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ASSIGNMENT AND SUBLETTING

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I. INTRODUCTION. What is the difference between a sublease and an assignment? A sublease is a transaction in which the tenant further leases part or all of the same space but retains some reversion. Even a day. So if your lease ends January 31, and you sublease until January 30, you have retained the last day, and technically that qualifies as a sublease. But if the periods are coterminous, you have made an assignment, even if you call it sublease. On the other hand, if you enter into a transfer agreement for half the space but you do not retain any reversion, in some jurisdictions you have made a partial assignment, in others retaining part of the space makes it a sublease.

There may be a case here or there which splits hairs over this but it is safe to expect that reserving one day will maintain identity as a sublease. (Some make it one hour! Why they do that is a mystery to us and dangerous, it walks the edge of form over substance, and really should be avoided.)

In assignments, a concern, for those who forgot the concept, is assignor liability, the surviving contract liability arising from a tenant signing the lease, and thereby becoming contractually bound to pay the rent and otherwise perform, even if it assigns the lease and ceases to have privity of estate with landlord because now the new tenant has that. But, if assigning tenant is not expressly released by landlord, it retains the contract liability.

Can a tenant assign or sublease without getting landlord's consent. The common law is a resounding yes. So, clauses and statutes are in derogation of the common law. This means landlord's limitation clauses must be tight. Some of these are as long and dense as any clause in a lease, and must be checked and rechecked. The exceptions sometimes render the clause so incomprehensible that a party will not be able to enforce it in court. Landlord is the one under the gun here; tenant will probably benefit from confusion when going to court concerning assignment/subletting clauses, since the fallback will be the common law freedom from limitation.

Check your local law. Some jurisdictions have limits on landlords' powers, and some modify the common law. For example, Texas has a statutory restriction against assignments. (Tex. Prop. Code § 1995.010). California has a complicated scheme related to reasonableness of assignments (Cal. Civil Code § 1995.010) Bear in mind, however, that the case law on reasonableness is by no means uniform and that it is very difficult - perhaps impossible - to give unequivocal advice to a client about what is meant by reasonable. Always keep some slack when advising a client to provide for an oddball result. Judges have idiosyncratic views of the subject and the complexity of the clauses sometimes makes them difficult to interpret.

II. BASIC CLAUSES. Subject to any unusual local law to the contrary, Landlord must state in its lease that assignment and subletting are not permitted without landlord's consent, or whatever the limitation is. Some clauses may not even require consent, but instead have specific criteria such as, no transfer at all during the first 5 years, or landlord may cancel in case of request to sublet or assign but if it does not then its consent is not needed.

Some retail landlords restrict transfer for the first few years of the term, often new building landlords do the same to prevent interference with their lease - up programs. But whatever it is, it must be stated. Some clauses are modified and tweaked and redone by the parties to such an extent that by the time you are done there is no statement that tenant may not assign or sublease without complying with the clause, i.e., without consent, etc. Recheck that clause.

Since there are so many variations in occupancy methods, most long clauses state that they apply to tenant's ability to assign, mortgage, pledge, encumber (since those will end up an assignment in case of default and foreclosure), sublease, license, transfer. It is a good idea to add, or occupied other than by tenant. The "occupied other than by tenant" terminology is a good fallback because brilliant lawyers will often invent a novel form of occupancy or method of transfer not covered by any list, and many judges who don't care for limits on assignment to start with will buy into those as not being covered by the lease limitation. But occupancy is an all

encompassing concept and hopefully enables landlord to point at it as bringing tenant back into the limits of the clause.

On tenant's side the basic limitation is that landlord will not unreasonably withhold its consent (sometimes expressed as "not unreasonably withhold, condition or delay," or sometimes with an actual time period within which it must be decided and communicated by landlord to tenant, such as "not unreasonably withheld, conditioned or delayed beyond 20 days." Some add that delay beyond the time is deemed consent; this sounds good but few subtenants are comfortable moving in without a piece of paper that says landlord has consented, so that addition may well fail to solve all problems).

