

# Introduction

Commercial leasing is an inherently complex area of real estate law practice. The complexity is not necessarily due to difficult intellectual concepts; instead it is due to the number of problems and issues that can arise in the ongoing relationship between the landlord and the tenant, which often can be very long-term. Leases are never “one size fits all”; they all must deal with a variety of unique issues, including those arising purely from the different configurations of each particular space leased (ranging from tiny retail kiosks to “big box” shopping center spaces, office suites, industrial facilities, and single-tenant buildings). The fact is that leases are the least “standardized” type of document that the modern real estate practitioner encounters.

No two commercial leases are alike, and when any commercial lease, with its inherent complexity, is to be transferred in part (as to the premises or its duration) by a sublease, or in its entirety by an assignment, the issues multiply. The competing interests of the original landlord, transferor, transferee, other sublessees under the same lease (in some cases), and various lenders to all of these parties can render even the most “simple” sublease or assignment transaction difficult. Therefore, there is no shortage of discrete problems, issues, and solutions in the subleasing and assignment game. *The Sublease and Assignment Deskbook: Legal Issues, Forms, and Drafting Techniques for Commercial Lease Transfers*, second edition, deals with these complexities by breaking down the most common issues encountered in lease transfers into separate chapters limited to specific subject matters. All of the chapters are written by active, practicing commercial leasing attorneys and professors from across the United States, who have a wealth of experience with these transactions and who have been generous in sharing their experience with the reader. All chapters are focused on the practical ways that lease practitioners and their clients can approach lease transfer transactions. Academic discussions are kept to a minimum in this book, and one must look elsewhere for treatment of the historical and philosophical underpinnings of leasing law. This book is intended to be useful both to the lawyer who infrequently encounters an assignment or subleasing problem and to the seasoned practitioner who deals with lease transfer issues for clients every day. Part VI of this book contains a large number of prime lease transfer clauses, subleases, assignments, and related documents. These forms demonstrate alternate drafting approaches and techniques for specific situations. All of the forms and clauses have been taken from actual documents worked on by different leasing attorneys.

After the first edition of this book was published in 2006, the commercial leasing world weathered the “great recession.” As a result, sublease and assignment practitioners and their clients have learned new lessons, and this second edition contains many updates to reflect those lessons. Chapters that appeared in the first

edition have been revised by their original authors as appropriate. The overview of sublease and assignment issues in chapter 2 is entirely new, a fresh and up-to-date treatment by Michael N. Samuels. In new chapter 21, Ira Meislik shares with us drafting lessons learned from his extensive experience in assignment and sublease situations. Bankruptcies of overlandlords and sublessors became nearly as commonplace as those of subtenants during the recession. For the second edition, two new chapters have been added dealing with bankruptcy-related sublease issues, one a comprehensive overview by practitioner Brian S. Harris and the other a chapter on the particularly challenging effects of sublessor bankruptcies by professors Elliot Dolby-Shields and Marshall Tracht. Nancy Ann Connery has contributed new chapter 17 on special assignment and sublease needs of certain types of tenants, such as law firms, doctors, franchisers, and real estate investment trusts. This second edition also contains updated sample forms and clauses, with helpful annotations added to many of them and new clauses added dealing with franchisor assignments and ground leases.

Perhaps the contents of this book, and the many discrete, complex issues that must be dealt with in the subleasing and assignment arena, are best illustrated by perusing an actual sublease. For this illustration we will use the sample sublease prepared by Sidney G. Saltz and Martin P. Miner included in this book as Form 7.13. This excellent form takes the drafting approach of incorporating the prime lease and then amending various prime lease provisions for application in the sublease context. This is but one basic approach to drafting the sublease. In chapter 22 of this book, New York leasing attorney Richard M. Frome discusses different methods of sublease drafting, including long, medium, and short approaches and the merits of each approach.

In reading the Saltz/Miner sublease, one first sees that it is captioned, and drafted, as a “sublease,” not as a lease assignment. In chapter 1 of this book, the basic differences between a sublease and an assignment are explained in a concise manner by Ann Peldo Cargile and Michael Noble. There are serious implications regarding the rights that the prime landlord and transferee have against each other that depend on whether the transaction is crafted as a sublease or an assignment.

A quick read of Form 7.13 reveals that section 29 makes the entire sublease conditioned on the prime landlord’s prior written consent. Whether such consent is in fact required, will be easily given, or will be nearly impossible to obtain depends upon how the original landlord and original tenant dealt with subleasing and assignment rights in the prime lease. Michael Samuels’ chapter 2 overview explains the various considerations of the landlord and the tenant in dealing with lease transfer provisions. The drafting of the prime lease’s assignment and subleasing section is dealt with in greater detail by Neil Botwinoff in chapter 8 (focusing on the goals and needs of the landlord and the tenant in drafting the transfer clause) and by Richard Frome in chapters 23 and 24 (dealing with specific lease language and drafting techniques). The manner in which such lease transfer clauses can seriously interfere with the sale of an operating retail business, or with the estate planning of its principals, is explored by Jack Levey in chapter 5. In chapter 9, the editor provides a look at whether lease transfer clauses adequately

deal with changes in the tenant's business entity form by merger, conversion, or otherwise, focusing on case law in this area. Nancy Connery's chapter 17 explains how the clauses need to be adapted to the special needs of particular tenants.

