. In this case, the landlord did not take affirmative steps to terminate, nor did it reenter the premises. See also *Bellevue Square Managers, Inc. v. GRS Clothing, Inc.*, 124 Wash. App. 238, 98 P.3d 498 (2004).
298. Xerox Corp. v. Listmark Computer Sys., 142 N.J. Super. 232, 361 A.2d 81 (1976); Armendariz v. Mora, 519 S.W.2d 921 (Tex. Civ. App. 1975). The subtenant in this situation is not a trespasser and is rightfully in possession until landlord proceeds to avoid the sublease. Where a commercial lease provides that a tenant may sublease less than the whole of the property without landlord's consent and requires that notice be given of any such sublease, and the tenant subleases all but a portion of the leased premises to a third party and fails to give notice to the landlord, landlord could not refuse to extend lease for the option period because tenant's breach of the duty to notify landlord is immaterial to the lease. *Holytrent Props. v. Valley Park Ltd.*, 32 S.W.3d 27 (Ark. Ct. App. 2000).

deemed a confirmation of the assignment.²⁹⁹ Similarly, a tenant may recover rent from his subtenant though making the sublease was forbidden by the prime lease.³⁰⁰ The cases conflict in this situation on tenant's right to enforce a contract to assign the lease or to recover payment of the consideration for the assignment. Some cases give recovery to the tenant with little hesitation.³⁰¹ But an apparent majority denies recovery where an issue is made of the lack of landlord's prerequisite consent.³⁰² Some cases question the value of a lease "which may not last an hour" after the transfer, and thus assume a failure of consideration.³⁰³ Others equate a tenant-assignor with a vendor of real property whose title is unmarketable.³⁰⁴ Under the marketable title doctrine a vendee is entitled to a title that is not only good but free from any reasonable doubt.³⁰⁵ This permits different results in the same jurisdiction. In New York, for instance, one case denied a purchaser of a lease restitution of its purchase price on the ground that the landlord had waived any right to object to the assignment by accepting rent and by other things done after knowledge of the assignment.³⁰⁶ Another New York case ruled that the existence of a dispute with respect to landlord's consent created a cloud that made tenant-vendor's title unmarketable.³⁰⁷ Where the question is raised it is assumed that the duty of obtaining the landlord's consent is on the tenant-assignor.³⁰⁸ A sublease, subject to

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299. First Am. Nat'l Bank v. Chicken Sys., 510 S.W.2d 906 (Tenn. 1974); Dieter v. Scott, 110 Vt. 376, 9 A.2d 95 (1939); OTR v. Flakey Jack's, Inc., 112 Wash. 2d 243, 770 P.2d 629 (1989); Goodwin v. Upper Crust, Inc., 624 P.2d 1192 (Wyo. 1981); 51C C.J.S. *Landlord and Tenant* § 33c n.45 (1968).
300. Fordyce v. Young, 39 Ark. 135 (1882); OTR, 112 Wash. 2d 243; Goodwin, 624 P.2d 1192.
301. Weisman v. Clark, 232 Cal. App. 2d 764, 43 Cal. Rptr. 108 (5th Dist. 1965); Stark v. Nat'l Research & Design Corp., 33 N.J. Super. 315, 110 A.2d 143 (1954); Deaton v. Taylor, 90 Va. 219, 17 S.E. 944 (1893). Spear v. Fuller, 8 N.H. 174, 28 Am. Dec. 391 (1835), reached the same conclusion but is only dictum because the landlord had no right to reenter for breach of the non-assignment clause.
302. Karidis v. Trampas, 207 Ill. App. 302 (1917) (tenant denied recovery against assignee); Austin v. Harris, 76 Mass. 296 (1858) (same); Shannon v. Mastin, 108 S.W. 1116 (Mo. Ct. App. 1908); Greene v. Barrett, Nephews & Co., 238 N.Y. 207, 144 N.E. 503 (1924) (vendee of lease recovered money paid on contract); Ferri v. Taylor, 203 A.D. 719, 196 N.Y.S. 857 (1st Dep't 1922) (same); Best v. Kelley, 22 Wash. 2d 257, 155 P.2d 794, 156 A.L.R. 1387 (1945) (broker fails to recover commission for sale).
303. Austin, 76 Mass. 296; Ferri, 203 A.D. 719.
304. Greene, 238 N.Y. 207; Ferri, 203 A.D. 719.
305. FRIEDMAN ON CONTRACTS § 4:1.
306. Murray v. Harway, 56 N.Y. 337 (1874).
307. Ferri v. Taylor, 203 A.D. 719, 196 N.Y.S. 857 (1st Dep't 1922).
308. Karidis v. Trampas, 207 Ill. App. 302 (1917); Austin v. Harris, 76 Mass. 296 (1858); Murray v. Harway, 56 N.Y. 337 (1874) Spilman v. New Rockford Inv. Co., 52 N.D. 169, 201 N.W. 691 (1924) (land contract).

sublessors obtaining consent of the head landlord within forty-five days, was breached by subtenants repudiating the sublease within a shorter time.³⁰⁹ Sublessee was guilty of an anticipatory breach. A contract to sell a lease “subject to consent of” landlord was held to have two possible, and contradictory, meanings: (1) purchaser takes subject to landlord’s rights, that is, seller need not produce landlord’s consent; or (2) landlord’s consent is a condition precedent.³¹⁰

§ 7:3.6 Landlord’s Waiver of Restriction Against Assignment and Subletting

A landlord may waive a restriction against assignment or subletting or estop himself from objecting thereto. Waiver occurs when he accepts rent after breach of the covenant or condition.³¹¹ Possession and rent represent an agreed exchange, and a landlord may not generally accept rent and deny his tenant’s right to possession for the period covered

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309. King World Prods., Inc. v. Fin. News Network, Inc., 660 F. Supp. 1381 (S.D.N.Y. 1987). The fact that the sublessor had not obtained landlord’s consent was immaterial. Sublessor recovered past and prospective damages. A dictum states that sublessee would have prevailed if it could show landlord’s consent could not have been obtained.
310. Young v. Wilkinson, 22 Ill. App. 2d 304, 160 N.E.2d 709 (1959), *rev’d on other grounds*, 18 Ill. 2d 428, 164 N.E.2d 39 (1960) (enforcing note given for assignment). “Subject to approval” of the vendor was held not to make the vendor’s consent a condition of an assignment of a contract of sale of realty. Johnson v. Landucci, 21 Cal. 2d 63, 130 P.2d 405, 148 A.L.R. 1355 (1942).
311. La Salle Nat’l Bank v. Bachman, 108 B.R. 1013 (N.D. Ill. 1989); *In re Duplan Corp.*, 473 F. Supp. 1089 (S.D.N.Y. 1979); Southland, Inc. v. Julius E. Marx, Inc., 341 So. 2d 127 (Ala. 1976); Hendrickson v. Freericks, 620 P.2d 205 (Alaska 1980); Karbelnig v. Brothwell, 244 Cal. App. 2d 333, 53 Cal. Rptr. 335 (2d Dist. 1966); Werner v. Baker, 693 P.2d 385 (Colo. Ct. App. 1984); Lewiston Pre-Mix Concrete, Inc. v. Rohde, 110 Idaho 640, 718 P.2d 551 (Idaho Ct. App. 1985); Sexton v. Chi. Storage Co., 129 Ill. 318, 21 N.E. 920, 16 Am. St. Rep. 274 (1889); Bonura v. Shrimp Boats, Inc., 305 So. 2d 748 (La. Ct. App. 1974); Anderson v. Lissandri, 19 Mass. App. 191, 472 N.E.2d 1365 (1985). W. 70th, Inc. v. Koch, 298 Minn. 121, 213 N.W.2d 332 (1973); Woollard v. Schaffer Stores Co., 272 N.Y. 304, 5 N.E.2d 829, 109 A.L.R. 1262 (1936); Finkbeiner v. Lutz, 44 Ohio App. 2d 223, 337 N.E.2d 655 (1975); Smith v. Hegg, 88 S.D. 29, 214 N.W.2d 789 (1974); Jensen v. O.K. Inv. Corp., 29 Utah 2d 231, 507 P.2d 713 (1973); OTR v. Flakey Jack’s, Inc., 112 Wash. 2d 243, 770 P.2d 629 (1989). Annots., 109 A.L.R. 1267, 1269 (1937); 118 A.L.R. 124, 125 (1939); 49 AM. JUR. 2D *Landlord and Tenant* §§ 1067, 1068, 1073 (1970); 51C C.J.S. *Landlord and Tenant* § 117 (1968). *But see* Excel Graphics Techs. v. CFG/AGSB, 767 N.Y.S.2d 99 (App. Div. 2003) (holding that acceptance of rent from subtenant and listing of subtenant’s name in the building directory do not constitute waiver of tenant’s default for subletting without landlord’s prior written consent, where landlord and tenant specifically agree and set forth in the lease that such acceptance of rent or such listing would not constitute waiver).

by the payment. It is immaterial that the rent is accepted from the tenant, assignee or subtenant.³¹² It is essential, however, that the rent be accepted with knowledge of the facts.³¹³ It is also material that

See generally Folb, *A Lessor Acceptance of Rents Accruing Subsequent to Known Breach of Condition as Waiver of Forfeiture*, 10 N.Y.U. INTRAMURAL L. REV. 223 (1955); RESTATEMENT OF PROPERTY § 421 (1936). There is some conflict on landlord's right to accept rent and rely on a provision in the lease disclaiming waiver. *See* U.S.A. Petroleum Corp. v. Jopat Bldg. Corp., 343 So. 2d 501 (Ala. 1977); 49 AM. JUR. 2D *Landlord and Tenant* § 332 (1995 rev.); 109 A.L.R. 1267, 1287 (1937). The rule was applied to a usufruct. *Step Ahead, Inc. v. Lehndorff Greenbrier, Ltd.*, 171 Ga. App. 805, 321 S.E.2d 115 (1984). Accepting two months' rent while litigating the right to assign was held no waiver. *Nat'l Distillers & Chem. Corp. v. First Nat'l Bank*, 804 F.2d 978 (7th Cir. 1986). Accepting rent while objecting to subleases was held in the circumstances to be no waiver. *SAAB Enters., Inc. v. Bell*, 198 A.D.2d 342, 603 N.Y.S.2d 879 (2d Dep't 1993). *Cf.* chapter 16 at note 338. For waiver generally, see sections 16:5.1, 16:5.2, 16:5.3. *Cf. text supra* at notes 295–98. Landlord was found to have waived the restriction of assignment when he accepted rent and otherwise treated the assignee as the lessee. *Am. Nat'l Trust Co. v. Ky. Fried Chicken*, 719 N.E.2d 201 (Ill. App. Ct. 1999).

312. *Cities Serv. Oil Co. v. Taylor*, 242 Ky. 157, 45 S.W.2d 1039, 79 A.L.R. 1374 (1932); *Capital Garage Co. v. Powell*, 97 Vt. 204, 122 A. 423 (1923); 49 AM. JUR. 2D *Landlord and Tenant* § 330 (1995 rev.); 51C C.J.S. *Landlord and Tenant* § 117(1), (4)a (1968). Information from tenant that payments would be made on its behalf by a third party precluded waiver. *Mattas Motors, Inc. v. Heritage Homes, Inc.*, 749 P.2d 458 (Colo. Ct. App. 1987). Consider in this connection chapter 16 at notes 329–31.
313. *Amjems, Inc. v. F.R. Orr Constr. Co.*, 617 F. Supp. 273 (S.D. Fla. 1985). *El Prado Rest., Inc. v. Weaver*, 268 So. 2d 382 (Fla. Dist. Ct. App. 1972); *Woollard v. Schaffer Stores Co.*, 272 N.Y. 304, 5 N.E.2d 829, 109 A.L.R. 1262 (1936); *Fairchild Realty Co. v. Spiegel, Inc.*, 246 N.C. 458, 98 S.E.2d 871 (1957); 109 A.L.R. 1267, 1287 (1937); 118 A.L.R. 124, 129 (1939); 49 AM. JUR. 2D *Landlord and Tenant* §§ 1070, 1073 (1995 rev.); 51C C.J.S. *Landlord and Tenant* § 117(1), (4)a (1968). Assignments by Food Fair Stores, Inc., to Food Fair Stores of Md. and then to Food Fair Stores, Ann Arundel, Inc., followed by checks of the assignees differing in color from those of the tenant-assignor, often accompanied by statements signed "Food Fair Stores, Inc.—Agent" were held to constitute neither notice nor waiver nor the basis of estoppel against the landlord. *Food Fair Stores, Inc. v. Blumberg*, 234 Md. 521, 200 A.2d 166 (1964). *Accord In re F.A.M.I. Serv. Sys.*, 19 B.R. 30 (S.D. Fla. 1982); *Tage II Corp. v. Ducas (U.S.) Realty Corp.*, 17 Mass. App. 664, 461 N.E.2d 1222 (1984) (addition of "II" to tenant's name too subtle to charge landlord with notice). A bank's payment of rent from an escrow fund was no notice to landlord of an assignment to the bank of the lease or an estoppel of the landlord. *Centerre Bank, N.A. v. Bliss*, 765 S.W.2d 276, 282–83 (Mo. Ct. App. 1988). Receipt of rent, despite apparent knowledge of an assignment or sublease, was held no waiver in the circumstances present, including other breaches and landlord's lawyer's poor advice. *See Jose v. Iglesias*, 462 F.2d 214 (9th Cir. 1972), particularly at 216.

the acceptance be of rent accruing after the breach. Acceptance of rent accruing prior to the breach is no waiver.³¹⁴ Waiver may also occur by other behavior, as where with knowledge and without objection a landlord permits his tenant to make improvements or other expenditures in reliance and to his prejudice.³¹⁵ In addition, where landlord does not initially consent to tenant's assignment of a lease but landlord's subsequent conduct fully implies acceptance of the assignment, landlord waives his objection to the assignment.³¹⁶

A landlord's consent to an assignment, or his waiver of a non-assignment clause, ends the restriction. "The covenant against assignment without the landlord's consent having once been waived is gone."³¹⁷ This is the rule of *Dumpor's Case*,³¹⁸ which, though abolished by statute in England,³¹⁹ is followed in this country with rare exception.³²⁰ The rule is applied whether the assignment that the landlord permitted was to any person or to specific persons, or whether the lease was made to the tenant or to "tenant and assigns."³²¹ It is

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314. *In re Wise Shoe Co.*, 26 F. Supp. 762 (S.D.N.Y. 1938) (involves insolvency); *Associated Cotton Shops, Inc. v. Evergreen Park Shopping Plaza*, 27 Ill. App. 2d 467, 170 N.E.2d 35 (1960); 109 A.L.R. 1267, 1268 (1937); 118 A.L.R. 124, 129 (1939); 49 AM. JUR. 2D *Landlord and Tenant* § 334 (1995 rev.); 51C C.J.S. *Landlord and Tenant* § 117(4)b (1968).
315. *D'Anna v. Rupp*, 32 S.W.2d 136 (Mo. Ct. App. 1930); *Northerly Corp. v. Hermett Realty Corp.*, 15 A.D.2d 888, 225 N.Y.S.2d 327 (1st Dep't 1962); 51C C.J.S. *Landlord and Tenant* § 117(1), (3) (1968). *Accord Sullenger v. Shaw*, 200 Ariz. App. 193, 511 P.2d 206 (1973); *Marshall v. Smith*, 199 S.W.2d 555 (Tex. Civ. App. 1946). For other events or transactions whereby a landlord may be deemed to have waived a tenant's default, see 118 A.L.R. 124, 131-32 (1939). Landlord was held estopped to forbid assignment after giving his parol consent and accepting rent and security from the assignee. The assignee agreed to a rent increase but reneged when landlord sought to add electric charges. *Blair House Assocs. v. Dattola*, 311 N.Y.S.2d 166 (Civ. Ct. 1970).
316. *Am. Nat'l Trust Co. v. Ky. Fried Chicken*, 719 N.E.2d 201 (Ill. App. Ct. 1999).
317. *Gillette Bros. v. Aristocrat Rest., Inc.*, 239 N.Y. 87, 90, 145 N.E. 748, 749 (1924). "And thus avoid the ancient doctrine that a condition not to alien without license ended by the first license granted." *In re Wil-Low Cafeterias, Inc.*, 111 F.2d 83, 85 (2d Cir. 1940).
318. *Dumpor's Case*, 4 Coke 119b, 76 Eng. Rep. 1110 (1578).
319. 22 & 23 VICT. C. 35, §§ 1-3 (1859).
320. *Aste v. Putnam's Hotel Co.*, 247 Mass. 147, 141 N.E. 666, 31 A.L.R. 149 (1923); *Lipsker v. Billings Boot Shop*, 129 Mont. 420, 288 P.2d 660 (1955); *Gillette Bros.*, 239 N.Y. 87; 1 AMERICAN LAW OF PROPERTY § 3.58, at 305 (1952); Annots., 31 A.L.R. 153 (1924); 32 A.L.R. 1080 (1924); 49 AM. JUR. 2D *Landlord and Tenant* § 508 (1995 rev.).
321. *See Investors' Guar. Corp. v. Thomson*, 31 Wyo. 264, 271 *et seq.*, 225 P. 590, 591 *et seq.*, 32 A.L.R. 1071 (1924).

immaterial whether landlord's consent to the assignment was by waiver or by affirmative consent.³²²

Dumpor holds in essence that a condition in a lease is single notwithstanding that the lease makes it binding not only upon the tenant but also upon his assigns, from which it follows that one license destroys the entire condition. In a careful analysis and historical account, a Wyoming case cited *Dumpor* for the wonderful stability of the law as well as the extraordinary pertinacity of its errors and concluded that it was not called upon to help perpetuate that error.³²³ If a lease were to impose the restriction upon the tenant alone, with no reference to assigns and making it personal to the tenant, the rule of *Dumpor* would have more reason. Few American courts have expressly rejected *Dumpor*,³²⁴ despite the fact that it may be questioned if any decision in Anglo-American jurisprudence has been subjected to as frequent and as extended criticism, ridicule, and condemnation as *Dumpor's Case*.³²⁵ Percy Bordwell has explained its persistence in this country on the ground that the states "have committed themselves too

322. See *id.*, 31 Wyo. at 273, 225 P. at 592, 32 A.L.R. 1071 (1924).

323. See *Investors' Guar. Corp.*, 31 Wyo. at 273, 283, 225 P. at 592-93, 596, 32 A.L.R. 1071 (1924). See also *Sea Cliff Delicatessen, Inc. v. Skrepek*, 605 N.Y.S.2d 389 (App. Div. 1993) (holding a landlord's acceptance of rent checks from tenant's assignee for approximately five years waived landlord's right to refuse consent to any assignment). But compare *SAAB Enters., Inc. v. Bell*, 603 N.Y.S.2d 879 (App. Div. 1993) (holding landlord's acceptance of rent while negotiating sale of property to tenants or third party is not a waiver of objection to subleases that violated prime lease).

324. *Kendis v. Cohn*, 90 Cal. App. 41, 265 P. 844 (1928); *Investors' Guar. Corp. v. Thomson*, 31 Wyo. 264, 255 P. 590, 32 A.L.R. 1071 (1924); see also 2 R. POWELL, REAL PROPERTY § 2411, n.41 (1966).

325. More than two centuries after the decision, Lord Eldon wrote, "Though *Dumpor's Case* has always struck me as extraordinary, it is the law of the land." *Brummel v. McPherson*, 33 Eng. Rep. 487 (Ch. 1807). Sir James Mansfield wrote, "The profession have always wondered at *Dumpor's Case*, but it has been law for so many centuries that we cannot reverse it." *Doe v. Bliss*, 128 Eng. Rep. 519 (C.P. 1813). For other English criticism, see 7 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 282-84 (1925); J. WILLIAMS, REAL PROPERTY 614 (24th ed. 1926) (a curious doctrine, it inhibited lessors from giving permission they might otherwise have). The most comprehensive American criticism appeared in Willard, *Dumpor's Case*, 7 AM. L. REV. 618-40 (1873) (bad law, bad sense), into which most later American critics, including this one, seem to have dipped. See also J. SMITH, LEADING CASES 133 *et seq.* (9th Am. ed. 1889); Bordwell, *English Property Reform and Its American Aspects*, 37 YALE L.J. 179, 179-81 (1927) (collecting authorities); Folb, *A Lessor Acceptance of Rents Accruing Subsequent to Known Breach of Condition as Waiver of Forfeiture*, 10 N.Y.U. INTRAMURAL L. REV. 223 (1955); 14 CAL. L. REV. 328 (1926) (and authorities collected); 23 HARV. L. REV. 630 (1910); 1 WASH. L. REV. 52 (1925).

far to get away from the rule without the help of the legislature."³²⁶ It was disapproved by the *Restatement*.³²⁷

The theory that a restriction against assignment is a single or "continuous" condition should logically produce the same result with respect to subleases, but *Dumpor* is not applied to subleases. A landlord's waiver of a restriction as to one sublease is no waiver as to others. The covenant or condition continues and the restriction applies to other subleases.³²⁸

The landlord may preserve his rights by stipulations in the lease to the effect that his consent or waiver with respect to one act of assigning or subletting shall apply only to the transaction so authorized, without waiver of the tenant's duty to obtain landlord's consent to any subsequent assignment or subletting. Stipulations of this nature are given effect.³²⁹ The stipulations may also provide that landlord's receipt of rent with knowledge of any breach by tenant shall not be deemed a waiver of the breach.³³⁰ These stipulations are

326. Note, *English Property Reform and Its American Aspects*, 37 YALE L.J. 179, 181 (1927).

327. RESTATEMENT (SECOND) OF PROPERTY § 16.1 reporter's note 7 (1977) (citing text).

328. *Fay v. Klots*, 199 N.Y.S. 49 (Sup. Ct. 1923); see also cases collected in *Kendis v. Cohn*, 90 Cal. App. 41, 59, 265 P. 844, 851 (1928); 1 AMERICAN LAW OF PROPERTY § 3.58, at 305 (1932); 49 AM. JUR. 2D *Landlord and Tenant* § 1174 (1995 rev.); Annots., 31 A.L.R. 153, 157 (1924); 32 A.L.R. 1080 (1924). See also *Justine Realty Co. v. Am. Can Co.*, 119 Ill. App. 3d 582, 456 N.E.2d 871, 75 Ill. Dec. 50 (1983).

329. *Merritt v. Kay*, 295 F. 973 (D.C. Cir. 1924); *Rothrock v. Sanborn*, 178 Cal. 693, 174 P. 314 (1918); *Kew v. Trainor*, 150 Ill. 150, 37 N.E. 223 (1894); *Springer v. Chi. R.E. Loan & Trust Co.*, 202 Ill. 17, 66 N.E. 840 (1903); *Justine Realty Co.*, 119 Ill. App. 3d 582. Folb, *A Lessor Acceptance of Rents Accruing Subsequent to Known Breach of Condition as Waiver of Forfeiture*, 10 N.Y.U. INTRAMURAL L. REV. 223, 228 (1955); 31 A.L.R. 153, 156-57 (1924); 49 AM. JUR. 2D *Landlord and Tenant* §§ 498, 1068 (1970). *Justine Realty*, 119 Ill. App. 3d 582, could have been decided on the ground mentioned at note 328.

330. More specific language of these stipulations might read:

Any consent by Landlord to any act of assignment or subletting shall be held to apply only to the specific transaction thereby authorized. Such consent shall not be construed as a waiver of the duty of Tenant, or Tenant's legal representatives or assigns, to obtain from Landlord consent to any other or subsequent assignment or subletting, or as modifying or limiting the rights of Landlord under the foregoing covenant by Tenant not to assign or sublet without such consent.

Receipt of rent by Landlord, with knowledge of any breach of this lease by Tenant or of any default by Tenant in the observance or performance of any of the conditions or covenants of this lease, shall not be deemed to be a waiver of any provision of this lease.

also given effect.³³¹ The cases are less clear on landlord's right to accept rent and avoid waiver by his unilateral act of delivering a receipt that states the acceptance is without prejudice to his rights.³³²

Acceptance of rent, as a waiver of landlord's right to forfeiture, does not necessarily waive a right to recover damages for the breach.³³³ Acceptance of rent was held not to waive a provision that assignment without landlord's consent terminated a renewal right.³³⁴ Principles of equitable estoppel that may bar a private landlord from objecting to tenant's actions may not operate to bar a public agency landlord.^{334.1}

§ 7:4 Assignments and Subleases

§ 7:4.1 In General

The formal distinction between an assignment and a sublease is based on the difference in what each transfers. An assignment is a transfer by a tenant of his entire interest in the lease. It is a transfer of his entire term and "estate." A sublease is a transfer of something less than the tenant's full interest.³³⁵ For instance, in New York, the "sublease" of the entire premises for the entire lease term of a prime

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331. *In re Wil-Low Cafeterias, Inc.*, 95 F.2d 306, 115 A.L.R. 1184 (2d Cir. 1938) (and cases collected); *Leeds Shoes, Inc. v. Wally*, 309 So. 2d 249 (Fla. Dist. Ct. App. 1975). *See also* section 16:5.2.
332. *See Karbelnig v. Brothwell*, 244 Cal. App. 2d 333, 341, 53 Cal. Rptr. 335, 340 (2d Dist. 1966); Folb, *A Lessor Acceptance of Rents Accruing Subsequent to Known Breach of Condition as Waiver of Forfeiture*, 10 N.Y.U. INTRAMURAL L. REV. 223, 225 (1955); 109 A.L.R. 1267, 1287 (1937).
333. *See text supra* at note 193 *et seq.* and cases cited therein. *See also Conger v. Duryce*, 90 N.Y. 594 (1882) (nonpayment of taxes).
334. *Nouri v. Wester & Co.*, 833 P.2d 848 (Colo. Ct. App. 1992).
- 334.1. *Odessa Tex. Sheriff's Posse, Inc. v. Ector Cnty. Tex.*, 215 S.W.3d 458 (Tex. App. 2006). Although occupant of premises on a long-term prepaid leasehold estate was effectively a successor in interest to the original tenant, it was not a lawful successor. Original tenant had expired for failure to pay taxes. Occupant, reincorporated by same interests, but not a formal successor, continued possession and remained on property for decades and made over \$300,000 in improvements with full knowledge of landlord county, but equitable principles would not operate an estoppel against county, so county could terminate the possession at will.
335. *In re Miami Dyeing & Printing, Inc.*, 14 B.R. 947 (Bankr. S.D. Fla. 1981); *Jaber v. Miller*, 219 Ark. 59, 239 S.W.2d 760 (1951); *Cities Serv. Oil Co. v. Taylor*, 242 Ky. 157, 45 S.W.2d 1039, 79 A.L.R. 1374 (1932); *Estate of Whitley v. Anning*, 392 So. 2d 799 (La. Ct. App. 1980) (collects Louisiana cases); *Weeks v. Cal-Maine Foods, Inc.*, 522 So. 2d 725 (Miss. 1988); *Siragusa v. Park*, 913 S.W.2d 915 (Mo. Ct. App. 1996); *Kmart v. Guastello*, 661 S.E.2d 790 (N.C. Ct. App. 2008) (reaffirming bright line test between sublease and assignment; transfer deemed sublease because sublandlord retained assignable lease options and a portion of the lease term); *Stewart v. Long Island R.R.*, 102 N.Y. 601, 607-09, 8 N.E. 200, 201-02 (1886);

lease is an assignment of such lease notwithstanding a provision in the agreement for a contingent right of reentry.³³⁶ If the transfer is of tenant's entire interest in a part of the leased premises, it is an assignment pro tanto.³³⁷ In most situations, the distinction is clear enough to leave little doubt whether an assignment or sublease has been effected. Identification is important because of the difference in numerous legal incidents between the three parties concerned, that is, original landlord, original tenant, and the transferee of the latter (assignee or subtenant, as the case may be). In case of an assignment, the original tenant's "estate" passes to the assignee, "privity of estate" is ended between landlord and tenant, and privity of estate is created between landlord and assignee.³³⁸

One example of the difference in rights of an assignee versus a sublessee is stated to be that the sublessee lacks the equitable status to raise defenses to nonpayment of rent on the master lease. In one case, the sublease was for a substantial period of time, and the subtenant paid rent to the landlord in the exact amount payable on the master lease. The sublandlord ultimately failed to remit payments to the master landlord even though the sublandlord received the necessary payments from the subtenant. The landlord, who had not known of the transfer of the leasehold to the subtenant, brought an action to evict the subtenant based upon the default. The subtenant attempted

Spears v. Canon de Carnue Land Grant, 80 N.M. 766, 461 P.2d 415 (1969); Morrisville Shopping Ctr., Inc. v. Sun Ray Drug Co., 381 Pa. 576, 584, 112 A.2d 183, 187 (1955); First Am. Nat'l Bank v. Chicken Sys., 510 S.W.2d 906 (Tenn. 1974) (collecting Tennessee authorities); OTR v. Flakey Jack's, Inc., 112 Wash. 2d 243, 770 P.2d 629 (1989); 1 H. TIFFANY, REAL PROPERTY § 123 (3d ed. 1939); Wallace, *Assignment and Sublease*, 8 IND. L.J. 359 (1933); 59 W. VA. L. REV. 86 (1956); 51C C.J.S. *Landlord and Tenant* §§ 37, 43 (1968); 49 AM. JUR. 2D *Landlord and Tenant* §§ 1077, 1157 (1995 rev.). Northside Station Assocs. P'ship v. Maddry, 105 N.C. App. 384, 413 S.E.2d 319 (N.C. Ct. App. 1992); Burgess Pic-Pac, Inc. v. Fleming Cos., 190 W. Va. 169, 437 S.E.2d 742 (1993) (citing text); Abernathy v. Adous, 2004 Ark. App. LEXIS 167 (Ark. Ct. App. 2004). A tenant's right to sublet to another who would sign and assume full responsibility for the remaining obligations of the lease was deemed to result in an assignment, on the ground that a subtenant owes no responsibility to the landlord. *Id.* Compare section 7:7.1. But where a transferee, by agreement, takes possession for only two months, leaving a balance of the lease with the transferor tenant, and the transferee assumes the lease, the assumption will be only for those responsibilities accruing during the two-month period, where such agreement tracks the intent of the parties. Christensen v. Tidewater Fibre Corp., 616 S.E.2d 583 (N.C. Ct. App. 2005).

336. Banque Nationale de Paris v. 1567 Broadway Ownership Assocs., 608 N.Y.S.2d 635 (App. Div. 1994).

337. See section 7:4.2.

338. See section 7:5.1[A].

to invoke equitable defenses to the eviction that would have been available to it had it been an ordinary tenant or assignee of an ordinary tenant. But the court held that these same defenses are not available to the sublessee.^{338.1}

§ 7:4.2 Assignments Pro Tanto

A tenant's transfer of his entire interest in a part of the leased premises constitutes an assignment pro tanto of the entire lease and creates a relation of landlord and tenant between the landlord and the assignee pro tanto.³³⁹ The relationship includes a liability of the latter to the former for rent. The amount of this rent has been held to be the amount fixed as rent in the lease between the original tenant and the assignee pro tanto, in a case that noted that this amount was fair and equitable in proportion to the rent agreed to be paid under the original lease.³⁴⁰ It is generally said that the liability of the assignee pro tanto for rent is for an amount proportional to the interest acquired by him in the entire leased premises.³⁴¹ It is doubtful, however, if an assignee pro tanto could successfully maintain that his liability to the original landlord is for less than the amount of the rent fixed in the lease running to him.^{341.1}

338.1. *Abernathy v. Adous*, 85 Ark. App. 242, 149 S.W.3d 884 (2004). The case is particularly chaffing because the court followed the distinct minority rule in Arkansas that depends upon the apparent intent of the parties, rather than the structure of the transaction, to determine whether the transfer is an assignment or sublease. (See notes 383–84, *infra*, and accompanying text.) The transfer would have been an assignment under the ordinary rules, but the parties (certainly not intending to waive the rights of the subtenant to invoke equitable defenses in a case like this) characterized the arrangement as a sublease.

339. *Joseph Bros. Co. v. F.W. Woolworth Co.*, 641 F. Supp. 822 (N.D. Ohio 1985); *Jordan v. Scott*, 38 Cal. App. 739, 177 P. 504 (1918); *Kostakes v. Daly*, 246 Minn. 312, 75 N.W.2d 191 (1956), *noted in* 55 MICH. L. REV. 605 (1957); *New Amsterdam Cas. Co. v. Nat'l Union Fire Ins. Co.*, 266 N.Y. 254, 194 N.E. 745, 99 A.L.R. 216 (1935); *Annot.*, 99 A.L.R. 220 (1935); 51C C.J.S. *Landlord and Tenant* §§ 37(2), 44(3) (1968); 49 AM. JUR. 2D *Landlord and Tenant* § 1078 (1995 rev.).

340. *New Amsterdam Cas. Co.*, 266 N.Y. at 256.

341. *Bancroft v. Vizard*, 202 Ala. 618, 81 So. 560 (1919); *Ellis v. Bradbury*, 75 Cal. 234, 17 P. 3 (1888); *Babcock v. Scoville*, 56 Ill. 461 (1870); *Daniels v. Richardson*, 39 Mass. 565 (1839); *Hogg v. Reynolds*, 61 Neb. 758, 86 N.W. 479, 87 Am. St. Rep. 522 (1901); *Damainville v. Mann*, 32 N.Y. 197 (1865); 51C C.J.S. *Landlord and Tenant* § 44(3) (1968).

341.1. *But see* MILLER & STARR, CALIFORNIA REAL ESTATE (3d ed. 2004) where the revisor, Mr. Regalia, asserts that "a sublease may be created by a transfer of a portion of the premises for the full remaining term of a lease. . . ." None of the authority cited in the relevant section of the Miller and Starr treatise, however, supports this contention.

An assignee of part of the premises was held liable by implication for only his proportional part of real estate taxes.³⁴²

The cases with respect to assignments pro tanto generally involve leases that were intended to be subleases, which run for the balance of the term of the prime lease, and are because of this fact treated in law as assignments instead of subleases. This phase of the matter is considered in subsequent sections.³⁴³ This is not invariably true. A tenant's trustee in bankruptcy was expressly permitted to make an assignment of part of the leased premises.³⁴⁴

§ 7:4.3 Sublease for Balance of Term As Assignment

The ancient technical system of feudal law based the landlord-tenant relation on the existence of a reversion in the landlord. A tenant who sublet for the rest of his term parted with all his interest in the premises, leaving no reversion in himself, and thereby created an assignment.³⁴⁵ Briefly, tenant's sublease for the balance of his term creates an assignment, not a sublease. This occurs regardless of the terms of the instrument and regardless of the intentions of the parties. This is the rule established in England and adopted by the majority of our states.³⁴⁶ Feudal concepts permitted no other result.

342. *Corsiglia v. Summit Ctr. Co.*, 348 N.W.2d 647 (Iowa Ct. App. 1984).

343. See sections 7:4.3, 7:4.3[A].

344. *In re Brentano's, Inc.*, 29 B.R. 881 (S.D.N.Y. 1983).

345. Court will not order reformation where parties executed a document designed as a sublease but construed by the court to be an assignment if evidence shows that alleged subtenant in fact intended to acquire all of the alleged sublandlord's interest. *Stop & Shop Cos., Inc. v. Cyktor, Civ. No. 94-4699* (D.N.J. July 16, 1997). An assignment of all of an assignor's leasehold interest, even though denominated by the parties as a sublease, is an assignment, so that the assignor is no longer entitled to the benefits of the landlord's covenants but is still obligated to pay rent. *Siragusa v. Park*, 913 S.W.2d 915 (Mo. Ct. App. 1996).

346. *Jaber v. Miller*, 219 Ark. 59, 239 S.W.2d 760 (1951); *Smiley v. Van Winkle*, 6 Cal. 605 (1856); *Jordan v. Scott*, 38 Cal. App. 739, 177 P. 504 (1918); *Davidson v. Minn. Loan & Trust Co.*, 158 Minn. 411, 197 N.W. 833, 32 A.L.R. 1418 (1924) (and cases discussed), *noted in* 8 MINN. L. REV. 609 (1924) (*but cf.* *Kostakes v. Daly*, 246 Minn. 312, 75 N.W.2d 191 (1956), *noted in* 55 MICH. L. REV. 605 (1957)); *Siragusa v. Park*, 913 S.W.2d 915 (Mo. Ct. App. 1996); *New Amsterdam Cas. Co. v. Nat'l Union Fire Ins. Co.*, 266 N.Y. 254, 194 N.E. 745, 99 A.L.R. 216 (annot. at 220) (1935); *Stewart v. Long Island R.R.*, 102 N.Y. 601, 8 N.E. 200 (1886); *Banque Nationale de Paris v. 1567 Broadway Ownership Assocs.*, 202 A.D.2d 251, 608 N.Y.S.2d 635 (1st Dep't 1994); *Murray Hill Mello Corp. v. Bonne Bouchee Rest.*, 113 Misc. 2d 683, 449 N.Y.S.2d 870 (Civ. Ct. 1982) (citing text); *Shumer v. Hurwitz*, 49 Misc. 121, 96 N.Y.S. 1026 (App. Term 1905); *Northside Station Assocs. P'ship v. Maddry*, 105 N.C. App. 384, 413 S.E.2d 319 (N.C. Ct. App. 1992) (transfer by cotenant); *Novosad v. Clary*, 431 S.W.2d 422 (Tex. Civ. App. 1968); *L&M Corp. v. Loader*, 688 P.2d 448

A tenant's failure to transfer his renewal rights has been held a reservation that prevented a sublease from turning into an assignment.³⁴⁷

In one situation the term of a sublease may extend beyond that of a head lease for only a time. This may be true of the sublease, as originally drawn or by subsequent extension or renewal. If head tenant also has a right of extension or renewal, head tenant may end the overlap by exercising this right. Where this is true, that is, a sublease for a term that projects into landlord's option period, the result has been held a sublease not an assignment.³⁴⁸

If *B*, *A*'s tenant, makes an agreement with *C*, which *B* and *C* deem a sublease but is held to be an assignment, the implications of this are numerous and serious.³⁴⁹ A tenant who had sublet for the balance of

(Utah 1984) (right of refusal transferred); 1 H. TIFFANY, REAL PROPERTY § 123 (3d ed. 1939); Ferrier, *Can There Be a Sublease for the Entire Unexpired Portion of a Term?*, 18 CAL. L. REV. 1 (1929); Wallace, *Assignment and Sublease*, 8 IND. L.J. 359 (1933) (discussing many cases); 59 W. VA. L. REV. 86 (1956); 51C C.J.S. *Landlord and Tenant* §§ 37, 43 (1968); 49 AM. JUR. 2D *Landlord and Tenant* §§ 1076, 1157 (1995 rev.); Annot., *Right of Lessor Who Relets for Entire Term as Against Sublessee or Person Claiming Under Latter*, 32 A.L.R. 1429 (1924).

Labeling an instrument a sublease did not change its nature as an assignment. *Siragusa*, 913 S.W.2d 915; *Berkley v. Great Atl. & Pac. Tea Co.*, 214 N.J. Super. 227, 518 A.2d 790 (1986). *Northside Station Assocs. P'ship*, 105 N.C. App. 384. A sublease for a term less than that of the prime lease, with a renewal option whose exercise would create a term beyond the prime lease, was held no assignment. *Bennion v. Comstock Inv. Corp.*, 18 Wash. App. 266, 566 P.2d 1289 (1977); *Abernathy v. Adous*, 2004 Ark. App. LEXIS 167 (Ark. App. 2004).

347. *Burgess Pic-Pac, Inc. v. Fleming Cos.*, 190 W. Va. 169, 437 S.E.2d 742 (1993).