III. STANDARDS. Assuming the landlord is not recapturing (discussed at VI below), or has no right to do so, how does it articulate its review right? The simplest way is simply to state, landlord's approval will not be unreasonably withheld or delayed. However, in case of disagreement, landlord must convince a court that its criteria were reasonable. In addition, there may be matters of particular relevance to landlord which it does not want to leave to the discretion of the judge, not the decision of whether they should be considered, and not the extent to which they should be considered. The usual remedy is to list the conditions and considerations which landlord may take into consideration. Every lawyer and landlord who does a lot of leasing has its favorite list. Some run into more than ten items. Some are ridiculous, overreaching. Tenant's counsel must read them and consider them, review them with tenant. Some may be impossible because of a special element of tenant's industry.

If you are the landlord, think about whether there are unique criteria you might want for this lease, ones you don't always use. Parking, utilities, smells, noise, hours. One might want a retail user doing food preparation to have experience, perhaps several recent years, perhaps also several locations so that you can see what the transferee's other locations look like. But to have an apparel store user learn on the job may not seem so threatening to the entire building. In industrial leasing, limiting light manufacturers to similar users is always a necessary protection, as is limiting warehouses to non-manufacturing replacements.

Remember, when you do a new lease, landlord has absolute control over the choice of tenant, it can take a chance if it likes them, or refuse regardless of how successful they are. But in a transfer context, the present tenant can force landlord to accept tenant's choice unless landlord has a reasonable basis to object or has specified a condition in the lease which transferee cannot meet.

As we always recommend, when you find an interesting one or series of conditions, save them, use them yourself. The best source of clauses is a lease you have worked on. People use their B list when they write articles or form books but their A list goes into their current leases.

Here are a few traps to watch out for. If tenant, never agree in your lease that any sublease must provide for rent not less than the rental rates landlord is charging in the building (except perhaps for a short time at the start of a new building rent-up to protect landlord's initial rental program). Virtually nobody pays as much for a sublease as for a direct lease; subtenant

has no direct privity with landlord, if landlord wishes it will not even deal with subtenant, subtenant cannot get its ideal term, cannot negotiate renewals or cancellations, in fact cannot negotiate anything in the prime lease, usually it is take it or leave it, and there is always a concern that sublessor might default under the prime lease, and for all these reasons a sublease is worth less. Some landlords ask for this provision presumably in the hope that it is agreed to and thus in effect they have a veto over any subletting. (Note, this effect also arises in case of an unusual use clause when tenant decides to transfer under a transfer clause requiring no change in use. If your pet store is not successful and you want to leave, what is the chance another pet store will want that same already once failed location?)

If an office tenant, try not to agree (not an absolute avoidance, merely something you should try moderately hard to avoid) to a ban on subleasing your office space to another tenant in the building, unless you also specify that this limitation will only apply when landlord has comparable space available. If landlord, always try to get this provision or your tenants will steal your vacant space and renewal and expansion candidates. Experience shows that in the whole world the most likely party interested in a sublease is the tenant of adjoining or nearby space, so if you are landlord you need to try to get that tenant to rent available vacant space from you and not sublease other space at a lower rate from another tenant. Forbidding the latter is a good way to solve this (you can also try to insert into every lease a provision forbidding tenant to sublease or accept assignments of other leases in the building).

If landlord, consider specific financial tests. Some like the test of not less financial standing than the financial condition of tenant when it signed the lease, or if more, its current

condition. If you are tenant, at least object to the former, since the finances of tenant the day of the transfer is all landlord has available to it now, therefore why should it obtain some enhancement upon assignment. Worse, what if tenant assigns to Exxon, so now Exxon can only sublease to another giant company, even though landlord never anticipated such an excellent result; once there is an excellent credit tenant why must it sublease only to an equally wealthy subtenant, and if the creditworthy assignee assumed the lease why must it only assign to an equally wealthy assignee. Tenant may try to insist on no definite standard but only finances reasonable in view of the lease obligations. Another argument is that in subleasing the finances of subtenant are irrelevant since prime tenant remains the tenant, and in an assignment assignor liability will keep assignor liable.

