ASSIGNMENTS AND SUBLEASES

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I. Why Are They Important?

One thing is more true today than ever before -- change is here to stay. Corporate America, and law firms and other businesses that support or consult with corporate America, have difficulty planning their needs for space, particularly office space, more than five years in advance. Companies are acquired and need to consolidate their office space or otherwise need to down-size, right-size or shrink the portion of their operating expenses devoted to real estate. New businesses spring up, grow rapidly and then find themselves out of space.

In the retail arena, long-time retailers are merging, filing for bankruptcy or being acquired by others. Consumer shopping habits have changed. While the ability to shop on-line has not significantly reduced "in person" retail sales, regional malls are not as attractive to shoppers as they once were. Revitalized suburban downtowns, strip malls, power centers or lifestyle centers close to home are the new places people want to shop in order to "touch and feel the merchandise."

Warehouses (typically classified as "industrial" uses) have grown to behemoth size to fit the new "intermodal" (meaning ship to rail to truck) method of distributing consumer goods, industrial parts and manufactured items. Today, to facilitate intermodal shipping delivery of goods, most retailers have located their regional distribution centers with easy access to railroad lines and interstate highways. Many of these goods arrive in U.S. ports from overseas locations in Asia, Europe and elsewhere around the world where they are lifted from ships by crane and placed on flat bed rail cars in their sea going shipping containers for transfer to truck beds that deliver them to these new warehouses serving as regional distribution centers or to other facilities capable of accepting deliveries by rail or close to railroad spurs. The goods are stored in large distribution centers before being broken down into smaller size units and shipped by truck to individual retail stores as needed. Another phenomenon is that many large manufacturers no longer want to store their own component parts – they often demand suppliers warehouse their parts for "on time, as needed" delivery. To accommodate their customers, manufacturers now store parts and components specifically for particular customers in distribution centers located close to the manufacturing plants they serve.

All of this means flexibility is a key component to a tenant's lease of space. Using assignments or subleases as part of a strategy to unload excess space is, thus, becoming one of many tools available to manage the need for space and place devoted to operating a business. The more flexible the assignment and subletting provisions, the more valuable the lease will be to the tenant, especially if the rent being paid is "below market."

From the landlord's perspective, having control of the mix of tenants and the terms under which space in its building is leased is critical. In addition, landlords expect to participate in any profits made by their tenants from subleasing or assignment. From the landlord's point of view, the landlord is in the business of marketing space, not its tenants, and if the landlord can remarket a tenant's excess space at a higher market rent, the landlord wants to receive all of the "excess rent" or "profits." Alternatively, if the landlord needs the space to

satisfy the expansion needs of another tenant in the building, it would rather be in control of who occupies the space. These issues are addressed in more detail in Parts V. and VI. below.

II. What is the Difference Between an Assignment and a Sublease?

A. Legal Differences

A lease is one mechanism by which an interest in real estate is established – the granting by the landlord to the tenant of a leasehold estate. If a lease is in writing, it also establishes a contractual relationship between the landlord and tenant. Once possession of the real estate is delivered to the tenant, the landlord and tenant are said to be in "privity of estate." [1] The written lease itself, upon execution, creates "privity of contract."[2]

1. Assignments

An assignment of a lease is distinguished from a subletting or sublease by the fact that in an assignment a tenant transfers its entire interest in the unexpired lease term. What this means legally is that the assignee under an assignment now has a direct lease arrangement with the landlord with respect to possession and occupancy of the real estate – the assignee now holds the leasehold estate of the assignor and is in privity of estate with the landlord as long as it remains in possession of the premises. In addition, most assignments, because they generally provide that the assignee assumes the obligations of the tenant under the lease, also establish privity of contract between the landlord and the assignee.[3] Upon delivery of possession to the

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[1] Privity of estate with the landlord imposes liability on the assignee for breach of those tenant lease covenants that run with the land.

> The test as to whether a covenant runs with the land, or is merely personal, is whether the covenant concerns the thing granted and the occupation or enjoyment of it or is a collateral and personal covenant not immediately concerning the thing granted. If a covenant concerns the land and the enjoyment of it, its benefit or obligation passes with the ownership; but to have that effect the covenant must respect the thing granted or demised and the act to be done or permitted must concern the land or the estate conveyed. In order that a covenant may run with the land, its performance or non-performance must affect the nature, quality, or value of the property demised, independent of collateral circumstances, or must affect the mode of enjoyment.

Keogh v. Peck, 316 Ill. 318, 147 N.E. 266, 269 (1925) (suit by tenant's assignee against landlord's assignee for specific performance of option to purchase contained in 99-year lease).

More recent Illinois courts have also enunciated the elements needed to establish a covenant running with the land. These elements are that (1) the covenantor and covenantee intend that the covenant run with the land; (2) the covenant itself touches and concerns the land; and (3) privity of estate exists. *Streams Sports Club, Ltd. v. Richmond*, 99 Ill.2d 182, 457 N.E.2d 1226, 1230, 75 Ill. Dec. 667 (1983); *Nassau Terrace Condominium Association, Inc. v. Silverstein*, 182 Ill. App. 3d 221, 537 N.E.2d 998, 1000, 130 Ill. Dec. 669 (1st Dist. 1989).

[2] *See* Milton R. Friedman, Vol. 1 FRIEDMAN ON LEASES, Fifth Edition edited and revised by Patrick A. Randolph, Jr. (2004, rel. #3 2006), §7:5.1[A] (hereinafter cited as "Friedman on Leases, §___").

[3] Privity of estate as between the landlord and the assignee will arise upon assignment, but unless the assignee assumes the tenant's obligations under the lease, privity of contract between the landlord and tenant's assignee will not arise. *Consolidated Coal Co. of St. Louis v. Peers*, 166 Ill. 361, 46 N.E. 1105, 1107 (1896)*; Montgomery Ward & Co. v. Wetzel*, 98 Ill. App. 3d 243, 423 N.E.2d 1170, 1175, 53 Ill. Dec. 366 (1st Dist. 1981); *Cork-Oswalt, Inc. v. Hickory Hotel Co.*, 20 Ill. App. 2d 406, 156 N.E.2d 259, 262 (3d Dist. 1959). An assignee that assumes the lease (con't)

assignee, the assignor is no longer in privity of estate with the landlord. However, although the privity of estate between the original tenant and the landlord is severed by an assignment, privity of contract will remain between the landlord and the tenant/assignor unless and until the landlord agrees to release the tenant/assignor from liability.[4] Thus, the tenant/assignor may find itself liable at some future date if the assignee fails to perform the obligations it assumed under the lease.

This contingent future liability means the tenant/assignor remains a primary obligor under the lease, and is not technically a surety, although there are cases that refer to the tenant/assignor as a surety.[5] However, if the assignee assumed the obligations of the tenant

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will also be liable for the performance of its conditions and covenants through privity of contract. 49 AM.JUR.2d *Landlord and Tenant* §1132 (rev. ed. 1975); *Springer v. DeWolf*, 194 Ill. 218, 62 N.E. 542, 543 (1901).