Whether the prime landlord in our sample sublease ultimately approves the sublease depends not only on the lease language but also the larger factual context of the transaction, such as the relative strength of the landlord, original tenant, and sublessee. If the original tenant wants to enter into this sublease because it is in financial distress, the prime landlord may want to consider other alternatives to approving the sublease, as explained by David Weisman in chapter 3. If the prime lease clause simply states that the sublease requires the prime landlord's consent, many states will imply a duty on the prime landlord not to unreasonably withhold its consent. Tom Barbuti explains the majority and minority approaches taken by the various states on this issue in chapter 6. Assuming that the implied reasonableness standard applies, or that the lease itself states that the landlord's consent will not be unreasonably withheld, the landlord must know whether it, in fact, is acting reasonably. In chapter 7, the editor provides a review of the numerous case law decisions that apply the reasonableness consent standard to various leases. If the prime landlord ultimately does not provide consent under section 29 of the Sultz/Miner sublease, the tenant must consider its options. Bruce Cavitt details in chapter 14 one strategy the tenant can take when the answer is "no." Such strategy must be considered in the background of cases that deal with prime lease language allowing the prime landlord to terminate the prime lease if the sublessor goes through with the sublease in breach of the transfer restrictions. See chapter 13 by Ann Peldo Cargile for a review of the enforceability of these termination clauses.

Turning back to our sublease form, section 2 contains certain assurances regarding the prime lease for the subtenant's benefit, running from the sublessor. However, since the existence of any sublease depends on the continuation of the prime lease, the subtenant really needs such assurances directly from the prime landlord, and also needs the ability to continue to use the premises if the sublandlord defaults under the prime lease or files bankruptcy. Ira Meislik writes in chapter 15 about obtaining such sublessee protections in prime landlord consent and recognition agreements.

Section 3 of the sample sublease describes the premises. The premises may be all of the space leased by the sublessor under the prime lease, or only a portion of such space. Chapter 16, by Robert Schlein, explains the special problems and considerations in subleasing only a portion of the original prime lease premises.

Section 5 of the sublease requires the sublessor to perform certain work, but makes it clear that the premises are otherwise delivered "as is." This underscores a need for the subtenant to perform due diligence on the subleased premises *before* signing the sublease. The editor provides an overview and checklist for sublease due diligence in chapter 4.

The sublease form provides in section 7 that rent is to be paid to the designated "payee." Thus, the sublease form is set up so that it can provide for payment to the sublandlord or directly to the prime landlord, depending on how the "payee" blank is completed. How this is completed often depends on whether the prime

landlord has the right to collect rent from the sublessee that is higher than the rent charged to the sublessor under the prime lease. Chapter 12 of this book, by Ann Peldo Cargile, indicates that prime lease clauses allowing the prime landlord to share in the sublease “profits” are most likely enforceable.

Moving on to section 23, the sublease form provides that the subtenant’s bankruptcy constitutes an event of default under the sublease. While the sublease is in existence, a bankruptcy of the subtenant, sublessor, or prime landlord has profound and often surprising effects on each of the other parties. As previously noted, this book contains fresh chapters 18 and 19 dealing with bankruptcy issues for the prime landlord, sublandlord, and subtenant. One concern is that both the prime landlord and the sublessor may be unable to prevent future assignments of the prime lease or sublease if the sublessor or subtenant files bankruptcy. The sweeping powers of the bankruptcy courts under the United States Bankruptcy Code can render assignment restrictions in the prime lease (or in the sublease) completely moot. These powers are discussed comprehensively by Susan G. Talley and Heather B. McGowan in chapter 20 (focusing on retail leases). Ideas for trying to maintain some semblance of landlord control in bankruptcy by inserting certain provisions in the lease are discussed by Susan Talley and Heather McGowan in chapter 25.

Sections 24 and 25 of our sublease form constitute the remedies and security deposit provisions. The sublessor must have adequate protections in these sections since the sublessor will remain liable to the prime landlord for the duration of the lease, including possibly during any renewal options (even if the options are exercised by the subtenant). In chapter 10, Tom Barbuti and Susan Winchurch explore the exposure and liability of the original tenant after an assignment, which for the most part also apply to a sublease situation. Bruce Cavitt expands on this in chapter 11, discussing the rights and obligations of the parties given different provisions in lease transfer documents and factual situations.

In summary, all of the contributors to this book hope that the lawyer encountering a sublease or assignment task or problem can find a chapter here that assists with the situation at hand. Additionally, the forms in this book can serve as starting point for those drafting prime leases, subleases, assignments, and related documents. Enjoy the book, and call upon it when needed.

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