A recent form of industrial property lease prepared by the RPTE Industrial Lease Committee simply provides: **Assignment and Subletting. Tenant shall have the right to assign this Lease or further sublet all or any part of the Premises, subject to the consent of Landlord, which shall not be unreasonably withheld, conditioned or delayed. Notwithstanding the foregoing, Landlord shall be deemed to have unreasonably withheld its consent if it refuses to consent and the proposed assignee operates substantially the same business as Tenant and has a net worth equal to or greater than Tenant. Tenant shall have the right to assign the Lease and sublet the Premises to any affiliate of Tenant, successor by merger or consolidation, or acquirer of substantially all of the assets of Tenant (the foregoing hereinafter known as an "Affiliate"), without the consent of Landlord. Tenant shall, however, give notice to Landlord of an assignment or subletting to an Affiliate at least ten (10) days prior to the effective date of such assignment or subletting accompanied**

by a written assumption by assignee if an assignment and reasonable evidence of the affiliation. In the event Landlord consents to an assignment, then Tenant shall be released from all further liability under this Lease. [Some landlords would object to the last sentence].

On the other hand, a typical large mall lease to a small tenant provides for these criteria, as part of a 5 page transfer clause**: The following shall be conditions which must be fulfilled by Tenant before Landlord is obligated to consent: 1. Each assignee or sublessee shall have submitted a current financial statement, audited by a certified public accountant** [hardly any small tenants have these audited]**, showing a net worth and working capital in amounts reasonably determined by Landlord to be sufficient to assure the future performance by such assignee or sublessee of Tenant's obligations hereunder; 2. Each assignee or sublessee has submitted, in writing, evidence reasonably satisfactory to Landlord of substantial experience in stores conducting the Authorized Use in shopping centers of comparable size to the Center and in the sale of merchandise and services permitted under Article 97 of this Lease; 3. The business reputation of each assignee or sublessee shall meet or exceed generally acceptable commercial standards; 4. The use of the Premises by each assignee or sublessee shall not violate, or create any potential violation of applicable laws, codes or ordinances, nor violate any other agreements affecting the Premises, Landlord or other tenants in the Center; and 5. Tenant shall pay Landlord an Assignment Fee as reimbursement to Landlord for administrative and legal expenses incurred by Landlord in connection with any assignment or subletting.** [We have observed on other occasions that there is no such thing as "net worth" in a commercial accounting context. It is simply not a GAAP term. Others insist that it has some understood

meaning and that it can be used and defended in court. We disagree but defer to people's right to do what they think is appropriate.]

And a fairly typical office criteria list might be**: In its determination of reasonableness, Landlord may take into account all reasonable matters including, without limiting the generality of the foregoing, the following: 1. the financial stability and business reputation of the proposed assignee or subtenant; 2. the nature of the business and the nature of the proposed use of the Premises by the proposed assignee or subtenant in relation to the majority of other tenants in the Building; 3. if Landlord has currently or within thirty (30) [more?, 180?] days will have available space which can meet subtenant's or assignee's requirement, neither the proposed assignee or subtenant nor any affiliated entity shall have inquired about, if an existing Building occupant, or if not then shall have actively negotiated with Landlord for, space in the Building during the preceding six (6) [less? 3?] months; 4. the proposed assignee or subtenant shall neither be entitled directly or indirectly to diplomatic or sovereign immunity nor be an entity or agency of any government; 5. there shall not be more than _____ subtenants and any sublease or part of the Premises shall not be of less than ____ sq. ft. and reasonably commercially configured** [this in case tenant defaults and landlord must take over the entire space and wishes to retain the subtenancy but rent the balance])**.**

[We refer you to The Sublease and Assignment Deskbook, by Brent Shaffer, an ABA Publishing book, with several versions of criteria lists plus other clauses and articles]

IV. ENTITY CHANGES, AFFILIATES, SUCCESSORS. What about entity changes? The general rule is that change in ownership of an entity is not a lease assignment unless the lease specifies that it is. If you are landlord going through the effort of limiting transfer in your lease you should not allow the tenant to subvert the entire scheme by selling its shares or membership interests. Tenant, on the other hand, has a need to protect normal business transactions of merger etc.