In *American Nat'l Bank & Trust Co. of Chicago v. Hoyne Industries, Inc.*, 738 F. Supp. 297 (N.D.Ill. 1990), *later proceeding*, No. 88 C 7756, 1990 U.S.Dist. LEXIS 9453 (N.D.Ill. Jul. 30, 1990), *aff'd*, 966 F.2d 1456, Rule 53 (7th Cir. 1992) (reported in full at 1992 U.S.App. LEXIS 13339), the landlord and the successor to the original tenant disputed whether privity of contract existed between them. If privity of contract did exist, the obligation to perform under the lease would be imposed on the successor tenant, which had vacated the premises 18 months before the lease's expiration date. Under Illinois law, when the assignee of a lease does not assume the obligations of the lease, only privity of estate results between the landlord and the assignee. The assignee, therefore, is liable for rent only as long as privity of estate exists and the assignee remains in possession. Privity of contract exists when the lease obligations are assumed by the assignee. In contrast to privity of estate, the assignee cannot abrogate those obligations by a further assignment of the lease and the termination of its right to possession. 738 F. Supp. at 299. Based on these legal principles, the district court determined that privity of contract existed between the landlord and the tenant's successor. Privity of contract existed even though the tenant and its successor had not obtained the landlord's consent to the assignment, because the successor had indeed assumed the tenant's lease obligations under the terms of the purchase agreement. 738 F. Supp. at 300 – 301. In rendering its opinion, the Seventh Circuit agreed with the lower court's reasoning based on the facts of the case. 1992 U.S.App. LEXIS 13339 at *16.

[4] *Springer v. DeWolf*, 194 Ill. 218, 62 N.E. 542, 543 (1901); *Consolidated Coal Company of St. Louis v. Peers*, 166 Ill. 361, 46 N.E. 1105, 1107 (1896); *Uresil Corp. v. Becton Dickinson & Co.*, No. 89 C 6130, 1990 U.S.Dist. LEXIS 811 (N.D.Ill. Jan. 29, 1990); *LaSalle National Bank v. Bachmann*, 108 B.R. 1013 (Bankr. N.D.Ill. 1989). This principle was followed in *Chicago Title & Trust Co. v. GTE Directories Service Corp.*, No. 94 C 5003, 1995 WL 584434, 1995 U.S. Dist. LEXIS 14331 (N.D.Ill. Sept. 29, 1995). Suit was filed against the original tenant after a subsequent assignee extended the lease and then assigned it to another party, which later vacated the premises. The court noted that a tenant's contractual liability remains unless its landlord releases it from liability. In addition, the court ruled that since the lease in question did not limit the exercise of the extension option to the original tenant, the lease could be extended by a subsequent assignee. As a result, the assignee had the right to extend the lease without obtaining the original tenant's permission. Further, since the original tenant was not released from liability, it would have continuing obligations under the extension. 1995 WL 584434 at *9. *See also* Friedman on Leases, §7:5.1[A], [B] and cases cited therein. However, the landlord was held to have waived its right to recover from the original tenant after the assignee filed for bankruptcy in *American Nat'l Trust Co. of Chicago v. Kentucky Fried Chicken of Cal., Inc.*, 308 Ill.App.3d 106, 719 N.E.2d 201, 209, 24 Ill.Dec. 340 (1st Dist. 1999), because it had entered into a settlement agreement with the assignee that released the assignee and its predecessors in interest. The *Kentucky Fried Chicken* case is discussed in more detail in Parts IV.A and VIII.B below.

[5] A surety is "[a] person primarily liable for paying another's debt or performing another's obligation. . . . A surety differs from a guarantor, who is liable to the creditor only if the debtor does not meet the duties owed to the creditor; the surety is directly liable." Black's Law Dictionary 682 (2d Pocket Edition 1996). One of the key principles of surety law is that a surety has certain defenses available to it if a creditor elects to seek recovery of a debt against the surety. Among them is that the surety is not bound by subsequent modifications of the debt entered into without its knowledge. For a discussion of the law of suretyship as it relates to tenant/assignees, *see* Friedman on Leases, §7:5.2.

under the lease, that assumption makes the assignee primarily liable and the tenant/assignor secondarily liable under the lease. Nevertheless, the landlord is generally free to sue either the tenant/assignor or the assignee. If the landlord sues the tenant/assignor and not the assignee, the tenant/assignor must make a third-party claim against the assignee to be sure all defenses the assignee has against liability are raised in the litigation with the landlord. Otherwise the tenant/assignor will unexpectedly find itself liable to the landlord, but not have any rights against the assignee. Even if the lease (or the landlord's consent to the assignment, if required) does not specifically prohibit the landlord from modifying the lease with the assignee without the tenant's consent, the landlord should avoid entering into any modifications of the lease without the tenant's consent. If the landlord does modify the lease without the tenant's consent, the landlord may discover the tenant/assignor has been inadvertently released, as there are some cases to that effect. There are also cases that have held if a landlord releases a judgment against an assignee, the landlord has also released the judgment against the original tenant/assignor, unless the release specifically reserves all rights against the tenant/assignor. *See* Friedman on Leases, §§7:5.1[D], 7:5.2 and cases cited therein.

As an illustration of this principal, see *Vallely Investments, L.P. v. BankAmerica Commercial Corporation*, 88 Cal. App.4th 816 (2001). In this case, the "landlord" was a ground lessor of the land leased initially to a developer. That developer assigned the lease to someone else and eventually Balboa Landing, became the tenant. Balboa then obtained leasehold financing from BankAmerica Commercial Corporation ("BACC"), which was secured by Balboa's leasehold estate. *Id.* at 819. When Balboa defaulted on the loan, BACC filed for a foreclosure action and Balboa filed for bankruptcy. To settle the foreclosure matter, eventually Balboa assigned the lease to BACC. In that assignment, which was not disclosed to the landlord, BACC assumed the obligations under the lease and later sold the leasehold estate to another party (Edgewater). *Id.* at 820-21.

When Edgewater defaulted in the payment of rent, filed for bankruptcy, and its bankruptcy trustee did not accept or reject the ground lease within the statutory time period, eventually the bankruptcy court entered an order rejecting the lease. The landlord did not find out about the lease assignment to BACC until after Edgewater filed for bankruptcy. After the lease was rejected, the landlord filed suit against BACC for a declaratory judgment that BACC was liable for the rent under the lease for the balance of the lease term. The court agreed, citing cases similar to those cited in footnotes 4 and 5 above, holding the privity of contract between BACC and the landlord was not terminated because the landlord had not released BACC from liability at the time of BACC's later assignment to Edgewater. *Id.* at 821-22. Foreclosure of the leasehold mortgage by BACC did not change the result because the reversionary interest of the landlord, which was senior to the leasehold mortgagor, remained intact after the foreclosure. *Id.* at 823.

BACC was not released from its obligations under the lease by the amendment to the lease between the landlord and Edgewater because the landlord was not aware of BACC's status as a possible surety when it entered into the lease amendment. "BACC took a chance in not notifying [the landlord] of its assignment, and it turned out to be a bad risk. It cannot now clothe itself in the defenses of a surety when it never showed those colors to [the landlord] until *after* Edgewater defaulted, when BACC first faced the possibility of liability." *Id.* at 828 (italics in original text).