348. A reservation of one day is sufficient to create a sublease. *Joseph Bros. Co. v. F.W. Woolworth Co.*, 844 F.2d 369 (6th Cir. 1988) (and cases cited); *F.W. Woolworth Co. v. Plaza N., Inc.*, 493 N.E.2d 1304 (Ind. Ct. App. 1986) (citing cases); *Am. Cmty. Stores Corp. v. Newman*, 232 Neb. 434, 441, 441 N.W.2d 154, 159 (1989) (and cases cited); *Bostonian Shoe Co. v. Wulnick Assocs.*, 119 A.D.2d 717, 501 N.Y.S.2d 393 (2d Dep't 1986). *Woolworth* explains that head tenant's right to an extension entitles him to a prolongation of the original term. (For the distinction between extension and renewal, see *infra* section 14:3.1.) *Thurston v. F.W. Woolworth Co.*, 66 Ind. App. 26, 117 N.E. 686 (1917). Some cases cited by *F.W. Woolworth* do not recognize this distinction.

349. 8 MINN. L. REV. 609, 611 (1924):

In holding that a sublease for the residue of a lessee's term operates as an assignment, it is evident that the intention of the parties is defeated. The sublessee finds himself liable to the lessor, a party with whom he did not intend to deal, on covenants which may not have been contained in the sublease and which the sublessee did not intend to assume.

his term was held to have no right thereafter to sublet.³⁵⁰ Conceptually, privity of estate thereby ends between *A* and *B* and is created between *A* and *C*. *C* becomes a prime tenant of *A* and liable directly to *A* for rent and other tenant obligations, that is, to the extent that an assignee is liable to a landlord under the doctrine of privity of estate.³⁵¹ If *C* now pays rent to *B* he may be compelled to pay again to *A*; and *B* may not compel *C* to pay rent to *B*, notwithstanding that the agreement between *B* and *C* provides for a higher rent than that payable under the lease between *A* and *B*. If *C*'s interest should be transferred to *A*, the circle is completed; it disappears by merger into *A*'s fee, and *B* has no rights against *C* for the increased rent or otherwise. It goes without saying that if the agreement between *B* and *C* is deemed an assignment, any right of renewal³⁵² or option to purchase³⁵³ that may have vested in *B* by virtue of the lease between *A* and *B*, passes from *B* to *C*.

Some of these implications have occasionally been realized. *A*, a prime landlord, recovered rent from *C*, who had taken a lease from *B* of part of *B*'s space for the balance of *B*'s term. *B* had become insolvent and had made no comparable claim against *C*. The issue was, therefore, solely between *A* and *C*.³⁵⁴ In this it differed from a California case, which also involved a claim for rent by *A* against *C*, who had leased part of *B*'s premises for the balance of *B*'s term. *C* was held liable for a duplicate payment. The fact that *C* had paid rent to *B* for a specified period was held no defense to *A*'s claim for the same period.³⁵⁵

When *B*, *A*'s tenant, leased to *C*, and *C*'s interest was thereafter transferred to *A*, the prime landlord, the lease between *B* and *C* was held merged into *A*'s fee interest and thereby defeated *B*'s claim for rent against *A*. *B*'s reservation of rent and of a right of entry for breach, matters with operative effect in many of these cases, was held insufficient to leave *B* with a "reversion of the estate."³⁵⁶ An Arkansas

The cases discussed in the remainder of this section should be considered in light of section 7:4.3[A].

350. *Chez Nous, Inc. v. Denamiel*, 176 A.D.2d 545, 574 N.Y.S.2d 726 (1st Dep't 1991).

351. See section 7:5.1[C][1].

352. Chapter 14, note 32 *et seq.*

353. Section 15:3.

354. *New Amsterdam Cas. Co. v. Nat'l Union Fire Ins. Co.*, 266 N.Y. 254, 194 N.E. 745, 99 A.L.R. 216 (1935).

355. *Jordan v. Scott*, 38 Cal. App. 739, 177 P. 504 (1918); see also 59 W. VA. L. REV. 86, 88 (1956). Finch, J., noted in a dissent that if a subtenant is obligated to pay the rent reserved by the prime landlord he may be liable for more rent than he assumed. *Stewart v. Long Island R.R.*, 102 N.Y. 601, 628, 8 N.E. 200, 212 (1886).

356. *Smiley v. Van Winkle*, 6 Cal. 605 (1856). *Accord* *Liebschutz v. Moore*, 70 Ind. 142, 36 Am. Rep. 182 (1880). Acquisition of the fee by a subtenant does not affect the continuance of the sublease. See text *infra* at note 549.

case involved the enforceability of a series of notes given by *C* to *B* for a transfer from *B* to *C*. Fire destroyed the leased premises, thereby ending the lease and abating any further rent. *C* claimed the notes represented future rent, which the fire made unenforceable. In holding that the transaction between *B* and *C* was an assignment from *B* to *C*, the court concluded that the notes represented not rent but the consideration for the assignment. Liability on these notes, therefore, survived the fire and the termination of the lease. Judgment was given *B* on the notes.³⁵⁷

In one case, where landlord was collecting payments equal to the prime rent from a subtenant or franchisee of the tenant, the court noted that if the arrangement were held an assignment, the “assignee” would obtain a \$50,000–\$60,000 building as a windfall.³⁵⁸

Conversely, a series of cases, with no consistent thread running through them, hold agreements between *B* and *C* to be subleases, with interesting consequences.

A Minnesota case awarded *B* the full rent reserved between *B* and *C*, despite *C*’s claim that *C* was an assignee and therefore liable to the prime landlord, and for no more than the lower rent reserved in the prime lease. *B*’s right of entry for breach was held to effect a sublease between *B* and *C*, under which *C*’s liability for rent was to *B*.³⁵⁹ In a later case the same court denied this effect to a right of entry, on the ground that the right of entry was not of “substantial advantage” to *B*.³⁶⁰ The result leaves the rule in Minnesota confusing if a technical reversion is the sole criterion.

A lease between *A* and *B* reserved a rent of \$200 a month, and provided for an increase to \$300 if *B* should “lease” the premises. *B* “assigned” to *C*, who paid \$300 a month to *A*, *C* then sued *A* for recovery of overpayments, claiming that the increased rent did not apply

357. *Jaber v. Miller*, 219 Ark. 59, 239 S.W.2d 760 (1951).

358. *Rotruck v. Grandma’s Biscuits, Inc.*, 243 Ga. 512, 255 S.E.2d 36 (1979).

359. *Davidson v. Minn. Loan & Trust Co.*, 158 Minn. 411, 197 N.W. 833, 32 A.L.R. 1418 (1924), noted in 8 MINN. L. REV. 609 (1924). Defendant’s title was derived through foreclosure of a mortgage on the sublease.

360. Plaintiff, a tenant, transferred to *X* part of the demised premises for the balance of his term and reserved a right to cancel if the premises so transferred should be used for any purpose other than an off-premises liquor store. *X* assigned to defendant, who altered the premises into an ice cream store. After watching defendant spend \$10,000 for this purpose, plaintiff sought to cancel by reason of the alteration. Plaintiff’s right of reservation was held insufficient for this purpose, for the reason given in the text. *Kostakes v. Daly*, 246 Minn. 312, 75 N.W.2d 191 (1956). As pointed out in a note on this case in 55 MICH. L. REV. 605, 607–08 (1957), it would have been preferable to have based the decision on estoppel.

to an assignment. *C*'s claim was defeated on the ground that *B*'s right of reentry for nonpayment created a sublease, not an assignment.³⁶¹

In an action by *B* against *C* to collect additional rent based on an increase in real estate taxes, which was reserved in the prime lease between *A* and *B* but not included in the agreement between *B* and *C*, judgment went to *C* on the ground that *B*'s right of reentry made *C* a subtenant, not an assignee, and thereby insulated *C* from any liability under the prime lease.³⁶²

In an assignment of lease from *B* to *C*, *C* had agreed to indemnify *B* against *B*'s liability as tenant under the lease and *B* reserved a right to enter and to be restored to his original position as lessee if *C* should default under the assigned lease. *B*'s reservation was held to make the transaction a sublease under which *C*, as "subtenant," was precluded from exercising a purchase option.³⁶³

B assigned all his rights under coal mining leases to *C*, *B* also authorized *C* to use *B*'s mining machinery, ownership of which was to remain in *B*. This was held to be a reservation that made *C* a sublessee and thereby precluded *C* from exercising a renewal option given by the lease to the tenant. Under this rationale, *C* would have been an assignee, in whom a renewal right against *A* would have vested, if the agreement had not included the temporary use of *B*'s personal property. This basis for distinguishing an assignment from sublease approaches frivolity.³⁶⁴

Landlord sued an assignee of a lease for damage to the premises. Defendant, whose liability under the lease was based on privity of estate, claimed that this liability had ended by reassignment prior to

361. *Spears v. Canon de Carnue Land Grant*, 80 N.M. 766, 461 P.2d 415 (1969).

362. *Coles Trading Co. v. Spiegel, Inc.*, 187 F.2d 984 (9th Cir. 1951).

363. *Novosad v. Clary*, 431 S.W.2d 422 (Tex. Civ. App. 1968). Compare *Hammes v. Esposito*, 10 Ill. App. 3d 6, 293 N.E.2d 641 (1973), discussed *infra* in note 457.

364. *Nat'l Shawmut Bank v. Correale Mining Corp.*, 140 F. Supp. 180 (S.D. W. Va. 1956), criticized in 59 W. VA. L. REV. 86 (1956). Substantially the converse of this was involved in *66 Terminal, Inc. v. Roberts*, 448 S.W.2d 938 (Mo. Ct. App. 1969), where *A* leased to *B* giving *B* a right of renewal. The lease forbade assignment and subletting without *A*'s consent. *A* consented to a sublease. *B* leased to *C* for the balance of his term, giving *C* an option to renew if *B* exercised *B*'s renewal option. *B* failed to renew. Held, *C* could not exercise *B*'s renewal option. *A*'s consent to a sublease limited *C*'s status, which insulated *C* from *B*'s rights against *A*. Substantially similar is *Michelson Realty Co. v. Curtis, Bamberg & Crossen*, 851 S.W.2d 7 (Mo. Ct. App. 1993).

the occurrence of the damage. Defendant had sublet for the balance of the term. He argued that this had the effect of an assignment to a third person, which ended liability predicated on privity of estate. The court pointed to the new conditions, with right of entry and new causes of forfeiture included in the sublease, an agricultural lease, which gave the sublessor a right to supervise cultivation, harvesting, and disposition of crops, with specified rights for failure to carry out specific undertakings. From this the court concluded that neither plaintiff nor defendant had considered the sublease an assignment and that they both believed defendant was obligated under the lease until the expiration of the term.³⁶⁵

[A] Reservations, Other Than That of Time, As Creating Sublease Rather Than Assignment

If a tenant sublets for the balance of his term there is, *a priori*, no intervening time between the scheduled expiration of the prime lease and that of the sublease. If a reservation is to be found, it must be of something other than time. Courts have seized on a tenant's right of reentry for breach by the subtenant, or of a rent or of covenants that differ from those in the prime lease, or a combination of these items.³⁶⁶ Some cases have held that a subtenant's covenant to surrender possession on the last day of the term of the prime lease leaves a "fragmentary" reversion.³⁶⁷ These have not escaped the obvious criticism that the coterminous periods permit a simultaneous expiration with no temporal gap.³⁶⁸ There is a split of American authority on what constitutes a reversion for the purpose of making a transaction a sublease rather than an assignment.³⁶⁹ This might suggest the existence of some clear distinctions. Instead, there is an inconsistent and bewildering group of cases seizing upon some item as, or as not, a reversionary

365. *Barkhaus v. Producers Fruit Co.*, 192 Cal. 200, 219 P. 435 (1923).

366. *See* cases collected and discussed in Wallace, *Assignment and Sublease*, 8 IND. L.J. 359 (1933), and authorities collected in note 346, *supra*.

367. *Stewart v. Long Island R.R.*, 102 N.Y. 601, 611, 8 N.E. 200, 203 (1886); *Ferrier, Can There Be a Sublease for the Entire Unexpired Portion of a Term?*, 18 CAL. L. REV. 1, 11 (1929).

368. 1 H. TIFFANY, *LANDLORD AND TENANT* § 911 (1910).

369. 1 H. TIFFANY, *REAL PROPERTY* § 123 n.15 (3d ed. 1939); *Ferrier, Can There Be a Sublease for the Entire Unexpired Portion of a Term?*, 18 CAL. L. REV. 1, 9 (1929); 8 MINN. L. REV. 609, 610 (1924); 59 W. VA. L. REV. 86 (1956); 42 L.R.A. (n.s.) 1084 (1913); 51C C.J.S. *Landlord and Tenant* § 37(2) (1968); 49 AM. JUR. 2D *Landlord and Tenant* § 1080 (1995 rev.).

interest,³⁷⁰ and with little consistency within at least several states.³⁷¹

370. **Right of reentry establishes sublease.** *Joseph Bros. Co. v. F.W. Woolworth Co.*, 844 F.2d 369 (6th Cir. 1988) (Ohio law); *Coles Trading Co. v. Spiegel, Inc.*, 187 F.2d 984 (9th Cir. 1951); *Dunlap v. Bullard*, 131 Mass. 161 (1881); *Davidson v. Minn. Loan & Trust Co.*, 158 Minn. 411, 197 N.W. 833, 32 A.L.R. 1418 (1924), *noted in* 8 MINN. L. REV. 609 (1924) (*but see* *Kostakes v. Daly*, 246 Minn. 312, 75 N.W.2d 191 (1956), *noted in* 55 MICH. L. REV. 605 (1957)); *Am. Cmty. Stores Corp. v. Newman*, 232 Neb. 434, 441, 441 N.W.2d 154, 159 (1989) (collects cases pro and con); *Spears v. Canon de Carnue Land Grant*, 80 N.M. 766, 461 P.2d 415 (1969); *Neal v. Craig Brown, Inc.*, 356 S.E.2d 912 (S.C. Ct. App. 1987); *Davis v. Vidal*, 105 Tex. 444, 151 S.W. 290, 42 L.R.A. (N.S.) 1084 (1912); *Novosad v. Clary*, 431 S.W.2d 422 (Tex. Civ. App. 1968); *Abernathy v. Adous*, 2004 Ark. App. LEXIS 167 (Ark. App. 2004); *Wallace, Assignment and Sublease*, 8 IND. L.J. 359, 370 (1933); *Ferrier, Can There Be a Sublease for the Entire Unexpired Portion of a Term?*, 18 CAL. L. REV. 1, 14 (1929). RESTATEMENT (SECOND) OF PROPERTY (Landlord and Tenant) § 15.1 cmt. i, at 90–91 (1977).

Difference in rent or conditions creates sublease. *Barkhaus v. Producers Fruit Co.*, 192 Cal. 200, 219 P. 435 (1923); *Collamer v. Kelley*, 12 Iowa 319 (1861); *Pepper v. Pyramid Oil & Gas Corp.*, 287 So. 2d 620 (La. Ct. App. 1973) (reservation of overriding royalty); *Morrisville Shopping Ctr., Inc. v. Sun Ray Drug Co.*, 381 Pa. 576, 112 A.2d 183 (1955); *Davis*, 105 Tex. 444.

Right of reentry, different rent, or covenant to surrender do not establish sublease. *Thomas v. United States*, 505 F.2d 1282, 1287 (Ct. Cl. 1974) (Pennsylvania law); *T.A.D. Jones Co. v. Winchester Repeating Arms Co.*, 61 F.2d 774 (2d Cir. 1932), *cert. denied*, 288 U.S. 609 (1932) (Florida law); *Jaber v. Miller*, 219 Ark. 59, 239 S.W.2d 760 (1951); *Smiley v. Van Winkle*, 6 Cal. 605 (1856); *Rocklen, Inc. v. Radulesco*, 10 Conn. App. 271, 522 A.2d 846 (1987); *Sexton v. Chi. Storage Co.*, 129 Ill. 318, 21 N.E. 920, 16 Am. St. Rep. 274 (1889); *Danaj v. Anest*, 77 Ill. App. 3d 533, 396 N.E.2d 95, 33 Ill. Dec. 95 (1979) (immaterial that instrument used words of demise); *Mut. Drug Co. v. Sewall*, 350 Mo. 375, 182 S.W.2d 575 (1944); *Gillette Bros. v. Aristocrat Rest., Inc.*, 239 N.Y. 87, 90, 145 N.E. 748, 749 (1924); *Wansgard v. Fitzpatrick*, 542 P.2d 194 (Utah 1975); 59 W. VA. L. REV. 86, 87 (1956). *See* *Urban Inv. & Dev. Co. v. Maurice L. Rothschild & Co.*, 25 Ill. App. 3d 546, 323 N.E.2d 588 (1975), discussed in chapter 16, note 54.

Reservation of a right of refusal was held no right of reentry. *Athens Wheel, Inc. v. Citizens & S. Trust Co.*, 201 Ga. App. 779, 412 S.E.2d 278 (1991).

For cases pro and con, see 49 AM. JUR. 2D *Landlord and Tenant* § 1080 (1995 rev.); 51C C.J.S. *Landlord and Tenant* § 37(2) (1968). A subtenant's right to cancel before expiration of the head lease keeps the instrument as a sublease. *Orchard Shopping Ctr., Inc. v. Campo*, 138 Ill. App. 3d 656, 485 N.E.2d 1248, 93 Ill. Dec. 38 (1985).

371. The Minnesota cases in *supra* notes 359 and 360 seem to support this view, as do the New York cases. *Davidson v. Minn. Loan & Trust Co.*, 197 N.W. 833, 836 (Minn. 1924), *noted in* 8 MINN. L. REV. 609 (1924), and *Ferrier*, 18 CAL. L. REV. at 10. *But see* *Gillette Bros. v. Aristocrat Rest., Inc.*, 145 N.E. 748, 749 (N.Y. 1924). *Cf.* *Anjo Rest. Corp. v. Sunrise Hotel Corp.*, 98 Misc. 2d 597 (N.Y. Sup. Ct. 1979) (discussed in *infra* note 457).

Massachusetts and Texas deny a prime landlord recovery of rent against his tenant's transferee where the prime tenant has reserved a right of reentry for breach, on the ground that the right of reentry is a "contingent reversionary interest" and an estate and interest in land.³⁷² Illinois has permitted recovery by a prime landlord against the tenant's transferee in similar circumstances, on the ground that a right of reentry is neither a reversion nor an estate in land.³⁷³ Both cite ancient sources. The older New York cases accord with Massachusetts and Texas,³⁷⁴ though a later New York case observed, "The possible right of reentry for breach of any condition was not the retention of such reversionary interest as is intended when distinctions are drawn between assignments and subleases."³⁷⁵ In many cases when a prime tenant recovers against his transferee, on the ground that the transferee is an assignee rather than a subtenant, the prime tenant has, for one reason or another, no enforceable rights against his transferee, with the result that recovery by the prime landlord results in no unfair prejudice to either the prime tenant or his transferee. This was true in a New York case where the prime tenant was insolvent³⁷⁶ and in an Illinois case where recovery against the transferee was predicated in part on the prime tenant's nonpayment,³⁷⁷ though here too there is no

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372. Dunlap v. Bullard, 131 Mass. 161 (1881). *Accord* Hartman Ranch Co. v. Associated Oil Co., 73 P.2d 1163 (Cal. 1937) (collecting Louisiana, Massachusetts, Montana, and Texas cases). The California cases are considered in Ferrier, *Can There Be a Sublease for the Entire Unexpired Portion of a Term?*, 18 CAL. L. REV. 1, 2 (1929); Lebel v. Backman, 175 N.E.2d 362 (Mass. 1961); Davis v. Vidal, 151 S.W. 290 (Tex. 1912).
373. Sexton v. Chi. Storage Co., 129 Ill. 318, 21 N.E. 920, 16 Am. St. Rep. 274 (1889). The right of entry is not an estate or interest in land; it does not imply a reservation of a reversion; it is a mere chose in action, and when enforced, the grantor is in through the breach of condition and not by the reverter; it exists only as an incident or interest for which it is reserved. *Indian Ref. Co. v. Roberts*, 97 Ind. App. 615, 631, 181 N.E. 283, 289 (1932), *followed in* *Shadeland Dev. Corp. v. Meek*, 489 N.E.2d 1192 (Ind. Ct. App. 1986). For other authorities criticizing the view that a right of reentry is a reversion rather than a chose in action, see 1 TIFFANY, REAL PROPERTY § 123, at 199 (3d ed. 1939); 8 MINN. L. REV. 609, 611 (1924); 44 B.U. L. REV. 253, 255 (1964). *Shadeland*, 489 N.E.2d 1192, holds that an assignment subject to assignee's performance of tenant's obligations under the lease explains the rights assigned and does not make the assignment conditional. *Cf.* the conditional assignment situation considered in *Olin v. Goehler*, 39 Wash. App. 688, 694 P.2d 1129 (1985); text *infra* at note 398.
374. *See supra* note 371.
375. *Gillette Bros. v. Aristocrat Rest., Inc.*, 239 N.Y. 87, 90, 145 N.E. 748, 749 (1924).
376. *New Amsterdam Cas. Co. v. Nat'l Union Fire Ins. Co.*, 266 N.Y. 254, 194 N.E. 745, 99 A.L.R. 216 (1935).
377. *Sexton*, 129 Ill. 318.

full consistency.³⁷⁸ It is reasonably clear that despite the thicket of ancient concepts there is some judicial effort to construe the relationships, as assignments or subleases, substantially as the parties had intended.³⁷⁹ Many dicta to the effect that the arrangement may be a sublease, as between tenant and his transferee, but an assignment between the latter and the prime landlord,³⁸⁰ probably mean no more than this.

Until recently there have been a few timid efforts to let the parties to the agreement, that is, the prime tenant and his transferee, determine whether they would create a sublease or an assignment. But even these have been hampered by a felt need to cling to feudal concepts and find at least a trace of an estate or reversion. One judge wrote that where a sublease is manifestly intended "the court will search diligently and even closely for some trace of reversion to support it."³⁸¹ A writer suggested that so long as no hazards were added to the prime lessor, a reservation of any interest in property, estate, or otherwise, should be sufficient to defeat an assignment, if this represents the interest of the parties as manifested by their acts.³⁸² This difficulty in giving effect to the intention of the parties, where no fraud is involved, is unique in our law.

There is no reason to apply the English and majority rule to a contemporary lease, whether it be of entire premises or of a small part of a multi-tenant building. The basis of the English rule is subinfeudation, a system under which every land owner other than the king held land under tenure from somebody higher in the hierarchy of feudal ownership and to whom he owed military service or the payment of rent. An estate in land was essential to a place in the feudal hierarchy.

378. See discussion in text *supra* at notes 354–62.

379. See generally *Coles Trading Co. v. Spiegel, Inc.*, 187 F.2d 984, 987 (9th Cir. 1951); *Jaber v. Miller*, 219 Ark. 59, 63, 239 S.W.2d 760, 762–63 (1951); *Barkhaus v. Producers Fruit Co.*, 192 Cal. 200, 205, 219 P. 435, 437 (1923); *Stewart v. Long Island R.R.*, 102 N.Y. 601, 618, 8 N.E. 200, 207 (1886); *Abernathy v. Adous*, 2004 Ark. App. LEXIS 167 (Ark. App. 2004); *Ferrier, Can There Be a Sublease for the Entire Unexpired Portion of a Term?*, 18 CAL. L. REV. 1, 11 (1929); *Wallace, Assignment and Sublease*, 8 IND. L.J. 359 (1933); 8 MINN. L. REV. 609, 612 (1924); 55 MICH. L. REV. 605, 606 n.8 (1957).

380. *Potts-Thompson Liquor Co. v. Potts*, 135 Ga. 451, 69 S.E. 734 (1910); *Davidson v. Minn. Loan & Trust Co.*, 158 Minn. 411, 416–17, 197 N.W. 833, 835, 32 A.L.R. 1418 (1924), noted in 8 MINN. L. REV. 609 (1924); *Behr v. Hurwitz*, 90 N.J. Eq. 110, 115, 105 A. 486, 488 (1918); *Stewart v. Long Island R.R.*, 102 N.Y. 601, 608, 8 N.E. 200, 201 (1886); 1 H. TIFFANY, REAL PROPERTY § 123 (3d ed. 1939); 8 MINN. L. REV. 609, 612 n.17 (1924); 55 MICH. L. REV. 605, 606 n.8 (1957); 49 AM. JUR. 2D *Landlord and Tenant* § 1157 (1995 rev.); 51C C.J.S. *Landlord and Tenant* § 37(2), at 110 (1968).

381. *Finch, J., dissenting in Stewart*, 102 N.Y. at 618, 8 N.E. at 207.

382. *Wallace, Assignment and Sublease*, 8 IND. L.J. 359, 386 (1933).

A tenant's transfer of his entire term ended his interest in the property. His transferee succeeded automatically to the benefits and burdens of his assignor. Intention of the parties was irrelevant. The sole question was whether the assignor retained a reversion and with it his place in the chain of ownership.³⁸³ One court swept this all aside, as a rule whose logic ended when feudalism ended, and laid down a new rule that makes the intention of the parties the sole criterion in determining whether an instrument is an assignment or a sublease.³⁸⁴ It suggested that an apartment tenant who is compelled to move to another city during his term should be able to sublet at a higher rent without needlessly retaining a reversion of the last day of the term. It noted that execution of a lease "is a very practical matter that occurs a hundred times a day without legal assistance," with few laymen even suspecting the common-law distinctions. It also wrote that the "English distinction between assignment and sublease is not a rule of property in the sense that titles or property rights depend on its continued existence."^{384.1}

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383. *Jaber v. Miller*, 219 Ark. 59, 239 S.W.2d 760 (1951). The reason for the transposing of a sublease (in form at least) to an assignment is feudal and arises from the duties owed by the tenant. If that tenant could leave the premises in possession of one who owed no duty to the landlord the ownership of the land would carry no benefit of fealty with it. The same would be true of a portion of the premises. In the absence of judicial determination that the feudal rule, though now firmly embodied in our law, is to be extended it is difficult to see why it should be permitted to override the difficulties it presents. *Midway Hotel Co. v. Belleclaire Syndicate, Inc.*, 138 Misc. 401, 403, 246 N.Y.S. 155, 156–57 (City Ct. 1930). Acknowledging that the *Jaber* rule remains alone in U.S. common law decisions in abandoning the formal distinctions, an Arkansas court elected to stand by the *Jaber* rule in *Abernathy v. Adous*, 85 Ark. App. 242, 149 S.W.3d 884 (2004).
384. *Jaber*, 219 Ark. 59, 239 S.W.2d 760 (1951). The court quoted (at 65, 239 S.W.2d at 763–64) from Holmes:

It is revolting to have no better reason for a rule than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

- The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). Van Voorhis, J., in discussing Holmes's strong leaning toward certainty, stability, and predictability in the law, citing cases, called this an *aphorism*. In so doing he read George II (1727–1760) for Henry IV (1399–1413). See also *Heyert v. Orange & Rockland Utils., Inc.*, 17 N.Y.2d 352, 359, 218 N.E.2d 263, 267, 271 N.Y.S.2d 201, 267 (1966). But see chapter 34 at note 139 *et seq.*
- 384.1. Out of respect for Milton Friedman's wisdom and experience, this author has left intact in the text Mr. Friedman's comments about the propriety of the formal rule for differentiating between assignments and subleases. But the current author has a quite different view. Although he confesses that consumer transactions ought not to be held, necessarily, to rigid interpretive rules, this author suggests that the assignment/sublease distinction

In other jurisdictions it is advisable practice to make the term of a sublease expire at lease one full day before the stated expiration of the prime lease. This assures the creation of a sublease, limits the rights and obligations generally to sublandlord and subtenant, and insulates the subtenant from the prime landlord.³⁸⁵

§ 7:4.4 Form of Sublease—Short Form—Incorporating Prime Lease by Reference

Following is a form of sublease. It specifies office space but any other use may be substituted.

The provisions for escalation may be omitted and provisions for alterations and decorations may be added, as well as a right of either party to cancel. Compare, as to cancellation, chapter 21.

Subtenant should have evidence of sublessor's authority to sublet and, in view of paragraph 6, should have assurance that prime landlord will render usual services to subtenant.

The provisions for security, set forth in paragraph 8, may be modified or expanded. For this purpose, see section 20:7.

arises most often in the commercial context, and the policy for predictable rules is far stronger. It is true that even parties to commercial leases often transfer leasehold estates without a clear view as to whether the transfer is an assignment or sublease. But the editor sees no point in establishing a rule that forces courts to analyze the parties' intent in determining which type of transfer is necessary. The current rule is quite clear, and parties with competent counsel will structure their transaction to fit within it. No great injury to the marketplace results, and transactions can proceed efficiently.

Where the parties do not retain counsel and transfer without an awareness of the rules, it is quite possible as well that they are unaware of the legal consequences of the transfer being an assignment versus a sublease. Thus, there is little point to try to glean their intent when it is likely that, however the parties may have characterized the transfer, they really understood what the characterization meant. Further, in the current author's experience, it is not unusual for the parties to characterize their transaction both as a lease and an assignment in the same instrument, and sometimes in the same sentence. In such cases, exactly what "intent" is the court supposed to find?

It is far better, rather, to reduce litigation and promote efficiency of dispute resolution by having a clear set of rules that the courts follow and by which the parties must abide. Although the existing rule perhaps is based upon archaic rationales, it has the high virtue of clarity. Clear rules promote efficient markets. Application of the clear rules here may create a few unanticipated results, but that evil will be balanced by reduction of litigation and clarity of outcome in many other disputes.

385. *Davis v. Morris*, 36 N.Y. 569 (1867).

AGREEMENT made the _____ day of _____ 20____,
between _____, a corporation, having an office at
_____, hereinafter referred to as "Landlord,"

-and-

_____, a _____ corporation,
having an office at _____, hereinafter referred to as
"Tenant,"

WITNESSETH, WHEREAS:

Landlord, as lessee, entered into a lease with____, as lessor, dated
____, leasing certain space on the ____ floor of the building
at____, New York, New York, to which lease reference is hereby
made as if the same were herein set forth at length, which lease is
hereinafter referred to as the "Prime Lease";

The parties hereto have agreed that Landlord shall sublet approxi-
mately ____ square feet of such space to Tenant,

NOW, THEREFORE, the parties hereto hereby covenant and agree
as follows:

1. Landlord hereby leases to Tenant the ____ square feet, more
or less, of the space on the ____ floor of said building, shown
on Exhibit A attached hereto and made a part hereof, for a
term of ____ years beginning on _____ and ending
on _____ unless sooner terminated in accordance
herewith.

Yielding and paying to Landlord a rent at the rate of Dollars
(\$____) per annum, plus \$____ per annum for electricity, and
plus the additional rent mentioned in paragraph 4.

Tenant shall pay the rent and additional rent provided for
hereunder in equal monthly installments in advance on the first
day of each and every month during the term.

2. The demised premises shall be used for executive offices and
for no other purpose.
3. Tenant shall not assign this lease nor sublet the demised
premises in whole or in part; and shall not permit Tenant's
interest in this lease to be vested in any third party by operation
of law or otherwise.

4. If Landlord shall be charged for additional rent or other sums pursuant to the provisions of the Prime Lease, including without limitation Articles ____ and ____ thereof [rent escalation], Tenant shall be liable for ___% of such additional rent or sums.³⁸⁶

If any such rent or sums³⁸⁷ shall be due to additional use by Tenant of electrical current in excess of Tenant's proportionate part of additional use in the premises demised under the Prime Lease, such excess shall be paid in entirety by Tenant. If Tenant shall procure any additional services from the building, such as alterations or after-hour air conditioning, Tenant shall pay for same at the rates charged therefor by the Prime Landlord and shall make such payment to the Landlord or Prime Landlord, as Landlord shall direct. Any rent or other sums payable by Tenant under this Article 4 shall be additional rent and collectable as such. If Landlord shall receive any refund under said Article ____ [tax escalation], Tenant shall be entitled to the return of so much thereof as shall be attributable to prior payments by Tenant.

5. This lease is subject and subordinate to the Prime Lease. Except as may be inconsistent with the terms hereof, all the terms, covenants and conditions in the Prime Lease contained (other than any option given by the Prime Lease) shall be applicable to this Agreement with the same force and effect as if Landlord were the lessor under the Prime Lease and Tenant were the lessee thereunder; and in case of any breach hereof by Tenant, Landlord shall have all the rights against Tenant as would be available to the lessor against the lessee under the Prime Lease if such breach were by the lessee thereunder.
6. Notwithstanding anything herein contained, the only services or rights to which Tenant is entitled hereunder are those to which Landlord is entitled under the Prime Lease and that for all such services and rights Tenant will look to the lessor under the Prime Lease.
7. Tenant shall neither do nor permit anything to be done which would cause the Prime Lease to be terminated or forfeited by

386. A subtenant who is liable for escalation that is computed pursuant to the head lease has standing to join with the tenant-sublandlord in an action to determine the amount of such escalation. *Kerr S.S. Co. v. Chi. Title & Trust Co.*, 120 Ill. App. 3d 998, 458 N.E.2d 1009, 76 Ill. Dec. 355 (1983).

387. This provision was held not self-operating, but contingent on notice and demand by landlord. *Altman v. Alaska Truss & Mfg. Co.*, 677 P.2d 1215 (Alaska 1983).

reason of any right of termination or forfeiture reserved or vested in the lessor under the Prime Lease, and Tenant shall indemnify and hold landlord harmless from and against all claims of any kind whatsoever by reason of any breach or default on the part of Tenant by reason of which the Prime Lease may be terminated or forfeited.

8. Tenant has paid the Landlord on the execution and delivery of the lease the sum of _____ Dollars (\$_____) as security for the full and faithful performance of the terms, covenants and conditions of this lease on Tenant's part to be performed or observed, including but not limited to payment of rent and additional rent in default or for any other sum which Landlord may expend or be required to expend by reason of Tenant's default, including any damages or deficiency in reletting the demised premises, in whole or in part, whether such damage shall accrue before or after summary proceedings or other re-entry by Landlord. If Tenant shall fully and faithfully comply with all the terms, covenants and conditions of this lease on Tenant's part to be performed or observed, the security, or any unapplied balance thereof, shall be returned to tenant after the time fixed as the expiration of the demised term and after the removal of Tenant and surrender of possession of the demised premises to Landlord.
9. If actual possession of the demised premises shall not be available by _____, Landlord or Tenant may elect, within thirty (30) days thereafter, to cancel this lease. If this lease shall be so cancelled, Landlord shall refund to Tenant any rent or security theretofore paid or delivered to Landlord hereunder, and upon such refund this lease shall have no force or effect.
10. Tenant represents that it has read and is familiar with the terms of the Prime Lease.
11. All prior understandings and agreements between the parties are merged within this Agreement, which alone fully and completely sets forth the understanding of the parties; and this lease may not be changed or terminated orally or in any manner other than by an agreement in writing and signed by the party against whom enforcement of the change or termination is sought.
12. Any notice or demand which either party may or must give to the other hereunder shall be in writing and delivered personally or sent by registered mail addressed, if to Landlord, as follows:

and if to Tenant, as follows:

Either party may, by notice in writing, direct that future notices or demands be sent to a different address.

13. The covenants and agreements herein contained shall bind and inure to the benefit of Landlord, the Tenant, and their respective executors, administrators, successors and assigns.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed the day and year first above written.

[Executions and Acknowledgments]

[Add Exhibit A, showing space sublet]

Language comparable to that in paragraph 5 of the above form has effectually applied to a sublease provision included in the head lease.³⁸⁸

Additions subsequently made to the head lease do not affect the sublease.³⁸⁹

§ 7:5 Relations Between Landlord, Tenant, and Assignee

A tenant who assigns his lease does not thereby represent title of the landlord is good. Failure of landlord's title gives the assignee no right of recovery against the tenant-assignor nor a defense to the latter's recovery of the consideration for the assignment.³⁹⁰ Accordingly, it is

388. *Butter, Fitzgerald & Potter v. Westinghouse Elec. Corp.*, 571 F. Supp. 1258 (S.D.N.Y. 1983) (increase in charges for operating expense); *In re Allen Carpet Shops, Inc.*, 25 B.R. 595, 598 (E.D.N.Y. 1982) (restrictions on use).

389. *S&D Grp., Inc. v. Talamas*, 710 S.W.2d 680 (Tex. Civ. App. 1986).

390. *Winn v. Mannhalter*, 708 P.2d 444 (Alaska 1985); *Miles v. United Oil Co.*, 192 Ky. 542, 234 S.W. 209, 19 A.L.R. 602 (1921); *Waldo v. Hall*, 14 Mass. 486 (1787); *White v. Murphy*, 229 S.W. 641 (Tex. Civ. App. 1921); Annot., *Implied Covenants of Title or Possession on Assignment of Lease*, 19 A.L.R. 608 (1922); 49 AM. JUR. 2D *Landlord and Tenant* § 1117 (1995 rev.); 51 C.J.S. *Landlord and Tenant* § 53 (1968). The cases are few and mostly old. A few cases cited in the above authorities contain dicta to the contrary or are distinguishable on their facts. A similar question has arisen more frequently in assignments by vendees under contracts of sale of real estate. In this connection it was written:

A buyer who assigns his interest does not thereby warrant marketability of the seller's title. He warrants by implication only that the contract is valid and the signatures are genuine. He warrants the existence but not the performance of the contract. If then, the

advisable for the assignee to make some check on the landlord's title.³⁹¹ An estoppel certificate from the landlord, indicating the status of the lease, would be helpful.³⁹²

§ 7:5.1 Liability Under the Lease

[A] Privity

Liability between an owner of real property and parties with a leasehold interest is predicated on privity. The common law recognizes three types of privity—privity of contract, privity of estate, and a combination of privity of contract and estate.³⁹³ Privity of contract rests on agreement, whereas privity of estate rests on an interest in the leased premises.³⁹⁴ An original tenant, that is, one who acquires his lease directly from the owner of the property, is normally in privity of both contract and estate. His acquisition of the leasehold interest creates the privity of estate. His execution of the lease, with rare exception, includes an undertaking to pay the rent and to perform and observe the covenants in the lease on the tenant's part to be performed and observed. This creates privity of contract. If tenant assigns the lease his privity of estate thereby ends but privity of contract continues, that is, his right to possession ends but his liability under the lease continues.³⁹⁵ The sublessee can compel landlord to perform an arbitration covenant whether or not sublessee is in privity of contract with landlord because the arbitration covenant is a "real contract" that

seller's title is bad, this constitutes no failure of consideration for the assignment, and such consideration may not be recovered by the assignee from the buyer.

FRIEDMAN ON CONTRACTS § 6:1.

391. See section 2:2.

392. See section 7:5.1[C][2][a] and text *infra* following note 624.

393. Walker's Case, 3 Co. Rep. 22a, 23a, 76 Eng. Rep. 676, 679–80 (K.B. 1587).

394. New Amsterdam Cas. Co. v. Nat'l Union Fire Ins. Co., 266 N.Y. 254, 259, 194 N.E. 745, 747, 99 A.L.R. 216 (annot. at 220) (1935).

395. Gillette Bros. v. Aristocrat Rest., Inc., 239 N.Y. 87, 90, 145 N.E. 748, 749 (1924). *Cf.* text *infra* at notes 399–401. A tenant-assignor was held liable under a lease after its termination in summary proceedings brought against the assignee for nonpayment, but without right to resume possession. The original tenant had not been made a party to the summary proceedings. A dissenting judge argued that landlord's claim after termination of the lease was for damages, not rent, and refusal to permit the original tenant's return was a refusal to mitigate damages. (*Cf.*, in this connection, section 16:3.) Howard Stores Corp. v. Robison Rayon Co., 315 N.Y.S.2d 720 (App. Term 1st Dep't 1970), *aff'g* 61 Misc. 2d 939, 307 N.Y.S.2d 491, *aff'd*, 36 A.D.2d 911, 320 N.Y.S. 861 (1st Dep't 1971).

runs with the land and may be enforced by parties in possession.³⁹⁶ The assignee acquires privity of estate.³⁹⁷ If the assignee assumes the tenant's obligations under the lease he comes under privity of contract as well.³⁹⁸

[B] Liability of Tenant to Landlord After Assignment by Tenant

A tenant does not relieve himself of liability under a lease by assigning the lease to a third person.³⁹⁹ This is true despite an assumption of the lease by the assignee.⁴⁰⁰ If he assigns, either with or without his landlord's consent, he remains liable under the

396. In *Melchor Inv. Co. v. Rolm Sys.*, 4 Cal. Rptr. 2d 343 (Cal. Ct. App. 1992), the court characterized the sublessee as being in "privity of estate" with the landlord, and cited as authority a case involving the status of an *assignee* (not a subtenant) as to an arbitration covenant in the master lease. To the extent that the court describes the subtenant as being in privity of estate with the original landlord, it appears to misstate the law. Subtenants may nevertheless be bound by covenants that run at equity, as equitable servitudes are not affected by concepts of privity of estate.