The lease should say that transfers of shares, partnership interests, members' interests, are all considered to be assignments. Again, being wary of clever attorneys trying to avoid the application of your clause, you should include generic "other equity ownership." Older leases omitted limited liability companies because they did not exist, and one wonders how a landlord will explain to a judge that they are actually included in such a clause. (Conversion from corporation to limited liability company, a common transformative procedure, perhaps should be included too.)

Tenant should try to obtain exemption from the need for consent for transfers to affiliates and subsidiaries. There seems no particular reason why a retail company cannot decide to move its Delmarva stores formerly in an East coast division subsidiary into a new division subsidiary and assign a lease in Baltimore to that new division, certainly if both entities are 100% owned by the parent company (or transfer the lease to the parent, for that matter). There seems even less reason in the context of an office lease.

However, Landlord should take some care to define what is meant by affiliate or subsidiary, since these are terms which can include many variations of common ownership. The purest would of course be 100% in common ownership. Conversions should be added as a deemed assignment, that is it is treated as if it were an assignment for purposes of the clause, especially conversion from corporation to limited liability company which has become quite common. There is some micro-debate about whether landlord needs to express that a future event whereby the affiliate ceases to be affiliated constitutes a transfer; some say the application of the change of ownership paragraph in the lease will trigger that result, but some prefer to express it. (That's the paragraph that says "transfer of __% of shares, members interests, partnership interests, or other equity ownership interests in Tenant shall be treated as if it were an assignment for purposes of this article.").

Additionally, tenant should try to obtain exemption for occupancy by affiliates. For large companies this may obviate all the concern about transfers to affiliates if it can leave the lease in the parent or one subsidiary and put into the space whatever division it chooses, but then landlord probably needs to add that cessation of affiliation is not permitted or is considered an assignment requiring consent.

Another common exemption from the need for consent is for mergers and similar changes of identity. The typical list is mergers, consolidations, asset sales, going public, sale of publicly held shares. Mergers, consolidations, asset sales usually have a financial test, one of the "higher of the amount on signing or amount immediately before the transaction" variety (with the usual tenant objections to the former). Asset sales often require a specified percentage of assets

in order to qualify (usually quite a high percentage, including, of course, the lease). Initial public offerings may also be exempted, although there may be required minimum standards such as listing on a major stock exchange or quotation on NASDAQ, versus pink sheets and bulletin boards which are homes to very marginal companies.

For landlord, it is always a good idea to add as a condition that the transaction be made for a legitimate business purpose not primarily to evade the anti transfer provisions of the lease. There are so many twists and turns in these transactions that one cannot be sure that a lease made today will cover new creative entity changes, so that having such a fall back is reassuring (for landlord). For tenant, of course, there is the concern that it permits landlord to object to a supposedly non-consent transaction, but not every concern can be resolved in advance.

Finally, publicly owned companies may not be able to comply with share limitations, such as notice and percent of ownership changes. Some landlords narrow the ownership change limitation provisions to insider trades but this is also a question of degree, so for a chain with 500 stores or an eight figure business, it is not so clear why landlord would need this protection (assuming for the sake of this argument that it is a protection). It is a good idea to use a definition of "public" so that later the party seeking to evade the application of the provision cannot so easily conjure up a different meaning than originally intended.

If you as landlord's counsel are accepting the idea that there should be fewer limits on a chain of stores, you must be sure that your clause applies to the entire, or specific number or percentage or both, of stores; often each store is a separate corporation or other entity, so your

clause applied to “Tenant” will not give you the protection you sought If you are tenant, be sure to keep some flexibility in case “all” stores in a chain are not part of the deal, by keeping it limited to a percentage, the lowest you can get.

V. RECAPTURE. Once you have established a groundwork where it is fairly clear that your clause applies to the transaction contemplated, what are landlord's rights? We have assumed the lease says it has a right to disapprove only on a reasonable basis.