This case is unusual, in that a foreclosing lender was the assignee of a lease on a temporary basis and presumably never took physical possession of the premises. The same principles would be equally applicable, however, to a tenant that assigns its lease without notice to the landlord if the landlord's consent is not required or to the assignee who assumes the obligations of the tenant under the lease and later assigns the lease to another new assignee without being released by the landlord. Perhaps the result would have been different in the *Vallely* case had the landlord been aware of the assignment from the tenant to BACC, but the case does not answer this question.

2. Subleases

In a sublease, less than all of the leasehold estate of the tenant is transferred, which means the landlord-tenant relationship between the landlord and the original tenant, including both privity of estate and privity of contract remain intact.[6] As a result of this lack of privity, generally the subtenant cannot sue the landlord directly to enforce the landlord's covenants in the prime lease. 49 AM.JUR.2d *Landlord and Tenant* §1184 (rev. ed. 1995). Thus, when the lease itself is terminated (thereby destroying the privity of contract and privity of estate between the landlord and tenant), any subleases and rights of any subtenants under those subleases will also end, regardless of whether the lease was terminated as a result of a default by the tenant, by agreement between the landlord and tenant or by rejection of the lease in the bankruptcy of the tenant. *See Syufy Enterprises, L.P. v. City of Oakland*, 104 Cal. App.4th 869 (1st Dist. 2002), and Friedman on Leases, §7:7.3 and cases cited therein.

Despite the holding in the *Hornsby's* case cited in footnote 6 above, there is some Illinois authority supporting the proposition that a nonparty to a lease "can sue on a contract . . . if the parties intended to benefit that non-party." *May's Family Centers, Inc. v. Goodman's, Inc.*, 571 F. Supp. 1012, 1015 (N.D.Ill 1983), citing *Carson Pirie Scott & Co. v. Parrett*, 346 Ill. 252, 178 N.E. 498, 501 (1931). In *May's*, a sublessee sued the landlord for damages under various legal theories for failure to consent to the sublessee's and sublessor's proposed assignment of the lease. The assignment clause in the prime lease stated that the landlord would not unreasonably withhold its consent. The landlord argued that the sublessee could not sue to enforce the prime lease because the sublessee was neither in privity with the landlord nor a third-party beneficiary of the lease. However, the district court determined that, under general principles of Illinois contract law and the lease provision at issue, the sublessee could state a claim as an "intended beneficiary" of the assignment provision of the prime lease. In so holding, the court relied on the

[6] In *Hornsby's Stores, Inc., v. Strauss*, No. 86 C 5809, 1986 U.S. Dist. LEXIS 16022 (N.D.Ill. Dec. 23, 1986), a sublessee and sublessor sued the landlord for the costs they incurred in replacing the demised premises' leaking roof after the landlord refused to make the repair at its expense. The court determined that since the prime lease obligated the landlord to make all structural repairs at its expense, the landlord was obligated to replace the roof. 1986 U.S. Dist. 16022 at *5. To the landlord's argument that the sublease imposed on the sublessee responsibility for structural repairs and maintenance of the roof, the court stated that "[t]he sublease only determines liability for repairs as between the [sublessor] and [sublessee]. The relationship between the tenants and the landlord is governed by the lease. Under that document, the landlord is obligated to replace the roof." 1986 U.S. Dist. LEXIS at *4 – 5. Thus, the sublessor was entitled to summary judgment against the landlord and to withhold its costs for replacement of the roof from the rent. However, because the sublessee was not a party to the prime lease, it had no right to recover its costs against the landlord.

fact that the relevant provisions of the lease anticipated successive assignments and sublettings and landlord approval of each such transfer of the premises. 571 F. Supp. at 1016.

In *Appliance Giant, Inc. v. Columbia 90 Associates, LLC*, 8 A.3d 932, 779 N.Y.S.2d 611 (2004), a subtenant was held to be entitled to damages from the landlord for breach of the covenant of quiet enjoyment and constructive eviction due to the loss of parking spaces in a shopping center when the landlord constructed an office building close by the subtenant's store. 8 A.2d at 933. The constructive eviction claim was based on the limitations on customer access and use of the store imposed by the landlord during construction of the new office building, and the breach of the landlord's promise to provide 400 parking spaces in the sublease that occurred when the landlord permanently eliminated some spaces. Nevertheless, the court did find errors in the trial court's jury instructions on damages. It remanded the case for a new trial on damages, holding because only direct damages based on the actual rental value of the lost parking spaces could be awarded, the jury award, which was partly based on consequential damages (lost profits), must be vacated and a new trial on damages was ordered. *Id.* 933-934.

Appliance Giant is a somewhat different type of case, because the subtenant was suing the landlord, and the court did not provide any specific facts as to why the subtenant was suing the landlord directly. The case does not mention the tenant or why the subtenant had a direct cause of action against the landlord. The breach of the covenant of quiet enjoyment is generally viewed as a covenant that touches and concerns the land, but a subtenant is not considered to be in privity of estate (or contract) with the landlord, which means that the sublease is not enforceable by the subtenant against the landlord. The case did mention that the loss of the specified number of parking spaces apparently was a covenant in the sublease, so perhaps the landlord was a ground lessee, which could explain why the "subtenant" (*i.e.*, sublessee) could sue the "landlord" (*i.e.*, the ground lessor).

Where the subtenant cannot sue the landlord to enforce a lease provision, the subtenant must instead look to the party with whom it is in privity of contract, the sublandlord/tenant. Similarly, the subtenant is not entitled to raise defenses to the nonpayment of rent. *See* Friedman on Leases, §7:4.1. Finally, for there to be a true sublease the original tenant must retain some sort of reversionary interest. This is why subleases typically run no longer than one (1) day shorter than the full term of the tenant's lease. *See* cases cited in Friedman on Leases, §7:4.1 n. 348. The requisite reversionary interest has been found if the tenant retains the right to exercise an option to renew and does not grant it to the subtenant in the sublease. *Id.* at n. 347. In an effort not to recharacterize an agreement the parties have called a sublease as an assignment, other courts or the parties to a transaction have struggled to find some reversionary interest. *See id.* at §7:4.3[A]. The safest approach is always to have the sublease term be no longer than one day shorter than the term of the tenant's lease without extension.

3. Intent of Parties Controls

Whether the landlord, tenant/assignor and assignee/subtenant call their arrangement an assignment or a sublease, courts typically look at the substance of the

transaction.[7] If there is a reversionary interest retained by the tenant/assignor, then the arrangement will be viewed as a sublease, not an assignment. Likewise, regardless of whether the parties call an arrangement a sublease, if the tenant effectively transfers all of its remaining interest in the premises to a new occupant, courts will generally find the arrangement an assignment not a sublease.

Of course, as with every general rule, there is usually an exception to the general rule or certain jurisdictions that do not follow the general rule. For example, in *Abernathy v. Adous,* 85 Ark. App. 242, 149 S.W.3d 884 (Ark. Ct. App. 2004), the court rejected the common law rule that when a tenant transfers its entire interest in its premises for the remainder of the term the transfer is an assignment, and held the parties' intent controlled, which meant that the transfer was a sublease. 149 S.W.2d at 888-89. The decision may have been based more on the equities in the case because the parties had referred to their arrangement as a sublease, rent payments were made by the subtenant to the tenant not to the landlord, and the landlord had refused to accept rent payments directly from the subtenant after the tenant failed to pay. *Id.* at 887-88. Also, the argument that the transaction was an assignment not a sublease was first raised by the subtenant when the landlord attempted to evict it after the tenant defaulted. *Id.* at 888.