397. *Studebaker Corp. v. Aetna Sav. & Trust Co.*, 21 F.2d 385 (7th Cir. 1927); *Jordan v. Scott*, 38 Cal. App. 739, 177 P. 504 (1918); *Mann v. Ferdinand Munch Brewery*, 225 N.Y. 189, 195, 121 N.E. 746, 747 (1919); Wallace, *Assignment and Sublease*, 8 IND. L.J. 359, 360 (1933); 8 MINN. L. REV. 609, 610 (1924). See also text *infra* at note 419.

398. *Studebaker Corp.*, 21 F.2d 385 (7th Cir. 1927); *Gateway Co. v. DiNoia*, 232 Conn. 223, 654 A.2d 342 (1995) (citing text); *Zinwell Co. v. Ilkowitz*, 83 Misc. 42, 144 N.Y.S. 815 (App. Term 1913); 52 C.J.S. *Landlord and Tenant* § 528(3)a (1968). See also text *infra* at note 451.

399. *Walker's Case*, 3 Co. Rep. 22a, 76 Eng. Rep. 676, 680 (K.B. 1587):

First, because the lessee himself shall not prevent by his own act such remedy which the lessor hath against him by his own contract, but when the lessor grants over his own reversion, there against his own grant, he cannot have remedy, because he hath granted the reversion to another, to which the rent is incident . . . and in none of the said cases the sole act of the lessee himself shall prevent the lessor of his remedy and introduce such inconvenience as hath been said.

See also *Good v. Saia*, 9 So. 3d 1070 (La. Ct. App. 2009), where the lease had been assigned numerous times and various assignees had paid rent directly to the landlord. The original tenant had not been involved in the lease for ten years. When the last assignee defaulted, landlord brought an action for possession and (presumably) damages. The default was a failure to insure the premises, and the premises therefore were uninsured when Hurricane Katrina hit. The lease had a paragraph rendering lessee liable for attorneys' fees, and the court held that the original tenant, despite the multiple assignments, remained liable under the lease for all covenants there.

400. *La Salle Nat'l Bank v. Bachman*, 108 B.R. 1013 (N.D. Ill. 1989); *Metro. Trust Co. v. Wolf*, 8 Ark. App. 1, 648 S.W.2d 494 (1983). Tenant is not

lease.⁴⁰¹ This is true even if the parties intend, when the lease is signed, that tenant assign to a corporation to be formed.⁴⁰² The assignment ends privity of estate but the privity of contract between landlord and tenant continues during the remainder of the leased term and at times beyond this. If the assigned lease gives the tenant a renewal option the tenant's liability carries over into the renewal term though the renewal option is exercised by the assignee.⁴⁰³ By surrendering possession to the assignee the tenant puts it out of his power to carry out some of his obligations, such as to surrender possession to

released from his obligation under lease unless landlord accepted the assignee in place of the tenant expressly or by implication other than by consent. 185 Madison Assocs. v. Ryan, 174 A.D.2d 461, 571 N.Y.S.2d 244 (1st Dep't 1991). Assignee that unequivocally assumes obligations of lease that is subject to leasehold mortgage remains liable on theory of privity of contract even when leasehold mortgagee forecloses and transfers leasehold to others. Vally Inv., L.P. v. BancAmerica Commercial Corp., 106 Cal. Rptr. 2d 689 (Cal. Ct. App. 2001).

401. Adams v. Shirk, 104 F. 54 (7th Cir. 1900); Viera v. Soto, 240 F. Supp. 541 (D.V.I. 1965); De Hart v. Allen, 26 Cal. 2d 829, 832, 161 P.2d 453, 455 (1945); Meredith v. Dardarian, 83 Cal. App. 3d 248, 147 Cal. Rptr. 761 (1978) (assignee's assumption immaterial); Kornblum v. Henry E. Mangels Co., 167 So. 2d 16, 10 A.L.R.3d 812 (Fla. Dist. Ct. App. 1965); Southland Inv. Corp. v. McIntosh, 137 Ga. App. 216, 223 S.E.2d 257 (1976); George W. Watkins Family v. Messenger, 115 Idaho 386, 766 P.2d 1267 (1988); Sexton v. Chi. Storage Co., 129 Ill. 318, 21 N.E. 920, 16 Am. St. Rep. 274 (1889); Rauch v. Circle Theatre, 374 N.E.2d 546 (Ind. Ct. App. 1978); Siragusa v. Park, 913 S.W.2d 915 (Mo. Ct. App. 1996); Gerber v. Pecht, 15 N.J. 29, 104 A.2d 41 (1954); Gillette Bros. v. Aristocrat Rest., Inc., 239 N.Y. 87, 90, 145 N.E. 748, 749 (1924); Hillsboro Plaza Enters. v. Moon, 860 S.W.2d 45 (Tenn. Ct. App. 1992); Martinez v. Ball, 721 S.W.2d 580 (Tex. Civ. App. 1987); Jones v. Dokos Enters., Inc., 233 Va. 555, 357 S.E.2d 203 (1987). 1 AMERICAN LAW OF PROPERTY § 3.61 (1952); 2 *Id.* § 9.5; 49 AM. JUR. 2D *Landlord and Tenant* §§ 1120, 1125, 1126 (1995 rev.); 51C C.J.S. *Landlord and Tenant* § 45(2) (1968). For a resume of landlord's various rights after assignment by tenant of a usufruct, see Block v. Brown, 199 Ga. App. 127, 404 S.E.2d 288 (1991).

It has been held that one who sued a tenant for rent after the tenant assigned his lease need not give the tenant notice of the default on which the landlord is suing. This although the lease required landlord to give notice of a default. The court ruled that when the tenant assigned it relinquished all its right and interest under the lease. *Siragusa*, 913 S.W.2d 915. The case is a bit weak because there was some indication that tenant had informal notice of the default. The same rule applies to an assuming assignee after he in turn assigns. *See text infra* at note 450. For the peculiar Georgia doctrine of usufruct, see *Southland Inv. Corp. v. McIntosh*, 137 Ga. App. 216 (1976); GA. CODE ANN. § 61-101 (1966). Foltz, *Usufructs and Estates for Years Distinguished*, 18 GA. ST. B.J. 116 (1982).

402. Iorio v. Superior Sound, Inc., 49 A.D.2d 1008, 374 N.Y.S.2d 76 (4th Dep't 1975). Warm Springs Dev. Assocs. Ltd. P'ship v. Burrows, 120 Idaho 280, 815 P.2d 478 (Ct. App. 1991).
403. *See* chapter 14 at note 42.

the landlord at the expiration of the term in the condition required by the lease. The tenant-assignor remains liable not only for the rent and other tenant obligations, he is also liable for damage occurring to the premises after the assignment, which may include damage during a renewal term.⁴⁰⁴

The tenant-assignor, then, assumes the risk of a subsequent occupant's behavior. The tenant-assignor can eliminate this risk during a renewal term because the right of renewal does not pass if it is reserved from the assignment.⁴⁰⁵ The tenant may also eliminate all risk and liability on tenant obligations if he obtains from the landlord a release from all liability accruing after the assignment. The landlord is under no obligation—and in most cases would probably refuse—to give any such release. At times, however, tenant may succeed in obtaining a release of this character as part of some transaction with the landlord, particularly if it involves an assumption by the assignee of the tenant's obligations. If the landlord should release the original tenant in these circumstances the release would normally be of liability accruing after the assignment. If the assignee were to assume prospective liability only, and the landlord were to release the original tenant from all liability, there would be nobody personally liable to the landlord for any breach occurring prior to the assignment.⁴⁰⁶ If the tenant-assignor cannot get a release from the original landlord he makes his liability once-removed by getting his assignee to assume. The incidents of such assumption are considered later.

[C] Liability of Assignee of Lease to Landlord

The obligations of a tenant's assignee to the landlord include a liability for rent,⁴⁰⁷ to repair,⁴⁰⁸ to surrender possession at the expiration of the term,⁴⁰⁹ and other covenants that run with the land.⁴¹⁰ The running of covenants involves much ancient learning.⁴¹¹ This includes covenants that "touch and concern"⁴¹² the land, as against those that are collateral. Here it may be noted that if a tenant

404. Kornblum v. Henry E. Mangels Co., 167 So. 2d 16, 10 A.L.R.3d 812 (Fla. Dist. Ct. App. 1964); Martinez v. Ball, 721 S.W.2d 580 (Tex. Civ. App. 1986).

405. See chapter 14 at note 41.

406. But see text *infra* at note 411.

407. Chapter 36 at notes 1–7. A lender/assignee who acquires tenant's leasehold estate in a bankruptcy auction is in privity of estate with the landlord and therefore liable to pay rent, regardless of the terms of a prior assignment of tenant's leasehold interest to lender as security for a loan. Cherry v. First State Bank, 112 S.W.3d 129 (Tenn. Ct. App. 2003).

408. Section 10:4.

409. Chapter 18, note 116.

410. Text *infra* at note 419.

411. See generally chapter 36.

412. See sections 36:1, 36:3.

undertakes some obligation that is unrelated to the leased property, this undertaking does not become an obligation of the tenant's assignee. For example, a tenant's undertaking to pay a note made by landlord to X was held a collateral covenant that did not run with the land, with the result that this covenant was unenforceable against an assignee of the tenant.⁴¹³ Had the tenant agreed to pay taxes on other lands of the landlord, the result would probably be the same.⁴¹⁴ This could possibly be avoided by (1) tenant's requiring an assignee to assume any tenant obligation⁴¹⁵ or (2) by a provision in the lease making it a default for any assignee to fail to assume all tenant obligations. It would be important to define these obligations as including those that do not run with the land. Landlord and tenant, however, ought to be able to agree, despite the ancient rules, on any form of consideration, conventional or not, for tenant's occupancy that would be enforceable against a subsequent occupant.

Succession of a corporate tenant's liability under a lease, by reason of dissolution⁴¹⁶ or merger⁴¹⁷ of the tenant, has already been mentioned.

Correlative to the obligations of an assignee is a right. Any right that the original tenant may have had against landlord for reformation or rescission passes to the assignee.⁴¹⁸

413. Gateway Co. v. DiNoia, 232 Conn. 223, 654 A.2d 342 (1995) (dictum, citing text in note 8); Dolph v. White, 12 N.Y. 296 (1855). But for the converse of this, cf. Bank of N.Y. v. Hirschfeld, 37 N.Y.2d 501, 336 N.E.2d 710, 374 N.Y.S.2d 100 (1975), chapter 36, note 25.

414. Cf. Childs v. C.H. Winans Co., 119 N.J. Eq. 556, 183 A. 300 (1936); Maher v. Cleveland Union Stockyards Co., 55 Ohio App. 412, 9 N.E.2d 995 (1936).

415. This would apply only to a first, not successor, assignee unless (2) in the text were used.

416. Text *supra* at note 109.

417. Text *supra* at note 135.

418. Bradshaw v. Atkins, 110 Ill. 323 (1884); Bronk v. Standard Mfg. Co., 141 Mich. 680, 105 N.W. 33 (1905); Schneider v. Bulger, 194 S.W. 737 (Mo. App. 1917); 49 AM. JUR. 2D *Landlord and Tenant* § 38 (1995 rev.); 6A C.J.S. *Assignments* § 77, n.90 (1975); Annot., *Mistake in Lease as Ground For Relief*, 26 A.L.R. 472, 519-20 (1923). The rule as to contracts of sale of realty differs. FRIEDMAN ON CONTRACTS § 6:3.

If . . . an accrued cause of action cannot be asserted apart from the contract out of which it arises or is essential to a complete and adequate enforcement of the contract, it passes with an assignment of the contract as an incident thereof. Thus, the assignment of a contract passes from assignor to assignee an accrued cause of action for rescission [cases] or for reformation [case].

Nat'l Reserve Co. v. Metro. Trust Co., 17 Cal. 2d 827, 833, 112 P.2d 598, 602 (1941), *quoted in* Fed. Sav. & Loan Ins. Corp. v. C&J Oil Co., 632 F. Supp. 1296, 1300 (W.D. Va. 1986). A landlord's obligation to build-out tenant premises is a one-time obligation, not a continuing obligation;

[C][1] Privity of Estate**[C][1][a] Obligations of Assignee Based Upon Privity of Estate**

Assignment of a lease does not in itself make the assignee liable for the obligations of the original tenant. By receiving the assignment—regardless of landlord’s consent thereto—the assignee acquires an interest in the premises that brings him into privity of estate with the owner and makes him liable to the owner for the payment of rent and on those tenant covenants that run with the land.⁴¹⁹ Acceptance of the assignment creates the privity of estate and its consequent liability. Successive assignments create privity of estate between the landlord and last assignee.⁴²⁰ It is not necessary for the assignee to take possession. It is sufficient that he have a right to possession.⁴²¹ The liability imposed on an assignee by privity of estate differs in two respects from that of the original tenant, or that of an assignee who has expressly assumed the tenant obligations. These are considered in the following paragraphs.

The assignee’s liability created by privity of estate does not include anything that accrued before the assignment. The assignee is not liable for a breach by the original tenant or by a prior assignee. Nor is he liable for rent payable before the assignment to him even if this covers a

therefore the assignee of the original landlord, who takes the assignment following landlord’s breach of the build-out covenant, is not liable to the tenant for failure to build-out. *Regency Advantage L.P. v. Bingo Idea-Watauga*, 936 S.W.2d 275 (Tex. 1996).

419. *Bloor v. Chase Manhattan Mortgage & Realty Trust*, 511 F. Supp. 17 (S.D.N.Y. 1981); *Kelly v. Tri-Cities Broad., Inc.*, 147 Cal. App. 3d 666, 195 Cal. Rptr. 303 (1983); *Jordan v. Scott*, 38 Cal. App. 739, 177 P. 504 (1918); *Kacavas v. Toothacker*, 278 Mass. 302, 179 N.E. 727 (1932); *First Am. Nat’l Bank v. Chicken Sys.*, 510 S.W.2d 906 (Tenn. 1974); 49 AM. JUR. 2D *Landlord and Tenant* § 1139 (1995 rev.); 52 C.J.S. *Landlord and Tenant* § 538(3)(a) (1970); see also text *supra* at note 397; Annots., *Liability of Tenant’s Assignee for Rent Accruing after Assignment to Him, in Absence of Assumption of Covenants in Lease*, 89 A.L.R. 433 (1934); 148 A.L.R. 196 (1944).
420. *Studebaker Corp. v. Aetna Sav. & Trust Co.*, 21 F.2d 385 (7th Cir. 1927); 51C C.J.S. *Landlord and Tenant* § 44(5)(b) (1968).
421. *Williams v. Safe Deposit & Trust Co.*, 167 Md. 499, 175 A. 331 (1934); *Kirby v. Goldman*, 270 Mass. 444, 170 N.E. 414 (1930); *Seventy-Eighth St. & Broadway Co. v. Pursell Mfg. Co.*, 166 A.D. 684, 152 N.Y.S. 52 (1st Dep’t 1915). Where the assignment is by operation of law, rather than express, the assignee is not liable unless he takes possession or otherwise evidences his consent to accept the lease. *Kendall v. Thirwell*, 453 S.W.2d 604 (Ky. Ct. App. 1970). Cf. 1 AMERICAN LAW OF PROPERTY § 3.61, at 312 (1952); 51C C.J.S. *Landlord and Tenant* § 44(3), at 129 (1968).

period subsequent thereto.⁴²² All this is true, but requires amplification. An assignee is not personally liable for prior breaches, but he takes the lease subject to forfeiture if these breaches are not cured.⁴²³

Liability based on privity of estate continues only so long as privity of estate continues. An assignee may relieve himself of this liability at any time by in turn assigning to another. The assignment may be made for no other purpose than to end his liability.⁴²⁴ But an actual assignment is apparently necessary, rather than abandonment alone.⁴²⁵ And it is not a bona fide assignment for this purpose

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422. *Williams v. Safe Deposit & Trust Co.*, 167 Md. 499, 175 A. 331 (1934); *Polo v. Int'l Trust Co.*, 166 Misc. 398, 1 N.Y.S.2d 910 (Sup. Ct. 1937), *aff'd*, 257 A.D. 82, 12 N.Y.S.2d 998 (1st Dep't 1939); *Wash. Natural Gas Co. v. Johnson*, 123 Pa. 576, 16 A. 799 (1889); 2 AMERICAN LAW OF PROPERTY § 9.5, at 356 (1952); 49 AM. JUR. 2D *Landlord and Tenant* § 1145 (1995 rev.); 51C C.J.S. *Landlord and Tenant* § 44(3), at 130 (1968); 52 *Id.* § 528(3)d(a). *But cf.* *Conditioner Leasing Corp. v. Sternmor Realty Corp.*, 17 N.Y.2d 1, 213 N.E.2d 884 (1966) (equipment lease; assignee liable for past due accelerated rent).
423. *See Stokes v. Hoffman House*, 167 N.Y. 554, 558, 60 N.E. 667, 668 (1901); 49 AM. JUR. 2D *Landlord and Tenant* § 1145 (1995 rev.).
424. *Williams v. Safe Deposit & Trust Co.*, 167 Md. 499, 175 A. 331 (1934); *Gillette Bros. v. Aristocrat Rest., Inc.*, 239 N.Y. 87, 90, 145 N.E. 748, 749 (1924); *First Am. Nat'l Bank v. Chicken Sys.*, 616 S.W.2d 156 (Tenn. 1981) (assignee may "dump" lease); *OTR v. Flakey Jack's, Inc.*, 112 Wash. 2d 243, 770 P.2d 629, 633 (1989); 1 AMERICAN LAW OF PROPERTY § 3.61 (1952); 2 *Id.* § 9.5, at 356 n.8; Annots., 89 A.L.R. 433 (1934), 148 A.L.R. 196 (1944); 51C C.J.S. *Landlord and Tenant* §§ 44(4), 44(5)a (1968); 52 C.J.S. *Landlord and Tenant* § 528(3)b. Compare the rule under which a tenant's covenant to surrender the premises at the expiration of the term, in a specified condition, is not broken before the term ends. This is distinguished from acts of waste committed during the term. *Estate Prop. Corp. v. Hudson Coal Co.*, 259 A.D. 546, 19 N.Y.S.2d 857, *aff'd*, 284 N.Y. 722, 31 N.E.2d 762 (1940). *See also* section 18:1. An equity receiver or trustee in bankruptcy who adopts a lease becomes liable through privity of estate, and may end this liability, as any other non-assuming assignee, by transferring the lease to another. *In re Wil-Low Cafeterias, Inc.*, 111 F.2d 83, 84-85 (2d Cir. 1940); *Madden v. La Cofske*, 72 F.2d 602, 95 A.L.R. 370 (9th Cir. 1934). This has been only slightly changed by the Bankruptcy Reform Act of 1978. *See text supra* at note 186. *See also Kelly v. Tri-Cities Broad., Inc.*, 147 Cal. App. 3d 666, 195 Cal. Rptr. 303 (1983), discussed in chapter 36, note 76. The rule was applied to an insurer of a lease guaranty insurance while it was successor in possession to the tenant. *Lake Havasu Resort, Inc. v. Commercial Loan Ins. Corp.*, 139 Ariz. 369, 678 P.2d 950 (Ariz. Ct. App. 1983).
425. *T.A.D. Jones Co. v. Winchester Repeating Arms Co.*, 61 F.2d 774 (2d Cir. 1932), *cert. denied sub nom.* *Se. Inv. Co. v. Tobler*, 288 U.S. 609 (1933) (and cases collected); *Seventy-Eighth St. & Broadway Co. v. Pursell Mfg. Co.*, 166 A.D. 684, 152 N.Y.S. 52 (1st Dep't 1915); 49 AM. JUR. 2D *Landlord and Tenant* § 1147 (1995 rev.). *But see* cases cited in 51C C.J.S. *Landlord and Tenant* § 44(4), nn.6, 7 (1968). Reletting by landlord after assignee's abandonment releases the assignee. *First Am. Nat'l Bank*, 616 S.W.2d 156.

unless he gives up possession. Assignment to a nominee without relinquishment of possession does not end the liability.⁴²⁶ Furthermore, the assignment does not relieve any liability that had accrued during the time privity of estate existed.⁴²⁷ If the liability became due prior to a reassignment, it is no defense to the assignee-reassignor that a grace period, which would permit landlord to declare the lease in default, had not then expired.⁴²⁸

This right of an assignee to end his liability, by choice, is of obvious advantage to him. On the other hand, it can make for uncertainty for landlord, who may not know who his tenant is or whether a party who is apparently in possession is liable for performance of the tenant obligations. Landlord should require as a minimum that any assignment be in writing, executed and acknowledged by the tenant-assignor, and that an executed copy be delivered to the landlord. Landlord's position will be better if any assignee is required to assume the tenant obligations, in which case the assignment should also be executed and acknowledged by the assignee.⁴²⁹

When a party other than the tenant is shown to be in possession of the premises, and paying rent therefor, there is a presumption that the lease has been assigned to him.⁴³⁰ This presumption is sufficient to take the case out of the statute of frauds.⁴³¹ It is effective for the running of the benefits and burdens of the covenants that run with the land.⁴³²

426. Century Holding Co. v. Ebling Brewing Co., 185 A.D. 292, 173 N.Y.S. 49 (1st Dep't 1918); Nat'l Bank of Commerce v. Dunn, 194 Wash. 472, 78 P.2d 535 (1938) (*approved in OTR*, 112 Wash. 2d at 243, 252, 770 P.2d at 633, n.2); 1 AMERICAN LAW OF PROPERTY § 3.61 (1952); *see generally* Annots., 89 A.L.R. 433 (1934), 148 A.L.R. 196 (1944); 51C C.J.S. *Landlord and Tenant* § 44(5)(a) (1968); 52 *Id.* § 528(3)d(c). Contrast the rule under which the inception of liability by privity of estate does not require taking possession. *See* text *supra* note 421.

427. Bloor v. Chase Manhattan Mortgage & Realty Trust, 511 F. Supp. 17 (S.D.N.Y. 1981). *Donelson v. Polk*, 64 Md. 501, 2 A. 824 (1886); *Kirby v. Goldman*, 270 Mass. 444, 170 N.E. 414 (1930); 2 AMERICAN LAW OF PROPERTY § 9.5, at 356 (1952); 51C C.J.S. *Landlord and Tenant* § 44(5)a (1968).

428. *Bloor*, 511 F. Supp. 17.

429. Compare matters mentioned and referred to in note 424 *supra*, second paragraph, and note 11, *supra*.

430. *Indep. Gin Co. v. Parker*, 19 Ariz. 413, 508 P.2d 78 (1973) (and cases collected); *Risolo v. Bruno*, 36 Misc. 2d 247, 232 N.Y.S.2d 436 (Sup. Ct. 1962); *Abbott v. Bob's U-Drive*, 222 Or. 147, 352 P.2d 598 (1960) (collecting cases); *Jensen v. O.K. Inv. Corp.*, 29 Utah 2d 231, 507 P.2d 713 (1973).

431. *Abbott*, 222 Or. 147.

432. *Id.*

[C][1][b] Restrictions That Bind Parties in Possession Without Privity

It is important to note that the concept of privity is necessary only insofar as liability is sought on lease covenants for performance that traditionally has been recognized as sounding “at law” as opposed to performance enforceable “in equity.” Remedies “at law” have traditionally included payment of money, and a review of the various lease obligations detailed by Mr. Friedman in the preceding sections reveals that those he identifies as binding only upon assignees with “privity of estate” are those involving money payments.

Equity, traditionally an entire separate system of courts, never recognized a requirement for privity of estate in common law England, and modern courts, in dispensing equitable relief upon covenants in a lease, do not require privity today. Equitable remedies in general include remedies requiring performance, including primarily affirmative and negative injunctions. For purposes of injunctive relief, all that is necessary is that the parties intended the covenant to bind any successive party in possession and that the transferee has actual or constructive knowledge of the covenant.⁴³³ Intention to bind can be assumed.

The new *Restatement (Third) of Property: Servitudes* recommends that courts do away with both the requirement of “touching and concerning the land”⁴³⁴ and the requirement of “vertical privity of estate.”⁴³⁵ But the authors of the *Restatement* recognize that many important distinctions in leasing law have grown out of these doctrines, and parties in leasing structures in the market place are heavily invested in the present legal rules. Consequently, the *Restatement* takes the position that this suggested abolition of these doctrines not occur where it would interfere with expectations of the marketplace regarding leases.

[C][2] Assumption of Lease by Assignee

Any claim that an assignee has assumed the tenant’s obligations must be clearly established. The assignee’s acceptance of the assignment, his payment of rent, and entering into some agreements with his assignor or the landlord do not satisfy this requirement. A written agreement between assignee and landlord, which eliminated

433. For instance, a non-competition covenant will run against a transferee of a tenant, whether assignee or sublessee, for purposes of injunctive relief. *Rosen v. Wolff*, 152 Ga. 578, 110 S.E. 877 (1922); *Gillen-Crow Pharmacies, Inc. v. Mandzak*, 8 Ohio Misc. 47, 220 N.E.2d 852 (1964).

434. See RESTATEMENT (THIRD) OF PROPERTY (Servitudes) (Tent. Draft No. 2).

435. RESTATEMENT (THIRD) OF PROPERTY (Servitudes) § 5.2(a) (Tent. Draft No. 5, 1995).

a requirement to supply the landlord with insurance and made the assignee a self-insurer, and which expressly continued all other provisions of the lease, was held no assumption.⁴³⁶ An assignee who receives landlord's notice of an increase in rent after expiration of the term, makes himself personally liable by remaining in possession thereafter.⁴³⁷ An assignment "Subject . . . to the rents, covenants, conditions and provisions in the lease mentioned," with an endorsement "Above assignment hereby accepted," was held to require a plenary trial to determine if the assignee had thereby agreed to assume.⁴³⁸

An assignee's acceptance of a written assignment, which stated the assignee thereby assumed the lease, was held an effective assumption though the instrument was never signed by the assignee.⁴³⁹ Although not mentioned by the court, this situation is within the rule that the statute of frauds does not apply to an original undertaking, as distinguished from an undertaking to answer for the debt, default, or miscarriage of another. In an analogous situation a grantee of real property may assume a mortgage by mere acceptance of a deed.⁴⁴⁰ It should follow that an assignee's parol assumption of a lease would be enforceable, if proved and supported by consideration.⁴⁴¹ An assignee's written "acceptance" of a lease, or one's taking, "subject to and together with" a lease, have been held an assumption.⁴⁴²

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436. Hart v. Socony-Vacuum Oil Co., 291 N.Y. 13, 50 N.E.2d 285, 148 A.L.R. 390 (annot. at 390) (1943); 1 AMERICAN LAW OF PROPERTY § 3.61 (1952); 2 AMERICAN LAW OF PROPERTY § 9.5; 51C C.J.S. *Landlord and Tenant* § 44(3) (1968); 49 AM. JUR. 2D *Landlord and Tenant* § 1135 (1995 rev.). Compare generally 42 A.L.R. 1173, 1174-77 (1926). For additional examples, see Kelly v. Tri-Cities Broad., Inc., 147 Cal. App. 3d 666, 195 Cal. Rptr. 303 (1983); First Am. Nat'l Bank v. Chicken Sys., 616 S.W.2d 156 (Tenn. 1981).
437. Despard v. Walbridge, 15 N.Y. 374 (1857). The defendant had been a subtenant who became in effect an assignee. See generally section 18:3.
438. Packard-Bamberger & Co. v. Maloof, 89 N.J. Super. 128, 214 A.2d 45 (1965). "Subject to the terms of said lease" was held not to impose contractual liability. Coles Trading Co. v. Spiegel, Inc., 187 F.2d 984 (9th Cir. 1951); S.T. McKnight Co. v. Cent. Hanover Bank & Trust Co., 120 F.2d 310 (8th Cir. 1941); Consol. Coal Co. v. Peers, 166 Ill. 361, 46 N.E. 1105, 38 L.R.A. 624 (1897); 14 COLUM. L. REV. 88 (1914). Under the same rule one acquiring real estate subject to a mortgage does not thereby assume liability for the mortgage debt. FRIEDMAN ON CONTRACTS § 3:3.1.
439. Jones v. Innkeepers, Inc., 12 Ark. App. 364, 676 S.W.2d 761 (1984) (citing text). Lopizich v. Salter, 45 Cal. App. 446, 187 P. 1075 (1920). The assignee's liability is not contingent on acceptance of possession. *Id.*; cf. section 34:5, *infra*.
440. FRIEDMAN ON CONTRACTS § 3:3.1.
441. See Barker Dev. Co. v. Unibank & Trust Co., 314 N.W.2d 175 (Iowa Ct. App. 1981).
442. See Penelko, Inc. v. John Price Assocs., 642 P.2d 1229 (Utah 1982).

If the assignee agrees to assume, attention should be given to the scope of the assumption. The assignee may assume (1) generally, or (2) merely prospectively.

Assignment of a lease to an assuming assignee is occasionally accompanied by an express release of the tenant-assignor from liability. Sometimes the lease provides for this to happen in case of a future assignment and assumption.⁴⁴³ This combination of assumption and release has been held to be a novation, taking effect as of the time of the assumption, with surprising consequences.⁴⁴⁴ The scope of

443. See text *supra* at note 19.

444. *Fay Corp. v. Bat Holdings I, Inc.*, 646 F. Supp. 946 (W.D. Wash. 1986), involved a lease made in 1928 that imposed on tenant liability under a gold clause. Gold clauses were invalidated by 1933 legislation. In 1977 another statute made a gold clause effective if assumed after October 27, 1977. In 1982 the assumption and release mentioned in the text occurred. This was held a novation that created a contract as of 1982. This made a post-1977 assumption by assignee of the 1929 gold clause, a clause from which the tenant-assignor had been released by the 1933 legislation. It will be noted that if the assignor had not been released from its leasehold obligations, or if the assignment had only created privity of estate, this result would not follow. In later litigation landlord was barred by waiver and estoppel from recovering the increased rent for the period from defendant's assumption and landlord's institution of the lawsuit. In the interim landlord accepted without comment the rent specified in the lease. 682 F. Supp. 1116 (W.D. Wash. 1988). Later, however, an Eighth Circuit decision found no waiver or estoppel and indeed bound the tenant to the gold clause escalation, with dramatic economic consequences. *Trostel v. Am. Life & Cas. Ins. Co.*, 92 F.3d 736 (8th Cir. 1996). See also *Trostel v. Am. Life & Cas. Ins. Co.*, 168 F.3d 1105 (8th Cir. 1999). In another case, the court permitted a tenant relief by narrowly construing the novation agreement by which, the landlord argued, the new tenant had assumed the lease burdens. *Grand Ave. Partners, L.P. v. Goodan*, 160 F.3d 580 (9th Cir. 1998); see also *Grand Ave. Partners, L.P. v. Goodan*, 25 F. Supp. 2d 1064 (C.D. Cal. 1996).

Any party arguing a novation of a contract bears a heavy burden. In *White v. Harrison*, 390 S.W.3d 666 (Tex. Ct. App. 2012), a commercial landlord refused the tenant's request to assign a lease. The tenant nevertheless "transitioned control" of the premises to the proposed assignee. The landlord accepted rent from the unapproved assignee and then entered into a new agreement concerning unpaid rent with that party. The court rejected the argument that the new agreement resulted in a novation vis-à-vis the original tenant. The court's primary rationale, as stated in the opinion, is that the agreement between the landlord and the proposed assignee on its face asserts that the original lease was unaffected, and that at most the proposed assignee occupied the property as an indulgence. The court was correct that a novation did not occur, but it was wrong in its rationale. A novation should occur if the agreement, to which the tenant was not a party, purported to extend the liability of tenant (perhaps by extending the term or increasing rental obligations). The facts of *Harrison* do not reveal that any such extension of liability was part of the agreement.

the release in this situation is dependent on some slight differences in language.⁴⁴⁵

[C][2][a] General Assumption

If the assignee assumes “with the same force and effect as if he had executed the lease as tenant,” the assumption includes all liability that had accrued at the time of the assignment, as well as the liability thereafter accruing.⁴⁴⁶ An assignee who assumes a lease retroactively in this fashion should learn, if possible, what liability has already accrued. Otherwise, he signs a blank check. He should try to obtain a certificate from the landlord that the lease is in good standing as of the time of the assignment. A landlord may object to give such certificate, on the ground that he does not know whether all the covenants and conditions of a lease on the tenant’s part have been complied with to date. The landlord can easily tell if rent and taxes have been paid or if insurance has been supplied. He may certify these items. He may not know without investigation if waste has been committed, if all repairs have been made or if there has been a subletting in violation of the lease.⁴⁴⁷

[C][2][b] Prospective Assumption

An assignee’s agreement to assume the tenant’s obligations is held, without more, to exclude existing breaches and include only obligations accruing subsequent to the assignment. But the amount of relevant authority is small.⁴⁴⁸ For this reason the assumption clause should be clear. If it is intended to be prospective it should be

The fact that the agreement between landlord and the proposed assignee disclaimed a change in the landlord’s relationship with tenant should have been irrelevant. The point of the novation doctrine is to look beyond *form* to *substance*.

445. In *Wright Motors, Inc. v. Marathon Oil Co.*, 631 N.E.2d 923 (Ind. Ct. App. 1994), a release of further liability under the terms of the lease was no release of environmental damages under statute or the common law (leaking gas contamination) but a release of liability arising out of or in connection with said [lease] agreements released from liability for toxic conditions. *Rodenbeck v. Marathon Petroleum Co.*, 742 F. Supp. 1448 (N.D. Ind. 1990).

446. *Farmers Bank v. Mut. Assurance Soc’y*, 31 Va. 69 (1832).

447. See also text *infra* following note 624.

448. *Townsend v. Scholey*, 42 N.Y. 18 (1870); *Won’s Cards, Inc. v. Samsondale/Haverstraw Equities, Ltd.*, 165 A.D.2d 157, 566 N.Y.S.2d 412 (3d Dep’t 1991). *Columbia Univ. v. Rathbone*, 227 N.Y. 560, 124 N.E. 902 (1919), is in accord. There the record on appeal (at 27) indicates the assignee assumed “the prompt and full performance of every covenant and condition in said lease inuring to the benefit” of the landlord. *Quebe v. Davis*, 586 N.E.2d 914 (Ind. Ct. App. 1992).

made expressly applicable only to the covenants and conditions on tenant's part to be performed and observed from and after a specified time. The assignee will then be clearly under no personal liability for anything that occurred before the assignment. But if at the time of the assignment there is an uncured tenant-breach, a forfeiture of the lease may follow.⁴⁴⁹ The assignee need not cure this breach—that is, if he is willing to permit the forfeiture to occur. Accordingly, the tenant has an interest in the good standing of the lease, as of the time of the assignment, regardless of any personal liability on his part.

An assumption of liability that will accrue from and after the assignment should contemplate the possible ambiguity of “accrue.” Its usual meaning, when referring to a monetary obligation, is that which is “due and payable.” But in an agreement between tenant and his assignee, ruled to require tenant to pay certain costs of construction and tenant to assume charges thereafter to accrue, it was held that tenant and not its assignee was liable for cost of work completed though not billed or payable until after the assumption by assignee.⁴⁵⁰

An assignee who assumes the tenant's obligations comes into privity of contract as well as privity of estate with the landlord. This liability is similar to that of the original tenant in that it is not discharged by a further assignment but continues thereafter.⁴⁵¹

[D] Concurrent Liability of Original Tenant and Assuming Assignee

In case of successive assignments of a lease, the primary liability, as between the original tenant and the assignees, rests on the last assignee. A tenant or assignee who paid the rent or discharged other tenant obligations, for which a later assignee was primarily liable, has a right-over against the latter. For this purpose the latter need not have assumed the lease. Liability by privity of estate is enough, and it is sufficient that the assignee charged was in privity of estate at the time

449. See *Stokes v. Hoffman House*, 167 N.Y. 554, 558, 60 N.E. 667, 668 (1901); 49 AM. JUR. 2D *Landlord and Tenant* § 1145 (1995 rev.).

450. *Fortane Southfield Co. v. Kroger Co.*, 740 F. Supp. 729 (E.D. Mo. 1990), *aff'd*, 931 F.2d 1282 (8th Cir. 1991).

451. *Studebaker Corp. v. Aetna Sav. & Trust Co.*, 21 F.2d 385 (7th Cir. 1927); *Catalina Groves, Inc. v. Oliver*, 73 Ariz. 38, 236 P.2d 1022 (1951); *Gateway Co. v. DiNoia*, 232 Conn. 223, 654 A.2d 342 (1995) (general discussion, citing text); *Broida v. Hayashi*, 51 Haw. 493, 464 P.2d 285 (1970); *Kewanee Boiler Corp. v. Am. Laundry Mach. Co.*, 289 Ill. App. 482, 7 N.E.2d 461 (1937); *Bankers Pocahontas Coal Co. v. Monarch Smokeless Coal Co.*, 123 W. Va. 53, 14 S.E.2d 922 (1941); 1 AMERICAN LAW OF PROPERTY § 3.61 (1952); 2 AMERICAN LAW OF PROPERTY § 9.5; 51C C.J.S. *Landlord and Tenant* § 44(3), (4), (5) (1968).

of the breach.⁴⁵² It has been held that the cause of action exists only if the tenant-assignor has made payment to the landlord,⁴⁵³ but the contrary has also been held.⁴⁵⁴ In an action by landlord against tenant and assignee for rent and other charges, the assignee was held primarily liable, the original tenant secondarily so.⁴⁵⁵

If landlord sues tenant for breach of the lease, and prevails, and then tenant sues assignee for reimbursement, the latter may raise a defense that had not been litigated in the first action. It is possible then for tenant to lose the first action and the second as well.⁴⁵⁶ Tenant should therefore join the assignee in the first action, if possible, so that the assignee will be bound by the first judgment. The same applies if landlord sues an assignee who claims over against a later assignee.