However, do not overlook the possibility that landlord insists on the right to withhold consent arbitrarily, that is, no requirement of using a reasonableness standard. After all, each lease is a unique negotiation and your tenant client may agree to such a result, hoping that if the need should arise landlord will permit it to assign or sublease despite having no legal obligation to do so, especially if tenant brings in a desirable replacement tenant, or if necessary pays consideration to landlord into the mix. Conversely, some leases will permit tenant unfettered rights to assign and sublease because landlord is simply not concerned, perhaps because it is comfortable that tenant's interest in not being pursued based on assignor liability will cause it to seek a good credit assignee, or because the lack of quality of the property does not justify too much concern as long as rent is paid, or because it is a single tenant property situation.

But, assuming the lease provides that landlord has a reasonable right to approve or disapprove, often this is accompanied by a right to cancel in lieu of consenting, euphemistically called "recapture." Simply described, landlord can match the sublease offer by its own designee

(sometimes at the lower of the original lease rent or the proposal for which tenant is seeking consent), or if all of the space and term is being subleased or assigned, cancel the lease instead of approving a transfer. This arises most often when market rent is materially higher than the lease rent, but there may be other reasons such as a prospective tenant needing more space than landlord otherwise has available. The clauses are widely variable on what triggers the recapture right so a very careful reading is warranted.

Keep in mind that a new lease will probably require landlord to bear all or some of the costs of: time it took to rent the space, landlord construction, construction allowance to new tenant for its alterations, brokerage commission, transactional costs of a new lease (legal fees, architectural), so that there needs to be substantial difference in lease and market rent, but if that difference exists landlord may prefer to cancel the lease. This may be a blessing to tenant, since it was moving anyway, and now it is free of financial responsibility, including assignor liability. However, tenant loses the value of its alterations, and any profit it would have made on the transfer, but if the remaining term of the lease is short the tenant may not be able to enjoy the increase in market rate anyway. Accordingly, tenant may not be dismayed at landlord reserving the right to cancel, or to match so long as tenant is off the liability or landlord itself does the match rather than using a designee. Including this recapture option is, of course, a decision that arises when the original lease is made.

In any event, either when tenant decides to move, or when it has found a successor assignee or a subtenant, depending on the details of the recapture provision landlord has the right to review and (a) approve or (b) reasonably disapprove or (c) recapture. Landlords prefer

requiring that tenant finds a successor before triggering a recapture right in landlord since landlord can perhaps simply cancel and re-rent to the successor, perhaps even at a higher rent than tenant secured, as opposed to a naked notice by tenant of intent to transfer setting off the option. Tenant, if it had agreed to the recapture, would prefer to simply notify landlord of its intent to leave and so avoid the cost and trouble of finding a replacement and negotiating and documenting that deal; there are prospective subtenants which will not proceed to negotiate a sublease on the basis that landlord may cancel and there will then be no deal at all. In such a case, broker sometimes tries to feel out landlord's intentions but these feelers are not binding on landlord unless it agrees to be bound.

This is all a negotiated topic before original lease signing. An extension of this arrangement is landlord's right to cancel as to the affected part of the space in case tenant proposes a subletting of only part. If the sublease term was the balance of the tenant's term, this is not such a problem; but if the term remaining is long and tenant intends to return, this becomes a complicated situation, especially if landlord will do its own leasing, the primary problem being who will rebuild tenant's space when it returns. It may be cleaner to simply limit these partial recaptures to situations where the entire balance of the term or the entire space is involved. Even then, because of issues such as who pays to separate the spaces, who decides about common halls and facilities, the simplest course, particularly for smaller spaces, is to try to exclude recapture for partial term and partial space subleases (or forbid partial transfers!).

Another recapture issue is the time landlord has available to make its decision. If a nice long time, landlord may be able to conclude a replacement lease before it exercises, the best of all worlds. Of course, for tenant, it just delays the time before it can move out.

There is a difference between retail and office or industrial space. Office and industrial space is essentially close to fungible. Some buildings are nicer than others, some are prettier, slightly better (or worse) located. But an office is an office, a factory is a factory. However, for a store the location is part of the very DNA of the store. Customers go there because it is near the bus stop, or near parking, or near the anchor, and so on. If a retailer wants to sell her business, the location goes with it; on the other hand if a business person sells her manufacturing business the precise location of the warehouse may not be as significant. Accordingly, a retailer must be very cautious about agreeing to a recapture provision, and perhaps should not agree to it even if the original lease deal fails as a result. Perhaps. This is especially true of retailers who have more than one location; the recapture provision cannot be permitted to apply to a sale of the chain (although perhaps it could apply to an isolated transfer).