4. Assignments Pro Tanto

A third type of transaction can be structured, although they are not very common – a partial assignment of a lease. In a partial assignment the tenant assigns its entire interest in a portion of the premises leased to it. Such assignments are called assignments "pro tanto." Friedman on Leases, §7:4.2. Such assignments are fairly infrequent, and arise most often in the context of a transaction called a sublease by the parties but later recharacterized as an assignment by a court because it granted possession for the balance of the lease term. Many unresolved questions exist for the courts that have addressed such situations. The best approach is to

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[7] Courts interpreting Illinois law have expressed this distinction in at least two ways. For instance, the "distinction between an assignment or sale of a lease and a sublease is whether the entire leasehold passes from the lessee to his transferee so as to put the latter and the original lessor in a landlord-tenant relationship; or whether less than the leasehold interest passes so as to leave the transferee in the landlord-tenant relationship with the transferor." *Fairmont Park Raceway, Inc. v. Commissioner,* 327 F.2d 780, 784 (7th Cir. 1964) (citing Illinois law). In the latter instance, a sublease, not an assignment, would exist. Alternatively, Illinois courts have stated,

> It has long been the law that where one assigns his whole estate without reserving a reversionary interest to himself, a privity of estate is immediately created between his transferee and the original lessor, and in such a case, the transfer is an assignment. . . . However, if any reversion in the leased premises is retained or reserved, no matter how small, the privity of estate between the transferee and the original lessor is not established and there is no assignment. [Citations omitted.]

Danaj v. Anest, 77 Ill. App. 3d 533, 396 N.E.2d 95, 96, 33 Ill. Dec. 19 (2d Dist. 1979).

See also Urban Investment & Development Co. v. Maurice L. Rothschild & Co., 25 Ill. App. 3d 546, 323 N.E.2d 588, 592 (1st Dist. 1975); *Builders Square, Inc. v. Illgross Partners & Co.,* No. 94 C 4632, 1994 WL 549020, 1994 U.S. Dist. LEXIS 14164 (N.D.Ill. Sept. 27, 1994) (holding agreement between plaintiff and original tenant was assignment and not sublease when language in agreement indicated that it was assignment and when original tenant reserved no reversionary interest, rejecting landlord's argument that original tenant's reservation of right to obtain periodic estoppels was reversionary interest sufficient to constitute sublease); Friedman on Leases, §7:4.3.

properly document the transaction, and if a sublease rather than an assignment of a portion of the tenant's premises is intended, the document should clearly call for the tenant to retain the required reversionary interest. *See* Friedman on Leases, §7:4.2; Thomas C. Barbuti, *Assignments Pro Tanto And Why To Avoid Them*, 22 The Practical Real Estate Lawyer 24-25 (Sept. 2006).

The key differences between the rights and responsibilities of the parties to a lease assignment, a sublease and a partial assignment are set out in the table attached as Appendix A. Except for the information on partial assignments included in Appendix A, partial assignments are ignored for the remainder of this paper.

B. Practical Drafting Differences

1. Assignments

From a drafting point of view, drafting subleases are far more complicated than drafting lease assignments. In a complete assignment of a lease, the following are the key issues that must be addressed:

1. The effective date of the assignment.

2. Whether the assignee will agree in the assignment document to assume all of the obligations of the tenant under the lease (generally preferred by assignors and landlords so that the landlord will be permitted, and thus more likely, to seek recourse against the assignee first, although landlords are not obligated to do so, assuming the landlord does not release the prior tenant).

3. Indemnification of the assignee by the assignor for pre-assignment breaches, occurrences and liabilities, and indemnification of the assignee by the assignor for post-assignment breaches, occurrences and liabilities.

4. If the assigning tenant has provided a security deposit to the landlord, how the tenant's rights to a return of the security deposit will be assigned to the assignee (this can be difficult if the landlord holds a letter of credit or other form of non-cash security deposit) or substitution of new security by the assignee.

5. If the lease contains options to expand the premises or renew the lease, whether these options will continue in favor of the assignee.[8]

6. Whether the landlord must consent to the assignment (the answer depends on the language in the lease – see Part III below for a discussion of the landlord's consent to assignments/subleases; see also Appendix B below

[8] From the assigning tenant's perspective, it should not want the assignee to be able to exercise those rights if the landlord has not released it from liability under the lease. Otherwise, it will have increased contingent liabilities arising during any renewal term or with respect to expansion space if the assignee exercises the options.

for sample lease clause requiring the landlord's consent to an assignment or sublease), and what happens if it does not (presumably the assignment will be null and void).

7. Whether the landlord will release the prior tenant from its obligations under the lease or the landlord's consent to the assignment (generally not included in landlord form leases, but may be negotiated in the lease or in the landlord's consent to the assignment, if its consent is required under the lease).

Two simple sample lease assignments are included in Appendix C (one where the assignment is in the context of a transaction involving the sale of assets by the assignor to the assignee, and another one that would be used where there is no other transaction between the tenant and the assignee). Appendix D contains two sample consents by a landlord to a lease assignment.

2. Subleases

Subleases have many more issues to be addressed because the subtenant will not be in privity of contract or privity of estate with the landlord, yet the sublandlord/tenant will want the subtenant to be responsible for performing all of the obligations related to the premises and its occupancy and the subtenant will want the benefit of the services provided by and other obligations of the landlord. Attorneys and others drafting subleases tend to want to simplify the sublease document by attempting to incorporate the prime lease provisions by reference into the sublease and making broad general statements such as:

> For purposes of the provisions of Sections ___, ___, ___ and ___ of this Sublease [*i.e.*, those that are incorporated by reference], the term "Landlord" shall mean "Sublandlord" and the term "Tenant" shall mean "Subtenant."

This approach can lead to ambiguities and unintended consequences. For example, there may be situations that the parties want to treat differently or for which they need to have different provisions. If the prime lease has a security deposit but the sublease does not, then the provisions with respect to a security deposit should not be incorporated by reference. Time limits for performance of lease obligations (*e.g.*, payment of amounts due under the sublease) may need to be different or the sublandlord/tenant will be forced to pay amounts due to the landlord without having the cash in hand from the subtenant or without having had an opportunity to determine whether the subtenant has defaulted and, if so, to give the subtenant notice of the default.

Another provision that is generally recommended for the benefit of tenants when becoming sublandlords is one where the subtenant agrees to look solely to the landlord (and not the tenant) for performance of obligations the tenant as sublandlord is not in a position to perform, such as repairing the building or providing utilities. While this type of provision works well for tenants, it can be problematic for the subtenant. The tenant normally cannot provide such items, because it has no control over the building itself, and if the sublease does not give the subtenant any relief for the landlord's failure to provide such services, the subtenant may be in the position of having to pay its rent under the sublease without having recourse against the

sublandlord. Because the subtenant is not in privity of estate with the landlord, it has no standing to enforce even those covenants in the primary lease that would ordinarily be considered covenants that "run with the land" (*i.e.*, those that touch and concern the land, such as obligations to maintain or repair the premises). The subtenant will have to depend on the tenant agreeing in the sublease to make reasonable efforts to cause the landlord to perform its obligations under the lease, such as to make repairs and provide utilities. What happens if there are no services? If the primary lease gives the tenant relief from its obligation to pay rent in such circumstances, it is easy to argue fairness demands the tenant as sublandlord grant similar relief to the subtenant. However, should the subtenant be entitled to a rent abatement even if the tenant is not?