A tenant's right-over against his assignee for reimbursement is generally limited to an action for a money judgment, and does not include a right to repossess the premises. The possessory remedies given a landlord against a defaulting tenant under local statutes are based mostly on a landlord-tenant relation, which does not exist between tenant and assignee. The usual form of assignment of lease passes the tenant's entire interest and makes no provision for defeasance. Even if it did the assignment would probably not qualify under

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452. *Studebaker Corp. v. Aetna Sav. & Trust Co.*, 21 F.2d 385 (7th Cir. 1927); *Catalina Groves, Inc. v. Oliver*, 73 Ariz. 38, 236 P.2d 1022 (1951); *Kewanee Boiler Corp. v. Am. Laundry Mach. Co.*, 289 Ill. App. 482, 7 N.E.2d 461 (1937); *Collins v. Pratt*, 181 Mass. 345, 63 N.E. 946 (1902); *Weeks v. Cal-Maine Foods, Inc.*, 522 So. 2d 725 (Miss. 1988); *Crowley v. Gormley*, 59 A.D. 256, 69 N.Y.S. 576 (2d Dep't 1901); *Bender v. George*, 92 Pa. 36 (1879); *Hailey v. Cunningham*, 654 S.W.2d 392 (Tenn. 1983). 2 AMERICAN LAW OF PROPERTY § 9.5, at 355 (1952); 32 A.L.R. 1429, 1439 (1924). Tenant's payment to landlord, without knowing landlord had released assignee, left tenant with no right over against assignee. *Weeks*, 522 So. 2d 725. Landlord's resort to security posted by the tenant-assignor was deemed sufficient for this purpose. *Nemtzoff v. Vagnier*, 163 N.Y.S. 1075 (App. Term 1917). The right-over would not exist where the assignee to be charged is discharged in bankruptcy, except for a possible claim in bankruptcy. See *In re Ames Dep't Stores, Inc.*, 148 B.R. 756 (S.D.N.Y. 1993); *Hindcastle, Ltd. v. Barbara Attenborough Assocs., Ltd.*, [1994] 4 All E.R. 129, discussed in chapter 16, note 84.
453. *Farrington v. Kimball*, 126 Mass. 313 (1879). A tenant sued for rent was permitted to maintain a cross action against the assuming assignee. *Prospect Realty, Inc. v. Bishop*, 33 Conn. Sup. 622, 365 A.2d 638 (1976); 32 A.L.R. 1429, 1442 (1924); *Trabue v. McAdams*, 71 Ky. 74 (1871); *Tenison v. Knapp*, 64 S.W.2d 1071 (Tex. Civ. App. 1933); 49 AM. JUR. 2D *Landlord and Tenant* § 1130 (1995 rev.).
454. *Darmstaetter v. Hoffman*, 120 Mich. 48, 78 N.W. 1014 (1899).
455. *First Am. Nat'l Bank v. Chicken Sys.*, 510 S.W.2d 906 (Tenn. 1974).
456. See *Hailey*, 654 S.W.2d at 396.

the statutes that give possessory remedies to landlords.⁴⁵⁷ This puts a tenant-assignor under a practical disadvantage, considering his continuing liability to the landlord, unless the assignee is of superior financial responsibility or unless the tenant has specific security for the assignee's performance. If, in lieu of assigning, the tenant sublets, he becomes a (sub)landlord with a right to evict his defaulting tenant.

The original tenant and the assuming assignee or assignees are all liable to the landlord, who may recover from all or any of them.⁴⁵⁸ The

457. *Italian Fisherman v. Middlemas*, 313 Md. 156, 545 A.2d 1 (1989). *Lo Russo v. Great 110, Inc.*, 59 Misc. 2d 40, 298 N.Y.S.2d 61 (Dist. Ct. 1969). *Accord Murray Hill Mello Corp. v. Bonne Bouchee Rest.*, 113 Misc. 2d 683, 449 N.Y.S.2d 870 (Cir. Ct. 1982). *See also Marvell v. Marina Pizzeria*, 155 Cal. App. 3d 1, 202 Cal. Rptr. 818 (1984). *Lo Russo* states that the assignor of a lease has no possessory remedies based on nonpayment of either the consideration for the assignment or of rent. But the tenant-assignor may have an equitable lien for the consideration for the assignment. Section 7:5.3. In two cases where an assignee had abandoned the premises the tenant-assignor sought unsuccessfully to get back into possession on tendering back rent to the landlord. In *Kandis v. Pusch*, 86 Ind. App. 246, 249, 155 N.E. 618, 619 (1927), the court wrote:

Had appellants desired to repossess themselves of the premises in event of default of the assignee they could have done so by subletting the premises, reserving to themselves the right of reentry upon default of the payment of the consideration to themselves, leaving themselves, of course, liable to the owner under the terms of the lease. Then had they paid before there was a forfeiture because of default in payment of the rent as provided in the lease, they could have held the premises, but the assignment of the lease was clear and unambiguous, and it appeared thereby that appellants had wholly disposed of their rights in the premises, and thereafter they had no right of reentry.

In *Flynn v. Mikelian*, 208 Cal. App. 2d 305, 311, 25 Cal. Rptr. 138, 142 (2d Dist. 1962), the court wrote:

The plaintiffs, as assignors of the lease, retained no interest in the premises in the nature of a right of reentry which they could exercise in the event of an abandonment of the premises by the assignee.

An assignee of a tenant recovered in ejectment against a subsequent assignee where the plaintiff (1) reserved a right of entry and (2) remained liable under the lease by having given an indemnity to a prior assignee. *Hammes v. Esposito*, 10 Ill. App. 3d 6, 293 N.E.2d 641 (1973). *Compare text supra* at note 377. A tenant who had assigned under an agreement for reassignment, in case of nonpayment of the consideration, was held to have no reversion or possessory rights. *Anjo Rest. Corp. v. Sunrise Hotel Corp.*, 98 Misc. 2d 597, 414 N.Y.S.2d 265 (Sup. Ct. 1979). A comparable problem of recovering possession exists between a vendor of real property and his vendee in possession after the latter's default. FRIEDMAN ON CONTRACTS § 11:1. *Cf. text infra* at note 488.

458. *Hamlen v. Rednalloh Co.*, 291 Mass. 119, 197 N.E. 149, 99 A.L.R. 1230 (1935); *Crowley v. Gormley*, 59 A.D. 256, 69 N.Y.S. 576 (2d Dep't 1901);

landlord is limited, of course, to a single recovery.⁴⁵⁹ The assignment of the lease is sufficient consideration for the assignee's assumption.⁴⁶⁰ Where the assumption is effected by agreement between tenant and his assignee (or the assignee and his assignee) the landlord has been held entitled to enforce the assumption as a third-party beneficiary.⁴⁶¹ But landlord's right of enforcement should not depend on his being recognized as a third-party contract beneficiary. Inasmuch as landlord has an enforceable right against tenant, and tenant has an enforceable right on the same claim against his assignee, landlord should be entitled to enforce his debtor's claim against his debtor's debtor. This is equitable subrogation, a rule that antedates third-party contracts. Under equitable subrogation a mortgagee could enforce the mortgagor's obligations against a grantee of the mortgagor, who had assumed the mortgage by agreement with his grantor.⁴⁶²

There is little authority on the right of a tenant to release his assignee from an assumption of the tenant's obligations. One of the few relevant decisions involved a lease that permitted assignment by tenant provided the assignee assumed. In this situation it was held that release by the tenant was not authorized.⁴⁶³ In the comparable situation of mortgage assumptions the cases are not uniform on the right of a mortgagor to release his grantee who assumed the mortgages. Generally, there is no right to release after the mortgagee (landlord here) has accepted or relied on the assumption. By analogy it would appear that landlord's acceptance of rent for a month or two from the assignee ends any right on tenant's part to release his assignee.⁴⁶⁴ It was so held in *OTR v. Flakey Jack's, Inc.*⁴⁶⁵

Gholson v. Savin, 137 Ohio St. 551, 31, N.E.2d 858, 139 A.L.R. 75 (1941); 1 AMERICAN LAW OF PROPERTY § 3.61, at 311 n.7 (1952); 49 AM. JUR. 2D *Landlord and Tenant* §§ 1129, 1140 (1995 rev.). *But cf.* the effect of the original tenant becoming a "surety." Section 7:5.2.

459. *Hamlen*, 291 Mass. 119; *Gholson*, 137 Ohio St. 551; 49 AM. JUR. 2D *Landlord and Tenant* § 1140 (1995 rev.).

460. *Springer v. De Wolf*, 194 Ill. 218, 62 N.E. 542 (1901); *Puget Mill Co. v. Kerry*, 183 Wash. 542, 49 P.2d 57, 100 A.L.R. 1220 (annot. at 1232) (1935); 49 AM. JUR. 2D *Landlord and Tenant* § 1134 (1995 rev.).

461. *Novosad v. Clary*, 431 S.W.2d 422 (Tex. Civ. App. 1968); *Bankers Pocahontas Coal Co. v. Monarch Smokeless Coal Co.*, 123 W. Va. 53, 14 S.E.2d 922 (1941).

462. *Friedman, Creation and Effect of Personal Liability on Mortgage Debts in New York*, 50 YALE L.J. 224, 230 *et seq.* (1940).

463. *Adams v. Shirk*, 117 F. 801 (7th Cir. 1902).

464. *See Friedman, Creation and Effect of Personal Liability on Mortgage Debts in New York*, 50 YALE L.J. 224, 228, 236 *et seq.* (1940).

465. *OTR v. Flakey Jack's, Inc.*, 112 Wash. 2d 243, 770 P.2d 629 (1989).

§ 7:5.2 *Tenant-Assignor As Surety*

From the preceding discussion it appears that: A tenant does not relieve himself of liability by assigning his lease. The assignee also acquires a liability under the lease, either under privity of estate or privity of contract, or both. The assignee's liability under privity of contract usually attaches to the tenant obligations accruing after the assignment, but may include liability for prior breaches, depending on the language of the assumption. Subsequent assignees come under a similar assignee's liability. As between successive assignees the primary liability is on the last assignee. Next in priority of liability is his immediate assignor, etc. The landlord may enforce his rights against any or all parties liable. Inasmuch as this includes a right by landlord to recover against the original tenant, in disregard of all others, the tenant remains at all times a primary obligor.⁴⁶⁶ In this respect the original tenant is not, strictly speaking, a surety.

However, there is, as mentioned, an order of priority between the original tenant and assignees, which is reflected in rights to recover against those higher on the ladder of liability. If a landlord interferes with this right-over he may lose his rights against the original tenant or somebody who is lower on the ladder than the assignee with whom the landlord has so dealt.⁴⁶⁷ In this respect a tenant, as well as assignees other than the ultimate assignee, have a status comparable to that of sureties. Many courts, without detailed comment, state merely that a tenant who has assigned is a surety. This is true even if the landlord released the tenant from "direct obligations" upon assignment.⁴⁶⁸ Some have stated that a tenant is a surety with respect to his

466. See section 7:5.1.

467. "Regardless of the precise analysis of the theories by which the lessee may be relieved of liability by an assignment, the principle is clear that an agreement between the lessor and the assignee materially varying the terms of the original lease will on one theory or another result in the termination of the lessee's covenant to pay rent." *Walker v. Rednalloh Co.*, 299 Mass. 591, 595-96, 13 N.E.2d 394, 397 (1938). *Accord Weeks v. Cal-Maine Foods, Inc.*, 522 So. 2d 725 (Miss. 1988); *Nat'l Sur. Co. v. Trilby Realty Corp.*, 249 A.D. 566, 293 N.Y.S. 219 (1st Dep't 1937); cases in 1 AMERICAN LAW OF PROPERTY § 3.61 (1952); Annot., 99 A.L.R. 1238 (1935); 49 AM. JUR. 2D *Landlord and Tenant* § 1127 (1995 rev.); 51C C.J.S. *Landlord and Tenant* § 45(2) (1968). Tenant is not released by agreement between landlord and assignee that reduces tenant's obligations. *St. Louis Twin Oaks Assocs., I Ltd. P'ship v. Exec. Office Network, Ltd.*, 804 F. Supp. 1127 (E.D. Mo. 1992) (remanded to determine if the agreement created a new tenancy).

468. Language in a long-term ground lease stating that tenant shall be released from direct obligations under the lease upon assignment does not result in

assignee but not with respect to the landlord.⁴⁶⁹ Statements of the latter type are dicta because these cases generally involve a situation in which a surety would not be released. This is because the act in question was either consented to by the claimed surety⁴⁷⁰ or was nonprejudicial to him.⁴⁷¹ Landlord's delay in proceeding against the assignee was held no defense to the original tenant.⁴⁷²

Contracts between a landlord and an assignee modifying the terms of a lease that change the obligations undertaken by the original tenant or other party to be charged or that in substance create a new tenancy, have been held a release of the "surety."⁴⁷³ Likewise, landlord's

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- an assignment constituting a novation because the tenant remains liable as a surety for the assignee's obligations. *Grand Ave. Partners, L.P. v. Goodan*, 160 F.3d 580 (9th Cir. 1998); *see also* *Grand Ave. Partners, L.P. v. Goodan*, 25 F. Supp. 2d 1064 (C.D. Cal. 1996).
469. *See* discussion in *Gerber v. Pecht*, 15 N.J. 29, 31–32, 104 A.2d 41, 42 (1954); *see also* *Price v. S.S. Fuller, Inc.*, 639 P.2d 1003 (Alaska 1982); *De Hart v. Allen*, 26 Cal. 2d 829, 161 P.2d 453 (1945); *Meredith v. Dardarian*, 83 Cal. App. 3d 248, 252, 147 Cal. Rptr. 761, 763 (1978); 51C C.J.S. *Landlord and Tenant* § 45(2) (1968). *Cf.* *Tenison v. Knapp*, 64 S.W.2d 1071 (Tex. Civ. App. 1933). For tenant's right of reimbursement against an assignee, or an assignee's right against a subsequent assignee, *see* text *supra* at note 454.
470. *Carrano v. Shoor*, 118 Conn. 86, 171 A. 17 (1934); *Chi. Title & Trust Co. v. Kesner*, 296 Ill. 187, 16 N.E.2d 175 (1938) (and cases cited).
471. *St. Louis Twin Oaks Assocs., I Ltd. P'ship v. Exec. Office Network, Ltd.*, 804 F. Supp. 1127 (E.D. Mo. 1992). Reduction of rent by agreement between landlord and assignee is no release of the tenant-assignor. *Fisher v. Milliken*, 8 Pa. 111 (1848); 10 S. WILLISTON, *CONTRACTS* § 1240, at 771 (3d ed. 1957); *Annots.*, 121 A.L.R. 1014 (1939), 99 A.L.R. 1238, 1243 (1935); 49 AM. JUR. 2D *Landlord and Tenant* § 1127 (1995 rev.). Similarly, reduction of interest does not release a guarantor of a mortgage. *Becker v. Faber*, 280 N.Y. 146, 19 N.E.2d 997, 121 A.L.R. 1010 (1939).
472. *Meredith v. Dardarian*, 83 Cal. App. 3d 248, 147 Cal. Rptr. 761 (1978).
473. *Kaskel v. Hollander*, 68 F.2d 265 (1st Cir. 1933) (renewal at increased rent); *T.A.D. Jones Co. v. Winchester Repeating Arms Co.*, 55 F.2d 944, *aff'd*, 61 F.2d 774 (2d Cir. 1932); *Fairchild v. Cahn*, 120 Cal. App. 418, 7 P.2d 1051 (1932) (numerous modifications), *cert. denied sub nom. Se. Inv. Co. v. Tobler*, 288 U.S. 609 (1933) (new lease at less rent), *noted in* 41 YALE L.J. 1239 (1932); *Gateway Co. v. DiNoia*, 232 Conn. 223, 654 A.2d 342 (1995) (citing text); *Walker v. Rednalloh Co.*, 299 Mass. 591, 13 N.E.2d 394 (1938) (permitting substantial alterations to premises); *Revel Realty & Sec. Co. v. Maxwell*, 65 Misc. 54, 119 N.Y.S. 257 (App. Term 1909) (shortening term of lease; landlord's assumption of duty to heat and repair; other changes); *Jedco Dev. Co. v. Bertsch*, 441 N.W.2d 664 (N.D. 1989) (considers the situation on the basis of a novation); *Glesener v. Balholm*, 50 Wash. App. 1, 5, 747 P.2d 475, 478 (1987) (premises damaged by assignee; short extension of term released original tenant); *Annots.*, 99 A.L.R. 1238, 1242 (1935). For the release of a guarantor of a lease in a comparable situation, *see* section 35:3. An agreement between a tenant and his assignee or subtenant is not such an agreement that releases tenant under

acquiescence in the exercise of a renewal right by one of four assignees of the lease was held a release, on the ground that the renewal by one alone cut off the assignor's right of subrogation against the others.⁴⁷⁴ A landlord's release of a judgment against the assignee has been held to discharge the original tenant.⁴⁷⁵ In New York if a release of a judgment against the assignee includes an express reservation of rights against the original tenant, this reservation will be given effect and the tenant remains liable.⁴⁷⁶ In Ohio, the rule is *contra*. There a purported reservation is disregarded and the "surety" is held released.⁴⁷⁷ Landlord's conveyance of the property to an assignee of the tenant ordinarily ends the lease by merger and, with it, the liability of the original tenant.⁴⁷⁸

If a lease forbids assignment, landlord's consent to assignment by an assignee releases the original tenant.⁴⁷⁹ But the situation is different if the lease provides that the tenant's interest may be assigned only with the landlord's consent (or that the tenant may not assign without the landlord's consent). This implies that a landlord may consent. Consent then is within his authority under the lease, not an enlargement on it, and does not release the original tenant.⁴⁸⁰ The

the head lease. 185 *Madison Assocs. v. Ryan*, 174 A.D.2d 461, 571 N.Y.S.2d 244 (1st Dep't 1991). The execution of a promissory note by the assignee to the landlord may have acted to create a new tenancy, thereby releasing the original tenant from further liability. The landlord's motion to dismiss was denied because it did not establish as a matter of law that it did not intend to create a new tenancy with the assignee. *St. Louis Twin Oaks Assocs., I Ltd. P'ship v. Exec. Office Network, Ltd.*, 804 F. Supp. 1127 (E.D. Mo. 1992).

474. *Gavrin Assocs. v. Allied Paper Co.*, N.Y.L.J., Jan. 9, 1976, at 6, col. 2 (N.Y. Sup. Ct.).
475. *Schieffelin v. Mocan Realty Corp.*, 283 N.Y. 606, 28 N.E.2d 24 (1940); *Annots.*, 99 A.L.R. 1238, 1247 (1935).
476. *500 Fifth Ave., Inc. v. Nielsen*, 6 Misc. 2d 392, 288 N.Y.S.2d 970 (Civ. Ct. 1968).
477. *Gholson v. Savin*, 137 Ohio St. 551, 31 N.E.2d 858, 139 A.L.R. 75 (annot. at 85) (1941).
478. *Barfield Mercantile Co. v. Connery*, 150 Ark. 428, 234 S.W. 481 (1921); *Annots.*, 99 A.L.R. 1238, 1247 (1935). *Compare* text *supra* at note 356. Merger ends the tenant's liability for rent. *Buell v. Simon Newman Co.*, 154 F.2d 35 (9th Cir. 1946); *Lansing v. Pine*, 4 Paige Ch. 639 (N.Y. 1834). Where tenant acquires part of the reversion, the rent is to be apportioned. *Higgins v. Cal. Petroleum & Asphalt Co.*, 109 Cal. 304, 41 P. 1087 (1895); *Hill v. Reno*, 112 Ill. 154, 54 Am. Rep. 222 (1885); *Schick v. Davenport Realty Co.*, 200 Iowa 997, 205 N.W. 782 (1925). *See generally* chapter 39.
479. *Silver v. Friedman*, 18 N.J. Super. 367, 87 A.2d 336 (1952).
480. *Gerber v. Pecht*, 15 N.J. 29, 104 A.2d 41 (1954); *Portnoff v. Medinkowitz*, 27 N.J. Super. 301, 99 A.2d 364 (1953); *Morgan v. Smith*, 70 N.Y. 537 (1877); 10 S. WILLISTON, *CONTRACTS* § 1242 (3d ed. 1957); 49 AM. JUR. 2D *Landlord and Tenant* § 827 (1995 rev.). *See also* chapter 35 at note 68 *et seq.*

same principle is applicable to subletting.⁴⁸¹ It is also applicable to a reletting by a landlord under a “survival clause,” which empowers a landlord to relet after breach by the tenant and hold the original tenant liable for any deficit. The rationale of this is that a landlord who could authorize a tenant to assign or sublet, directly or by agent, may act as agent for this purpose under the survival clause.⁴⁸² The rule under which the original tenant is bound by a consent of the landlord, which is given pursuant to the lease, is of general application. It has been applied to landlord’s consent given to assignees to alter its premises.⁴⁸³

§ 7:5.3 Tenant-Assignor’s Remedies to Enforce Payment of Consideration for Assignment

A tenant’s interest in a lease may be assigned for a substantial consideration. If payment of this consideration is to be postponed, the assignor should consider the remedies for enforcing its payment. It has already been noted that a tenant-assignor who has paid the rent or discharged other tenant obligations, has a right of reimbursement from an assignee of the lease, but that this remedy does not include a right to repossess the premises.⁴⁸⁴ If a possessory remedy is desired, a sublease should be used rather than an assignment.⁴⁸⁵ Assignment imports a complete divestiture of the assignor’s interest, which leaves him with no reversion and, therefore, no possessory interest.⁴⁸⁶ This limitation of the remedy for reimbursement must be deemed similarly applicable to payment of the consideration for an assignment of the lease.⁴⁸⁷ There is some authority that a conditional assignment leaves tenant-assignor with a reversion that is enforceable in possessory proceedings though it is doubtful that these are ordinary landlord-tenant summary proceedings, and that a reservation of this nature is implied when an assignment of lease accompanies tenant’s sale of a business with reservation of security attached to the business assets sold.⁴⁸⁸ The

481. Sinberg v. Davis, 285 Pa. 426, 132 A. 287 (1926).

482. Morgan v. Smith, 70 N.Y. 537 (1877); Ralph v. Deiley, 293 Pa. 90, 141 A. 640, 61 A.L.R. 763 (1928); Annots., 99 A.L.R. 1238, 1247 (1935).

483. Carrano v. Shoor, 118 Conn. 86, 171 A. 17 (1934); Luthin v. Parodneck, 140 Misc. 129, 250 N.Y.S. 139 (Mun. Ct. 1931); Annots., 99 A.L.R. 1238, 1246 (1935).

484. Text *supra* at note 457.

485. Text *infra* at note 499.

486. Sections 7:7.1, 7:4.2, 7:4.3, 7:4.3[A].

487. Text *supra* at note 398.

488. See Olin v. Goehler, 39 Wash. App. 688, 694 P.2d 1129 (1985), and the Washington cases cited. See also Nipet Realty, Inc. v. Melvin’s Rest. & Bar, Inc., 67 Misc. 2d 790, 327 N.Y.S.2d 2 (Civ. Ct. 1971). But as to *Nipet Realty*, cf. Anjo Rest. Corp. v. Sunrise Hotel Corp., 98 Misc. 2d 597, 414 N.Y.S.2d 265 (Sup. Ct. 1979), discussed *supra* in note 457.

concept here differs from that of a sublease considered in note 370 above. This concept may be useful to a tenant-assignor after the transaction if no other remedy is available. It is no substitute for the practicality of a sublease. Tenant-assignor's right to recover installments of consideration for the assignment was not affected by assignee's prompt cancellation of the lease for a new lease from the same landlord or for the assignee's subsequent claims against the landlord.⁴⁸⁹

In an Illinois case, a tenant who had recovered judgment against an assignee for the balance of the purchase price of the assigned lease brought supplementary proceedings to enforce payment of the judgment. The leased premises were improved and were occupied by rent-paying occupants. The court strongly indicated the plaintiff-assignor was entitled to part of the cash flow of the premises until the judgment was satisfied. The court found it unnecessary to determine if the assigned lease was subject to a lien in plaintiff's favor.⁴⁹⁰ In other cases the assignor of a lease has had the benefit of a vendor's lien.

Many states imply an equitable lien in favor of the seller of real property for the unpaid purchase price where the seller has taken no other security. This lien comes into existence regardless of any agreement therefor and regardless of any intention to claim a lien, unless an intention to the contrary is shown. Its basis is a belief that the purchaser should not in good conscience keep the property without payment.⁴⁹¹ In a few states an express vendor's lien may be reserved.⁴⁹² The implied lien is generally inapplicable to personal property⁴⁹³ but has been applied to an assignment of a lease, despite the characterization of a lease as a chattel real and personal property.⁴⁹⁴ The distinction has been explained on the ground that tangible personal property may pass from hand to hand with possession being strong evidence of ownership; to permit a seller to follow such property

489. Terminal Cent., Inc. v. Henry Modell & Co., 212 A.D.2d 213, 628 N.Y.S.2d 56 (1st Dep't 1995).

490. Cmty. Disc. Ctrs., Inc. v. Oakbrook Guido's, Inc., 68 Ill. App. 3d 466, 386 N.E.2d 67, 24 Ill. Dec. 863 (1979). Defendant claimed unsuccessfully that the lease in issue had merged into the fee. See chapter 39, note 9. The court affirmed the lower court in part, vacated the lien and remanded the case for joinder of additional parties. Cf. head landlord's right to subrents, text *infra* at note 511.

491. See FRIEDMAN ON CONTRACTS § 7:14; 5 H. TIFFANY, REAL PROPERTY § 1567 (3d ed. 1939); Annot., 91 A.L.R. 440 (1941); 77 AM. JUR. 2D *Vendor and Purchaser* §§ 431-73 (1975); 92 C.J.S. *Vendor and Purchaser* §§ 377-460 (1955).

492. FRIEDMAN ON CONTRACTS § 7:14; 5 H. TIFFANY, REAL PROPERTY § 1571 (3d ed. 1939); Annot., 91 A.L.R. 440 (1941); 77 AM. JUR. 2D *Vendor and Purchaser* §§ 464-73 (1975); 92 C.J.S. *Vendor and Purchaser* § 378(b) (1955).

493. FRIEDMAN ON CONTRACTS § 7:14; 77 AM. JUR. 2D *Vendor and Purchaser* § 451 (1975); 92 C.J.S. *Vendor and Purchaser* § 399(c) (1955).

494. Johnson v. Jackson, 152 Ind. App. 643, 284 N.E.2d 530 (1972).

into the hands of third persons would easily lead to frauds. On the contrary, a lease, despite its characterization as personal property, is “an interest in realty,” “an estate in the land.”⁴⁹⁵ A weakness of the equitable lien is that it may be cut off by a transfer to an innocent purchaser for value without notice of its existence.⁴⁹⁶

Better than an equitable lien for the assignor is a purchase-money leasehold mortgage to be taken by the assignor at the time of the assignment. This requires a lease with provisions appropriate for a leasehold mortgage.⁴⁹⁷ It would be well for a tenant to anticipate this possibility when negotiating the lease. The fact that another leasehold mortgage, intended to be a prior lien, is involved, does not of itself preclude the creation of a junior purchase-money leasehold mortgage. In this situation provisions should be added to the purchase-money mortgage that are typical of junior mortgages.⁴⁹⁸

§ 7:6 Form of Tenant’s Assignment of Lease with Consent by Landlord and Assumption by Assignee

THIS AGREEMENT made the ____ day of _____, 20__,
among _____ hereinafter referred to as “Landlord,”

—and—

_____ hereinafter referred to as “Assignor,”

—and—

_____ hereinafter referred to as “Assignee,”

WITNESSETH, WHEREAS: On or about _____, 20__,
Landlord, as landlord, and Assignor, as tenant, entered into a lease,
dated said date, with respect to premises _____;

495. Oliver v. Mercaldi, 103 So. 2d 665, 67 A.L.R.2d 1089 (annot. at 1094) (Fla. Dist. Ct. App. 1958); Bratt v. Bratt, 21 Md. 578 (1864); Richardson v. Bowman, 40 Miss. 782 (1866); Turkes v. Reis, 14 Abb. N. Cas. 26 (N.Y. 1882); Phyfe v. Wardell, 5 Paige 268, 28 Am. Dec. 430 (N.Y. 1835); Cole v. Smith, 24 W. Va. 287 (1884) (lien expressly reserved); 92 C.J.S. *Vendor and Purchaser* § 385, at 326 (1955). *Contra* Cade v. Brownlee, 15 Ind. 369, 77 Am. Dec. 95 (1860). The lien was held to attach to a renewal term provided for in the original lease. The renewal was deemed a continuation of the original term. *Phyfe*, 5 Paige 268.

496. Choate v. Tighe, 57 Tenn. (10 Heisk.) 621, 624–25 (1873); 5 H. TIFFANY, REAL PROPERTY § 1567, n.91 (3d ed. 1939).

497. See sections 7:8.1–7:8.3, particularly section 7:8.3.

498. See FRIEDMAN ON CONTRACTS § 3:7.

Assignor desires to assign, and Assignee desires to acquire Assignor's interest in and to said lease;

The aforementioned lease provides, among other things, that the said lease shall not be assigned without the landlord's consent in writing,

NOW, THEREFORE, in consideration of the sum of One Dollar (\$1.00) by each party hereto to the other in hand paid, the receipt of which is hereby acknowledged, and of other good and valuable consideration, the parties hereto hereby covenant and agree as follows:

1. Assignor assigns to Assignee, as of _____, 20__, all Assignor's right, title and interest in and to said lease, together with the rent security in the sum of \$_____ deposited thereunder.

Assignor covenants that it is not in default under said lease, that said lease is not encumbered by any prior transfer, assignment, mortgage or any encumbrance, and that Assignor has full and lawful authority to assign said lease.

2. Assignee assumes the said lease as of _____, 20__, and will perform and observe all the covenants and conditions therein contained on Assignor's part to be performed and observed, which shall accrue from and after said last mentioned date. Such liability of Assignee under said lease shall be joint and several with Assignor.
3. Landlord consents to the aforesaid assignment of said lease by Assignor to Assignee upon the express condition that no further assignment of said lease shall hereafter be made without prior written consent of the Landlord.
4. Assignor shall remain liable for the performance and observance of the covenants and conditions in said lease contained on its part to be performed and observed, such liability to be joint and several with that of Assignee, as aforesaid.

As between Assignor and Assignee, Assignee's said liability under said lease shall be primary, and Assignee shall hold Assignor harmless from all further liability thereunder.

5. This agreement may not be changed, modified, discharged or terminated orally or in any other manner than by an agreement in writing signed by the parties hereto or their respective successors and assigns.

IN WITNESS WHEREOF, the parties hereto have duly executed or caused these presents to be executed the day and year first above written.

[executions and acknowledgments to be added]

§ 7:6.1 Comments on the Foregoing Form

In article 1, second paragraph, the tenant-assignor covenants that he is not in default under the lease, the lease is not encumbered, and he has full authority to assign.

Article 2 includes an assumption by the assignee, of the tenant-obligations, as of a fixed date (usually fixed as of the effective date of the assignment), thereby negating any liability for any matter preceding the date specified.

Landlord's consent to the assignment, included in article 3, reserves landlord's right to forbid future assignments, and avoids a waiver of landlord's rights in this respect.

The provisions of article 4 confirm the case law.

If the assigned lease is guaranteed, the written consent of the guarantor is to be added, with a statement that the guaranty continues in effect.

§ 7:7 Relations Between Landlord, Tenant, and Subtenant

§ 7:7.1 In General

A sublease creates the relation of landlord and tenant between the sublandlord and subtenant.⁴⁹⁹ Between head landlord and subtenant the sublandlord stands as a buffer. The tenant sublandlord remains

499. Wright v. Mr. Quick, 109 Ill. 2d 236, 486 N.E.2d 908, 93 Ill. Dec. 375 (1985); Marcellus v. K.O.V., Inc., 5 Kan. App. 2d 294, 615 P.2d 170 (1980); Krance v. Faeh, 215 Neb. 242, 338 N.W.2d 55 (1983); Wehrle v. Landsman, 23 N.J. Super. 40, 92 A.2d 525 (1952); Annot., 24 A.L.R.2d 707 (1952); 49 AM. JUR. 2D *Landlord and Tenant* § 1179 (1995 rev.); 51C C.J.S. *Landlord and Tenant* §§ 48(2), 49 (1968). A prime tenant, who transfers the prime lease to a third party, remains liable to his subtenant to the same extent as a prime landlord to his tenant after conveying the fee to a third party. Scott v. Mullins, 211 Cal. App. 2d 5, 127 Cal. Rptr. 269 (2d Dist. 1962). See also chapter 29 at note 85. A typical gasoline station sublease, from an oil company, requiring subtenant to use landlord's products and uniforms and follow landlord's instruction, has been held to create a landlord-tenant, not an employer-employee, relation. Edwards v. Neely Oil, Inc., 556 S.W.2d 114 (Tex. Civ. App. 1977). The relation may vary with the amount of the control reserved by the oil company. See Exxon Corp. v. Tidwell, 867 S.W.2d 19 (Tex. 1993). Cf. chapter 15 at note 56 *et seq.* But a summary disposition of this was held error. Juarbe v. City of Philadelphia, 288 Pa. Super. 339, 431 A.2d 1073 (1981) (holding inapplicable apparent authority

liable under the terms of the prime lease as if there were no sublease.⁵⁰⁰ He is not liable to the head landlord for subrents that exceed the head rent.⁵⁰¹ Between head landlord and subtenant there is no privity of either estate or contract.⁵⁰² The head landlord's receipt of rent directly from the subtenant does not negate the existence of a sublease.⁵⁰³ But it may impose some additional responsibility on the prime landlord.⁵⁰⁴ The head landlord's receipt of rent from a subtenant does not preclude him from terminating the prime lease for

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- and also agency by estoppel). Sublandlord's inability to comply with his covenant to obtain head landlord's permission for alterations by subtenant permitted subtenant to cancel. *Bourgeois, Dupuis, Wright & Cohen v. Hayes*, 457 So. 2d 231 (La. Ct. App. 1984). *Cf.* as to independence of covenants. Chapter 1 at note 122; Index, Independent covenants. Holding over by a subtenant gives the sublessor the same rights as a prime landlord would have against a prime tenant who holds over. *Econ. Rentals v. Garcia*, 112 N.M. 748, 760–61, 819 P.2d 1306, 1318–19 (1991).
500. *Tefft v. Apex Pawnbroking & Jewelry Co.*, 75 A.D.2d 891, 428 N.Y.S.2d 52 (2d Dep't 1980); *Sinberg v. Davis*, 285 Pa. 426, 132 A. 287 (1926).
501. *Joseph Bros. Co. v. F.W. Woolworth Co.*, 641 F. Supp. 822 (N.D. Ohio 1985). Tenant's right to a partial rent reduction after a fire was not affected by tenant's right to full subrent from its subtenant. *D.E. Props. Corp. v. Food For Less*, 859 S.W.2d 197 (Mo. Ct. App. 1993).
502. *Pepper v. Pyramid Oil & Gas Corp.*, 287 So. 2d 620 (La. Ct. App. 1973); *Ashley v. Young*, 79 Miss. 129, 29 So. 822 (1901); *Wehrle v. Landsman*, 23 N.J. Super. 40, 92 A.2d 525 (1952); *First Am. Nat'l Bank v. Chicken Sys.*, 510 S.W.2d 906 (Tenn. 1974); *Digby v. Halley*, 574 S.W.2d 186, 189 (Tex. Civ. App. 1978); *Ferrier, Can There Be a Sublease for the Entire Unexpired Portion of a Term?*, 18 CAL. L. REV. 1, 2 (1929); 49 AM. JUR. 2D *Landlord and Tenant* §§ 1183–85 (1995 rev.); 51C C.J.S. *Landlord and Tenant* § 48(1)b (1968). *But see Cordonier v. Cent. Shopping Plaza Assocs.*, 82 Cal. App. 3d 991, 147 Cal. Rptr. 558 (2d Dep't 1978). *But see Melchor Inv. Co. v. Rolm Sys.*, 3 Cal. App. 4th 587, 4 Cal. Rptr. 2d 343 (6th Dist. 1992), discussed *infra* in note 528.
503. *Rotruck v. Grandma's Biscuits, Inc.*, 243 Ga. 512, 255 S.E.2d 36 (1979); *Anderson v. Ries*, 222 Minn. 408, 24 N.W.2d 717, 167 A.L.R. 1033 (1946); *Employees' Consumer Org., Inc. v. Gorman's, Inc.*, 395 S.W.2d 162 (Mo. 1965); *Leibowitz v. Bickford's Lunch Sys.*, 241 N.Y. 489, 150 N.E. 525 (1926); *Neal v. Craig Brown, Inc.*, 356 S.E.2d 912 (S.C. Ct. App. 1987); 1 H. TIFFANY, REAL PROPERTY § 124 (3d ed. 1939). *See* note 356, *supra*. *Lusk Operating Co. v. Gelardin*, 186 Misc. 817, 61 N.Y.S.2d 714 (App. Term 1946), held that landlord's receipt of rent directly from the subtenant did not constitute acceptance of the subtenant as an assignee or subtenant but the decision merely gave effect to a provision in the lease.
504. When head landlord's agent, who had been collecting rent from the subtenant, failed to collect subrentals for eight months or inform the prime tenant of this, this dereliction was attributed to the head landlord and held to excuse the prime tenant from liability for rent for this period. *Fisk Bldg. Assocs. v. Cont'l Am. Ins. Co.*, 362 N.Y.S.2d 315 (Civ. Ct. 1974). *Compare Broad Props., Inc. v. Wheels, Inc.*, 43 A.D.2d 276, 351 N.Y.S.2d 15 (1974), discussed in chapter 5, note 81.

nonpayment.⁵⁰⁵ When a landlord repudiates the prime lease the tenant/sublandlord is no longer obligated to pay rent.⁵⁰⁶ A subtenant has been said to be under a “duty” to ascertain the terms of the head lease.⁵⁰⁷ This means merely that he is charged with knowledge of its terms.⁵⁰⁸ A subtenant whose lease was expressly subject to the head lease was held to have no claim against his sublandlord by reason of being evicted on expiration of the head lease, but before the expiration of the sublease.⁵⁰⁹ But making the sublease expressly subject to the head lease does not thereby incorporate in the sublease the terms of the head lease,⁵¹⁰ or make the subtenant liable under the covenants of the tenant under the head lease.⁵¹¹ However, where a sublessee was making payments to the sublessor on a present interest in a conditional future estate and the condition precedent was a change in

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505. *In re Ferris*, 415 F. Supp. 3 (W.D. Okla. 1976). Where master tenant is insolvent, master landlord has the right to collect sublease rents but, as against third parties, must take action to “activate” its implied priority claim over such rents. *Haw. Nat’l Bank v. Cook*, 58 P.3d 60 (Haw. 2002) (citing the text). Note that in this case, unlike many of the other cited cases, the landlord’s rights were not express, but simply an implied equitable lien on the rents collected. They were preferred over the claims of formal recorded assignee of rents. However, the court found that the landlord’s rights took priority only as of the time the landlord “activated” its claim by notice to the tenant. Rents collected prior to activation by the rent assignee were retained by the assignee to be applied to the debt the assignment secured.
506. A commercial lease tenant who has sublet to another is not obligated to tender rent payments to the landlord after landlord has repudiated the lease by failing in its performance to the subtenant. *KMT Enter., Inc. v. Nyssen*, 959 P.2d 640 (Or. Ct. App. 1998).
507. *Pedro v. Potter*, 197 Cal. 751, 242 P. 926, 42 A.L.R. 1165 (1926).
508. *Faucet v. Provident Mut. Life Ins. Co.*, 244 Ala. 308, 13 So. 2d 182 (1943); *Pedro*, 197 Cal. 751; *Moran v. Commonwealth Edison Co.*, 74 Ill. App. 3d 964, 393 N.E.2d 1269, 30 Ill. Dec. 922 (1979); 51C C.J.S. *Landlord and Tenant* §§ 47, 48(1)a (1968). A subtenant who was aware of a head lease but not of the head landlord’s cancellation right, that was exercised, had a right to damages against the sublandlord. *Occidental Sav. & Loan Ass’n v. Bell Fed. Credit Union*, 218 Neb. 519, 357 N.W.2d 198 (1984).
509. *Georgeous v. Lewis*, 20 Cal. App. 255, 128 P. 768 (1912). Query: If the subordination of the sublease, vis-à-vis the prime landlord, should have barred any claim subtenant might have had against sublandlord on a covenant of quiet enjoyment in the sublease. *Compare* section 7:7.4[B].
510. Provisions in a prime lease, for apportionment of rent paid in advance, after termination of the lease by fire, did not entitle the subtenant to a similar apportionment. *Pedro*, 197 Cal. 751. Same, as to provision for attorneys’ fees. *Enright v. Mintz*, 116 Misc. 2d 1084, N.Y.S.2d 180 (Civ. Ct. 1982).
511. *In re Windsor Park Nursing Home*, 850 N.Y.S.2d 342 (Sup. Ct. 2008) (making sublease “subject to” prime lease does not incorporate attorney’s fee provision into sublease so as to benefit sublandlord in an action for rent against subtenant); *Coles Trading Co. v. Spiegel, Inc.*, 187 F.2d 984, 24 A.L.R.2d 702 (9th Cir. 1951) (subtenant not liable for additional rent, based on increase in real estate taxes, required of tenant under prime

zoning to allow development of the property, the “rental” payments were found to be payments for the right to develop the property and that the sublessee had assumed the risk that the condition precedent might never occur.⁵¹² The subtenant is nevertheless bound by restrictions included in the head lease, as against the maintenance of signs,⁵¹³ or against the conduct of a business competing with that of another tenant.⁵¹⁴ If the restriction is in the head lease, knowledge thereof is imputed to the subtenant.⁵¹⁵ A modification of a head lease does not affect a sublease executed before the modification.⁵¹⁶

A restriction against assignment, included in a head lease, does not bar assignment by a subtenant.⁵¹⁷

For this reason landlord may want to include a restriction against assignment, mortgaging, or further subletting under a sublease.⁵¹⁸

The insulation of landlord and subtenant affects the relations between three parties—landlord, tenant, and subtenant. Generally, landlord has no enforceable rights against subtenant under either the prime lease or sublease and, conversely, subtenant has no rights against landlord under either the sublease or the prime lease.

lease); *S.T. McKnight Co. v. Cent. Hanover Bank & Trust Co.*, 120 F.2d 310 (8th Cir. 1941). “Subject to the agreements of the lease” are words of qualification, not of contract. *Consol. Coal Co. v. Peers*, 166 Ill. 361, 46 N.E. 1105, 38 L.R.A. 624 (Sup. Ct. 1896).