VI. PROFITS. Dealing with transfer profit is a very complex topic. Even when the lease provides that landlord shall receive all the 'profit' the tenant still must first reserve the right to deduct costs. Brokerage and legal fees are the basic deduction categories, so that tenant can reimburse itself for these before any discussion of profit. What about free rent which tenant gives to subtenant? What about alterations tenant makes solely for the sublease? What about cash which landlord made available for tenant to originally build out the space; tenants say that is

built into the rent and so is not an item which should be recovered by landlord, which may be correct (may be less than 100% correct, who knows?). What about the unamortized costs of the tenant's leasehold improvements which are the reason the tenant got more than it was paying the landlord? Also consider timing to the extent that a provision which permits tenant to deduct today something which it has not yet actually paid out may not be totally fair to landlord. You really need to read an article on this topic, if you are dealing with other than a small vanilla lease.

Tenant must try to avoid including in the real estate profit amounts actually being paid for the business. Landlord, on the other hand, often believes that a bargain rent may be a material factor in the price being paid for the business and accordingly not only is it receiving too little rent but tenant is in effect selling the bargain rental stream. This theory goes, if your business earns $100,000 per year and sales of the same type business are priced at 10 times earnings so you are selling for $1million, but the lease rent is $20,000 per year below fair market value, then the business is really selling for 10 times $80,000 or $800,000 and the balance is the lease sale profit in which landlord should share (if there is a profit sharing arrangement in the lease). So landlord wants part of the $200,000 but tenant does not give up any of the $800,000. Tenant may say that if multiple properties or a very large price are involved then attributing value to the lease is not fair; this may be correct, may be not.

VII. <u>BOILERPLATE AND MISCELLANY</u>. There are many decisional and statutory rules affecting subleases and assignments as well as preferences of the parties to the lease. It is most simple to have one big omnibus paragraph in the transfer article covering as many of these

as are important to you. For example, provisions that no transfer or consent to transfer shall be construed as a waiver of restrictions on further transfers; each assignee must assume in writing, except as to entity ownership changes; tenant must deliver counterparts of documents to landlord; parties must enter into confirmation agreement if landlord requests; processing fee, perhaps; each one sentence is a big hunk of boiler plate, but if you pack them in one place you don't have to worry about omitting some of them.

A very important protection for landlord is a waiver by tenant of any right to sue landlord for damages for claim of being unreasonable in refusing the consent. While landlord could agree, if tenant successfully insisted, to expedited ADR, that is a far cry from subjecting itself to the threat of large damages for refusing consent for what landlord believes very deeply is a good faith reason. Because a protracted dispute resolution procedure will probably not be resolved in time to "save the deal," some tenants are particularly insistent upon an expedited procedure. To compromise, the landlord might agree that it will be liable for tenant's out-of-pocket costs, legal fees and even rent paid after the effective date of the proposed assignment (but <u>not</u> consequential damages) if the landlord has been found to have acted in bad faith, although many landlords will not accept any liability except in large deals.

Note that there are several other aspects of a lease that are affected by the outcome of the discussion of assignments and subleases. Perhaps the foremost is the issue of a guarantor. Although typical forms of guarantees provide that they continue despite assignments or subleases, some landlords require a confirmation of a guaranty in connection with an assignment; this is the better practice for landlords to follow. The original guarantor may be unenthusiastic

about confirming its credit support of an operator that it does not know. The tenant or guarantor may be able to negotiate for a right to substitute a replacement guarantor in the event of an assignment so long as the replacement guarantor is of adequate creditworthiness.