The parties must also consider what will happen upon the termination or expiration of the sublease. What improvements will the subtenant be obligated to remove? All that the tenant is obligated to remove under the primary lease, or just those the subtenant has installed during the term of the sublease? From the perspective of both the tenant and the subtenant, the better lease to be under is one that does not obligate either to remove any improvements, but the respective obligations of the parties will depend on the terms of the primary lease and the sublease. What if the subtenant holds over? Will the subtenant be responsible for damages? What are the landlord's other remedies?[9]

How will the subtenant and tenant handle the cost of additional services for items such as overtime HVAC or extra electricity? If the subleased space is not separately metered or serviced by the landlord, will the tenant bear the cost for the portion of the space it occupies and the subtenant its share for the subleased space even if the tenant or subtenant is not the party requesting the added services? Or, should the party requesting the additional service pay all of the cost? For services that are provided specifically to one or the other by the landlord that can be identified in the landlord's bill, obviously, the sublease should provide that the party causing the expense to be incurred will pay for it, but sometimes it is not all that obvious. The other alternative is to have the subtenant pay its rent on a "gross" basis regardless of the added pass-throughs the tenant must pay, but this may not be attractive to the tenant, particularly if the sublease rent is less than the rent the tenant is paying.

Insurance provisions are equally difficult to draft. Liability insurance should be carried by both the tenant and the subtenant, and both the landlord and the tenant should be named on the subtenant's insurance. Ideally, the tenant will also name the subtenant on its

[9] A fairly recent New York Appellate Division case, *Kronish Lieb Weiner & Hellman LLP v. Tahari, Ltd.*, 35 A.D.3d 317, 829 N.Y.S.2d 7 (S.Ct. App. Div. 2006), reversed a trial court's decision that a new tenant for space faced with a subtenant that had held over in its subleased space for 18 months could not sue the subtenant for trespass and tortious interference with a contract. The Appellate Division held that, because the tenant had already received an order for immediate possession of the subleased office space in a prior ejectment action, the tenant did not have to be in actual possession of the property to bring an action for trespass, which was a purely legal question. 35 A.D.3d at 318. Further, the tenant was entitled to bring a claim for tortious interference with the tenant's lease, and the subtenant's claim it had been orally promised an extension in writing was unreasonable when the landlord's consent to the sublease specifically stated the sublease could be only modified with the consent of the landlord. *Id.* at 319. Also, the court noted that because a claim for tortious interference was in tort, not contract, it was not necessary for the tenant to allege the subtenant used improper means or that its conduct was intended solely to harm the tenant – standards that would have had to be met had the prior tenant sued the subtenant under the sublease. *Id.* at 318.

insurance. This will be particularly important if the tenant remains in occupancy of a part of its original premises. Property damage insurance must also be addressed. In part this will depend on the respective insurance and repair and restoration obligations of the landlord and the tenant under the primary lease and the sublease. If the tenant is obligated to carry property damage insurance on the building or reimburse the landlord for its costs to insure the building, it may want to pass a proportionate share of the cost on to the subtenant. Even if it is not obligated to insure the building or reimburse the landlord for its costs to do so, many leases now require tenants to carry insurance on all tenant improvements within the premises (sometimes without regard to whether the tenant or a prior tenant caused the improvements to be constructed). The question will be whether the subtenant must now pick up that obligation on those improvements it has not constructed. If more than one party is to carry insurance, it may cause issues with overlapping coverages or gaps in coverage in the event of a loss.

Indemnification provisions must be addressed. The subtenant in most subleases will be obligated to indemnify the landlord and the tenant for its negligence, but will have no contractual right of indemnification from the landlord. In Illinois, by statute (applicable to all leases entered into after September 17, 1971), landlords may not be indemnified for their own negligence or that of their "agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises." *See* 765 ILCS 705/1(a). However, this does not apply to a provision in a commercial lease that exempts the landlord from liability for property damage. *See* 765 ILCS 705/1(b).[10] Similar statutory provisions or case law may or may not be available to subtenants. The tenant should indemnify the subtenant for breaches of the lease or obligations under the lease arising prior to the effective date, as well as any breaches arising out of its continued occupancy of other portions of the original premises leased under the primary lease. Tenants who are subleasing all of the premises and who will effectively be absent from the premises may not want to continue to indemnify the subtenant, arguing they will not have possession or control over the premises or any portion of the building, and should, instead, be indemnified by the subtenant.

If a fire or other property damage event occurs, what will happen? Will the subtenant have an independent right to determine whether it will terminate the sublease if the tenant does not? Must the tenant refrain from terminating the primary lease at the request of the subtenant even if it has the right to do so under the primary lease? One alternative is to provide that the tenant will make all determinations whether to terminate the primary lease, and if it elects to do so, the sublease will also terminate. This is certainly best for the tenant. It may not necessarily be what the subtenant expects.

[10] This latter provision is consistent with the trend in commercial leases to have each party insure its own property and waive all rights of subrogation in the event of damage to the property covered by insurance. Thus, the subtenant must generally insure its own personal property, but if the damage is not covered by insurance and one of the landlord's employees damages the subtenant's personal property somehow (perhaps in the course of inspecting the premises), the subtenant will have no recourse except to its own insurance. The same problem exists for the tenant if the lease provides the landlord is not responsible for damage to the tenant's personal property. The only exception might be if a contractor of the landlord caused the damage, in which case, the tenant or subtenant could pursue an independent claim in tort against the negligent contractor.

What about condemnation? Should the sublease rent be reduced regardless of whether the primary lease rent is reduced? Should it be reduced only if the primary lease rent is reduced? Some of the answers to these questions will depend on the nature of the premises and subleased premises and which portion of either or both the condemnation action affects.

What about expansion and renewal rights? Should the subtenant be able to dictate to the tenant whether or not to exercise any of those rights? Extending the term and expanding the space of the tenant under the primary lease will increase the tenant's exposure if the subtenant should later default. On the other hand, if the terms are "below market" and the landlord has no right to recapture the subleased space or share in all or some portion of the "profits" the tenant realizes from the sublease, and has not conditioned its consent to the sublease on the subtenant not having any rights to renew or extend, then the subtenant may want the landlord to renew or expand at the request of the subtenant. The answers to some of these questions might depend on the credit of the subtenant and the length of the remaining term of the sublease.

What if the subtenant has made a separate arrangement with the landlord to have a direct lease after the expiration of the sublease? How do the parties "fill in" the gap between the end of the sublease and the end of the primary lease without causing the court to latter construe the sublease as an assignment or partial assignment?