512. The prime lease gave the lessee the right to develop the property upon affecting a change in zoning and no rent or real estate taxes were to be paid until the zoning changes were approved. The court found this to be a present interest in a future estate that could be transferred to a sublessee. *Jobco-Mitchel Field, Inc. v. Lazarus*, 548 N.Y.S.2d 700 (App. Div. 1989).

513. *Bartholdi Realty Co. v. Robard Realty Co.*, 156 A.D. 528, 141 N.Y.S. 353 (1st Dep’t 1913); *Alzo Adver., Inc. v. Indus. Props. Corp.*, 722 S.W.2d 524 (Tex. Civ. App. 1986). A sublease making provisions of the head lease “binding” on subtenant raised an issue of fact whether subtenant was liable for escalation rent included in the head lease. *NPS Eng’rs & Constructors, Inc. v. Underweiser*, 141 A.D.2d 412, 529 N.Y.S.2d 493 (1st Dep’t 1988), *modified*, 73 N.Y.2d 996, 539 N.E.2d 100, 541 N.Y.S.2d 344 (1989).

514. *Rosen v. Wolff*, 152 Ga. 578, 110 S.E. 877 (1922).

515. *Id.* at 586, 110 S.E. at 881.

516. *S&D Grp., Inc. v. Talamas*, 710 S.W.2d 680 (Tex. Civ. App. 1986).

517. *Krasner v. Transcon. Equities, Inc.*, 70 A.D.2d 312, 420 N.Y.S.2d 872 (1st Dep’t 1979) (though sublease was expressly subject to head lease). *Boston Props. v. Pirelli Tire Corp.*, 185 Cal. App. 3d 56, 185 Cal. Rptr. 56 (1982), is *contra*. *Boston Props.*, relying on California cases that reject the rule of *Dumppor’s Case* (see text *supra* at note 318 *et seq.*), held that a covenant against subletting, included in the head lease, proscribed further subletting despite the head landlord’s consent to one sublease. In so holding, *Boston Props.* refuses to distinguish between a transfer of the estate of a head tenant and that of a subtenant.

518. See the clause in text *supra* at note 125.

Furthermore, the nature of the relationship between landlord and subtenant is such that subtenant may be denied certain equitable remedies that would otherwise be available to an assignee under a prime lease. For example, where a tenant defaulted under a prime lease, subtenant was not entitled to a right to cure and avoid inequitable forfeiture.^{518.1}

A subtenant is not liable to the head landlord under the head lease.⁵¹⁹ He is not liable for rent⁵²⁰ or breach of other covenants.⁵²¹ There are three general exceptions to this. First, if the prime tenant is insolvent the head landlord may resort to the subrents—and has a preference therein ahead of other creditors of the prime tenant—to the extent necessary to satisfy the prime tenant's liability under the head lease.⁵²² Second, a subtenant may be liable directly to the head

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- 518.1. *Abernathy v. Adous*, 2004 Ark. App. LEXIS 167 (Ark. Ct. App. Feb. 25, 2004) (holding that sublessees are not entitled to the same considerations against inequitable forfeiture that an assignee gets).
519. *Haynes v. Eagle-Picher Co.*, 295 F.2d 761 (10th Cir. 1961), *cert. denied sub nom. Eagle-Picher Co. v. Haynes*, 369 U.S. 828 (1962) (collecting authorities); H. TIFFANY, REAL PROPERTY § 124 (3d ed. 1939); 49 AM. JUR. 2D *Landlord and Tenant* § 1184 (1995 rev.).
520. *J.E. Martin, Inc. v. Interstate 8th St.*, 41 Colo. App. 203, 582 P.2d 299 (1978); *Ashley v. Young*, 79 Miss. 129, 29 So. 822 (1901); *Davis v. Morris*, 36 N.Y. 569 (1867); 49 AM. JUR. 2D *Landlord and Tenant* § 1184 (1995 rev.); 52 C.J.S. *Landlord and Tenant* § 529b(1) (1968). *But see* N.J. REV. STAT. 2A:42-4. In *Xerox Corp. v. Listmark Computer Sys.*, 142 N.J. Super. 232, 361 A.2d 81 (1976), a subtenant was held liable to the prime landlord for 3.4% of the prime rent, this being the pro rata share of the subtenant. *Cf. In re Ferris*, 415 F. Supp. 33 (W.D. Okla. 1976); chapter 16, note 32.
521. *Flat-Marks Realty Corp. v. Silver's Lunch Stores, Inc.*, 74 F.2d 210 (2d Cir. 1934), *cert. denied*, 294 U.S. 731 (1935); *Campbell v. Am. Limestone Co.*, 109 F. Supp. 741, 747 (E.D. Tenn. 1951); *Hartman Ranch Co. v. Associated Oil Co.*, 10 Cal. 2d 232, 73 P.2d 1163 (1937); *Mayhew v. Hardesty*, 8 Md. 479, 495 (1855); *Field v. Mills*, 33 N.J.L. 254, 257–58 (1869); *LaVack v. Nat'l Stores, Inc.*, 124 A.D.2d 352, 507 N.Y.S.2d 293 (3d Dep't 1986) (not liable under indemnity in head lease); *Tefft v. Apex Pawnbroking & Jewelry Co.*, 75 A.D.2d 891, 428 N.Y.S.2d 52 (2d Dep't 1980); *Martin v. O'Connor*, 43 Barb. 514 (N.Y. 1865); *Crowe v. Riley*, 63 Ohio St. 1, 57 N.E. 956 (1900); 1 H. TIFFANY, REAL PROPERTY § 124 (3d ed. 1939); 49 AM. JUR. 2D *Landlord and Tenant* § 1184 (1995 rev.). *But see* text *supra* at notes 514–15, and see note 525, *infra*.
522. *Cent. Manhattan Props., Inc. v. D.A. Schulte, Inc.*, 91 F.2d 728 (2d Cir. 1937), *noted in* 24 VA. L. REV. 321 (1937); *Young v. Wyatt*, 130 Ark. 371, 197 S.W. 575 (1917); *City Inv. Co. v. Pringle*, 69 Cal. App. 416, 231 P. 355 (1924), *later decision*, 73 Cal. App. 782, 239 P. 302 (1925); *S.S. Kresge Co. v. Twelve Seventy-Five Woodward Ave. Corp.*, 270 Mich. 218, 258 N.W. 252 (1935); *Shaw v. Creedon*, 133 N.J. Eq. 397, 32 A.2d 721 (Ch. 1943); *Otis v. Conway*, 114 N.Y. 13, 20 N.E. 628 (1889); 49 AM. JUR. 2D *Landlord and Tenant* § 1184 (1995 rev.). *See also* 40 COLUM. L. REV. 1049, 1055 (1940). This preference may be analogized to a vendor's lien. FRIEDMAN ON CONTRACTS § 7:1.4. It may be questioned if a landlord without an

landlord where the prime tenant is a subsidiary or instrument of the subtenant, in circumstances that justify piercing the corporate veil, particularly if representations were made that the liabilities were those of the parent.⁵²³ Finally, the head landlord may recover directly against the subtenant, as a third-party beneficiary, where the subtenant has assumed the tenant obligations under the head lease.⁵²⁴ Though the head landlord may not recover against a subtenant on covenants included in the head lease, except as aforementioned, the head landlord may restrain or evict the subtenant by reason of breach by subtenant of the covenants in the head lease.⁵²⁵ A lease that contemplates subletting by the prime tenant generally includes a collateral

express reservation of a lien should be preferred to other creditors of a tenant. Compare Friedman, *Creation and Effect of Personal Liability on Mortgage Debts in New York*, 50 YALE L.J. 244, 231–32 (1940). But see section 7:5.3. A bank, with an express lien, prevailed over the head landlord for subrents. The rule mentioned in the text was apparently not raised. *In re Sabre Farms, Inc.*, 27 B.R. 532 (D. Or. 1982). Any right of prime landlord to recover against subtenant for rent or otherwise, as mentioned in the text at this note or notes 23, 24, will be terminated by termination of the prime lease. Section 7:7.3 (“if a sandwich lease is broken the space tenants may walk”), unless provision is made for subtenant to attorn to the prime tenant. See notes 593–94, *infra*.

523. *Weisser v. Mursam Shoe Corp.*, 127 F.2d 344, 145 A.L.R. 467 (2d Cir. 1942); *C.H. Little & Co. v. Gay Apparel Corp.*, 108 F. Supp. 762 (S.D.N.Y. 1952). For a decision refusing to pierce the corporate veil in this situation, see *Freight Terminals, Inc. v. Ryder Sys., Inc.*, 326 F. Supp. 881, 885 (S.D. Tex. 1971). Normally, where the parent corporation does not appear as tenant or guarantor it is not liable under a lease. *Donnelly v. Marriott Corp.*, 266 So. 2d 183 (Fla. Dist. Ct. App. 1972). A subtenant, whose stockholders and directors were common with that of the prime tenant, tried without success to apply the converse of the rule stated in the text. *Arnold’s of Miss., Inc. v. Clancy*, 251 Miss. 613, 171 So. 2d 152 (1965). See also *infra* note 535. A parent of a corporate tenant was liable under the lease for undercapitalizing and stripping its subsidiary of assets. *Collet v. Am. Nat’l Stores, Inc.*, 708 S.W.2d 273 (Mo. Ct. App. 1986). See also chapter 30 at note 21.
524. *C.R. Anthony Co. v. Wal-Mart Props., Inc.*, 54 F.3d 514 (8th Cir. 1995) (Arkansas law); *Hartman Ranch Co. v. Associated Oil Co.*, 10 Cal. 2d 232, 73 P.2d 1163 (1937); *Jones v. El Paso Natural Gas Prods. Co.*, 391 S.W.2d 748 (Tex. Civ. App. 1965); *Shearer v. United Carbon*, 143 W. Va. 482, 103 S.E.2d 883 (1958); Note, 40 COLUM. L. REV. 1049, 1058 (1940); 51C C.J.S. *Landlord and Tenant* § 48(1)b; 52 C.J.S. *Landlord and Tenant* § 529b(1) (1968). Subtenant’s assumption, required by the terms of the prime lease, creates privity between prime landlord and subtenant. *Cordonier v. Cent. Shopping Plaza Assocs.*, 82 Cal. App. 3d 991, 147 Cal. Rptr. 558 (2d Dep’t 1978). Cf. text *supra* at note 502.
525. *Wilson-Broadway Bldg. Corp. v. Nw. Elevated R.R. Co. & Chi. N. Shore & Milwaukee R.R.*, 225 Ill. App. 306 (1922). Head landlord recovered against subtenant for holding over. *Tedford v. Roswell Vill. Ltd.*, 173 Ga. App. 780, 328 S.E.2d 403 (1985). But see *Emro Mktg. Co. v. Plemmons*, 855 F.2d 528 (8th Cir. 1988), discussed in chapter 16, note 97.

assignment of subrents to the prime landlord, the assignment to become effective on default under the prime lease or its termination for breach. This assignment has been assimilated to the rent pledge included in mortgages in those states that follow the lien theory of mortgages. Following this mortgage rule, it is held that mere nonpayment of rent by the prime tenant is insufficient to activate the assignment.⁵²⁶ A form for this is set forth below.⁵²⁷

The insulation between prime landlord and subtenant prevents subtenant from enforcing against prime landlord any rights given in the prime lease to the prime tenant.⁵²⁸ Subtenant may not enforce against the prime landlord a right of renewal given in the prime lease

526. Childs Real Estate Co. v. Shelburne Realty Co., 23 Cal. 2d 263, 143 P.2d 697 (1943); Lincoln Crest Realty, Inc. v. Standard Apartment Dev. Co., 61 Wis. 2d 4, 211 N.W.2d 501 (1973). In *Lincoln* the prime tenant secured a bank loan by making an assignment *in praesenti* to the bank of subrents, making this assignment expressly subordinate to the assignment included in the prime lease. The bank prevailed over the prime landlord with respect to subrents collected before termination of the lease. *Compare* text *infra* at note 595 and at note 632.

527. The following is the form; *cf.* the form in note 595, *infra*.

SECTION [18.07.] Effective as of the date of the happening of an Event of Default, Lessee hereby assigns to Lessor all of its right, title and interest in and to all present and future subleases and all rents due and to become due thereunder. After the effective date of such assignment, Lessor shall apply any net amount collected by it from sublessees to the net rent or additional rent due under this Lease. No collection of rent by Lessor from an assignee of this Lease or from a sublessee shall constitute a waiver of any of the provisions of this Article or an acceptance of the assignee or sublessee as a tenant or a release of Lessee from performance by Lessee of its obligations under this Lease. In the event of the failure of any sublessee to pay subrent to Lessor pursuant to the foregoing assignment after the happening of an Event of Default, any such rent thereafter collected by Lessee shall be deemed to constitute a trust fund for the benefit of Lessor. In the event, however, that Lessee shall have remedied such Event of Default, such assignment shall be and deemed to be terminated and Lessee shall be deemed to be reinstated with all of the rights with respect to said subleases and rents. Despite any such reinstatement the provisions of this article shall apply to any subsequent default or defaults of Lessee.

528. Handleman v. Pickerill, 84 Cal. App. 214, 257 P. 890 (1927); Employees' Consumer Org., Inc. v. Gorman's, Inc., 395 S.W.2d 162 (Mo. 1965); 51 C.C.J.S. *Landlord and Tenant* § 48(1) (1968). A prime lease that required insurance policies with waiver of the insurer's right of subrogation against the tenant was held intended to afford similar protection to the subtenant. *Holiday Vill. Shopping Ctr. v. Osco Drug, Inc.*, 315 F. Supp. 171 (D. Mont. 1970). *But see* *Marchese v. Standard Realty & Dev. Co.*, 74 Cal. App. 3d 142, 141 Cal. Rptr. 370 (1977), where subtenant recovered on the covenant of quiet enjoyment included in the head lease. The head lease contemplated this sublease and subtenant was an added signer of the head

to the prime tenant⁵²⁹ except where this right was expressly assigned to the subtenant.⁵³⁰ But if the subtenant has a right of renewal for a term beyond that of the prime lease, subtenant has a claim against the prime tenant for a failure to exercise a renewal right on its part⁵³¹ even if the prime tenant receives a new and different lease or has no renewal right at all.⁵³² Subtenant may not enforce against prime landlord prime tenant's purchase option,⁵³³ an obligation of the prime landlord to insure for the benefit of landlord and tenant,⁵³⁴ to repair,⁵³⁵ to

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- lease. (Lease and letter from counsel.) Subtenant enforced a duty to arbitrate, which was included in the prime lease but not the sublease. Subtenant had assumed many of the prime tenant's obligations but the relevance of this was not specified. The court stated there was privity of estate between prime landlord and subtenant, a matter at variance with general law. (See note 502, *supra*.) *Melchor Inv. Co. v. Rolm Sys.*, 3 Cal. App. 4th 587, 4 Cal. Rptr. 2d 343 (6th Dist. 1992). Subtenant's right to a second means of access was enforced against the head landlord. *Lewis v. Rickenbaker*, 174 Ga. App. 371, 330 S.E.2d 140 (1985). *But see* *W. Town Plaza Assocs., Ltd. v. Wal-Mart Stores, Inc.*, 619 So. 2d 1290 (Ala. 1993), discussed in chapter 3, note 110.
529. *Bsales v. Texaco, Inc.*, 516 F. Supp. 655 (D.N.J. 1981); *Nat'l Shawmut Bank v. Correale Mining Corp.*, 140 F. Supp. 180 (S.D. W. Va. 1956), *noted in* 59 W. VA. L. REV. 86 (1956); *Hebert v. Hines*, 615 So. 2d 44 (La. Ct. App. 1993); *Ducote v. Callico*, 307 So. 2d 644, *writ denied*, 309 So. 2d 337 (La. Ct. App. 1974); *First Trust Co. v. Downs*, 230 S.W.2d 770 (Mo. Ct. App. 1950); *Am. Cmty. Stores Corp. v. Newman*, 232 Neb. 434, 442-43, 441 N.W.2d 154, 160 (1989); *Loudave Estates, Inc. v. Cross Rds. Improvement Co.*, 28 Misc. 2d 54, 214 N.Y.S.2d 72 (Sup. Ct. 1961), *aff'd*, 20 A.D.2d 862, 251 N.Y.S.2d 408 (1st Dep't 1964); *Reformed Dutch Church v. 198 Broadway, Inc.*, 88 A.D.2d 511, 450 N.Y.S.2d 4 (1st Dep't 1982); *Neal v. Craig Brown, Inc.*, 365 S.E.2d 912 (S.C. Ct. App. 1987); *Zeidman v. Davis*, 161 Tex. 496, 342 S.W.2d 555 (1961); *Annot.*, 127 A.L.R. 948 (1948); 51C C.J.S. *Landlord and Tenant* § 58(3) (1968). *Annot.*, *Sublessee's Rights with Respect to Primary Lessee's Option to Renew Lease*, 39 A.L.R.4TH 824 (1985).
530. *Minshew v. Chevron Oil Co.*, 575 P.2d 192 (Utah 1978); *Annot.*, *Sublessee's Rights with Respect to Primary Lessee's Option to Renew*, 39 A.L.R.4TH 824 (1985).
531. *Burgess Pic-Pac, Inc. v. Fleming Cos.*, 190 W. Va. 169, 437 S.E.2d 742 (1993).
532. *Hausauer v. Dahlman*, 18 A.D. 475, 45 N.Y.S. 1088 (4th Dep't 1897), *aff'd*, 163 N.Y. 567, 57 N.E. 1111 (1900); *see also* cases in *Burgess Pic-Pac, Inc.*, 190 W. Va. at 171, 437 S.E.2d at 744.
533. *Gilbert v. Van Kleeck*, 284 A.D. 611, 132 N.Y.S.2d 580 (3d Dep't 1954); *Novosad v. Clary*, 431 S.W.2d 422 (Tex. Civ. App. 1968).
534. *Bowlby-Harman Lumber Co. v. Commodore Servs., Inc.*, 144 W. Va. 239, 107 S.E.2d 602 (1959).
535. *Wright v. Mr. Quick*, 109 Ill. 2d 236, 486 N.E.2d 908, 93 Ill. Dec. 375 (1985) (sublessee not liable to third person for failure to repair, despite incorporation in sublease of head lease); *Arnold's of Miss., Inc. v. Clancy*, 241 Miss. 613, 171 So. 2d 152 (1965); *Hollander v. W.&E. Realty Co.*, 105 Misc. 49, 172 N.Y.S. 455 (App. Term 1918).

rebuild the premises after a fire,⁵³⁶ not to lease other space for a competing purpose,⁵³⁷ nor other rights.⁵³⁸

Subtenant is not liable to his sublessor, the prime tenant, for any of the tenant obligations included in the prime lease,⁵³⁹ except to the extent these have been assumed by subtenant.⁵⁴⁰

Landlord is not liable for negligence of a subtenant⁵⁴¹ but a tenant may be liable for acts of his subtenant.⁵⁴²

Any unjustified interference by landlord with subtenant's possession gives subtenant no defense to his immediate landlord's claim for rent.⁵⁴³ A landlord who interferes with the possession of a subtenant interferes with that of his tenant, and is liable therefor.⁵⁴⁴ A landlord who procures the attornment of the subtenant during the existence of the prime lease is guilty of evicting the prime tenant and is liable to him for this.⁵⁴⁵ Once the prime lease ends, the relations between landlord, tenant, and subtenant change. Dispossess proceedings by prime tenant against subtenant cease upon reentry of the head landlord, because the prime tenant thereupon loses his right to possession.⁵⁴⁶ Once the interest of the prime tenant ends, his right to rent from the subtenant ends on ground of failure of consideration.⁵⁴⁷

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536. *Employees' Consumer Org., Inc. v. Gorman's, Inc.*, 395 S.W.2d 162 (Mo. 1965).
537. *State ex rel. Buttrey Foods, Inc. v. Dist. Court*, 148 Mont. 350, 420 P.2d 845 (1966).
538. *Arendt v. Lake View Assocs.*, 9 Ill. Dec. 585, 51 Ill. App. 3d 564, 366 N.E.2d 1096 (1977) (return of security deposited by subtenant with sublandlord).
539. *Coles Trading Co. v. Spiegel, Inc.*, 187 F.2d 984, 24 A.L.R.2d 702 (9th Cir. 1951) (additional rent based on increase in real estate taxes).
540. A subtenant's assumption of all sublessor's obligations under the prime lease, except payment of rent, was held to make subtenant liable for tax escalation accruing under the prime lease. This was on the ground that rent did not include taxes. *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578 (Tenn. 1975). *Compare* in this connection chapter 5 at notes 38, 39; section 5:2.4.
541. *Jankowski v. Crestburn Corp.*, 23 A.D.2d 783, 258 N.Y.S.2d 733, *aff'd*, 17 N.Y.2d 514, 214 N.E.2d 790, 267 N.Y.S.2d 513 (1966). *But see generally* section 10:1.12.
542. Sections 7:7.2, 9:10.
543. *Jones & Brindisi, Inc. v. Bernstein*, 119 Misc. 697, 197 N.Y.S. 263 (App. Term 1922); *Cline v. Altose*, 158 Wash. 119, 290 P. 809, 70 A.L.R. 1471 (1930).
544. *Sant v. Baril*, 173 Mont. 14, 566 P.2d 48 (1977); Annot., *Liability of Landlord for Interfering with Tenants of Lessee*, 70 A.L.R. 1480 (1931).
545. *McGlashan v. Marvin*, 185 A.D. 157, 173 N.Y.S. 603 (4th Dep't 1918); Annot., *Liability of Landlord for Interfering with Tenants of Lessee*, 70 A.L.R. 1480 (1931).
546. *Cohen v. Carpenter*, 128 A.D. 862, 113 N.Y.S. 168 (2d Dep't 1908).
547. *Cohn v. Mary Lee Candies, Inc.*, 293 Mich. 157, 291 N.W. 259 (1940). *Cf. Schneiker v. Gordon*, 732 P.2d 603 (Colo. 1987), discussed *infra* in note 581.

There is no fiduciary relation between prime tenant and subtenant that bars a subtenant from obtaining in his own name a renewal of the prime lease.⁵⁴⁸

Subtenant's purchase of the fee does not release his liability under the sublease. No merger occurs by union of the fee and sublease in the same hands.⁵⁴⁹ A sublease can exist simultaneously with a time payment obligation arising in connection with the sale of personal property under the sublease. If the payment obligation is cross defaulted with the continuation of the sublease, there is a distinct danger that the sublease would be viewed as a disguised mortgage, and treated as an equitable mortgage, requiring a foreclosure to terminate the sublessee's rights. But at least one New York case has upheld such an arrangement, even with a cross default clause.⁵⁵⁰

A prime tenant may not sublet more than he has.⁵⁵¹ He is liable to his subtenant for subletting for a term beyond that of the prime lease if this leads to eviction or surrender of possession by the subtenant.⁵⁵² When a prime tenant sublet a greater area and a longer term than he had, a grantee from the prime landlord, who took subject to the two leases of record, the prime lease and the sublease, was not bound by these excesses.⁵⁵³

548. See chapter 14 at note 350.

549. *Krasner v. Transcon. Equities, Inc.*, 70 A.D.2d 312, 420 N.Y.S.2d 872 (1st Dep't 1979) (surrender by subtenant to prime tenant); *Guar. Title & Trust Co. v. Moores*, 68 N.E.2d (Ohio Com. Pl. 1945), *aff'd*, 68 N.E.2d 378 (Ohio Ct. App. 1946); chapter 39 at note 16 *et seq.* When the sublease is deemed an assignment, the result is *contra*. See text *supra* at note 356.

550. Where seller of business on leased property subleases business property to purchaser and the promissory note executed in connection with the sale of the business provides that a default under the note is a default under the sublease, the transaction does not constitute a secured transaction, but rather a true sublease and sublessor is entitled to maintain a summary proceeding under the New York landlord/tenant laws. *Salmat Pizza Enter. v. Dezzara Rest. Corp.*, 643 N.Y.S.2d 890 (Civ. Ct. 1996).

551. *Nybor Corp. v. Ray's Rest., Inc.*, 29 N.C. App. 642, 225 S.E.2d 609 (1976). Subtenant recovered against his sublandlord for these excesses. *Id.*

552. *Nybor Corp.*, 29 N.C. App. 642; *Frankfurt v. Decker*, 180 S.W.2d 985 (Tex. Civ. App. 1944); 51C C.J.S. *Landlord and Tenant* § 49 (1968). *Contra* *Gulden v. Newberry Wrecker Serv., Inc.*, 154 Ga. App. 130, 267 S.E.2d 763 (1980). *Gulden* relied on the rule that a subtenant is chargeable with notice of the terms of the prime lease. This is true vis-à-vis the head landlord or third persons, but should not nullify what the sublease purports to give subtenant. In this connection it is noteworthy that a grantee under a warranty deed may recover against his grantor-warrantor for breach of warranty despite his knowledge of a defect of title when the deed was delivered. See FRIEDMAN ON CONTRACTS § 7:2.1[A] n.252. *Occidental Sav. & Loan Ass'n v. Bell Fed. Credit Union*, 218 Neb. 519, 357 N.W.2d 198 (1984), rejects and is *contra* to *Gulden*.

553. *Nybor Corp.*, 29 N.C. App. 642. Subtenant recovered against his sublandlord for these excesses. *Id.* *Accord* *Occidental Sav. & Loan*, 218 Neb. 519.

A prime tenant who commits a breach of the head lease that does not affect the subtenant's right to possession is not liable to the subtenant therefor.⁵⁵⁴

Sublessee's failure to perform under the sublease does not absolve the sublessor from liability under the head lease.⁵⁵⁵

§ 7:7.2 Tenant's Responsibility for Subtenant Behavior

A tenant is, in general, responsible for the acts and omissions of his subtenant.⁵⁵⁶ The prime tenant has been held liable for fire damage due to his subtenant's negligence⁵⁵⁷ and, in one case, for the subtenant's arson,⁵⁵⁸ but there is authority *contra* where a tenant had no ability to foresee or control the conduct of its subtenant.^{558.1} The prime tenant has been evicted and his lease forfeited by reason of subtenant's breach of a covenant in the prime lease against unlawful use,⁵⁵⁹ making alterations,⁵⁶⁰ and for maintaining an illegal still.⁵⁶¹

If a subtenant remains in possession after expiration of the prime lease the prime tenant is responsible for the rent accruing during this

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554. *Summit Foods, Inc. v. Greyhound Food Mgmt., Inc.*, 752 F. Supp. 363 (D. Colo. 1990) (prime tenant who sublet part of its space breached obligation to head landlord to operate its business). *Cf.* rule with respect to department store concessions, chapter 37, note 52; *Port Auth. v. Harstad*, 531 N.W.2d 496 (Minn. 1995) (and cases cited in n.3).
555. *Port Auth.*, 531 N.W.2d 496 (and cases cited in n.3).
556. *Capital Commercial Props., Inc. v. Vina Enters., Inc.*, 250 Va. 290, 462 S.E.2d 74 (1995) (citing text).
557. *Marcellus v. K.O.V., Inc.*, 5 Kan. App. 2d 294, 615 P.2d 170 (1980) (citing text); *Lustig v. U.M.C. Indus., Inc.*, 637 S.W.2d 55 (Mo. Ct. App. 1982); *Dixie Fire & Cas. Co. v. Esso Standard Oil Co.*, 265 N.C. 121, 143 S.E.2d 279 (1965), noted in 45 N.C. L. REV. 295 (1966). *See also* *King v. Richards-Cunningham Co.*, 46 Wyo. 355, 378, 28 P.2d 492, 498 (1934).
558. *Bishop v. Associated Transp., Inc.*, 46 Tenn. App. 644, 332 S.W.2d 696 (1959), criticized in *Roady, Real Property, Tennessee Survey*, 13 VAND. L. REV. 1241, 1250-52 (1960).
- 558.1. *Korman Suites at Willow Shores v. Kelsch Assocs.*, 372 N.J. Super. 161, 855 A.2d 642 (Super. Ct. Law Div. 2004). A "developmentally disabled" subtenant negligently caused fire. Landlord was not permitted to terminate lease of sublandlord, which operated facility specifically for such persons, was held not liable because negligence of this particular individual was not foreseeable. Case may have turned on provisions of New Jersey Anti-Eviction Act.
559. *Miller v. Prescott*, 163 Mass. 12, 39 N.E. 409 (1895).
560. *Goenner v. Glumicich*, 81 Pa. Super. 521 (1923). *Accord* as to waste and impermissible alterations by subtenant, *Wilson v. Kruse*, 199 Or. 1, 258 P.2d 112 (1953). *See also* RESTATEMENT (SECOND) OF PROPERTY (Landlord and Tenant) § 16.3 reporter's note 3, at 150.
561. *Burke v. Bryant*, 283 Pa. 114, 128 A. 821 (1925). *Cf.* *First Trust & Sav. Bank v. Rakkios*, 247 Ill. App. 183 (1928).

period⁵⁶² and may at the prime landlord's election be held as a holdover tenant for another year where this doctrine obtains.⁵⁶³ The prime tenant can avoid becoming a holdover tenant in this situation if the following is included in the prime lease:

If any subtenant of Tenant shall remain in possession beyond the term of this lease, as the same may be extended or renewed, then, without prejudice to any other right or remedy thereby vested in Landlord, Tenant shall not become a holdover tenant, by such retention of possession, if (i) the term given such subtenant shall not extend beyond the term of this lease, as the same may be extended or renewed, and (ii) Tenant shall proceed with promptness and diligence until the completion thereof in obtaining the removal of such subtenant.

A restriction on use, included in the prime lease, binds a subtenant.⁵⁶⁴ This is true whether or not the subtenant has actual knowledge of the restriction.⁵⁶⁵

This is one reason, among others, why it is imperative for a prospective subtenant to become familiar with the prime lease before

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562. Kan. City Breweries Co. v. Markowitz, 203 Mo. App. 390, 221 S.W. 398 (1920); 52 C.J.S. *Landlord and Tenant* § 529a (1968). "Therefore, when the subtenant holds over it is conceptionally a holding over by the tenant." Sanchez v. Eleven Fourteen, Inc., 623 A.2d 1179, 1181 (D.C. 1993).
563. Sullivan v. George Ringler & Co., 59 A.D. 184, 69 N.Y.S. 38 (2d Dep't 1901), *aff'd*, 171 N.Y. 693, 64 N.E. 1126 (1902); Rourke v. Bozarth, 103 Okla. 133, 229 P. 495 (1924) (and cases cited); 51C C.J.S. *Landlord and Tenant* § 316a (1968); 49 AM. JUR. 2D *Landlord and Tenant* § 356 (1995 rev.). A possible procedural problem for the prime tenant in this situation is illustrated by Phelan v. Kennedy, 185 A.D. 749, 173 N.Y.S. 687 (1st Dep't 1919), where prime tenant paid prime landlord the first four months' rent that had accrued during a holdover term of one year. Prime tenant recovered judgment against subtenant for this sum. The lower court based this on subrogation to prime landlord's right against subtenant for rent. The higher court ruled that prime tenant had no such right against subtenant, but affirmed on the theory that prime tenant was entitled to *damages* for subtenant's breach of covenant to surrender possession. Prime tenant's right to recover further damages for the rest of the holdover term was left open. See also chapter 18, notes 245-49.
564. Bass v. Metro. W. Side Elevated R.R., 82 F. 857 (7th Cir. 1897) (assignment, rather than sublease); Commercial Auto Loan Corp. v. Keith, 79 Ga. App. 268, 53 S.E.2d 381 (1949); Fulway Corp. v. Liggett Drug Co., 1 Misc. 2d 527, 148 N.Y.S.2d 222 (Sup. Ct. 1956); 51C C.J.S. *Landlord and Tenant* § 341 (1968); 49 AM. JUR. 2D *Landlord and Tenant* § 507 (1995 rev.). A lease that restricted tenant's use but permitted subletting for purposes not in violation of law was held to permit subletting to any class of persons or businesses not forbidden by law. Fair W. Bldg. Corp. v. Trice Floor Coverings, Inc., 394 S.W.2d 707 (Tex. Civ. App. 1965).
565. Rosen v. Wolff, 152 Ga. 578, 110 S.E. 877 (1922).

committing himself to the sublease. It also indicates that an express right to sublet may be frustrated if a restriction on use, included in the prime lease, is too stringent. A lease “for a bakery only and for no other purpose” bars a tenant from subletting to anybody other than a competitor.⁵⁶⁶ This may be the only party he does not want as a subtenant.

§ 7:7.3 Termination of Prime Lease—Effect on Sublease

A sublease that was made subsequent to the head lease is necessarily subject to the head lease. If the head lease falls the sublease falls if this happens by reason of some right of termination or cancellation given the prime landlord by the terms of the head lease.⁵⁶⁷ The sublease falls with the head lease where the term of the prime lease is shorter than that of the sublease⁵⁶⁸ or the prime landlord has a right to terminate the head lease by reason of an option to cancel,⁵⁶⁹ insolvency of the prime tenant,⁵⁷⁰ subletting by the prime tenant for

566. *E.g., id.*

567. For the effect of a leasehold mortgage on a sublease made prior to the mortgage, see *Bobo v. Vanguard Bank & Trust Co.*, 512 So. 2d 246 (Fla. Dist. Ct. App. 1987); note 668, *infra*. Sublessor may be liable to subtenant for willful acts that result in termination of the lease. *Tapps of Nassau Supermarkets v. Linden Blvd.*, 704 N.Y.S.2d 27 (App. Div. 1st Dep’t 2000). Master tenant’s rejection of master lease in bankruptcy terminates sublease, absent some nondisturbance agreement to the contrary. *Syufy Enters. v. City of Oakland*, 128 Cal. Rptr. 2d 808 (Cal. Ct. App. 2002); *Goldcrest Transp. v. Across Am.*, 748 N.Y.S.2d 411 (App. Div. 2d Dep’t 2002).

568. Text *supra* at note 537.

569. *MAC Enters., Inc. v. Del E. Webb Dev. Co.*, 132 Ariz. 331, 645 P.2d 1245 (1982) (though landlord approved the sublease); *Pedro v. Potter*, 197 Cal. 751, 242 P. 926, 42 A.L.R. 1165 (1926); *Sanchez v. Eleven Fourteen, Inc.*, 623 A.2d 1179 (D.C. 1993); *Occidental Sav. & Loan Ass’n v. Bell Fed. Credit Union*, 218 Neb. 519, 357 N.W.2d 198 (1984); *Lusonray Holding Co. v. McCastline*, 192 A.D. 156, 182 N.Y.S. 425 (1st Dep’t 1920); *Bove v. Coppola*, 45 Misc. 636, 91 N.Y.S. 8 (App. Term 1904); 51C C.J.S. *Landlord and Tenant* § 48(1) (1968). A clause in a head lease terminating it after condemnation also terminated a sublease that contained no such clause. The result was to bar the subtenant from any part of the condemnation award. *City of Rochester v. Nw. Bell Tel. Co.*, 431 N.W.2d 874 (Minn. Ct. App. 1988). Under emergency rent laws the right of a subtenant may be transformed into that of a statutory tenant. *Jaynet Drug Corp. v. Sheraton-Astor Corp.*, 158 N.Y.S.2d 344 (Sup. Ct. 1956). See also *Blake Bros. Corp. v. Roche*, 12 Mass. App. 556, 427 N.E.2d 501 (1981); chapter 39, note 18.

570. *Isador Palewonsky Assocs. v. Sharp Props., Inc.*, 998 F.2d 145, 154 (3d Cir. 1993); *In re Ferris*, 415 F. Supp. 33 (W.D. Okla. 1976); *U.S.A. Petroleum Corp. v. Jopat Bldg. Corp.*, 343 So. 2d 501 (Ala. 1977); *Xerox Corp. v. Listmark Computer Sys.*, 142 N.J. Super. 232, 361 A.2d 81 (1976); *Ruella Realty Co. v. Wilkie*, 198 N.Y.S. 211 (App. Term 1923). Rejection of a lease in insolvency of the tenant did not affect a subtenant who had a

a prohibited purpose,⁵⁷¹ and, of course, for nonpayment or other breach by the prime tenant.⁵⁷² In a situation not frequently occurring,

nondisturbance agreement with the head landlord. *Chumash Hill Props., Inc. v. Peram*, 39 Cal. App. 4th 1226, 46 Cal. Rptr. 2d 366 (2d Dist. 1995). In *Chatlos Sys., Inc. v. Kaplan*, 147 B.R. 96 (D. Del. 1992), where tenant-debtor permitted rejection of the lease for failure to assume it (§ 365(d)(4)), the lease was held terminated leaving the debtor no right to evict a subtenant. This right was held vested in the head landlord. In *In re 6177 Realty Assocs.*, 142 B.R. 1019 (S.D. Fla. 1992). Rejection and termination under § 365(d)(4) was held to terminate the lease and any subleases and leasehold mortgages. *Ilkhchooyi v. Best*, 37 Cal. App. 4th 395, 404, 45 Cal. Rptr. 2d 766, 771 (4th Dist. 1995). This is the minority rule. See *In re Ames Dep't Stores, Inc.*, 148 B.R. 756 (S.D.N.Y. 1993), discussed in chapter 16, note 82. In *In re Dial-A-Tire, Inc.*, 78 B.R. 13 (W.D.N.Y. 1987), termination of a head lease, under § 365(d)(4) was held not per se to terminate a sublease on the ground that rejection of a lease in landlord's bankruptcy gives the tenant (in this case a subtenant) the option to treat the lease as terminated or to remain in possession (§ 365(h)(1)). Compare the discussion of the effect on a leasehold mortgage of termination of a lease in bankruptcy in text *infra* at note 658 *et seq.* This reference to insolvency of the prime tenant must be qualified and amplified by reason of the Bankruptcy Reform Act of 1978. If the prime lease includes the customary provision that purports to authorize the head landlord to cancel the lease in case of insolvency of the prime tenant, such provision is no longer enforceable. Chapter 16 at note 51. Rejection of a prime lease in assignment for benefit of creditor's proceedings ended the prime lease and thereupon the sublease. *Ahmed & Cesar, Inc. v. Watertown/Arsenal Assoc.*, 29 Mass. App. 923, 557 N.E.2d 59 (1990).

571. *Cesar v. Virgin*, 207 Ala. 148, 92 So. 406, 24 A.L.R. 715 (1921).