The assignment provisions are also related to continuous operations provisions in retail leases. Often those provisions are modified to allow the tenant to cease operations when it is taking inventory or remodeling or - in this case - assigning or subleasing the premises. Signage and trade names are also affected; the lease must be able to modified if an assignee or subtenant is found. In one case, a tire store had assigned its lease to another tire store who had to use the pylon sign for the first tenant because the landlord would not consent to a change in the sign. In a retail lease, the percentage rent rate is often based upon the initial type of business and might be something that the landlord or tenant would want to change in connection with an assignment so that, for example, the assignee of a super market (which typically pays no percentage rent or one percent of sales) would not get the benefit of that rate if it were operating a high-margin business such as a jewelry store in part of the space.

VII. FORMS. There are forms in formbooks, of course. Many main lease provisions carry over so some people incorporate by reference the entire overlease except as specified. Be sure to check how this works for the exculpatory paragraph, since a sublessor has a different interest than a fee owner, and things like time periods, sub-subletting. You should, whichever side you are on, read the entire overlease assuming that the references were changed to sublessor and subtenant, just in case there are some places where it does not work. Also, a few full

sublease forms can be found at Real Property Probate & Trust Law Journal, Spring 1999, Vol. 34, No. 1, Subleases - A New Approach - on the RPTE website. Also, see the NYC Bar Association full sublease form available to public access at: www.nycbar.org/RealEstate/Forms.html. The abovementioned The Subleases and Assignment Deskbook. And an excellent book,. Commercial Real Estate Leases: Preparation, Negotiation and Forms, (3d ed.), Aspen Law & Business, 2000, by Mark A. Senn, which contains a Section on preparation of subleases in Chapter 13. And always consider Googling a document; often you will find excellent negotiated forms which regulatory or other reasons have caused to be made public.

Annexed, just to see how these might be handled, are a few sample clauses such as (1) one setting out which clauses are not entirely incorporated, and (2) one about what happens if overlandlord defaults. This is always a sticky issue since many sublandlords (especially those remaining in part of the space) refuse to sue their overlandlord. Also, never agree to allow sublandlord to avoid all (or at least most) of resulting adverse effects and damages if its default causes the overlease to be terminated.

If you are landlord, it is preferable to have a separate written consent. Subscribing the sublease is never a good idea since it tends to suggest that landlord approves all the provisions although in fact it most likely has not even read them. At a minimum a consent should contain a representation that landlord has been given all documents, that original tenant remains liable (if that is the arrangement), that landlord does not consent to and is not bound by any provision of the documentation except the basic transfer being consented to, and that the limitation on transfer

provisions of the lease are not waived as to future transactions by any party. As is often encountered in estoppel certificates, some consents try to reinvent the overlease. They seek to modify almost any provision which landlord wishes to try to renegotiate. If tenant is in a great enough hurry to conclude the transfer it may reluctantly agree to all or some of these.

IX. SUMMARY. Transfer clauses are sometimes huge, complex, and interpreted strictly against limitations by courts. Landlord must be sure they are as clear as can be, and tenant must be sure its operational and financial flexibility is not excessively impaired by the provisions. Tenant also needs clarity so that its transferee can evaluate the landlord's rights, as well as its future ability to assign or sublease. Since it is the exit strategy for tenant, it can damage or be fatal to a sale of the business and its owners' ability to reap the resulting rewards. For landlord, it protects against having as a tenant someone landlord would never permit into its property either because of credit issues, quality issues or otherwise.

On the other hand, most tenants do not assign or sublet, most structure their affairs and stay where they are for the lease term, especially in locales where terms are 5 years or less. Larger companies may leave leases in one division or subsidiary as long as their other divisions or subsidiaries can freely occupy. The point is, this may not be a dealbreaker topic, but as always, it depends on the client's preference; if its goal is to sell its store and the lease forbids it, that is a dealbreaker. Each lease stands on its own.

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SOME SUBLEASE PROVISIONS

1. [Provisions concerning incorporating the main leases.]

A. Lessee acknowledges that it has received and reviewed a redacted copy of the Prime Lease. This Sublease is subject and subordinate in all respects to the Prime Lease, and to the matters which the Prime Lease are or shall be subordinate. Lessor represents and warrants that none of the redacted provisions of the Prime Lease imposes any obligations upon or restricts any rights of Lessee hereunder.