What happens if the subtenant holds over and that causes the tenant to be liable for a holdover? In Illinois, the landlord will have the right to evict the tenant under the forcible entry and detainer statute, *see* 735 ILCS 5/9-102(a)(4), but the question remains whether the subtenant should be liable for holdover rent on the entire premises, not just its space. The answer will depend on the terms of the primary lease, the terms of the sublease and may also depend on the nature of the subleased space. Also, at least in Illinois, the answer may depend on how Section 9-202 of the Code of Civil Procedure, which calls for the party holding over to pay double the yearly value of the premises, is applied.[11] Does the subtenant occupy one of two

[11] Section 9-202 of the Code of Civil Procedure provides:

> If any tenant or any person who is in or comes into possession of any lands . . . by, from or under, or by collusion with the tenant, wilfully holds over any lands .. . . after the expiration of his or her term or terms, and after demand made in writing, for the possession thereof, by his or her landlord, or the person to whom the remainder or reversion of such lands . . . belongs, the person so holding over, shall, for the time the landlord or rightful owner is so kept out of possession, pay to the person so kept out of possession, or his or her legal representatives, at the rate of double the yearly value of the lands . . . so detained to be recovered by a civil action. 735 ILCS 5/9-202.

In *Stride v. 120 West Madison Building Corp.*, 132 Ill. App. 3d 601, 477 N.E.2d 1318, 1321-22 (1st Dist. 1985) (case involving holdover on termination of lease by landlord's assignee under lease clause allowing landlord to terminate lease if building or land under building were sold and requiring tenant to pay both double rent during holdover and all of landlord's damages), the Illinois Appellate Court for the First District held that for double rent to be awarded under Section 9-202 of the Code of Civil Procedure, the holdover must be in "bad faith," even if the lease itself contained a double rent provision that did not require bad faith. In *Stride* the court also held the provision was an unenforceable penalty rather than an enforceable liquidated damages clause because the lease also had language calling for the tenant to pay the landlord's actual damages.

A subsequent case, *J.M. Beals Enterprises, Inc. v. Industrial Hard Chrome, Ltd.*, 271 Ill. App. 3d 257, 648 N.E. 249, 251-52 (1st Dist. 1995), held that a bona fide dispute over possession would bar the statutorily required finding (con't)

floors leased to the tenant, so that the landlord effectively has possession of one floor? Under Section 9-301 of the Illinois Code of Civil Procedure, the landlord can seize any personal property of the tenant found on the premises as security for rent owed by the tenant (including holdover rent), but not that of any other person, which means the landlord will not have the same remedies against the subtenant that holds over as it does for a tenant that holds over. Other states may have different statutes or legal precedent covering these issues. See Friedman on Leases, §18:4 for a summary of statutes and case law on the subject from other jurisdictions.

Finally, should the tenant retain the right to amend the lease, or should any amendments be subject to the subtenant's consent? If the tenant continues to occupy a portion of the premises leased under the lease, it will need the right, perhaps, to amend the lease as it relates to the portion of the premises it occupies. However, the subtenant's obligations under the sublease (and any provisions of the lease incorporated by reference) should not be affected. Ambiguities may arise, however, if the tenant defaults after the lease is amended, the landlord terminates the primary lease, and yet wants the subtenant to attorn to it as a direct tenant (see the forms of Sublease Consents included in Appendix D).

An area seldom addressed, because landlords generally refuse to do so in consenting to a sublease, is protection for the subtenant from a termination of the sublease if the tenant breaches its obligations under the lease by not paying rent (even if it is collecting the subtenant's rent). The only protection for the subtenant is to obtain a non-disturbance agreement from the landlord. If the landlord is to provide a non-disturbance agreement, it will ask the subtenant to attorn to it (thereby creating privity of estate and privity of contract when exercised).[12] There can be a number of problems for the landlord and the subtenant created by an attornment. First of all, if the rent being paid by the subtenant is less than the rent due by the tenant under the lease, the subtenant will be faced with a potentially large rent increase just to stay in the space it thought it had at the rate specified in the sublease. If the landlord does not obtain the subtenant's promise to pay the higher rent that would have been paid by the tenant,

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of wilfullness. *Beals* involved an alleged holdover by an industrial tenant completing repairs to its former premises after moving out its equipment. The tenant began the repairs in December after entering into a settlement agreement with landlord that confirmed whether the landlord or the tenant owned certain equipment on the premises. The settlement agreement had been entered into only 21 days before the end of the lease term. Under the settlement agreement terms, certain repairs were to be performed by the tenant and certain equipment was to be left "in operating condition" by December 31. The landlord then had until March 1 to inspect the premises to determine whether the tenant had complied. On January 18 the landlord supplied a list of work it determined the tenant was still required to complete (which took two workers full-time for one week in March to complete, and which was performed without disrupting the landlord's use of the premises). *Id.* at 252-253. Based on these facts, the court reversed the trial court's order for summary judgment in favor of the landlord because it held Section 9-202 of the Code of Civil Procedure required a finding the tenant's holdover was "knowingly wrongful" and it was a factual matter whether the tenant's actions were "knowingly wrongful" under the statute. *Id.* at 253.

[12] The one situation in which a "landlord" may be more likely to enter into a non-disturbance argument with a "tenant" is in the context of a ground lease. Because the ground lessor is typically paid rent only on the value of the land and the ground lessee (or its sub-ground lessee) often builds and owns it own building, some of the issues that arise if a landlord is asked to accept a subtenant under the terms of its sublease if the tenant's lease is terminated (such as reduced rent) are likely not to apply. If the ground lease is terminated and the sublease continues as a direct lease by agreement with the ground lessor, the ground lessor may then own a building it didn't own before and be entitled to higher rents than it was collecting.

then the landlord will have a reduced revenue stream from the building for the balance of the sublease term. If the landlord does agree to provide a non-disturbance agreement to the subtenant, the landlord's consent or the lease must require the landlord's consent to any amendments of the sublease so that the sublease terms remain the same as when the landlord agreed to provide a non-disturbance agreement. The non-disturbance agreement must also address whether the subtenant must cure any defaults that existed on the part of the tenant. Obviously, the subtenant will not want to be obligated to cure any tenant defaults, unless they were caused by the subtenant or its employees, agents or contractors.

III. Restrictions on Assignments or Subleases

Under Illinois common law, a tenant has the right to assign or sublease at will. *Cole v. Ignatius*, 114 Ill. App. 3d 66, 448 N.E.2d 538, 541 – 542, 69 Ill. Dec. 820 (1st Dist. 1983) (assignment is valid in absence of express restriction on assignment). The common law in most other states is the same.[13] Even retail leases that call for the tenant to pay percentage rent based on the tenant's gross sales have been held assignable when the lease did not prohibit an assignment. *See Williams v. Safeway Stores, Inc.*, 198 Kan. 331, 424 P.2d 541 (1967).[14] As a result, landlords frequently attempt to limit this broad tenant right by including lease provisions specifically limiting the tenant's right to assign or sublet. *Edelman v. F. W. Woolworth Co.*, 252 Ill. App. 142, 145 (1st Dist. 1929).