572. *Nat'l Shawmut Bank v. Correale Mining Corp.*, 140 F. Supp. 180 (S.D. W. Va.), *aff'd*, 238 F.2d 516 (4th Cir. 1956), *noted in* 59 W. VA. L. REV. 86 (1956); *In re Yachthaven Rest., Inc.*, 103 B.R. 68, 75 (S.D.N.Y. 1989); *V.O.B. Co. v. Hang It Up, Inc.*, 691 P.2d 1157 (Colo. Ct. App. 1984); *Parris-W. Maytag Hotel Corp. v. Cont'l Amusement Co.*, 168 N.W.2d 735 (Iowa 1969); *Wehrle v. Landsman*, 23 N.J. Super. 40, 92 A.2d 525 (1952); *Precision Dynamics Corp. v. Retailers Representatives, Inc.*, 465 N.Y.S.2d 684 (Civ. Ct. 1983); *Hooper v. Seventh Urban, Inc.*, 70 Ohio App. 2d 101, 434 N.E.2d 1367, 24 Ohio Op. 3d 126 (1980); *Bennion v. Comstock Inv. Corp.*, 18 Wash. App. 266, 566 P.2d 1289 (1977); 51C C.J.S. *Landlord and Tenant* § 116 (1968); 49 AM. JUR. 2D *Landlord and Tenant* § 324 (1995 rev.). *City of Cleveland v. A.L. Rose Mfg. Co.*, 89 Ohio App. 3d 267, 624 N.E.2d 245 (1993) (collects cases). Landlord's reentry on the ground of insolvency of the prime tenant was held to forfeit a sublease. *U.S.A. Petroleum Corp. v. Jopat Bldg. Corp.*, 343 So. 2d 501 (Ala. 1977). *Cf. Emro Mktg. Co. v. Plemmons*, 855 F.2d 528 (8th Cir. 1988), discussed in chapter 16, note 97.

The same applies to a leasehold mortgagee. See text *infra* at note 685 *et seq.* A sublease does not survive an involuntary surrender by the prime lessee. Regardless of the lessee's cooperation with the landlord, the surrender is involuntary if the lease could be terminated because of default under specific lease covenants. The landlord in this case gave a ground lease to MetLife, who built a shopping center on the parcel and subleased a

expiration of a prime lease before that of the sublease permitted only the prime landlord, not the prime tenant-sublessor, to terminate a sublease.⁵⁷³ The sublease, as well as the prime lease, may fall by foreclosure of a paramount fee mortgage.⁵⁷⁴ Inasmuch as the sublessor is the tenant under a prime lease, the sublease is subject to possible termination on the bankruptcy of the prime landlord.⁵⁷⁵ The possibility also exists that the landlord will exercise the right to recapture. This right enables the landlord to cease the lease upon tenant's assignment, thus, destroying the assignment.⁵⁷⁶ The possibility of

portion to Applebee's. Most of the tenants vacated and MetLife was in arrears on the taxes and ground lease payments. MetLife then surrendered the parcel to the new owner of the ground and Applebee's sublease was terminated. *Applebee's Ne., Inc. v. Methuen Investors, Inc.*, 709 N.E.2d 1143 (Mass. App. Ct. 1999). A voluntary surrender of the lease by the tenant to the landlord, however, does not affect the rights of a subtenant under a sublease that the sublessor had the authority to make. *Bargain Mart, Inc. v. Lipkis*, 561 A.2d 1365 (Conn. 1989).

573. *Allenfield Assocs. v. United States*, 159 B.R. 446 (E.D. Pa. 1993). The result was to prevent the prime tenant-sublessor, after expiration of its lease, from manipulating the sublease. Although prime tenant cannot cooperate with landlord to eliminate subtenant, where the prime lease is terminated by surrender, but surrender is deemed "involuntary" due to pre-existing defaults, the sublease is also terminated. *Applebee's Ne., Inc. v. Methuen Investors, Inc.*, 709 N.E.2d 1143 (Mass. App. Ct. 1999).
574. *Conn. Hous. Fin. Auth. v. Eno Farms Ltd. P'ship*, 48 Conn. L. Rptr. 66 (Conn. Super. Ct. 2009) (foreclosure of mortgage on senior lease terminates two subleases, and owner's association, formed subsequent to mortgage and created to manage properties subject to the mortgage); *127 Korea House, Inc. v. House of Korea, Inc.*, 49 A.D.2d 736 (N.Y. App. Div. 1975) (mem.).
575. Section 365(h) of the Bankruptcy Reform Act of 1978 authorizes a landlord's trustee in bankruptcy to reject a lease. Such rejection gives the tenant the option of acquiescing in the rejection or remaining in possession. *Syufy Enters. v. City of Oakland*, 128 Cal. Rptr. 2d 808 (Ct. App. 2002).
576. *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 6 Cal. Rptr. 2d 467 (Cal. 1992). The landlord's right to recapture is a common contractual device by which the landlord attempts to secure the "bonus value" in a lease by providing from the outset that the landlord can cancel the lease if the tenant attempts to transfer it. The landlord will assuredly invoke such right if the value of the leasehold has increased and the tenant seeks to transfer it at a profit. This case involved a relatively common contractual device by which landlords attempt to secure the "bonus value" in a lease by providing from the outset that the landlord can cancel the lease if the tenant attempts to transfer it. It is noteworthy that this case was decided in California, a jurisdiction that has been considered "pro-tenant" on the issue of assignability of leases. In fact, legislation in California has more or less reversed the impact of California Supreme Court decisions restricting the landlord's options. The opinion in this case, however, finds the

adequate protection of a subtenant in this contingency is not clear.⁵⁷⁷ The effect on a sublease of a voluntary surrender of the prime lease, by prime tenant to head landlord, depends on the status of the prime lease at the time of the surrender. If the prime landlord had begun proceedings on an enforceable cause of action for forfeiture, a voluntary surrender thereafter by the prime tenant ends the lease.⁵⁷⁸ In these circumstances a declaration of forfeiture by the prime landlord may be sufficient to end both the prime lease and the sublease.⁵⁷⁹ However, the circumstances may present enough of an issue of fact to make it advisable for the prime landlord to proceed to a judgment that would make the status *res judicata*. This could be of advantage to the subtenant too if the subtenant were contemplating attornment to the prime landlord and would remove any doubt that the subtenant could safely pay future rent to the prime landlord, free of any liability to the sublessor. Where the prime tenant is in bankruptcy, its rejection and termination of the prime lease terminates the sublease as well.⁵⁸⁰

landlord recapture provision enforceable as a matter of common law, without regard to the application of the statutes. The freedom of contract is at stake when the parties have a clear and unambiguous provision creating rights of transfer and this overcomes public policy.

577. See text *infra* at notes 658, 659. The form in note 658, *infra*, may be used for the benefit of a subtenant if the last fifteen words are omitted. For a mini-saga of a subtenant's unsuccessful attempt to recover from a bankrupt tenant/sublessor for the failure to obtain a "non-disturbance" agreement from the landlord as it had agreed to "attempt" to do, see *Einstein/Noah Bagel Corp. v. Smith (In re BCE W., L.P.)* 264 B.R. 578 (B.A.P. 9th Cir. 2001).
578. *Cesar v. Virgin*, 207 Ala. 148, 92 So. 406, 24 A.L.R. 715 (1921); *Hawley Corp. v. W. Va. Broad. Corp.*, 120 W. Va. 184, 197 S.E. 628, 118 A.L.R. 120 (1938); 49 AM. JUR. 2D *Landlord and Tenant* § 324 (1995 rev.). See U.S.A. Petroleum Corp. v. Jopat Bldg. Corp., 343 So. 2d 501 (Ala. 1977), *supra* note 572, and chapter 16, note 316. Voluntary surrender of a prime lease, when the prime tenant was in default, terminated a sublease but not a prime lease of equipment between the prime tenant-sublessor and the sublessee. *Viravong v. Thai Rest.*, 666 So. 2d 14 (Ala. Civ. App. 1995). A subtenancy is terminated upon the termination for default of the master lease between master landlord and tenant, even though the sublease would be preserved notwithstanding a voluntary surrender entered into by parties to the master lease. *Goldcrest Transp. v. Across Am.*, 748 N.Y.S.2d 411 (App. Div. 2d Dep't 2002).
579. *Herman v. Campbell*, 86 Cal. App. 2d 762, 195 P.2d 801 (Dist. Ct. App. 1948); *Thal v. S.G.D. Corp.*, 625 So. 2d 852 (Fla. Dist. Ct. App. 1993); *Lippe v. Prof'l Supply Co.*, 503 N.Y.S.2d 254 (Civ. Ct. 1986) (head tenant's surrender by stipulation after default left subtenant a tenant by sufferance, removable only after thirty-day notice); 49 AM. JUR. 2D *Landlord and Tenant* § 1185 (1995 rev.); 51C C.J.S. *Landlord and Tenant* § 116 (1968).
580. *In re Child World, Inc.*, 161 B.R. 349 (S.D.N.Y. 1993).

A surrender of the head lease, by prime tenant to head landlord, at a time when no right of forfeiture had accrued under the prime lease, is without effect on the existence of the sublease.⁵⁸¹ The prime tenant has no power to destroy the estate that he created. The effect of this on the rights of the subtenant merits separate consideration.

Under the common-law rule a surrender by a prime tenant to his landlord released a subtenant from liability for rent thereafter accruing and also for use and occupational value. The same result followed the prime tenant's acquisition of the fee.⁵⁸³ This was explained on the basis of merger. The prime tenant's reversion disappeared together with its incidents, such as the right to collect rent from the subtenant.

581. Goldberg v. Tri-States Theatre Corp., 126 F.2d 26 (8th Cir. 1942); Northridge Hosp. Found. v. Pic 'N' Save No. 9, Inc., 187 Cal. App. 3d 1088, 232 Cal. Rptr. 329 (1986); Camp v. Goodman, 47 A.2d 516 (D.C. Mun. Ct. App. 1946); Brunswick Corp. v. Berlo Vending Co., 196 So. 2d 497 (Fla. Dist. Ct. App. 1967); Parris-W. Maytag Hotel Corp. v. Cont'l Amusement Co., 168 N.W.2d 735 (Iowa 1969) (collecting authorities); Shaw v. Creedon, 133 N.J. Eq. 397, 32 A.2d 721 (Ch. 1943); Eten v. Luyster, 60 N.Y. 252 (1875); Ocean Grill, Inc. v. Pell, 226 A.D.2d 603, 641 N.Y.S.2d 373 (2d Dep't 1996); Unionport Shoes, Inc. v. Parkchester S. Condo., Inc., 205 A.D.2d 385, 613 N.Y.S.2d 605 (1st Dep't 1994); Da Costa's Auto., Inc. v. Birchwood Plaza Shell, Inc., 106 A.D.2d 484, 482 N.Y.S.2d 832 (2d Dep't 1984); 1 H. TIFFANY, REAL PROPERTY § 150 (3d ed. 1939); 51C C.J.S. Landlord and Tenant § 129b (1968); 49 AM. JUR. 2D Landlord and Tenant §§ 263, 1186 (1995 rev.).

In *Northridge* a provision that the sublease would terminate whenever the head lease terminated for any reason did not apply to a voluntary surrender of the head lease. This was applied after the head tenant acquired the fee through a nominee and surrendered the head lease, this despite ambiguity in the relevant terms of the sublease. Greenwich Assocs. v. Salle, 110 A.D.2d 111, 493 N.Y.S.2d 461 (1st Dep't 1985). A subtenant had a right of refusal to an assignment of the head lease if the head tenant should desire to assign. This right of refusal was not activated by the head tenant's surrender of the head lease. Futterman v. S. African Airways, 481 N.Y.S.2d 283 (Sup. Ct. 1984).

An exception to the rule stated in the text is *Schneiker v. Gordon*, 732 P.2d 603 (Colo. 1987). There a subtenant vacated during the term of the sublease, leaving the premises in a bad state of repair. Sublandlord could not afford the repairs and the unexpired term of the sublease was too short for a further sublease. Subtenant's surrender to prime landlord was deemed a minimization of damages and permitted the sublandlord to recover further subrent, plus cost of repairs, less the prime rent saved by sublandlord. Cf. text *supra* at note 547.

582. [Reserved.]

583. Webb v. Russell, 100 Eng. Rep. 639 (K.B. 1789); 3 H. TIFFANY, REAL PROPERTY § 901 (3d ed. 1939); Bordwell, *English Property Reform and Its American Aspects*, 37 YALE L.J. 1, 16-18 (1927); 13 COLUM. L. REV. 245 (1913); 26 HARV. L. REV. 458 (1913); 36 MICH. L. REV. 149 (1937); 49 AM. JUR. 2D Landlord and Tenant § 512 (1970); 18 A.L.R. 957, 963 (1922); 52 C.J.S. Landlord and Tenant § 495 (1968).

The prime landlord had no right to rent or occupational value from the subtenant on the theory that the merger of the prime tenant's estate into the larger fee estate left the prime landlord, vis-à-vis the subtenant, without the necessary privity of estate or contract. In describing this doctrine it was said:

The law of merger was one of the most technical and arbitrary parts of the old conveyancing. All of the scholastic logic of the time of Coke was here seen at its worst. . . . A case of particular hardship was where the intervening tenant, B, would surrender for the purpose of taking a new lease. The undertenant might continue without the payment of rent.⁵⁸⁴

The rule was anomalous in that the sublease continued with respect to the subtenant's right to possession, but ended with respect to any right of the prime landlord or the prime tenant to recover either rent or occupational value.⁵⁸⁵ An English statute made the rule inapplicable to a prime tenant's surrender for the purpose of acquiring a new lease,⁵⁸⁶ and a comparable statute has long existed in New York.⁵⁸⁷ Later English statutes abolish the rule entirely by providing that upon a surrender of a prime lease the subtenant holds directly from the prime landlord.⁵⁸⁸

There are dicta that the common-law rule still obtains in this country.⁵⁸⁹ Actual holdings to this effect are rare.⁵⁹⁰ The American cases generally escape the consequences of the rule by finding some

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584. Bordwell, *English Property Reform and Its American Aspects*, 37 YALE L.J. 1, 16–17 (1927) (footnotes omitted). A leading English case that felt compelled to give judgment for a defendant—subtenant nevertheless characterized the defense as “made of a most unrighteous and unconscionable nature.” *Webb v. Russell*, 100 Eng. Rep. 639 (K.B. 1789).
585. Bordwell, 37 YALE L.J. at 16–17; 13 COLUM. L. REV. 245, 246 (1913).
586. 4 Geo. 2, c.28, § 6 (1731).
587. N.Y. REAL PROP. LAW § 226 (McKinney 1989).
588. 8 & 9 Vict. c. 106, § 9 (1845); 15 & 16 Geo. 5, c. 20, § 139 sched. I (1925).
589. *Bailey v. Richardson*, 66 Cal. 416, 5 P. 910 (1885); *McDonald v. May*, 96 Mo. App. 236, 69 S.W. 1059 (1902); *Shaw v. Creedon*, 133 N.J. Eq. 397, 32 A.2d 721 (N.J. Ch. 1943); *Krider v. Ramsay*, 79 N.C. 354 (1878).
590. *Buttner v. Kasser*, 19 Cal. App. 755, 127 P. 811 (Dist. Ct. App. 1912) denies a prime landlord recovery of use and occupational value against a subtenant, after surrender of the prime lease, but this was on the ground that such recovery would disregard subtenant's rights under the sublease. The subtenant's liability for rent was not in issue. *Metro. Life Ins. Co. v. Hellinger*, 272 N.Y. 24, 26, 3 N.E.2d 621 (1936), noted in 36 MICH. L. REV. 149 (1937), said: “We do not reach the question of what defendant's obligations, if any, would have been had there been a mere technical surrender of the master lease and nothing more.”

basis for a transfer of the sublease,⁵⁹¹ an attornment of the subtenant to the prime landlord.⁵⁹²

It is common for subleases today to include a clause under which the subtenant agrees to attorn to the prime landlord, at the latter's election, upon a "sooner termination"⁵⁹³ of the prime lease. As so stated, the attornment is for the benefit of the prime landlord or, possibly, for the benefit of the holder of a mortgage on the prime lease, its purpose being to preserve valuable subleases for their economic value. In view of the rule here considered the attornment could bar a subtenant from the common law right of free occupation. A clause for this purpose is set forth below.⁵⁹⁴

Where subleasing is contemplated, the landlord often insists upon a collateral assignment of subleases as further security for the prime tenant's obligations. A clause for this purpose generally provides that in the event of default by the tenant the subrents are assigned to the landlord. This clause, plus a covenant by the landlord not to collect more than one month's rent in advance, was held to give the landlord no remedy against a subtenant who surrendered his sublease a year before its expiration (a time when the prime lease was not in default) and paid his sublessor over \$39,000 to accept such surrender.⁵⁹⁵

591. *Beal v. Boston Car Spring Co.*, 125 Mass. 157, 28 Am. Rep. 216 (1878); *Metro. Life Ins. Co. v. Hellinger*, 272 N.Y. 24, 3 N.E.2d 621 (1936), *noted in* 36 MICH. L. REV. 149 (1937); *Hessel v. Johnson*, 129 Pa. 173, 18 A. 754, 5 L.R.A. 851, 15 Am. St. Rep. 716 (1889), *on second appeal*, 142 Pa. 8, 21 A. 794 (1891); *Minshe v. Chevron Oil Co.*, 575 P.2d (Utah 1978) (cancellation of prime lease and assignment of sublease to prime landlord). A tenant's surrender of his lease to the prime landlord, together with an assignment of a sublease, was held not to include subrent in arrears. Tenant recovered this from the subtenant. *George W. Loft Realty Co. v. M.H. Harris, Inc.*, 113 N.J.L. 469, 174 A. 709 (Ct. Err. & App. 1934).

592. *Appleton v. Ames*, 150 Mass. 34, 22 N.E. 69, 5 L.R.A. 206 (1889); *Weiss v. Mendelson*, 24 Misc. 692, 53 N.Y.S. 803 (App. Term 1898); *McDonald v. May*, 96 Mo. App. 236, 69 S.W. 1059 (1902); 2 H. UNDERHILL, LANDLORD AND TENANT § 709 (1909).

593. *I.e.*, a termination of the prime lease before its stated expiration because of default.

594. The clause may read:

In case of a termination of the Prime Lease, Tenant will, at the election of the Prime Landlord, attorn and pay the rent hereunder to the Prime Landlord; and in case of a proceeding to foreclose a mortgage on the Prime Lease, Tenant will, at the election of the holder of such mortgage, attorn and pay the rent to such holder.

595. 154 Nassau St. Realty Co. v. Pinkerton's Nat'l Detective Agency, Inc., 17 A.D.2d 292, 233 N.Y.S.2d 747 (1st Dep't 1962), *aff'd*, 12 N.Y.2d 1084, 190 N.E.2d 422, 240 N.Y.S.2d 30 (1963). *Compare text supra* at note 526 as well as text *infra* at note 632.

§ 7:7.4 Status of Subtenant When Landlord Fails to Renew

Although typically the term of a sublease will end before the term of the master lease, occasions arise in which the subtenant's lease rights, either original or as extended, run beyond the original term of the master lease, but not beyond the term of the master lease if the master lessee should extend or renew. As indicated elsewhere in the text,^{595.1} the sublease in such cases generally is viewed as retaining its character as a sublease, and is not treated as an assignment, notwithstanding the fact that it potentially lasts beyond the term of the master lease.

The question then arises, however, whether the master tenant (the sublandlord) has a duty to renew or extend its lease in order to provide a term sufficient to protect the subtenant. The few decided decisions do not appear to view the sublandlord as having a duty to exercise that option, even though failure to do so would result in the destruction of the estate the sublandlord has agreed to give to the subtenant.^{595.2} Presumably this result responds to the reality that a subleases frequently are for only for a portion of the sublandlord's space, or only a portion of the renewal period, and consequently it might seem inappropriate to read the lease as implicitly binding the sublandlord to a substantial burden through exercise of the option when the subtenant did not see fit to bargain for this protection. On the other hand, where these facts do not exist, and the sublandlord would not undertake a substantial burden by exercising the option, the argument might exist that the parties did intend that the sublandlord take that step. But to make this argument invites the courts into hair splitting contests both as to consequences and as to the parties' intent. One clear rule makes it possible for knowledgeable parties to bargain to a satisfactory result. Consequently, it is advisable for a sublease to contain language to the effect that landlord agrees that it will exercise any options to extend or renew in the master lease necessary to preserve the term of the sublease. Here is some suggested language:

This sublease is subject to the term of a certain master lease [identify if instrument has not already done so] with a term ending [insert end of master lease term], with [an] option[s] for extension [renewal] as follows [here describe the terms of extension or renewal]. Landlord under this sublease agrees to exercise such options in a timely fashion to preserve the term of the master lease for such periods as are necessary for the landlord to provide possession to tenant under this sublease, including any extensions or renewals provided in this sublease.

595.1. See note 348, *supra*, and accompanying text.

595.2. *Tiger Crane Martial Arts, Inc. v. Franchise Stores Realty*, 652 N.Y.S.2d 674 (Sup. Ct. 1997).

Of course, it might be best, as suggested in the text of the next section, for the sublessee to secure a separate agreement with the master landlord, but the business relationships may be such as to preclude such an arrangement. Nevertheless, in many cases it would appear that the subtenant has a justifiable expectation that its own sublandlord will preserve the availability of possession for the term of the sublease. As the decided cases do not protect this expectation, the subtenant must initiate bargaining to insure that it exists through the terms of the sublease.

§ 7:7.5 **Protection of Subtenant**

[A] Subtenant's Right to Pay Rent to Prime Landlord

When a mortgage on a fee is foreclosed the owner of any interest in the property junior to the mortgage may redeem by paying the mortgage debt and thereby protect his interest.⁵⁹⁶ This is not true of a subtenant vis-à-vis the prime landlord. A subtenant is put on notice that the continuance of the sublease is at the risk of the continuance in good standing of the prime lease. If a prime landlord is willing to accept rent, or other performance due under the prime lease, from a subtenant, the subtenant may safely make such payment or performance, and the cost of so doing will be credited against the subtenant's liability to the prime tenant-sublessor.⁵⁹⁷ From this some have concluded that a subtenant has a right to make payment to the prime landlord.⁵⁹⁸ This is not true. If a tender is made by an assignee of the

596. *Big Apple Supermarkets, Inc. v. Corkdale Realty, Inc.*, 61 Misc. 2d 483, 305 N.Y.S.2d 531 (Sup. Ct. 1969) (collecting New York cases); G. OSBORNE, MORTGAGES § 304 (2d ed. 1970).

597. *JPMorgan Chase Bank, N.A. v. Rocar Realty Ne., Inc.*, 47 A.D.3d 425, 850 N.Y.S.2d 30 (1st Dep't 2008) (although tenant was able to offset the rent it paid prime landlord against its liability on sublease, tenant was still liable to sublandlord for period of sublandlord's term for difference between prime lease rent and sublease rent. Where prime landlord sent notice of termination to sublessor, but continued to accept rent from sublessee after date set forth in termination notice, sublessee's liability to pay rent under sublease terminated; sublessee was no longer under a duty to pay difference in rent for continued period of tenant's possession.); *Thompson v. Commercial Guano Co.*, 93 Ga. 282, 20 S.E. 309 (1893); *Peck v. Ingersoll*, 7 N.Y. 528 (1852).

598. For dicta to this effect, see *F.W. Woolworth Co. v. Rice*, 114 N.J. Eq. 542, 546, 169 A. 332 (Ch. 1933); *In re Strasburger*, 132 N.Y. 128, 132, 30 N.E. 379, 380 (1892); 40 COLUM. L. REV. 1049, 1064 (1940).

lease the prime landlord has no choice but to accept.⁵⁹⁹ But he is not required to accept tender from a subtenant.⁶⁰⁰

The prime landlord need not accept performance from one with whom he is not in privity. An explanation is that if the rule were otherwise he would be compelled to accept a tenant not of his choice.⁶⁰¹ This might have some force if a subtenant could elevate his status to that of a prime tenant by paying an installment of prime rent and thereby circumvent a prohibition against assignment of the lease. But a subtenant who makes such payment remains a subtenant. Empowering a subtenant to pay and thereby protect himself from eviction would give a prime landlord all he bargained for and yet serve the policy against forfeitures. Occasionally, a sublease requires the subtenant to make payments required under a prime lease. This provision means little unless the prime landlord has agreed to accept the payments.⁶⁰²

[B] Nondisturbance Agreement Between Prime Landlord and Subtenant

To an ordinary tenant, security of possession depends essentially upon three matters:

- (1) obtaining a lease from a landlord with good title to the premises;
- (2) performing his tenant obligations and thereby precluding the landlord from bringing the term to an end; and
- (3) protection against mortgages paramount to the lease.

Fire or condemnation may also end the lease. A subtenant is subject to the same risks, plus others that are peculiar to subtenancy. If the subtenant plans to make a substantial investment in alterations or installations, or if eviction would disrupt his business, he must do something to reduce or eliminate these risks. At least one court has even found that, absent contractual obligation, a landlord has no

599. See generally section 7:5.1.

600. 1154 Union Ave. Corp. v. Davis, 223 A.D. 464, 228 N.Y.S. 386, *aff'd*, 249 N.Y. 561, 164 N.E. 583 (1928); 305 Broadway Co. v. Stanpud Operating Corp., 48 Misc. 2d 95, 264 N.Y.S.2d 327 (Civ. Ct. 1965) (collecting New York cases); Precision Dynamics Corp. v. Retailers Representatives, Inc., 465 N.Y.S.2d 684 (Civ. Ct. 1983); Backus v. West, 104 Or. 129, 205 P. 533 (1922); Abernathy v. Adous, 2004 Ark. App. LEXIS 167 (Ark. App. 2004) (holding that landlord is not required to accept payment of back rent from subtenant, who was attempting to cure prime tenant's default under the prime lease). 51 C.J.S. *Landlord and Tenant* §§ 47, 48(1)a (1968). The same applies to a leasehold mortgagee. See text *infra* at note 686 *et seq.*

601. 305 Broadway, 48 Misc. 2d at 97, 264 N.Y.S.2d at 330.

602. See 1154 Union Ave. Corp. v. Davis, 223 A.D. 464, 228 N.Y.S. 386, *aff'd*, 249 N.Y. 561, 164 N.E. 583 (1928).

obligation to renew a tenancy as to a subtenant *even if* the landlord accepts a rent check from a subtenant.^{602.1}

It is essential that the prime lease permit subletting. To determine whether it does, the prime lease must be examined. If possible, the subtenant should have a copy of the prime lease. If the term of the prime lease is twenty-one years, the prime tenant cannot create a sublease for a longer period. If the prime tenant has an option to renew for an additional twenty-one years, will he exercise it? If he will not, the subtenant will have no more than a twenty-one-year term, and any greater renewal rights that may appear in a sublease are worthless.

The sublease stands on the prime lease and falls with it, whether the prime lease ends by normal expiration, by some limitation based on breach, or by privilege of cancellation. The prime lease may give the prime landlord a privilege to cancel in case of sale, demolition, long-term lease, or for personal use. Cancellation of the prime lease, and with it the sublease, may begin with an election by the prime landlord. In the usual situation the subtenant is insulated from the prime landlord and can look only to his immediate landlord, who is both the prime tenant and the sublessor. The sublease may include a covenant of quiet enjoyment, which will give the subtenant a cause of action against his sublessor, but not until he has been evicted. The covenant of quiet enjoyment will not prevent eviction. It has no binding effect on the prime landlord or the holder of a paramount fee mortgage.

A sublease may include a covenant by the sublessor to hold the subrent in trust, to be applied first to payment of the prime rent before the sublessor may apply the balance to his own use.⁶⁰³ This is of limited value. It is not as broad as a covenant of quiet enjoyment because it obligates the prime tenant merely to pay rent. It does not cover his other obligations, such as taxes, insurance, and repairs; nor does it affect the prime landlord. If the subtenant can arrange to have these obligations discharged, this would not be enough. There are some types of breach that the subtenant can neither cure nor avoid, for example, an assignment by the prime tenant in the face of a prohibition against assignment. If the tenure of the subtenant depends on the prime tenant exercising a renewal right, the subtenant has no assurance that this will be done.

602.1. STP Assocs., LLP v. Schauer, 894 N.Y.S.2d 844 (N.Y. Dist. Ct. Nassau Cnty. 2010). The court raised the issue of a subtenant's right to cure a tenant's default for nonpayment *sua sponte*, and held that a landlord has no obligation to revive the tenancy even if the landlord accepts payment from the subtenant, since there is no privity of contract between the parties.

603. For such a clause, see 472 Fulton St. Corp. v. Uwanna Foods, Inc., 24 N.Y.S.2d 566 (Sup. Ct. 1940), *aff'd*, 262 A.D. 899, 29 N.Y.S.2d 273 (2d Dep't 1941).

The only reliable assurance a subtenant can get against eviction by the prime landlord is by an agreement with the prime landlord.⁶⁰⁴ It would be helpful to have assurance from the prime landlord that the prime lease will not be terminated by reason of a breach by the prime tenant (the sublessor) without giving the subtenant prior notice and an opportunity to cure the breach. This might appear to give the subtenant an opportunity to protect his tenure. But the subtenant may have neither the desire nor the ability to shoulder the expense of this, particularly if the sublet premises are a small part of the premises covered by the prime lease. Furthermore, as mentioned above, the subtenant cannot prevent or cure sublessor breaches, such as insolvency and improper assignment. However, the good standing—or even the existence—of the prime lease becomes of no importance to the subtenant if the prime landlord agrees that the sublease shall continue though the prime lease ends.

There may be a theoretical or conceptual difficulty in conceiving of the existence of a sublease without the prime lease, but there is no reason why the prime landlord and a subtenant cannot enter into a nondisturbance agreement.

A nondisturbance agreement provides generally that if the prime lease ends before its specified expiration, except possibly as a result of condemnation, fire, or other catastrophe, the prime landlord shall waive his right to cut off the sublease and that the sublease shall continue as if the prime landlord, as lessor, and the subtenant, as lessee, had entered into a lease for the unexpired term of the sublease, on the same terms, covenants, etc., including rights of renewal, as those of the sublease. The reason for excluding a serious fire or condemnation is an assumption that in these events the prime landlord may prefer to call everything off. A subtenant who is protected by an assurance of nondisturbance does not need the right to cure tenant defaults under the prime lease.⁶⁰⁵

If the possible duration of the subterm is beyond that of the prime lease, the agreement can protect the subtenant against a failure of his sublessor to renew. This is effected by providing that if the prime tenant shall fail to exercise a renewal option, the subtenant may, nevertheless, exercise a renewal right that is included in the sublease, and that if he does, the prime landlord and subtenant will enter into a lease, as landlord and tenant directly, on the same terms as if the subtenant has renewed directly with his sublessor.

604. However, this certainty may be reduced under § 365(h) of the Bankruptcy Reform Act of 1978 by bankruptcy of the landlord. *See text infra* at note 663.

605. A nondisturbance clause, included in a prime lease and referring to a subtenant's attornment, was held to preserve a sublease after rejection of the prime lease in the sublessor's bankruptcy. *Chumash Hill Props., Inc. v. Peram*, 39 Cal. App. 4th 1226, 46 Cal. Rptr. 2d 366 (2d Dist. 1995).

The prime lease may provide that if there is substantial damage to the premises by fire or otherwise, neither party need restore and that the lease will end. There may be a similar provision relating to a substantial taking by condemnation. The nondisturbance agreement should not be applicable in these situations where, for good reason, the prime lease had contemplated an abandonment of the entire project. Its application should be limited to protecting the subtenant only against eviction by reason of his sublessor's default.

If the prime tenant has agreed to erect substantial improvements or to make alterations in order to prepare the premises for the subtenant's occupation, completion of such work is generally a prerequisite to the inception of the sublease and to the obligations of the subtenant. If the prime tenant fails to do this, it might be advantageous to the prime landlord to complete the construction and reap the benefit of the sublease, particularly if the prime tenant had finished a substantial part of the work. Accordingly, the prime landlord may wish to have an option to do the required work. He may even obligate himself to do it, but probably only if its cost will not exceed a specified sum.

The same problem of having to make costly alterations may confront the prime landlord at any time when the nondisturbance agreement is invoked. At a time when the prime tenant's default is serious enough to lead to his eviction, the premises may well be in a neglected condition. Accordingly, the agreement may provide that it shall be entirely inapplicable, at the landlord's election, if at such time the cost to the landlord of putting the premises into proper condition exceeds a specified sum.

Other qualifications are necessary for the prime landlord's protection. The nondisturbance agreement is, in effect, a ratification of the sublease by the prime landlord. The subtenant may have some claims against his sublessor—such as rent paid in advance to the sublessor—or some defense or offset that accrued under the sublease. The prime landlord should not take on the sublessor's position to the extent of assuming any such claims in advance. It is enough that he assure the subtenant of possession. Any claims of the subtenant against his sublessor should be assertable only against the sublessor.⁶⁰⁶

The prime landlord enters into the nondisturbance agreement because he approves of the sublease in the form in which he has seen it. But he may never receive his expected benefits should the sublease thereafter be modified by agreement between sublessor and subtenant. To avoid this possibility, the nondisturbance agreement should prohibit any modification of the sublease or its cancellation without the prime landlord's consent and provide that no such modification or cancellation shall bind the prime landlord.

606. See *MTS Co. v. Taiga Corp.*, 365 N.W.2d 321 (Minn. Ct. App. 1985).

When and why is a prime landlord apt to involve himself to this extent with a subtenant? Probably only if the sublease and subtenant are both substantial and then only if the prime landlord regards the sublease as being worth preserving should he have to evict the prime tenant. The agreement is not a one-sided bargain. It assures the prime landlord that if the prime tenant collapses and he has to step into the picture, the commitment of a strong subtenant will be preserved and will run to his benefit. This is a good quid pro quo.

In one of the few cases in which a nondisturbance agreement was litigated, subtenant claimed that the prime landlord was bound by a covenant, made by the sublessor in the sublease, by which the sublessor agreed not to lease neighboring property for a purpose competing with the subtenant. The nondisturbance agreement required the prime landlord to honor the sublease in case of a default or termination of the prime lease. Until any such default, it was held, the prime landlord was not bound by this covenant made by the sublessor to the subtenant.⁶⁰⁷

Nothing in the nondisturbance agreement, as discussed above, will protect the subtenant against a paramount mortgagee. For such protection the subtenant can look only to the paramount mortgagee, from whom it may also be possible to obtain a nondisturbance agreement.⁶⁰⁸

A prospective tenant of a large area, for example, an office building or shopping center, who expects to make many subleases would find it convenient to be able to assure any prospective subtenant that he has a right to call upon his landlord to give a nondisturbance agreement to any subtenant. This could be disastrous to the head landlord. He might be bound by a series of subleases at below the market rents or otherwise flawed. These subleases may be due to the head tenant's misjudgment, or perhaps a desire to fill vacant space at any cost, or they may result from a less admirable purpose. A tenant who has a right to call on the head landlord for nondisturbance agreements for all subtenants may create a "sandwich lease," that is, a direct sublease to one who occupies no space but is the sublessor of the space tenants,

607. *Cassidy v. Billy M. Corp.*, 365 So. 2d 520 (La. Ct. App. 1979). The agreement in *Cassidy* was called an attornment and nondisturbance agreement. As another ground the court noted that "attornment" refers to a change in the lessor. *See Ripple's, Inc. v. Leltarre Assocs.*, 443 N.Y.S.2d 824 (Sup. Ct. 1981). In involved circumstances a head landlord was held bound by the head tenant-sublessor's obligation, after the latter's defection, to sell liquor in subtenant's restaurant. For breach of this subtenant was relieved from a restriction against the sale of liquor, which would otherwise have permitted the head landlord to evict. *MTS Co. v. Taiga Corp.*, 365 N.W.2d 321 (Minn. Ct. App. 1985). Had subtenant gone out of business for failure to sell liquor the head landlord might conceivably have become liable for substantial damages.

608. *See* section 8:1.

the latter being sub-subtenants. The relation between head tenant and sandwich-sublessee need not be explored here. The sub-subtenants pay full market rent. The sandwich tenant pays less than market rent and insulates the head landlord from the space sub-subsubtenants. If the head tenant defaults, purposely or not, the head landlord is left to deal with the under-market sandwich tenant while the latter milks the lucrative sub-subrents. The head landlord should therefore give a nondisturbance agreement only in connection with a sublease of which he approves and one that he might make if he were in the position of the head tenant. If the head lease makes no reference to nondisturbance agreements this matter would have to be considered case-by-case. This would waste time and expense. This expense the head landlord would expect to pass along to the head or subtenant. Therefore, the head lease may specify criteria for nondisturbance agreements. It might, for instance, limit them to space tenants who occupy one floor and pay at least the market rent. The nondisturbance agreement would be in a form attached to the head lease as an exhibit. The sublease would be in a previously approved form. If the head tenant should want nondisturbance agreements that differ from these rent, space, and term requirements (but not as to actual occupancy) this could be considered separately, with an agreement by the head landlord not unreasonably to refuse or delay his consent. In this connection the head landlord should consider the comparable matters discussed in sections 7:3.4[D], 7:3.4[D][3], above, particularly landlord's nonliability for damages. The head landlord will expect others to pay his costs for these agreements.

Forms of nondisturbance agreements are set forth in the two following sections. The first form is designed for general use. The second form includes everything in the first form and, in addition, provides for a situation wherein the prime tenant undertakes to erect a building.

**[B][1] Form of Nondisturbance Agreement Between
Prime Landlord (Fee Owner) and Subtenant⁶⁰⁹**

AGREEMENT made the _____ day of _____, 20____,
between Landlord Corporation, a _____ corporation
having an office at _____, hereinafter referred to as "Prime
Landlord,"

—and—

609. For comments on this form, see section 7:7.4[B]. A tenant's right to cancel, unless landlord obtained a nondisturbance agreement within a specified time, was lost for failure to exercise the cancellation right within a reasonable time after its accrual. *Cent. New Haven Dev. Corp. v. La Crepe, Inc.*, 177 Conn. 212, 413 A.2d 840 (1979).

_____, _____ a corporation having an office at _____, hereinafter referred to as "Subtenant,"

WITNESSETH, WHEREAS:

Prime Landlord is the owner of premises in the City, County and State of New York known as _____, which premises are subject to a certain lease (hereinafter referred to as the "Prime Lease") dated _____, made to _____, as Tenant, hereinafter sometimes referred to as "Sublessor"; and

Sublessor, as lessor, and Subtenant, as lessee, are about to enter into a sublease of part of said premises, a copy of which is attached hereto as Exhibit A, hereinafter referred to as the "Sublease"; and

The parties hereto desire to assure Subtenant's possession of the premises to be sublet under the said sublease upon the terms and conditions therein mentioned, irrespective of a termination of the Prime Lease;

NOW, THEREFORE, in consideration of the covenants hereinafter set forth, the parties hereto hereby covenant and agree as follows:

1. Prime Landlord consents to the execution and delivery of the Sublease in the form annexed as Exhibit A.
2. (A) If the current term of the Prime Lease, or any renewal thereof, shall terminate before the expiration of the term of the Sublease, as the Sublease may be renewed in accordance with the terms thereof, for any reason other than condemnation, fire or other damage, the Sublease, if then in existence, shall continue as a lease between Prime Landlord as lessor, and Subtenant, as lessee, with the same force and effect as if Prime Landlord, as lessor, and Subtenant, as lessee, had entered into a lease as of the date of the termination of the Prime Lease, containing the same terms, covenants and conditions as those contained in the Sublease, including the rights of renewal thereof, for a term equal to the unexpired term of the Sublease.
- (B) The rights under this paragraph 2 shall inure to the benefit of only the Subtenant herein named and shall not pass to any assignee of the Sublease or any other party, [excepting only (i) a corporation into or with which Subtenant may be duly merged or consolidated, provided such corporation shall have a net worth no less than that of [\$_____, or] Subtenant and (ii) that Subtenant may

- assign its rights hereunder to a subsidiary of or a corporation controlled by Subtenant].⁶¹⁰
- (C) Any option which shall be or become vested in Subtenant to cancel the Sublease, because of default of Prime Tenant, shall be ineffective unless Subtenant shall give Prime Landlord notice thereof, and Prime Landlord shall fail to cure such default within the time and in the manner Prime Tenant would have been authorized to do had Prime Tenant simultaneously received such notice.⁶¹¹ The provisions of this paragraph shall apply to any default occurring before or after the lease goes into effect.
3. From and after such termination of the Prime Lease:
- (A) Subtenant will attorn to Prime Landlord, and Prime Landlord will accept such attornment.
- (B) Prime Landlord will have the same remedies by entry, action or otherwise for the nonperformance of any agreement contained in the Sublease for the recovery of rent, for the commission of any waste or for any cause of forfeiture which Sublessor had or would have had if the Prime Lease had not been terminated.
- (C) From and after the time of such attornment, Subtenant shall have the same remedies against Prime Landlord for the breach of an agreement contained in the Sublease that Subtenant might have had against Sublessor if the Prime Lease had not been terminated, except that Prime Landlord shall not be (i) liable for any act or omission of Sublessor, (ii) subject to any offsets or defenses which Subtenant might have against Sublessor, or (iii) bound by any rent or additional rent which Subtenant might have paid in advance to Sublessor.⁶¹²
4. If, at the time of the termination of the Prime Lease, Sublessor shall be obligated to do any work or make any alterations or improvements, in the premises demised under the Sublease, at a cost in excess of ten percent (10%) of the then fixed annual

610. The following may be substituted for bracketed material:

unless the liability of the assignor of such sublease shall survive such assignments.