B. Lessor shall not take any action or fail to take any action which would or could result in a violation of or default under any of the provisions of the Prime Lease.

C. Except to the extent expressly set forth herein to the contrary: (x) all of the terms, provisions, covenants and conditions of the Prime Lease are hereby incorporated by reference in and made part of this Sublease with the same force and effect as though set forth in full herein; (y) the terms, provisions, covenants and conditions of the Prime Lease shall likewise apply to and bind and benefit Lessee hereunder. For purposes of such incorporation, (i) the term "Landlord" in the Prime Lease shall refer to Lessor hereunder, its successors and assigns; (ii) the term "Tenant" therein shall refer to Lessee hereunder, its successors and assigns; (iii) the term "Additional Charges" therein shall refer to the "Additional Rent" as defined herein; (iv) the term "this lease" (or "this Lease") therein shall refer to this Sublease; (v) the term "the term of this lease" therein shall refer to the Term of this Sublease; (vi) the term "Premises" therein shall refer to the Subleased Premises hereunder; and (vii) the terms "Commencement Date", "Expiration Date" and "Fixed Rent" therein shall each refer to the respective definitions of such terms as are set forth herein. The obligations of Lessee hereunder which are to be performed in respect of the

Subleased Premises during the Term shall survive and extend beyond the termination of this Sublease to the extent such survival is provided for in the Prime Lease or this Sublease.

The following terms, provisions, covenants and conditions of the Prime Lease are specifically not incorporated in this Sublease and shall not apply to benefit or bind the parties hereto: (i) All sections of the Prime Lease which precede Section 1.06; (ii) Article 3; (iii) Sections 4.01(d) and (f); (iv) The first two sentences of Section 4.03; (v) Section 4.04; [etc.].

2. [Provisions concerning what happens if main landlord defaults.]

A. Notwithstanding anything to the contrary set forth in this Sublease (including, without limitation, the incorporation of certain provisions of the Prime Lease herein by reference), Lessor shall have no obligation to render any services or repairs to Lessee of any nature whatsoever or to expend any monies for the preservation, maintenance or repair of the Demised Premises or any portion thereof, and Lessee shall look solely to the Prime Landlord for the furnishing of any services or repairs with respect to the Demised Premises to which Lessee may be entitled. Lessor shall in no event be liable to Lessee nor shall the obligations of Lessee hereunder be impaired or the performance thereof excused because of any failure or delay on the Prime Landlord's part in furnishing services with respect thereto. If Prime Landlord shall default in any of its obligations to Lessor with respect to the Demised Premises, Lessee shall be entitled to participate with Lessor in the enforcement of Lessor's rights against the Prime Landlord, but Lessor shall not be obligated to bring any action or proceeding or to take any steps to enforce Lessor's rights against such party other than, promptly upon receipt of the written request of Lessee, making a demand upon such party to perform its obligations under the Prime Lease with respect to the Demised Premises.

B. If, within five (5) Business Days after Lessee's written request, Lessor fails to commence the enforcement of any rights available to Lessor under the Prime Lease, if applicable, in respect of any default or delay by the Prime Landlord (it being understood and agreed that Lessor shall have no obligation to exercise any such rights except as expressly provided for in section 2 (a) above), then Lessee shall have the right, in the name of Lessee, or of Lessor, if necessary, to enforce any such rights of Lessor with respect to the Demised Premises. Such enforcement shall be at the sole expense of the Lessee, and Lessee shall indemnify Lessor against all costs and expenses, including but not limited to reasonable attorneys' fees and expenses, which may be incurred by Lessor in connection with any claim, action, or proceeding so undertaken by Lessee. Lessor shall cooperate with Lessee, at Lessee's sole cost and expense and in a commercially reasonable manner, in connection with any such enforcement by Lessee. Any amount of recovery resulting from such enforcement obtained by either Lessee or Lessor shall be the property of Lessee. If and to the extent that Lessor shall receive an abatement of rent under the Prime Lease due to the loss of use or loss of services to the Premises, then an equitable portion of such abatement to the extent such loss is properly allocable to the Demised Premises, shall be passed through as an abatement under this Sublease.