Under Illinois law, outright prohibitions against assignment are permissible and are not considered invalid restraints on alienation, although they are not favored. 24 I.L.P. *Landlord and Tenant* §83 (1980); *Associated Cotton Shops, Inc. v. Evergreen Park Shopping Plaza of Delaware, Inc.*, 27 Ill. App. 2d 467, 170 N.E.2d 35, 39 (1st Dist. 1960); Lee M. Smolen, *Filling the Gap in a Real Property Lease*, 35 DePaul L. Rev. 437, 451 (1985). The same is generally true in most other jurisdictions. Traditionally, absolute prohibitions against assignments and subletting have been enforced by courts on the basis that the landlord could withhold its consent for any or no reason.[15] However, there are also a minority of jurisdictions (Illinois included) in which the courts have implied a duty on the part of the landlord not to unreasonably withhold its consent or have held the landlord's right to withhold its consent must be exercised under a good faith and fair dealing standard.[16] These issues and a number of the Illinois cases, as well as a few in other states are discussed in more detail in Part IV.B below. Some states have statutes addressing the rights of landlords and tenants with respect to assignments and subleases. For example, the California and Texas statutes are discussed in Part IV below.

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[13] *See* Friedman on Leases, §7:2. However, Texas has a statute that prohibits a tenant from subletting without the landlord's consent. TEX. PROP. CODE §91.005 (1984). *See also* cases and resources cited in Friedman on Leases, §§7:3:1 and 7:3.2 for other restrictions that are not generally applicable to commercial leases for definite terms or fixed amounts of rent.

[14] *See also* Friedman on Leases, §7:3.2[E] and cases cited therein.

[15] *See* Friedman on Leases, §7:3.4 and cases cited at n. 152 decided under Georgia, Louisiana, Massachusetts, Minnesota, New York, South Carolina and Vermont law.

[16] *See* Friedman on Leases, §7:3.4 and cases cited at n. 162 and n. 163 decided under Arizona, Florida, Illinois, Indiana, Maryland, Nebraska and New Mexico law.

Even if outright prohibitions on assignments or subletting are enforced, such provisions "are construed against the restriction." *See* Friedman on Leases, §7:3.3. This means a court generally will construe such a provision strictly and against the landlord. 24 I.L.P. *Landlord and Tenant* §83 (1980); *Edelman v. F. W. Woolworth Co.*, 252 Ill. App. 142, 145 (1st Dist. 1929). Thus, prohibitions on assignments do not prohibit subleases, and vice versa. Friedman on Leases, §7:3.3. In *Edelman*, the landlord failed to state expressly in the lease that it would not consent to a sublease to a business competitor of the landlord. As a result, the landlord was held to have unreasonably withheld its consent when it refused to consent to the tenant's proposed assignment to a competitor. 252 Ill. App. at 144 – 145.

In addition, a reservation of a right in the landlord to consent to any proposed assignment or sublease is for the landlord's benefit only, but can be waived by the landlord itself. *Kaybill Corp. v. Cherne*, 24 Ill. App. 3d 309, 320 N.E.2d 598, 607 (1st Dist. 1974) (landlord may waive covenant against assignment by subsequent inconsistent conduct). The issue of waivers by landlords is discussed in greater detail in Part IV.A below.

Generally tenants in commercial leases today are sophisticated enough to negotiate exceptions to strict prohibitions against assignments or subletting, and some landlords, recognizing that absolute prohibitions are neither favored by the courts nor palatable to most tenants, include modified prohibitions in their form leases. Such provisions may reserve to the landlord, either in its sole discretion or without unreasonably withholding its consent, the right to approve a proposed assignment or sublease. This issue of the landlord's right to consent to an assignment or sublease is discussed in greater detail in Part IV below.

Although the reservation of the right in the landlord to approve a proposed assignment or sublease is for the landlord's benefit only, the landlord is bound to the standards it writes for consents to an assignment or sublease. In other words, once the landlord has established the standards for its consent in the lease, it cannot object to a proposed assignment or sublease if the tenant has met the appropriate requirements. *Bolingbrook Equity I Limited P'ship v. Zayre of Illinois, Inc.*, 252 Ill. App. 3d 753, 624 N.E.2d 1287, 1295 – 1296, 191 Ill. Dec. 909 (1st Dist. 1993) (assignment valid when tenant properly complied with lease requirement of giving landlord notice of "intended assignment" setting forth nature of business organization and "effective date of the intended assignment"); *Parr v. Triple L&J Corp.*, 2004 WL 2610499, 107 P.3d 1104 (Colo. App.) (landlord unreasonably delayed its consent to the assignment of a restaurant lease as part of a sale of the business).

Rather than rely on judicial discretion, if a landlord is aware of a particular circumstance in which it would refuse to consent to an assignment or sublease, it should protect its interests by an explicit statement to that effect in the lease. To protect its interests that exist regarding particular uses of the demised premises or the type of tenant that is acceptable to the landlord, a landlord could expressly condition its consent to an assignment or sublease on the tender of a substitute tenant meeting the same standards as the original tenant with respect to such matters as the nature, quality or uniqueness of its business or merchandise, its trade or industry name recognition, the price of the merchandise it offers for sale, or its character, reputation or financial capability. These issues are often of particular importance to retail landlords where the mix of tenants is important to the overall success of its shopping center or other retail development.

A. Assignments and Subleases in the Context of Corporate Transactions

If a lease contains a prohibition on any assignments or subleases without the landlord's consent, the question becomes whether such a provision covers an assignment "by operation of law" or as the result of a corporate acquisition or merger. An assignment by operation of law could include an assignment effected by a merger of two entities. Courts will generally enforce the non-assignment provisions. However, the courts are not uniform as to whether such a provision has been violated when there is a merger, consolidation, or stock transfer of a corporate lessee. Jay M. Zitter, MERGER OR CONSOLIDATION OF CORPORATE LESSEE AS BREACH OF CLAUSE IN LEASE PROHIBITING, CONDITIONING, OR RESTRICTING ASSIGNMENT OR SUBLEASE, 39 A.L.R.4th. 879, 2 (1995). To include a transfer of a controlling interest within the definition of an assignment (or to require the landlord's consent to such an event) generally requires specific language to that effect, although there are cases holding otherwise. The lack of uniformity in the courts is due in part to the significant variance in the language of commercial lease provisions against assignments and subleases. *See* 49 Am. Jur. 2d Landlord and Tenant § 1101, MERGER OR CONSOLIDATION OF CORPORATE LESSEE (2006). The best approach from the landlord's perspective is to draft as comprehensive a prohibition as possible and then negotiate with any tenants that object to reduce the scope of the prohibition for their leases. Tenants would, obviously, prefer much fewer restrictions.[17]

1. Cases Holding Transaction Violated Prohibition on Assignment

Numerous courts have focused on the fact that two distinct corporate entities were involved in the transaction when holding that the non-assignment provision was violated when the corporate lessee merged, consolidated, or transferred a controlling interest in its stock. *See* 39 A.L.R.4th. at 2. The Maryland Court of Appeals has also addressed whether a corporate tenant's merger into another corporation violated a commercial lease's non-assignment provision which expressly prohibited assignments by operation of law. *See Citizens Bank & Trust Co. v. Barlow Corp.*, 295 Md. 472, 474 (Ct. App. 1983). The court noted that when the bank merged with another institution this occurred pursuant to Maryland statutes that provided that the extinguished lessee's leasehold interest in the property passed to the successor corporation "by operation of law." 295 Md. at 478. The court emphasized that under the merger "there has been a change in ownership, and not merely a change in the legal form of ownership," and concluded that the landlord was entitled to terminate the lease because the non-assignment provision had been violated. 295 Md. at 482; *see also, Parks v. CAI Wireless Sys.*, 85 F. Supp. 2d 549, 554-55 (D. Md. 2000).