611. It is at least doubtful if this clause applies to a default occurring before the lease goes into effect, on the ground that a cancellation applies only to an operative lease. *Nichols v. Cities Serv. Oil Co.*, 157 F. Supp. 554 (D. Md. 1957).

612. There may be other obligations of the sublessor that the head landlord will want to disavow. *See MTS Co. v. Taiga Corp.*, 365 N.W.2d 321 (Minn. App. 1985), discussed in text *supra* at note 606.

rent under the Sublease, and if Prime Landlord shall refuse to do or make the same, Prime Landlord or Subtenant may elect, within thirty (30) days after such refusal, to cancel this Agreement, in which event neither party hereto shall have any rights against the other hereunder.

5. Neither Subtenant nor its successors or assigns shall enter into any agreement which shall modify, surrender or merge the Sublease. Any agreement made in contravention to the provisions of this paragraph 5 shall be of no force or effect as to Prime Landlord.
6. In case any lease or tenancy shall come into existence between Prime Landlord and Subtenant pursuant to the provisions of this agreement, the provisions of paragraph 7 hereof shall apply to any liability imposed upon Prime Landlord, by reason of such lease or tenancy.
7. The term "Prime Landlord" as used in this agreement means only the owner for the time being of the aforementioned premises, so that in the event of any sale or other transfer of an interest therein, Prime Landlord shall be and thereby is entirely freed and relieved of all covenants and obligations of the Prime Landlord hereunder. The provisions of this agreement, however, shall bind any subsequent owner of the premises.
8. Any notice or demand which under the terms of this agreement must or may be given or made by the parties hereto shall be in writing and may be given or made by mailing the same by registered or certified mail addressed to the respective addresses hereinbefore given. Either party and its respective successors in interest taking the benefit of this agreement may designate by notice in writing a new or other address to which such notice or demand shall thereafter be so given, made or mailed. Any notice given herein by mail shall be deemed delivered when deposited in the United States General or Branch Post Office, enclosed in a registered prepaid wrapper addressed as hereinabove provided.

IN WITNESS WHEREOF, the parties hereto have duly executed this agreement the day and year first above written.

[Executions and Acknowledgments
of Prime Landlord and Subtenant]

The undersigned hereby consents to the execution and delivery of the foregoing instrument and agrees that neither the execution of the same nor anything done pursuant to the provisions thereof shall be deemed or taken to modify the Prime Lease therein referred to.

Dated:

[Execution and Acknowledgment by Prime Tenant]

[attach copy of Sublease, as Exhibit A]

[B][2] Another Form of Nondisturbance Agreement Between Prime Landlord (Fee Owner) and Subtenant—Construction Form—Construction of Building by Prime Tenant-Sublessor⁶¹³

Agreement made this ____ day of _____, 20____, between Landlord Corporation, a _____ corporation having an office at _____, hereinafter referred to as "Landlord," and Subtenant Corporation, a _____ corporation having an office at _____, hereinafter referred to as "Subtenant,"

WITNESSETH, WHEREAS:

Landlord is the owner of the premises in the City, County and State of New York known as _____, and is the Landlord under a certain lease of said premises dated as of _____, made to Sublessor Corporation, as tenant (said tenant being hereinafter referred to as "Sublessor"), which lease requires Sublessor to erect a new building on said premises and contains various other terms, covenants and conditions, a copy of which lease has been initialed by the parties hereto for identification, and which lease is hereinafter referred to as the "prime lease";

Sublessor, as lessor, and Subtenant, as lessee, are about to enter into a sublease of a part of said new building for a term of ____ years, unless sooner terminated as therein provided, but with the privilege to renew for a further term of ____ years, which sublease contains various other covenants and conditions, with all of which Landlord is familiar, a copy of which sublease is attached hereto as Exhibit A and is hereinafter referred to as the "sublease";

613. For comments on this form, see section 7:7.4[B].

The parties hereto desire to assure Subtenant's possession of its part of said new building upon the terms and conditions prescribed in the sublease for the full balance of the term therein mentioned irrespective of a termination of the prime lease after substantial completion of the new building as hereinafter defined (unless such termination results from condemnation or fire or other catastrophe); and

The parties hereto desire to assure Subtenant that its renewal rights under the sublease shall not be rendered ineffectual by a lapse of the renewal rights contained in the prime lease, subject, however, to the conditions and limitations more particularly hereinafter set forth;

NOW, THEREFORE, in consideration of One Dollar (\$1.00) in hand paid by each of the parties hereto to the other, and of other good and valuable consideration, the receipt whereof is hereby acknowledged, and of the covenants hereinafter set forth, the parties hereto hereby covenant and agree as follows:

1. Landlord consents to the execution and delivery of the sublease as presently drafted.
2. If the prime lease shall terminate after such building shall have been substantially completed and before the expiration of the then current term, unless such termination results from condemnation or fire or other catastrophe, the sublease, if then in existence, shall continue with the same force and effect as if Landlord as lessor and Subtenant as lessee had entered into a lease for a term equal to the then unexpired term of the sublease, as of the termination of the prime lease, containing the same terms, covenants and conditions as those contained in the sublease, including the rights of renewal therein.
3. (A) If the prime lease shall terminate during said term before substantial completion of the said building and the Landlord shall, within ninety (90) days thereafter notify the Subtenant that it has elected to and will carry out and perform the obligations of Tenant under the said prime lease as to the completion of the said building, then the sublease shall continue for the balance of the term herein mentioned with the same force and effect as if Landlord as lessor and Subtenant as lessee had entered into a lease of the date of the termination of the prime lease containing the same terms, covenants and conditions as those contained in the sublease, including the rights of renewal therein, for a term equal to the then unexpired term of the sublease.

- (B) Any option which shall be or become vested in Subtenant to cancel the Sublease, because of default of Prime Tenant, shall be ineffective unless Subtenant shall give Prime Landlord notice thereof, and Prime Landlord shall fail to cure such default within the time and in the manner Prime Tenant would have been authorized to do had Prime Tenant simultaneously received such notice.⁶¹⁴ The provisions of this paragraph shall apply to any default occurring before or after the lease goes into effect.
4. From and after such termination of the prime lease and if Subtenant's right of possession shall be preserved as aforesaid:
- (A) Subtenant will attorn as Tenant to Landlord, and Landlord will accept such attornment.
- (B) Landlord will have the same remedies by entry, action or otherwise for the nonperformance of any agreement contained in the sublease for the recovery of rent, for the doing of any waste or for any cause of forfeiture, as Sublessor had or would have had if the prime lease had not been terminated.
- (C) From and after the time of such attornment, Subtenant shall have the same remedies against Landlord for the breach of an agreement contained in the sublease that Subtenant might have had against Sublessor if the prime lease had not been terminated, except that Landlord shall not be (i) liable for any act or omission of Sublessor, (ii) subject to any offsets or defenses which Subtenant might have against Sublessor, or (iii) bound by any rent or additional rent which Subtenant might have paid in advance to the Sublessor.⁶¹⁵
- (D) Landlord and Subtenant will enter into an agreement supplemental hereto containing the same terms and conditions as those contained in the sublease but with such changes as may be necessary by reason of the substitution of Landlord in the place and stead of Sublessor as lessor, except that Landlord hereunder shall have such

614. It is at least doubtful if this clause applies to a default occurring before the lease goes into effect, on the ground that a "cancellation" applies only to an operative lease. *Nichols v. Cities Serv. Oil Co.*, 157 F. Supp. 554 (D. Md. 1957).

615. There may be other obligations of the sublessor that the head landlord will want to disavow. *See MTS Co. v. Taiga Corp.*, 365 N.W.2d 321 (Minn. Ct. App. 1985), discussed in text *supra* at note 606.

reasonable time as may be necessary to complete the building, subject to delays which may be caused by strikes, Acts of God, inability to obtain work and materials at reasonable prices, and other contingencies beyond the reasonable control of Landlord.

For the purposes of paragraphs 2 and 3 the said building shall be deemed to have been substantially completed if the completion thereof can be effected at a cost of not more than \$_____.

5. If the renewal rights given Subtenant in the sublease are rendered ineffectual by a failure of Sublessor or its successors or assigns to exercise a renewal right given in the prime lease, Subtenant may, subject to the conditions and limitations hereinafter set forth, give a notice and obtain a lease of the character hereinafter in this paragraph 5 indicated. If a renewal right contained in the prime lease is permitted to lapse, Subtenant may, within thirty (30) days after such lapse, notify Landlord of its election to enter into a lease with Landlord. Promptly thereafter Landlord as lessor and Subtenant as lessee will enter into the form of lease that Subtenant would have been entitled to obtain from the then holder of Sublessor's interest in the prime lease if the lapsed right of renewal in the prime lease and Subtenant's renewal right in the sublease had been seasonably exercised. The form of lease and agreement which Subtenant may obtain under this paragraph 5 shall be based upon the sublease as presently drafted (with such changes as may be necessary by reason of the substitution of Landlord in the place and stead of Sublessor) and shall not be affected by any subsequent modification thereof.

Subtenant shall have no rights under this paragraph 5 if it shall fail to give such notice within said thirty (30) day period. The rights under this paragraph 5 shall inure to the benefit of only Subtenant Corporation and shall not pass to any assignee of the sublease or any other party, excepting only (i) a corporation into or with which Subtenant Corporation may be duly merged or consolidated, provided such corporation shall have a net worth no less than _____ dollars (\$_____) immediately preceding such merger or consolidation; [or \$_____] and (ii) that Subtenant Corporation, after execution of a lease of the character in this paragraph 5 indicated, may assign such lease to a subsidiary of or a corporation controlled by Subtenant Corporation. Any notice given by Subtenant shall be ineffectual at the election of Landlord to give Subtenant any right or rights under this paragraph if, when any such notice shall be given, the improvements on the premises covered by

the prime lease shall be in such state of disrepair or destruction as to require the expenditure of \$_____ or more to put such improvement into good and usable condition.

6. The term "Landlord" as used in this agreement means only the owner for the time being of the aforementioned premises, so that in the event of any sale of the said premises the owner shall be and hereby is entirely freed and relieved of all covenants and obligations of the Landlord hereunder. The provisions of this agreement, however, shall bind any subsequent owner of the premises.
7. If any defaults shall occur under the prime lease, then, subject to the further conditions hereof, Subtenant may, but shall be under no obligation to, make payments to cure the same, and in such event Landlord shall accept any sums so tendered if tendered prior to the expiration of any grace period, but Landlord shall not be obligated to accept any payment which would have the effect of waiving any claim for damages which Landlord may at any time have against Tenant or its successors in interest unless the payment by Subtenant shall be of the entire amount of such claim for damages whether or not then accrued.
8. Neither Subtenant nor its successors or assigns shall enter into any agreement which shall modify, surrender or merge the sublease. Any agreement made in contravention to the provisions of this paragraph 8 shall be of no force or effect as to Landlord.
9. Nothing in this agreement contained shall be deemed or construed to modify any of the provisions of the prime lease as between Landlord and Sublessor or to waive any rights which Landlord may now or hereafter have against Sublessor by reason of the prime lease or anything connected therewith.
10. If any lease or tenancy shall come into existence between Landlord and Subtenant pursuant to the provisions of paragraph 4 or paragraph 5, the provisions of paragraph 6 shall apply to any liability imposed upon Landlord by reason of such lease or tenancy.
11. This instrument may not be modified orally or in any other manner than by an agreement in writing signed by both parties hereto or their respective successors in interest.
12. Any notice or demand which under the terms of this agreement must or may be given or made by the parties hereto shall be in writing and may be given or made by mailing the same by registered or certified mail addressed to the respective addresses hereinbefore given. Either party and its respective

successors in interest taking the benefit of this agreement may designate by notice in writing a new or other address to which such notice or demand shall thereafter be so given, made or mailed. Any notice given herein by mail shall be deemed delivered when deposited in the United States General or Branch Post Office, enclosed in a registered prepaid wrapper addressed as hereinabove provided.

13. The covenants and agreements herein contained shall apply to, inure to the benefit of and be binding upon the parties hereto and upon their respective successors in interest and legal representatives except as otherwise hereinbefore provided.

IN WITNESS WHEREOF, the parties hereto have duly executed this agreement the day and year first above written.

[Executions and Acknowledgments
of Prime Landlord and Subtenant]

The undersigned hereby consents to the execution and delivery of the foregoing instrument and agrees that neither the execution of the same nor anything done pursuant to the provisions thereof shall be deemed or taken to modify the Prime Lease therein referred to.

[Executions and Acknowledgment by prime tenant]

[Attach copy of Sublease, as Exhibit A]

§ 7:8 Leasehold Mortgages

§ 7:8.1 In General

A prospective mortgagee of a lease, like a prospective mortgagee of a fee, is concerned with the economic security of the mortgaged property and with the adequacy of the form of the mortgage instruments to protect and to realize on this security after default. From this point on leasehold mortgages and fee mortgages differ in their supporting structure. In case of default a fee mortgagee may foreclose and acquire the mortgaged property. He can sit there and sleep there, or sell the property and make a profit or take a loss. He has something tangible. A mortgage on a lease, on the other hand, is like a mortgage on a toy balloon. Prick it and it's gone. And so with a leasehold mortgage if the lease is terminated

in accord with its terms before its specified expiration.⁶¹⁶ If the termination is fraudulent the leasehold mortgage survives.⁶¹⁷ The leasehold mortgagee takes his mortgage subject to all the provisions of the lease.⁶¹⁸

The basic problem in leasehold mortgages is to prevent the lease from being cancelled, a right to renew from being lost, or other tenant rights from being dissipated. To this end the lease should have certain provisions that leasehold mortgagees generally require. Counsel for lenders vary in these requirements and some change their requirements as a result of experience and the growing complexity of these transactions. However, the basic objective is to preserve the leasehold until the mortgage debt is satisfied. If leasehold financing is contemplated, and it is feasible to do so, it is advisable to submit a proposed lease, before its execution, to a prospective leasehold mortgagee.

One essential is that the lease be mortgageable. It is mortgageable in the absence of a restriction against mortgaging.⁶¹⁹ It is preferable, nevertheless, to include an express right to mortgage. The lease might state that the tenant and the tenant's successors and assigns shall have an unrestricted right to mortgage and pledge the lease, provided that any such mortgage or pledge be subject and subordinate to the lease. This would permit an endless number of leasehold mortgages, in theory at least. The landlord may seek to limit the number of mortgages and to limit the type of leasehold mortgagees,^{619.1} for example, to lending institutions. Any limitation of this type should

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616. Sw. Vill. Water Co. v. Fleming, 442 So. 2d 89 (Ala. 1983). Bowen v. Selby, 106 Neb. 166, 183 N.W. 93 (1921) (nonpayment by tenant); 51C C.J.S. *Landlord and Tenant* § 51(a) (1968). The leasehold mortgage has no duration after expiration of its lease. 61 Assocs. v. 425 Fifth Ave. Assocs., 207 A.D.2d 323, 615 N.Y.S.2d 687 (1st Dep't 1994).
617. James Everard's Breweries v. Wohlstadter, 177 A.D. 862, 164 N.Y.S. 899 (1st Dep't 1917), involved a tenant default, undefended summary proceedings against the tenant-leasehold mortgagor brought without notice to the leasehold mortgagee, followed by a new lease on similar terms, given to the wife of the original tenant. The leasehold mortgage was held to attach to the new lease.
618. Bowen, 106 Neb. 166; 51C C.J.S. *Landlord and Tenant* § 51(a) (1968).
619. The exception of a tenancy at will may be disregarded for this purpose. See section 7:3.2[A].
- 619.1. In *Newell Funding LLC v. Tatum*, 24 Misc. 3d 579 [N.Y. Civ. Ct. 2009], a cooperative shareholder mortgaged its shares to a mortgagee for a loan unrelated to the apartment in question. Later, the shareholder defaulted and the lender foreclosed on the shares. Lender bought at the sale and brought a summary possession action to terminate occupancy by the borrower, but the cooperative apartment rules prohibited a private lender from having a possessory right in its apartments. Consequently, lender lacked standing to bring a possession action.

be drawn with care. It will be objectionable to a lending institution if a limitation that leasehold mortgages be made only to lending institutions implies a restriction that the lending institution mortgagee may assign the mortgage only to another lending institution. Furthermore, there should be no impediment to the tenant, or its successors or assigns, taking back a purchase money mortgage upon a sale of the lease. The landlord is justified in limiting the number of leasehold mortgages existing at the same time in order to keep within reasonable limits the number of mortgagees who are to be given notice of default under the lease and who will have other leasehold mortgagee's rights hereinafter mentioned.

The lien of a leasehold mortgage generally attaches to the various benefits of the lease inuring to the benefit of the tenant. This includes a landlord's covenant to pay the tenant for improvements,⁶²⁰ to compensate the tenant in lieu of giving him a renewal term,⁶²¹ and the tenant's interest in security deposited with the landlord.⁶²² The lien presumably attaches as well to a purchase option given the tenant,⁶²³ but not if the option is to purchase the property on credit.⁶²⁴

A prospective mortgagee needs assurance when he makes the mortgage loan that the lease is in existence. For this reason he requires an estoppel certificate from the landlord, certifying that the lease is in full force and effect, the amount of rent then payable, the date to which rent and other charges have been paid, whether the lease has been modified, and if so, how, and whether, to landlord's knowledge, tenant is in default in the performance or observance of any covenants and conditions in the lease on tenant's part to be performed or observed, or any condition exists that with the passage of time⁶²⁵ would, if uncorrected, constitute a default. The foundation for this is a provision in the lease requiring a landlord to give such a certificate without charge at any time and from time to time upon request, within, perhaps, ten days. Reciprocally, the lease should require tenant to give landlord a comparable certificate whenever landlord requests.

620. *Stockett v. Howard*, 34 Md. 121 (1870).

621. *Terry v. Marx Realty & Improvement Co.*, 130 Misc. 406, 224 N.Y.S. 37 (Sup. Ct. 1927).

622. *Keusch v. Morrison*, 240 A.D. 112, 269 N.Y.S. 169 (1st Dep't 1934).

623. *See* authorities *infra* note 666.

624. *Menger v. Ward*, 87 Tex. 622, 30 S.W. 853 (1895). This is an example of the general rule that a vendor, under a contract of sale providing for deferred payments, need not accept the obligation or rely on the credit of an assignee of the vendee. FRIEDMAN ON CONTRACTS § 6:1.

625. "Passage of time" refers to a tenant breach that has not ripened into a default because a grace period is running. An extended estoppel certificate is set forth in *Homart Dev. Co. v. Sgrenici*, 443 Pa. Super. 538, 553, 662 A.2d 1092, 1099, n.7 (1995).

Landlord will probably need such a certificate when he mortgages the fee, sells the property, and perhaps on other occasions.⁶²⁶

The lease should be for a term long enough to amortize the leasehold mortgage debt, plus enough margin to afford the mortgagee time enough for this purpose after foreclosing. Laws regulating lending institution investments may determine the length of the required term and whether renewal rights comply with these requirements. These laws may make it necessary for one or more renewals to be exercised before execution of the leasehold mortgage.⁶²⁷ A prospective tenant should be familiar with these requirements before executing the lease.

The existence of a fee mortgage, which is paramount to the lease, is no legal bar to mortgaging the lease. A prospective leasehold mortgagee appraises the lease in the light of the subrentals (or other basis for its value) as against the cost of keeping the lease in good standing, that is, the rent, additional rent, operating costs, etc. There is no legal reason for not adding to these costs the debt service on the prior fee mortgage, which may have to be advanced to preserve the lease against foreclosure. If the fee mortgage is self-liquidating, the amount of this debt service is more definite than many of tenant's expenses. If the fee mortgage is only partially payable during its term, with a substantial balance or "balloon" payable on maturity, the situation is different. At first blush, then, the existence of a prior fee mortgage may merely reduce the value of a lease and the amount that may be borrowed on its security. Practically, however, a paramount fee mortgage produces more difficulties. A leasehold mortgagee may be concerned with possible rights in a fee mortgagee to declare the mortgage due for nonmonetary defaults, for example, failure to maintain the premises,⁶²⁸ failure to remove building violations, or insolvency of the mortgagor, etc., which are difficult for a third person to remove. These are comparable to the second and third types of default in the mortgaged lease, which are considered in the next pages, and which require elaborate provisions for their counteraction.⁶²⁹ The reduction in the possible amount of a leasehold mortgage troubles the tenant.

626. Tenant's estoppel certificate barred tenant's claim, as against a purchaser of the property, of an oral exclusive right to operate a sporting goods store. *Sports World, Inc. v. Neil's Sporting Goods, Inc.*, 507 So. 2d 480 (Ala. 1987). But for the possible unreliability of tenant's estoppel certificate, see *Won's Cards, Inc. v. Samsondale/Haverstraw Equities, Ltd.*, 165 A.D.2d 157, 566 N.Y.S.2d 412 (3d Dep't 1991), discussed in chapter 36, note 19.

627. The necessity for this was recognized in *Loudave Estates, Inc. v. Cross Rds. Improvement Co.*, 26 Misc. 2d 522, 524, 203 N.Y.S.2d 966, 967 (Sup. Ct. 1960). *Cf.* chapter 14 at note 108.

628. *See Sw. Vill. Water Co. v. Fleming*, 442 So. 2d 89 (Ala. 1983), discussed in text *infra* at note 685 *et seq.*

629. *See* section 7:8.3.

A nondisturbance agreement from the fee mortgagee will assure the leasehold mortgagee that a foreclosure by the former will not destroy the lease. But the term “nondisturbance agreement” lacks precision.⁶³⁰ A bare nondisturbance agreement leaves a paramount fee mortgagee with rights in the proceeds of insurance and condemnation that are prior to a leasehold mortgagee. This is unacceptable to the leasehold mortgagee where, as is often the case, the leasehold mortgage finances a building. These and other matters can be solved in drafting the nondisturbance agreement, but in so doing the nondisturbance agreement becomes so close to a subordination of the fee mortgage to the lease that leasehold mortgagees are likely to insist on nothing short of subordination.⁶³¹ This is simpler to achieve and more certain in result. Some lending institutions lack the power to lend on a lease that is subordinate to a fee mortgage. This possibility makes subordination of a fee mortgage essential. If the lease is mortgageable in the economic sense, there is little reason why the fee mortgagee should not expressly subordinate. His interests are similar to those of the lessor and can be protected by receiving rights that are comparable (but paramount) to the lessor’s, particularly in the application of condemnation and insurance moneys. Any subordination of the fee mortgage should be not only to the lease but also to any extensions or renewals thereof, as well as to any “pickup” leases available under the terms of the lease to a leasehold mortgagee.

When a fee mortgagee subordinates to a lease he must “think black” and anticipate what his position will be if he has to foreclose. His position will be as successor landlord under a lease, the terms of which he has approved as security for his mortgage, provided that the lease is not modified in the interim. To assure this position he must obtain a commitment from the owner that the lease will not be modified or cancelled and that no rent beyond a specified amount will be collected in advance.⁶³²

630. See sections 7:7.4[B], 7:7.4[B][1], 7:7.4[B][2], and particularly chapter 8 following note 18.

631. Occasionally a prospective leasehold mortgagee insists that the fee mortgage be subordinated to the *leasehold mortgage* as well as to the lease. This is unnecessary and is conceptually repugnant, because the liens affect different estates. Subordination of a fee mortgage to a leasehold mortgage can lead to an unexpected result. If the fee mortgage is subject to the lease, foreclosure makes the former fee mortgagee a successor landlord as if he had bought the property, subject to the lease, from the original landlord. If the lease gives the tenant a purchase option, which is exercised, a merger of the lease into the fee results. This shifts the lien of the leasehold mortgage to the fee (*see* authorities *infra* note 666) and must necessarily make the fee mortgage a junior mortgage.

632. A leasehold mortgagor may be forbidden to collect more than one or three months rent in advance. An exception may be made where

From a leasehold mortgagee's point of view the possible defaults under the mortgaged lease fall into three classes.

- (1) The first is monetary breaches, that is, defaults that can be cured by payment of money and with little delay. These include nonpayment of rent or taxes or failing to supply the landlord with insurance. These give a leasehold mortgagee no difficulty if he has notice of the default, is authorized to cure the default on tenant's behalf, and if he is given a reasonable time to do so. It is not enough for landlord to agree to give notice to a leasehold mortgagee. He might break his agreement and terminate the lease, leaving the leasehold mortgagee only with an action for breach of contract. The lease should provide that no notice of default that is required to be given tenant shall have any effect unless a copy is simultaneously given the leasehold mortgagee. It is preferable that the leasehold mortgagee be entitled to a longer time than is given to tenant to cure the default. Otherwise, the leasehold mortgagee must, for his protection, shorten the tenant's time to perform.
- (2) The second type of default includes a failure to repair or restore or to comply with laws. These can be performed only by a party in possession or entitled to possession. A leasehold mortgagee is in no position to do this work until he has completed a foreclosure action, procured a receivership, or gone into possession with the mortgagor's permission, or obtained an assignment of the lease in lieu of foreclosure. The lease must therefore give the leasehold mortgagee appropriate time to obtain possession before complying with these requirements. A lease sometimes gives a leasehold mortgagee time for this "provided there are no other defaults hereunder" in the interim. This language should be unnecessary, because giving a mortgagee time to cure a specified default gives no immunity with respect to other defaults. Furthermore, the quoted phrase may be construed to negate the mortgagee's right, expressed elsewhere in the lease, to notice and time to cure the other defaults. In view of the delay necessarily involved with this type of default the landlord is reasonably

substantial alterations or improvements are to be made for a subtenant. An exception should also be made where advance rent paid or security deposited by a subtenant is impressed with a trust. A leasehold mortgagee, placed in possession by a court, was held not bound by rents paid in advance by subtenants who had expressly subordinated their leases to a leasehold mortgage. The leasehold mortgage forbade the mortgagor from collecting subrents in advance. *Kirkeby Corp. v. Cross Bridge Towers, Inc.*, 91 N.J. Super. 126, 219 A.2d 343 (1966).

entitled to have a guaranty or other assurance that the default in question will ultimately be cured and that the landlord will suffer no loss thereby. If the mortgagee is a lending institution a letter of the institution to this effect should be sufficient. A lease may condition a mortgagee's right to cure a default of this type upon his undertaking to begin and prosecute a foreclosure action to completion. Any such provision should permit the mortgagee to discontinue the foreclosure before completion if the default should be cured in the meantime.

- (3) The third type is a default that a leasehold mortgagee can neither prevent nor cure. The classic example was tenant insolvency in some form—bankruptcy, receivership, assignment for benefit of creditors, and the like.⁶³³ Other examples are an assignment or subletting by the tenant-mortgagor in breach of some limitation on these actions. A mortgageable lease should provide that none of these will be deemed a default with respect to the leasehold mortgagee. It will be noted that, assuming that rent and other tenant obligations are met, a landlord generally suffers no loss by reason of this type of default. A lease that qualifies for leasehold financing is generally intended to have little if any limit on assignment or subletting. And if the tenant has built valuable improvements upon the property, which is likely in this situation, thereby giving the landlord the best kind of security, there is little reason for making tenant insolvency an event of default. This in general is the attitude of leasehold mortgagees.

The possibility of a lapsed renewal right can be avoided by giving the leasehold mortgagee any renewal right that the tenant fails to exercise.

The lease may provide for arbitration to resolve disputes between landlord and tenant. Determination of renewal rent may be one such dispute. If the tenant is required to erect a building, other disputes may relate to the adequacy of building plans and specifications, or satisfaction with work or materials. In this connection the lease generally provides that should the tenant fail to proceed with arbitration the leasehold mortgagee may do so in his place.

The foregoing would appear to protect a leasehold mortgagee against tenant defaults. Nevertheless, out of an abundance of caution, the mortgagee desires an additional privilege. The lease generally provides that if, despite all else, the lease is terminated by reason of

633. Text *supra* at note 526 and at note 595. *But see* chapter 16 at note 51. For the effect of the Bankruptcy Reform Act of 1978 on landlord's bankruptcy, see text *infra* at note 663.

a tenant default, the leasehold mortgagee will be entitled to get from the landlord, within a specified time thereafter, a new lease, naming the leasehold mortgagee or its nominee as tenant.⁶³⁴ This “pickup lease” is virtually a resurrection of the old lease with respect to rent, term, expiration, renewal rights, etc. To get this lease the leasehold mortgagee will have to pay any back rent and cure other defaults,⁶³⁵ and pay the expenses to which the landlord had been put in evicting the original tenant and having the new lease prepared. Provision for the pickup lease should expressly negative any obligation of the landlord to give actual possession thereunder to the new tenant. This is because the landlord did not create, and may not know of, the subtenancies and other rights created by the original tenant. It is common to provide that if more than one leasehold mortgagee applies for a pickup lease the senior mortgagee will prevail. An occasional lease provides that the junior mortgagee will get the pickup lease. The effect of this on a senior mortgage of the original lease has apparently not been established.

The right to a pickup lease, in addition to the rights mentioned above,⁶³⁶ would appear to satisfy the needs of a leasehold mortgagee. However, it has been questioned for several reasons whether primary reliance should be placed on what may essentially be a contract to give a lease and which substitutes for an existing lease a mere cause of action for specific performance. It has also been suggested that the mortgagee’s road to a new lease may be beset with intervening liens and, furthermore, that a right to a new lease does not satisfy an obligation imposed on some institutional lenders of an ability “to continue the lease in

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634. A leasehold mortgagee’s right to a pickup lease, as provided for in the original lease, was upheld, but the decision was reversed on the ground of failure of the mortgagee to make timely application for the lease. The time was held to run from the mortgagee’s notice of tenant’s default without interruption during the pendency of a temporary injunction against cancellation of the lease obtained by the tenant against the landlord. *Berger-Tilles Leasing Corp. v. York Assocs., Inc.*, 53 Misc. 2d 490, 279 N.Y.S.2d 62, *rev’d*, 28 A.D.2d 1132, 284 N.Y.S.2d 486 (2d Dep’t 1967). In *Vallely Inv., L.P. v. BancAmerica Commercial Corp.*, 106 Cal. Rptr. 2d 689 (Cal. Ct. App. 2001), a leasehold mortgagee used a subsidiary to hold the mortgagor tenant’s estate for a short period of time. But the subsidiary expressly assumed the obligations under the lease from the defaulting lessee/mortgagor. Thereafter, the leasehold mortgagee foreclosed on the leasehold interest and assigned lease to a third party. When the third party filed for bankruptcy, the landlord was able to recover from the subsidiary under principles of privity of contract. The assumption promise remained valid even though the lease had been reassigned through a foreclosure.
635. The other defaults should not include those noncurable by a third person and should not include, for instance, the making of an assignment or sublease forbidden by the terms of the mortgaged lease.
636. See text at *supra* notes 632–35.

force." For these reasons leasehold mortgagees tend to place no primary reliance on the right to a pickup lease but regard it merely as a backup to other remedies. Some comment on this is in order.

In most cases a tenant's renewal right is enforced with little practical difficulty. But institutional leasehold mortgagees, because of their fiduciary nature and because of the large sums involved in leasehold financing, do not feel free to overlook a few lower court decisions that cast some doubt on the enforceability of this right. One of these suggested that in bankruptcy proceedings of the landlord, the bankruptcy court could adjust the rent and covenants of a lease in accordance with the equities of the case.⁶³⁷ This suggestion involves no renewal rights but goes to the heart of the lease. If this decision were to be taken seriously, nobody could be free of its shadow in becoming a tenant, assignee, or mortgagee of an important lease. A federal district court in Oregon upheld the decision of a landlord's receiver to reject a tenant's exercise of a renewal option on compensating the tenant for her loss.⁶³⁸ The tenant's business, operation of a steam room, was damaging the rest of landlord's building and had created a situation that could be corrected only by expensive reconstruction. A federal district court in New York refused to permit a landlord's receiver to disaffirm a tenant's renewal right, which entailed the supply of heat and other services to the tenant, but extended the time to affirm or disaffirm in view of the possibility that the services would become burdensome.⁶³⁹ Another New York federal district court denied a landlord's trustee in bankruptcy a right to reject a tenant's renewal right, included in a lease that gave the landlord a choice of giving the tenant a renewal or paying for the tenant's improvements. This court ruled that these rights were part of the "estate" granted the tenant.⁶⁴⁰ It is of interest that New York refuses to recognize a distinction between an extension and a renewal of a lease and holds that a tenant's notice of election to renew creates, per se, a term for the combined periods of the original and renewal term, without the execution of a new instrument,⁶⁴¹ whereas Oregon seems not to have taken a stand on this distinction.⁶⁴²

637. *In re Freeman*, 49 F. Supp. 163 (S.D. Ga. 1943). Cf. the doctrine of impracticability, chapter 27 at note 145. The interpretation of Bankruptcy Act § 70b by *In re Freeman* was rejected by *In re Garfinkle*, 577 F.2d 901, n.4 (5th Cir. 1978).

638. *Coy v. Title Guar. & Trust Co.*, 198 Fed. 275 (D. Or. 1912).

639. *Am. Brake Shoe & Foundry Co. v. N.Y. Rys.*, 278 F. 842 (S.D.N.Y. 1922).

640. *In re N.Y. Investors Mut. Grp., Inc.*, 153 F. Supp. 772 (S.D.N.Y. 1957), *aff'd sub nom. Cohen v. E. Netherland Holding Co.*, 258 F.2d 14 (2d Cir. 1958).

641. *Orr v. Doubleday, Page & Co.*, 223 N.Y. 334, 119 N.E. 552 (1918); 1 A.L.R. 338 (1919).

642. *See generally* sections 14:3, 14:3.1, 14:3.2, 14:3.3.

Another matter that is of concern in connection with pickup leases is that of intervening liens, sometimes expressed as the doctrine of relating back. This affects rights that vest in third persons between the time of the creation of the option and its exercise. If the option relates back the optionee takes precedence over these intervening rights; otherwise, the intervening rights prime the optionee. In some situations the optionee prevails, in others it is the third parties, and in some situations the cases conflict.⁶⁴³ It should be clear that the relating back is not the reason for the results but a not very useful description of the results. To say, in any situation, that an option does not relate back is to deny that an unexercised option has any effect. But it does have effect, as shown by an apparent unanimity of cases holding that a purchaser of realty, with knowledge of an outstanding purchase option, takes subject to the optionee's right to specific performance or damages.⁶⁴⁴

It has also been held that a marriage of an optionor between the date of the option and its exercise creates no dower interest in the wife that is good as against the optionee.⁶⁴⁵ And a declaration of a homestead during this period is ineffective as against the optionee.⁶⁴⁶ These are roughly comparable to those cases mentioned above that uphold the optionee's right to purchase against third persons who take title with notice. It is difficult to fit into this pattern a decision that denies to a tenant in possession, with an option to purchase, an injunction against cutting trees by a third person whom the landlord had authorized to do this.⁶⁴⁷ This is also true of a case holding that a tenant of part of a building, with an option to purchase the entire building, took title subject to a lease of another part of the building,

643. See section 15:5.1. See generally Annot., *Exercise of Option as Affecting Rights Intervening Between Giving and Exercise of Option*, 50 A.L.R. 1314 (1927).

644. FRIEDMAN ON CONTRACTS § 4:9; Annot., 50 A.L.R. 1314, 1315 *et seq.* (1927); 49 AM. JUR. *Specific Performance* § 148 (1943); 92 C.J.S. *Vendor and Purchaser* § 13 (1955). See generally *M.L. Gordan Sash & Door Co. v. Mormann*, 271 N.W.2d 436, 439 (Minn. 1978); Annot., *Exercise of Option as Affecting Rights Intervening Between Giving and Exercise of Option*, 50 A.L.R. 1314 (1927). For a more extended discussion of relating back, see section 15:5.1.

645. *Mineral Dev. Co. v. Hall*, 115 S.W. 230 (Ky. Ct. App. 1909); *Detwiler v. Capone*, 357 Pa. 495, 55 A.2d 380 (1947).

646. *Smith v. Bangham*, 156 Cal. 359, 104 P. 689 (1909), 28 L.R.A. (n.s.) 522 (1910); *Watson v. Bethany*, 209 La. 989, 26 So. 2d 12 (1946).

647. *Reeve v. Hicks*, 197 Ga. 181, 28 S.E.2d 649 (1944); *Varn Turpentine & Cattle Co. v. Allen & Newton*, 38 Ga. App. 408, 144 S.E. 47 (1928). *Contra Pardee v. C. Crane & Co.*, 74 W. Va. 359, 371, 82 S.E. 340, 345 (1914).

which was made subsequent to the creation of the option.⁶⁴⁸ These decisions speak of relating back but appear to rest upon an assumption that the holder of an unexercised option does not have enough interest in the property to block these transactions. In the circumstances involved this assumption seems misplaced. A more difficult situation is presented by the fire and condemnation cases.

If property that is subject to a contract of sale is damaged or destroyed after the date of the contract but before the scheduled closing, the majority courts hold the purchaser is entitled to credit on the purchase price of the proceeds of insurance.⁶⁴⁹ In case of an option, however, the majority refuse to credit the optionee with the insurance moneys.⁶⁵⁰ It is said that until exercise of the option the optionee has no “interest” in the property.⁶⁵¹ All this should impel an optionee to consider the wisdom of maintaining fire and extended coverage insurance for his benefit.

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648. *Durfee House Furnishing Co. v. Great Atl. & Pac. Tea Co.*, 100 Vt. 204, 136 A. 379, 50 A.L.R. 1309 (1927), *criticized in* 3 A. CORBIN, CONTRACTS § 11.16, at 594–96, nn.5, 6 (1996 rev.). *See also* Notes, 75 U. PA. L. REV. 791 (1927); 27 COLUM. L. REV. 749 (1927). *Cwiakala v. Giunta*, 23 N.J. Super. 261, 92 A.2d 849 (1952), is *contra* in result.
649. FRIEDMAN ON CONTRACTS § 4:11; 46 C.J.S. *Insurance* § 4.11, at 495–96 (5th ed. PLI 1991). Matters comparable to those discussed in this paragraph of the text are considered in chapter 15 at notes 14–25.
650. *Caldwell v. Frazier*, 65 Kan. 24, 68 P. 1076 (1902); *Strong v. Moore*, 105 Or. 12, 207 P. 179 (1922), 23 A.L.R. 1217 (1923); 46 C.J.S. *Insurance* § 1145 (1946). *Contra* *Williams v. Lilley*, 67 Conn. 50, 34 A. 765 (1895), 37 L.R.A. 150 (1915); *Peoples St. Ry. v. Spencer*, 156 Pa. 85, 27 A. 113, 36 Am. St. Rep. 22 (1893). If the damage occurs after exercise of the option, the tenant has the rights of a vendee to the insurance moneys. FRIEDMAN ON CONTRACTS § 4:11; 46 C.J.S. *Insurance* § 1145 (1946).
651. *Strong v. Moore*, 105 Or. 12, 207 P. 179 (1922), 23 A.L.R. 1217 (1923). It might be argued that one who acquires an option to buy real property for a nominal consideration ought not obtain a substantial part of an award at the expense of the owner. In *Marsh v. Lott*, 156 Cal. 643, 105 P. 968 (1909), for instance, 25 cents was the actual consideration paid for an option to buy the property for \$100,000, and which had increased in value three years later by over 50%. And it has been said that the optionee should not be permitted to wait until an award has been fixed in excess of the option price before determining whether to exercise the option. *In re Upper N.Y. Bay*, 246 N.Y. 1, 33, 157, N.E. 911, 921 (1927), *noted in* 41 HARV. L. REV. 100 (1927). The equities would be substantially different where the consideration paid for the option is the equivalent of a substantial part of the purchase price of the property or where a tenant under a long-term lease erected valuable improvements solely on the basis of a right to buy the premises, on or before expiration of the term, at the option price. The effect of condemnation on an option to purchase is the subject of extended discussion, with collections of authorities, in FRIEDMAN ON CONTRACTS § 4:11; 46 C.J.S. *Insurance* § 4.12 (4th ed. 1984).

There is no comparable way for the optionee to provide for possible condemnation. It is rare for an option agreement to mention condemnation. The majority cases now allow compensation in condemnation for a tenant's option to buy the premises.⁶⁵² Cases that deny compensation for a tenant's unexercised purchase option⁶⁵³ represent the traditional⁶⁵⁴ but passing⁶⁵⁵ view.

A pair of U.S. Supreme Court cases illustrate the irrelevance of relating back as a doctrine. In one, the value of real estate for the purpose of establishing the purchaser's cost basis was held fixed as of the time of exercise of an option for its purchase, rather than as of an earlier date.⁶⁵⁶ In the other, an optionee was required to make payment in gold, the only legal tender at the time the option was given, rather than in depreciated government notes, which had subsequently been made legal tender.⁶⁵⁷

The Bankruptcy Reform Act of 1978, which enacted the Bankruptcy Code, attempted to resolve concerns about the effect of rejection, or disaffirmance, of a lease in the landlord's bankruptcy on tenants, leasehold mortgagees, and sublessees.⁶⁵⁸ Section 365(h) provided that, on rejection in the landlord's bankruptcy, the tenant had the option to remain in possession for the remainder of the term, including renewals, with the right (and only remedy) to deduct from the rent the cost of performing any defaulted obligations of the landlord under the lease. Alternatively, the tenant had the right to treat the lease as terminated.⁶⁵⁹

Immediate concern was raised about the effectiveness of this provision on two grounds. It was unclear whether the right to remain in "possession" would extend to a tenant who had subleased the premises to a third party.⁶⁶⁰ Further, leasehold mortgagees and sublessees feared

652. See chapter 13, note 86.

653. See chapter 13, note 87.

654. See chapter 13, note 88.

655. See chapter 13, note 89.

656. *Helvering v. San Joaquin Fruit & Inv. Co.*, 297 U.S. 496 (1936).

657. *Willard v. Tayloe*, 75 U.S. (8 Wall.) 557 (1869).

658. The material in this and the four paragraphs following, as well as the comparable material in section 16:2 on the 1994 amendments to the Bankruptcy Act, is substantially based on suggestions kindly given the writer by Prof. Robert Zinman of the St. John's School of Law and president of the American Bankruptcy Institute.

659. For the effect of termination of a lease in bankruptcy, see text in chapter 16 at notes 74, 75.

660. *In re Lee Rd. Partners, Ltd.*, 155 B.R. 55 (Bankr. E.D.N.Y. 1993), the debtor objected to the tenant's exercise of this provision because tenant was a sublessor and therefore not in physical possession. Tenant's constructive possession was held adequate. The case distinguishes *In re Harbor View Dev. 1986 Ltd. P'ship*, 152 B.R. 897 (D.S.C. 1993). For more on the tenant's right to remain in possession in this situation, see the following paragraph and chapter 16, note 48.

that they would lose their interest if the tenant opted to treat the lease as terminated. These problems were dealt with in the 1984 Amendments to the Bankruptcy Code.

First, the words “of the leasehold, the term of which has commenced” were added after “possession.” “Of the leasehold” was designed to indicate that the word “possession” was not limited to physical possession and the words “the term of which has commenced” was intended to make clear that contracts to lease would not receive the protection afforded by the section.⁶⁶¹

Second, the tenant’s right to treat the lease as terminated on disaffirmance by a landlord in bankruptcy was limited, inter alia, to situations where the tenant would be permitted to treat the lease as terminated under “agreements the lessee . . . has made with other parties.” This change was designed to sanction agreements by the tenant with a leasehold mortgagee or subtenant not to treat the lease as terminated if it is disaffirmed in the landlord’s bankruptcy. Such a provision should be included in any leasehold mortgage or sublease.⁶⁶²

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661. For commencement of the term, see chapter 16, note 84, and section 34:1.
 662. The leasehold mortgage may well provide:

The mortgagor shall not, and shall have no right to, acquiesce in the rejection of this lease under Section 365 of the Bankruptcy Act of 1978, as amended, or any comparable federal or state law.

Any suggestion that tenant go further than a negative covenant and make a full assignment of the lease to the leasehold mortgagee raises a nest of questions: would this make the leasehold mortgagee liable for tenant’s obligations under the lease (text *infra* at note 664 *et seq.*; section 7:8.2); would a merger be effected (text *infra* at note 666; section 39:1); would the original tenant retain its rights in improvements and to enforce subleases, including possessory rights; should the leasehold mortgagee reassign the lease, exclusive of the right to acquiesce in the rejection of the lease (*cf.* chapter 14 at note 39); and, if so, would this be effective under the Act, or should the leasehold mortgagee sublet back to the tenant-leasehold mortgagor?

The language of the 1994 amendment is not clear but its intention is manifest in the legislative history report, which reads:

This amendment enables a sublessee or leasehold mortgagee to step into the position of the debtor’s lessee in the event the lessee seeks to treat the trustee’s rejection as a termination. It is not intended to limit the trustee’s right of rejection.

The order of choice for succeeding to a tenant’s interest will be in inverse order of priority. This will give the junior leasehold parties the opportunity to take over the tenant’s position subject to senior leasehold mortgage interests. If a junior leasehold does not elect to succeed to the interest, his leasehold mortgagee may elect to exercise the right in order to protect the mortgage interest. For leasehold rights of equal priority such as can occur with space tenants in a building, the court will determine on a case-by-case

These changes seemed to work for approximately eight years. Then appeared a series of cases that would largely negate the first change. These cases either construed “possession of the leasehold” as requiring physical possession, or as not including the benefit of covenants in the lease other than the right to possession. The effect was the virtual shutdown of leasehold financing in the nation. As a result, section 365(h) of the Bankruptcy Code was further amended in 1994 to eliminate the word “possession” and to provide that the tenant can take advantage of all covenants in the lease that are appurtenant to the leasehold estate. A separate subsection (h)(1)(C) provides that in a shopping center lease the disaffirmance will not affect any provision pertaining to radius, location, use, exclusivity, or tenant mix or balance, apparently whether or not the provision is appurtenant or in gross. These changes were accepted by the lending community as sufficient to permit the resumption of leasehold financing.

The text of section 365(h) in its current form reads as follows:

- (h)(1)(A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and—
 - (i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or
 - (ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.
- (B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any

basis the allocation of the right of succession, based upon the equities of the case and the respective hardships of each party in interest.

S. REP. NO. 103-168 (1993).

renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

- (C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.
- (D) In this paragraph, "lessee" includes any successor, assign, or mortgagee permitted under the terms of such lease.⁶⁶³

For more on the 1994 amendment, see chapter 16 at note 90 and following.

If a leasehold mortgagee acquires the tenant's interest in the lease as a result of enforcing his security, the leasehold mortgagee will become liable for the tenant obligations under the lease. In title theory states, where the creation of the leasehold mortgage makes the mortgagee liable for these obligations per se, and in a state where the leasehold mortgagee's possession has this effect, it would be well for the lease to state that the mortgage is not to constitute an assignment of the lease or impose any liability on the mortgagee until he acquires the tenant's full interest in the lease.⁶⁶⁴ Absent an express assumption, the mortgagee's liability will be by privity of estate, which the mortgagee may end by assigning the lease to a third person. The landlord may insist that the leasehold mortgagee and any other assignee expressly assume and that no assignment of the tenant's interest shall be effective until the landlord receives an executed counterpart copy of the assignment and assumption, all in recordable form. The leasehold mortgagee should have no serious objection to this, in view of the fact that he will be under liability, at least by privity of estate during his ownership of the lease, provided (1) that this liability accrues only from the time of his acquisition of the lease and (2) that this liability be terminated whenever he assigns to an assuming assignee and delivers to landlord a similar copy of the assignment and assumption. The lease should provide for similar releases of successive assignees. This assumes, and institutional mortgagees

663. 11 U.S.C. § 365(h).

664. See section 7:8.2.

and others require, that whenever they acquire the lease, if not before, the lease will be freely assignable. Another matter should be noted at this time. This limitation and termination of mortgagee's liability could be frustrated by an acceleration clause in this lease, by which the landlord may, on tenant's default, make the rent for the rest of the term become immediately due and payable.⁶⁶⁵ Somewhat comparable to this is a clause making the aggregate rent for the entire term the consideration for landlord's making the lease and providing that tenant pay the same in installments only during a period prior to a termination of the lease. These provisions are unacceptable to a leasehold mortgagee.

The lease should state that a union of the tenant's interest and that of the fee is not to effect a merger of the lease, although merger will probably not occur in favor of any party with knowledge of the situation. This is clearly true when a tenant or his assignee exercises an option to purchase the leased premises. In this situation the leasehold mortgage attaches to the fee.⁶⁶⁶

Either the lease or the leasehold mortgage, or perhaps both, should provide that all subtenants must offer to attorn to the leasehold mortgagee, or to the purchaser at a foreclosure sale of the leasehold mortgage and that the subleases will be subject to any new ground lease or pickup lease made to the leasehold mortgagee or its nominee.

Provision should also be made to prevent any cancellation or modification of the lease, and providing that no such acts are to have any effect as against a leasehold mortgagee.

The lease must provide for the disposition of the proceeds of hazard insurance in a manner to protect the interest of the landlord, tenant, and leasehold mortgagee, as well as that of the fee mortgagee, if there is a fee mortgage. The fact that one or more of these parties primes the others does not dissipate the necessity of protecting them all. In this situation the insurance moneys must be available for repair or replacement, and no mortgagee may be given any option to apply these funds in reduction of his mortgage debt. A leasehold institutional mortgagee agrees to this, but insists nevertheless that the policies include a mortgagee endorsement in its favor. This assures the leasehold mortgagee against diversion of the funds. It is customary to provide for

665. *Compare* Conditioner Leasing Corp. v. Sternmor Realty Corp., 17 N.Y.2d 1, 213 N.E.2d 884, 266 N.Y.S.2d 801 (1966). *See also* section 5:3.

666. *See* authorities collected in Chapman v. Great W. Gypsum Co., 216 Cal. 420, 14 P.2d 758 (1932), 85 A.L.R. 917 (1933), *noted in* 33 COLUM. L. REV. 167 (1933); Moore & McCaleb, Inc. v. Gaines, 489 So. 2d 491 (Miss. 1986); Chinn v. Sheridan Hardwood, Inc., 229 Or. 123, 366 P.2d 321 (1961). For merger of the lease into the fee, see section 39:1.

the payment of insurance moneys to a trustee for insurance, who sees to their application. If the leasehold mortgagee is a lending institution it is common to name this institution as the trustee. The lending institution is usually willing to act without charge in order to assure itself of the proper application of the moneys.

Disposition of proceeds of hazard insurance is relatively easy if, as is usual, all parties agree that they be applied to repair or replacement. A condemnation award, by contrast, represents for the most part compensation for interests that are taken permanently. Inasmuch as the total award presumably approximates the full value of what is taken, any overcompensation to one party leads to shortchanging another. If the tenant has erected improvements with the proceeds of a leasehold mortgage, on unimproved or underimproved land, it may be appropriate for the award for the land to go to the landlord and fee mortgagee, and the building award to the tenant and leasehold mortgagee. But if the improvements have a life expectancy greater than the unexpired term of the lease, including renewals—so that the landlord expects eventually to acquire a usable building—the landlord may seek part of the building award. If the proceeds of the leasehold mortgage did not pay for the improvements no fixed rules are applicable. If the leasehold mortgagee demands enough of the total award to satisfy the leasehold mortgage the landlord should contemplate the possibility that the leasehold mortgage is excessive in amount and the effect of this on the distribution to the owners of the other interests.

Provisions for inclusion in a lease, with respect to leasehold mortgages, appear in a subsequent section.⁶⁶⁷

A sublease made prior to a mortgage on the head lease was not terminated by foreclosure of the leasehold mortgage.⁶⁶⁸

It has been noted above that a tenant who wants to sell his business may have to accompany the sale with a transfer of his lease. In a sale of a small business with deferred payments, a common practice is for the tenant-seller to assign his lease to the purchaser-assignee, who simultaneously reassigns the lease to the tenant-seller. The balance of the price for the sale of the business may be payable as additional rent. Both assignments are given to seller's attorney to be held in escrow and, on default, delivered to the seller. The first assignment would appear to be a surrender of all seller's right in the lease; the second, the purchaser's right in the lease and right to possession. The practice appears to work but there are few relevant cases. In one case, where the assignments were

667. Section 7:8.3.

668. *Bobo v. Vanguard Bank & Trust Co.*, 512 So. 2d 246 (Fla. 1st Dist. Ct. App. 1987). The court noted, "The master lease will continue to exist, but with a new lessee."

made with landlord's knowledge and consent, the transaction was held a security arrangement that entitled the original tenant, as against his landlord, to resume possession.⁶⁶⁹

§ 7:8.2 Liability of Leasehold Mortgagee for Rent and Other Tenant Obligations—Right of Leasehold Mortgagee to Cure Defaults Under Mortgaged Lease

Liability of a leasehold mortgagee for the obligations of the tenant under a mortgaged lease is based on the same rules that govern the liability of an assignee of a lease. These rules have already been considered.⁶⁷⁰ Similar rules are applicable in the analogous situation of an assignment of a lease as security for a debt.⁶⁷¹ A leasehold mortgagee who forecloses and thereby acquires title to the mortgaged lease becomes thereby an assignee of the lease and liable thereby through privity of estate for all tenant obligations accruing during his

669. *Fotiadis v. 313 W. 57th Assocs.*, 176 A.D.2d 565, 574 N.Y.S.2d 739 (1st Dep't 1991). The case does not indicate how the purchaser vacated the premises. The arrangement might be regarded as the original tenant's reservation of a right of reentry. *See* section 7:4.3[A]. If this arrangement involved a mortgage of real property, there would be a serious question of the validity of the mortgagor's waiver of his equity of redemption. *See* FRIEDMAN ON CONTRACTS § 3:1. *But compare* the discussion of mortgagor-mortgagee dealings in the California cases. *Guam Hakubotan, Inc. v. Furusawa Inv. Corp.*, 947 F.2d 398 (9th Cir. 1991).

670. Section 7:5.1[C].

671. *See, e.g., Silk v. Everett Nat'l Bank*, 345 Mass. 277, 186 N.E.2d 926 (1936), *noted in* 44 B.U. L. REV. 253 (1964); *Detroit Trust Co. v. Mortensen*, 273 Mich. 407, 263 N.W. 409 (1935); *Cent. Holding Co. v. Ebling Brewing Co.*, 185 A.D. 292, 173 N.Y.S. 49 (1st Dep't 1918); *Amco Trust, Inc. v. Naylor*, 159 Tex. 146, 317 S.W.2d 47 (1958), 73 A.L.R.2d 1109 (1960), *noted in* 58 MICH. L. REV. 140 (1959); *Dieter v. Scott*, 110 Vt. 376, 9 A.2d 95 (1939). An unconditional assignment of a lease, though intended as security, made the assignee liable under the lease without its taking possession. *S. Lakeview Plaza v. Citizens Nat'l Bank*, 703 S.W.2d 84 (Mo. Ct. App. 1985). Ordinarily an assignment for security transfers no obligations. *Black v. Sullivan*, 48 Cal. App. 3d 557, 564, 122 Cal. Rptr. 119, 124 (1975); *Fitzgerald v. 667 Hotel Corp.*, 103 Misc. 2d 80, 88–89, 426 N.Y.S.2d 368, 375 (Sup. Ct. 1980) (assignment of rent to mortgagee which disavowed liability of mortgagee). The assignee of a lease for security may bar a modification or cancellation of the lease. *F.W. Woolworth Co. v. Buford-Clairmont Co.*, 769 F.2d 1548, 1554–55 (11th Cir. 1985) (and authorities cited). Where a lender has taken an assignment of lease for security, but acquires tenant's leasehold estate in a bankruptcy auction, the controlling relationship is that established by the assignment in bankruptcy and the terms of the prior assignment for security have no impact on the question of lender/assignee's obligation to pay rent. *Cherry v. First State Bank*, 112 S.W.3d 129 (Tenn. Ct. App. 2003).

ownership of the lease. This liability may begin to accrue before foreclosure. In some states that follow the title theory of mortgages, the execution and delivery of a leasehold mortgage is deemed to vest title to the leasehold estate in the mortgagee, who becomes liable at that time on the tenant obligations thereafter accruing.⁶⁷² Because of this it has been suggested that in these states a leasehold mortgage cover a period less than the full term of the lease, thus converting the leasehold mortgage into something akin to a sublease.⁶⁷³ Any such practice would appear to create more problems than it solves.⁶⁷⁴ In the states that follow the lien theory of mortgages there are two rules. In a few, based on an early New York case, a leasehold mortgagee becomes liable when he goes into possession,⁶⁷⁵ but not

672. *Williams v. Bosanquet*, 1 Brod. & Bing. 72, 129 Eng. Rep. 714 (C.P. 1819); *Williams v. Safe Deposit & Trust Co.*, 167 Md. 499, 175 A. 331 (1934); *M'Murphy v. Minot*, 4 N.H. 251 (1827), *questioned in* Lord v. Ferguson, 9 N.H. 380, 383 (1838); *Farmers Bank v. Mut. Assurance Soc'y*, 31 Va. 69 (1832); Annot., 73 A.L.R.2d 1118, 1120 (1960); 51C C.J.S. *Landlord and Tenant* § 51b (1968). Under the Maryland rule a leasehold mortgagee's liability on tenant covenants does not arise until default under the leasehold mortgage if this mortgage permits the lessee mortgagor to retain possession until default. *See Jones v. Burgess*, 176 Md. 270, 276, 4 A.2d 473, 475 (1939).

673. *Williams v. Bosanquet*, 1 Brod. & Bing. 72, 129 Eng. Rep. 714, 723 (Com. Pl. 1819); 2 AMERICAN LAW OF PROPERTY § 9.6, at 361 (1952); 2 L. JONES, MORTGAGES § 990 (8th ed. 1928). It has been suggested that the last day of the term be excluded, but that the tenant be given an option to acquire this last day upon payment of one day's rent. 2 L. JONES, *supra*.

674. *Compare*, for instance, sections 7:4.3, 7:4.3[A], 7:5.1. This is discussed in Hyde, *Leasehold Mortgages*, 12 PROCEEDINGS, ASSOCIATION OF LIFE INSURANCE COUNSEL 659, 676 (1955):

This may be an effective way of avoiding personal liability for performance of the tenant's obligations, although it is subject, in the writer's opinion, to the following reservations: The option to buy the last day of the term (i) might be enough to have the whole transaction considered as a mortgage of the entire term and hence having the effect, either presently or potentially, of an assignment, and (ii) might be inconsistent with the mortgage covering any right of extension or renewal which the tenant may have, or any greater estate of the property which he may acquire. Of course, there are cases where there is no right of extension or renewal, and where the possibility of the tenant acquiring the fee, without a refinancing of the merged or combined interests, is very remote.

675. *Astor v. Hoyt*, 5 Wend. 603 (N.Y. 1830); *Century Holding Co. v. Ebling Brewing Co.*, 185 A.D. 292, 173 N.Y.S. 49 (1st Dep't 1918); *see also* *Amco Trust, Inc. v. Naylor*, 159 Tex. 146, 317 S.W.2d 47, 50 (1958), 73 A.L.R.2d 1109 (1960), *noted in* 58 MICH. L. REV. 140 (1959); 2 L. JONES, MORTGAGES § 990 (8th ed. 1928); Annot., 73 A.L.R.2d 1118, 1123 (1960); 51C

before.⁶⁷⁶ In most of the lien states the liability does not accrue until the leasehold mortgagee acquires title to the lease.⁶⁷⁷ Even under the New York rule a leasehold mortgagee does not become liable under the lease if his possession is for some limited purpose, for example, to manage the property.⁶⁷⁸ It may be questioned if a leasehold mortgagee ought ever become liable as tenant before becoming the full-fledged owner of the lease in his own right, that is, after foreclosure. The rationale for doing otherwise equates one with a limited security interest to a party with an unconditional ownership of the lease and of the income from the property.⁶⁷⁹ Should one who, for instance, lends a tenant \$5,000 and takes a mortgage or other interest in the lease solely to secure its repayment, become liable for perhaps \$80,000 of rent?⁶⁸⁰ Any such result gives a windfall to a landlord who had contracted solely for the liability of his tenant. His right to dig into another "deeper pocket" seems unwarranted.⁶⁸¹ Even in a title state the tenant-mortgagor has not parted with all his interest. He retains a right of redemption, if not the right to possession. This may be compared to the rule under which one who acquires less than all of a tenant's interest

C.J.S. *Landlord and Tenant* § 51(b) (1968). See *Bloor v. Chase Manhattan Mortg. & Realty Trust*, 511 F. Supp. 17 (S.D.N.Y. 1981), discussed in text *supra* at note 427. In *Bloor*, the lease has been assigned to the leasehold mortgagee in lieu of foreclosure.

676. *S. Lakeview Plaza v. Citizens Nat'l Bank*, 703 S.W.2d 84 (Mo. Ct. App. 1985); *Tallman v. Bresler*, 65 Barb. 369, *aff'd*, 56 N.Y. 635 (1874).
677. *Johnson v. Sherman*, 15 Cal. 287 (1860); *Burghard v. Detroit Trust Co.*, 273 Mich. 629, 263 N.W. 885 (1935); *Cargill v. Thompson*, 57 Minn. 534, 59 N.W. 638 (1894); *Amco Trust*, 159 Tex. 146; *Slane v. Polar Oil Co.*, 48 Wyo. 28, 41 P.2d 490 (1935); 2 AMERICAN LAW OF PROPERTY § 9.6, at 361 (1952); 2 L. JONES, MORTGAGES § 990 (8th ed. 1928); Annot., 73 A.L.R.2D 1118, 1120 (1960); 51C C.J.S. *Landlord and Tenant* § 51b (1968). The holder of a tenant's interest for security in tenant improvements, who acquired title to them in lieu of foreclosure, inherited tenant's obligation to remove the improvements. *Hawkeye Land Co. v. Laurens State Bank*, 480 N.W.2d 854 (Iowa 1992).
678. *Ireland v. U.S. Mortg. & Trust Co.*, 72 A.D. 95, 76 N.Y.S. 117, *aff'd*, 175 N.Y. 491, 67 N.E. 1083 (1903).
679. *Amco Trust*, 317 S.W.2d at 50, states that so long as the tenant has a reversionary interest the transaction is merely a subletting. Cf. section 7:4.
680. That was the situation in *Johnson v. Sherman*, 15 Cal. 287 (1860).
681. One court held:

Plaintiff is looking for a windfall. What his argument means is that the bank in attempting to secure its loan overreached itself and, in effect, gratuitously underwrote the lessee's obligations to the plaintiff. Such, in our opinion, would not be a reasonable interpretation to place upon this business transaction and the method and language used to achieve its purpose.

Silk v. Everett Nat'l Bank, 345 Mass. 277, 279, 186 N.E.2d 926, 927 (1963), noted in 44 B.U. L. REV. 253 (1964).

becomes a subtenant, not an assignee, and does not become liable to the prime landlord.⁶⁸² If a mortgagee goes into possession he acts not as owner of the tenant's interest but as its trustee, and is accountable to the mortgagor for the net profits of the property. These are applicable to the mortgage debt.⁶⁸³ It would be fair to entitle the landlord to reach these net subrents to the extent necessary to satisfy the rent and other tenant obligations under the prime lease. This would be an extension of the rule under which a prime landlord has a superior right to subrents accruing after insolvency of the prime tenant.⁶⁸⁴ To the extent that California and other states that reject the New York rule refuse to make a leasehold mortgagee-in-possession liable to a landlord in this situation, they deprive the landlord of the subrents flowing from the landlord's property.

At times a leasehold mortgagee may need a right to advance the rent or perform other tenant obligations, this to protect its interest. A lease prepared for use in leasehold financing usually expressly permits this.⁶⁸⁵ Without such provision a leasehold mortgagee has been denied a right to cure tenant defaults, with the result that a breach and termination of the mortgaged lease may terminate the leasehold mortgage as well. This was the *Southwest Village Water* case.⁶⁸⁶

There appears to be no justification for leaving a leasehold mortgagee in this helpless position. A subtenant is under the same disability, where the result was explained on the ground that a different rule would compel a landlord to accept a tenant not of his choice.⁶⁸⁷ But in *Southwest Village* the lease expressly permitted assignment, subletting, and mortgaging of the lease, but not curing of lease defaults by the leasehold mortgagee. Had the leasehold mortgage been foreclosed and the leasehold mortgagee transformed into a successor tenant, his right to cure defaults would have been undisputable. Furthermore, had the leasehold mortgagee been liable for tenant obligations before foreclosure, as mentioned earlier in this section, such liability would have presumably been accompanied by a right to cure defaults.

682. Section 7:7.

683. *Cargill v. Thompson*, 57 Minn. 534, 59 N.W. 638 (1894). See also *Stephens v. Reed*, 121 F.2d 696 (3d Cir. 1941); *Winthrop v. Arthur W. Binns, Inc.*, 160 Pa. Super. 214, 50 A.2d 718 (1947); 35 COLUM. L. REV. 1248, 1255 (1935); 59 C.J.S. *Mortgages* § 305b (1949).

684. Text *supra* at note 519 *et seq.*

685. Text *infra* after note 690 at subsection (b).

686. *Sw. Vill. Water Co. v. Fleming*, 442 So. 2d 89 (Ala. 1983). The remedy of the leasehold mortgagee for this termination is against the leasehold mortgagor. *Southwest Village*, 442 So. 2d at 91.

687. Text *supra* at note 601.

§ 7:8.3 Lease Provisions Relating to Leasehold Mortgages⁶⁸⁸

Provisions to be included in a lease that is intended to be mortgaged may read:

ARTICLE 10

MORTGAGES OF TENANT'S INTEREST

Section 10.01. Tenant, and its successors and assigns, shall have the unrestricted right to mortgage and pledge this lease, subject, however, to the limitations of this Section. Any such mortgage or pledge shall be subject and subordinate to the rights of Landlord hereunder.

Section 10.02. No holder of a mortgage on this lease shall have the rights or benefits mentioned in this Article, nor shall the provisions of this Article be binding upon Landlord, unless [and until the name and address of the mortgagee]⁶⁸⁹ shall have been delivered to Landlord, notwithstanding any other form of notice, actual or constructive.

Section 10.03. If Tenant, or Tenant's successors or assigns, shall mortgage this lease in compliance with the provisions of this Article, then so long as any such mortgage shall remain unsatisfied of record, the following provisions shall apply:

- (a) Landlord, upon serving upon Tenant any notice of default pursuant to the provisions of Article ____⁶⁹⁰ hereof, or any other notice under the provisions of or with respect to this lease, shall also serve a copy of such notice upon the holder of such mortgage, at the address provided for in paragraph (g) of this section, and no notice by Landlord to Tenant hereunder shall be deemed to have been duly given unless and until a copy thereof has been so served.

688. Footnotes in this section identify other parts of lease referred to in these provisions with respect to leasehold mortgages. The writer is indebted to the late Kurt W. Lore, of the New York Bar, for suggestions with respect to these provisions. Another form appears in *Model Leasehold Encumbrance Provisions*, 15 REAL PROP. PROB. & TR. J. 395 (1980).

689. For material in brackets the following may be substituted:

Landlord shall receive an executed counterpart copy of such assignment, together with the name and address of the assignee.

690. Tenant defaults generally.

- (b) Any holder of such mortgage, in case Tenant shall be in default hereunder, shall, within the period and otherwise as herein provided, have the right to remedy such default, or cause the same to be remedied, and Landlord shall accept such performance by or at the instance of such holder as if the same had been made by Tenant.
- (c) For the purposes of this Article, no event of default shall be deemed to exist under Article ____⁶⁹¹ hereof in respect of the performance of work required to be performed, or of acts to be done, or of conditions to be remedied, if steps shall, in good faith, have been commenced within the time permitted therefor to rectify the same and shall be prosecuted to completion with diligence and continuity as in Article ____⁶⁹² hereof provided.
- (d) Anything herein contained to the contrary notwithstanding, upon the occurrence of an event of default (inclusive of the occurrence of any of the events specified in paragraph (b), (c) or (d) of Section _____⁶⁹³ hereof), other than an event of default due to a default in the payment of money, Landlord shall take no action to effect a termination of this lease without first giving to the holder of such mortgage written notice thereof and a reasonable time thereafter within which either (i) to obtain possession of the mortgaged property (including possession by a receiver) or (ii) to institute, prosecute and complete foreclosure proceedings or otherwise acquire Tenant's interest under this lease with diligence. Such holder upon obtaining possession or acquiring Tenant's interest under this lease shall be required promptly to cure all defaults then reasonably susceptible of being cured by such holder. Provided, however, that: (i) such holder shall not be obligated to continue such possession or to continue such foreclosure proceedings after such defaults shall have been cured; (ii) nothing herein contained shall preclude Landlord, subject to the provisions of this Article, from exercising any rights or remedies under this lease with respect to any other default by Tenant during the pendency of such foreclosure proceedings; (iii) if such holder shall be a party other than a Lending Institution as defined in Section ____⁶⁹⁴ hereof, such holder

691. *Id.*

692. *Id.*

693. Defaults of tenant, other than nonpayment, voluntary and involuntary insolvency proceedings, receivership, etc.

694. Lending institution defined.

shall deposit with Landlord during the period of forbearance by Landlord from taking action to effect a termination of this lease such security as shall be reasonably satisfactory to Landlord to assure to Landlord the compliance by such holder during the period of such forbearance with such of the terms, conditions and covenants of this lease as are reasonably susceptible of being complied with by such holder; and (iv) such holder, if a Lending institution, as so defined, shall agree with Landlord in writing to comply during the period of such forbearance with such of the terms, conditions and covenants of this lease as are reasonably susceptible of being complied with by such holder. Any default by Tenant, not reasonably susceptible of being cured by such holder or the occurrence of any of the events specified in Sections _____⁶⁹⁵ (except to the extent of information in such holder's possession), _____⁶⁹⁶ and _____⁶⁹⁷ in paragraphs (b), (c) and (d) of Section ____⁶⁹⁸ and in Section _____⁶⁹⁹ hereof, shall be deemed to have been waived by Landlord upon completion of such foreclosure proceedings or upon such acquisition of Tenant's interest in this lease, except that any of such events of default which are reasonably susceptible of being cured after such completion and acquisition shall then be cured with reasonable diligence. Such holder, or his designee, or other purchaser in foreclosure proceedings may become the legal owner and holder of this lease through such foreclosure proceedings or by assignment of this lease in lieu of foreclosure.

- (e) In the event of the termination of this lease prior to the expiration of the term, except by eminent domain, as provided in Article _____⁷⁰⁰ hereof, Landlord shall serve upon the holder of such mortgage written notice that the lease has been terminated together with a statement of any and all sums which would at the time be due under this lease but for such termination, and of all other defaults, if any, under this lease

695. Requirement that tenant give landlord annual operating statements.

696. Prohibition of tenant's collection of subrents more than three months in advance except where tenant has agreed to build or alter, at tenant's expense, for subtenant, or where such advance rents have been placed in trust.

697. Tenant's breach of covenant against modification or cancellation of specified subleases.

698. Tenant defaults, other than nonpayment, including voluntary and involuntary insolvency proceedings, receivership, etc.

699. Requirement that tenant give landlord estoppel certificate.

700. Eminent domain.

then known to Landlord. Such holder shall thereupon have the option to obtain a new lease in accordance with and upon the following terms and conditions:

Upon the written request of the holder of such mortgage, within thirty days after service of such notice that the lease has been terminated, Landlord shall enter into a new lease of the demised premises with such holder, or his designee, as follows:

Such new lease shall be entered into at the reasonable cost of the tenant thereunder, shall be effective as at the date of termination of this lease, and shall be for the remainder of the term of this lease and at the rent and upon all the agreements, terms, covenants and conditions hereof, including any applicable rights of renewal. Such new lease shall require the tenant to perform any unfulfilled obligation of Tenant under this lease which is reasonably susceptible of being performed by such tenant. Upon the execution of such new lease, the tenant named therein shall pay any and all sums which would at the time of the execution thereof be due under this lease but for such termination, and shall pay all expenses, including reasonable counsel fees, court costs and disbursements incurred by Landlord in connection with such defaults and termination, the recovery of possession of said premises, and the preparation, execution and delivery of such new lease. Upon the execution of such new lease, Landlord shall allow to the tenant named therein and such tenant shall be entitled to an adjustment in an amount equal to the net income derived by Landlord from the demised premises during the period from the date of termination of this lease to the date of execution of such new lease.

- (f) If by reason of its failure either to exercise any renewal option under Article _____⁷⁰¹ hereof, or for any other reason whatsoever, Tenant shall not become entitled to renew this lease for any renewal term provided for in said Article _____, Landlord shall serve upon the holder of such mortgage written notice thereof and such holder shall have the option upon written request served upon Landlord to obtain from Landlord a new

701. Tenant's renewal rights.

lease of the demised premises for such renewal term in accordance with and upon the following terms and conditions:

Such written request shall be served upon Landlord not later than sixty days after the service of the aforementioned notice by Landlord on such holder, and within thirty days after the service of such written request, Landlord and the holder of such mortgage, or such holder's designee, shall enter into a new lease of the demised premises as follows:

Such new lease shall be entered into at the reasonable cost and expense of the tenant thereunder, shall be effective as at the date of termination of the then current term of this lease, and shall be for the renewal term next succeeding the then current term of this lease, and at the rent and upon all the agreements, terms, covenants and conditions hereof, including any applicable rights of renewals. Such new lease shall require tenant to perform any unfulfilled obligation of Tenant under this lease which is reasonably susceptible of being performed by such tenant. Upon the execution of such new lease the tenant therein named shall pay any and all sums remaining unpaid under the lease then expiring, then unpaid, plus the reasonable expenses incurred by Landlord in connection with the preparation, execution and delivery of such new lease.

- (g) Any notice or other communication which Landlord shall desire or is required to give to or serve upon the holder of a mortgage on this lease shall be in writing and shall be served by registered mail, addressed to such holder at his address as set forth in such mortgage, or in the last assignment thereof delivered to Landlord pursuant to Section 10.02 hereof, or at such other address as shall be designated by such holder by notice in writing given to Landlord by registered mail.

Any notice or other communication which the holder of a mortgage on this lease shall desire or is required to give to or serve upon Landlord shall be deemed to have been duly given or served if sent in duplicate by registered mail addressed to Landlord at Landlord's addresses as set forth in Section _____⁷⁰² of this lease or at such other addresses as shall be designated by Landlord by notice in writing given to such holder by registered mail.

- (h) Effective upon the commencement of the term of any new lease executed pursuant to paragraph (e) or paragraph (f) of

702. Requirements for giving notices under lease.

this Section, all subleases shall be assigned and transferred without recourse by Landlord to the tenant under such new lease, and all moneys on deposit with Landlord or the Trustee acting under Section _____⁷⁰³ hereof which Tenant would have been entitled to use but for the termination or expiration of this lease may be used by the tenant under such new lease for the purposes of and in accordance with the provisions of such new lease.

- (i) Anything herein contained to the contrary notwithstanding, the provisions of this Article shall inure only to the benefit of the holders of leasehold mortgages which shall be, respectively, a first, second and third lien. If the holders of more than one such leasehold mortgage shall make written requests upon Landlord for a new lease in accordance with the provisions of paragraph (e) or paragraph (f) of this Section, the new lease shall be entered into pursuant to the request of the holder whose leasehold mortgage shall be prior in lien thereto and thereupon the written requests for a new lease of each holder of a leasehold mortgage junior in lien shall be and be deemed to be void and of no force or effect. If the parties shall not agree on which leasehold is prior in lien, such dispute shall be determined by _____ Title Insurance Co., or its successor, and such determination shall bind the parties.
- (j) Nothing herein contained shall be deemed to obligate Landlord to deliver possession of the demised premises to the tenant under any new lease entered into pursuant to paragraph (e) or paragraph (f) of this Section.
- (k) No agreement between Landlord and Tenant modifying, cancelling or surrendering this lease shall be effective without the prior written consent of the leasehold mortgagee.
- (l) No union of the interests of Landlord and Tenant herein shall result in a merger of this lease in the fee interest.

Section 10.04. If the holder of a mortgage on this lease shall be a Lending institution, as defined in Section _____⁷⁰⁴ hereof, then so long as such Lending Institution shall be the holder of such mortgage such Lending Institution may, in lieu of the trustee

703. Trust of proceeds of fire and other hazard insurance for use in repair or replacement.

704. Lending institution defined.

provided for in Section _____⁷⁰⁵ hereof, hold and disburse any funds which such trustee would have been entitled to hold and disburse, but upon and subject nevertheless to all the provisions hereof applicable thereto, except that such Lending Institution shall not be entitled to receive any fees or other compensation therefor. Any reference in this lease to “trustee” shall where applicable be deemed to apply to a Lending Institution.

Section 10.05. If any leasehold mortgagee shall acquire title to Tenant’s interest in this lease, by foreclosure of a mortgage thereon or by assignment in lieu of foreclosure or by an assignment from a designee or wholly owned subsidiary corporation of such mortgagee, or under a new lease pursuant to this Article, such mortgagee may assign such lease and shall thereupon be released from all liability for the performance or observance of the covenants and conditions in such lease contained on Tenant’s part to be performed and observed from and after the date of such assignment, provided that⁷⁰⁶ [the assignee from such mortgagee shall have assumed such lease in accordance with Section _____⁷⁰⁷ hereof and shall have complied otherwise with said Section].⁷⁰⁸

Section 10.06. Tenant covenants it will not treat the lease as terminated by any election made under Section 365(h) of the Bankruptcy Code of 1978 or under any similar law or right of any nature, and hereby assigns to the leasehold mortgagee any right to acquiesce in any such termination.

705. Trust of proceeds of fire and other hazard insurance for use in repair or replacement.

706. For material in brackets, the following may be substituted:
 an executed counterpart of such leasehold mortgage and of each assignment thereof or a copy certified by the holder of the mortgage or by the recording officer to be true.

707. Requirement that landlord receive executed copy of every assignment of lease, with assumption by assignee, all in recordable form, and providing further for assignor’s release thereupon of liability thereafter accruing.

708. *See supra* note 706.