The Oregon Supreme Court held that when the corporate tenant executed a downstream merger, by merging with its wholly owned subsidiary, this effected a lease transfer by operation of law, which required the landlord's consent under the lease. *See Pacific First Bank by Wash. Mut. v. New Morgan Park Corp.*, 319 Or. 342, 354 (1994). The court concluded that because the landlord did not consent to the merger, the successor corporation was not

[17] A comprehensive sample lease provision governing assignments and subleases is contained in Appendix B (Long Form), and a less onerous sample that is likely to be more palatable to a tenant (although not a tenant-oriented one) is contained in Appendix B (Short Form). An Alternative Form to consider is also contained in Appendix B.

entitled to a declaration that it was a tenant in compliance with the lease agreement. *Id.* at 355. Moreover, the court asserted that "[a]lthough there is meager authority addressing the effect on a non-assignment clause of mergers by corporate tenants, where such clauses prohibit transfers by operation of law, such mergers are a breach of the non-assignment clause 'if the effect is to transfer the lease to an entity other than that of the original tenant' even though no interest in property is impaired by the merger." *Id.* at 349 (quoting Milton R. Friedman, FRIEDMAN ON LEASES, §7.303[E][2] (3d ed. 1990)). For the current provisions of the quoted source, see Friedman on Leases, §7:3.3[E][2].

Courts have also held that a non-assignment provision has been violated in the event that a corporate lessee transfers all of its assets, including its leasehold interest in the premises, to another corporate entity pursuant to a corporate reorganization plan, including a dissolution of a subsidiary and transfer of assets to its parent. *See Reston Recreation Ctr. Assocs. v. Reston Prop. Investors Ltd. P'ship*, 238 Va. 419, 425 (1989) (holding that the tenant violated the lease provision requiring the landlord's consent to a sublease when the tenant effected a transfer by creating a subsidiary corporation); *Lord Baltimore Filling Stations, Inc. v. Hoffman*, 117 A.2d 397, 398 (D.C. 1955) (holding that the corporate lessee violated the non-assignment provision when, under a dissolution plan, it transferred all of its assets to the parent corporation without the landlord's consent); *Peacock v. Feldman*, 243 Ill. App. 236, 238-41 (1st Dist. 1927) (holding that a corporate tenant breached non-assignment provision when it dissolved and was replaced by a larger corporation; however, breach was waived when lessor continued to accept rent while aware of change in corporate identity).

In the *Lord Baltimore* case, the District of Columbia Court of Appeals noted that while no merger had taken place, the lessee assigned the lease to a separate corporate entity. 117 A.2d at 398. The court then asserted that "the fact that the one was the wholly owned subsidiary of the other did not prevent the transaction from being a true assignment." *Id.* Furthermore, the court held that the lessor's acceptance of rent payments did not constitute a waiver of the breach because the lessor was not aware of the breach. *Id.* at 399.

Thus, courts finding that the non-assignment provision of a commercial lease has been violated when the corporate lessee effects a merger, consolidation, or stock transfer will likely base their conclusion on the argument that there has been a change in ownership (and not merely a change in the owner's legal form) or that the lease has been transferred, either voluntarily or by operation of law, to a separate and distinct corporate entity.

2. Cases Holding Transaction Did Not Violate Prohibition on Assignment.

The courts holding that a merger, consolidation, dissolution, or stock transfer of a corporate lessee does not violate commercial lease provisions against assignments or subleases generally emphasize that the lease provision was not intended to include mere changes in the corporation's ownership. 39 A.L.R.4th at 3. *In re Ames Dep't Stores, Inc.*, 127 B.R. 744, 748-49 (Bankr. S.D.N.Y. 1991), the United States Bankruptcy Court of the Southern District of New York found that Illinois law governed and asserted that the sale of the Zayre Illinois Corporation stock to Ames Department Stores did not constitute an unauthorized assignment of the commercial lease. *Id.* at 749. The court asserted that under Illinois law, "the transfer of all of the stock issued by a tenant corporation does not effect an assignment of the tenant's lease unless

the lease so provides." *Id.* at 748 (citing *Chicago v. S.N.H., Inc.*, 32 Ill. App. 3d 110, 119 (1st Dist. 1975); *Associated Cotton Shops, Inc. v. Evergreen Park Shopping Plaza of Delaware, Inc.*, 27 Ill. App. 2d 467, 170 N.E.2d 35 (1st Dist. 1960)).

The Illinois Appellate Court has declared that lease provisions prohibiting assignments or subleases do not apply when the corporate lessee, or its stockholders, dispose of all their stock if the lease does not contain an express provision prohibiting the sale or transfer of the original corporate lessee's stock ownership. *See Associated Cotton Shops*, 27 Ill. App. 2d 475-76. The court also noted that "the leasehold rights would remain in [the corporation] as an entity distinct from the transferee of its stock." *Id.*[18] The Southern District of New York Bankruptcy Court cited this language in the *Associated Cotton Shops* case in the *Ames Dep't Stores* case, noting that assignment restrictions are aimed at transfers of the leasehold interest not the corporation's transfer of stock control, and asserted that non-assignment clauses can be bypassed when a corporate tenant executes a change in stock control. 127 B.R. at 749.

Many other courts that are in agreement with the Illinois Appellate Court emphasize that when the landlord chose to execute a lease with a corporate tenant, a merger, as well as a stock transfer by the current stockholders, would be reasonably foreseeable. *See Standard Operations, Inc. v. Montague*, 758 S.W.2d 442, 444 (Mo. 1988); *Branmar Theatre Co. v. Branmar, Inc.*, 264 A.2d 526, 528 (Del. Ch. 1970) (holding shareholders' stock sale did not violate lease provision even though they had previously attempted to assign lease to parties to whom stock was sold). The *Branmar* court noted that the lease enumerated the parties' rights and duties and the landlord could have implemented a lease provision that expressly provided for a forfeiture in the event the tenant corporation's stockholders sold their shares. *Id.*

Similarly, in *Richardson v. La Rancherita of La Jolla, Inc.*, 98 Cal. App. 3d 73, 79 (4th Dist. 1979), the California Court of Appeals held that the lease provision providing that the corporate tenant could not sublet the premises or assign the lease either voluntarily or by operation of law, was not violated when the corporation's shareholders sold their stock to an individual holder. However, it should be noted that the court recognized that there were factual issues regarding the meaning and intent of the lease provision that could have been raised in support of the view that the non-assignment provision had been violated, but because the parties failed to address them, the court had to rely solely on the lease language. *Id.*

When determining if a lease prohibition on assignment has been violated in the context of a merger, the court will focus on the lease language, and will apply the general principles that restrictions are disfavored and are construed strictly against the landlord. As a result, even if the lease prohibits voluntary assignments as well as those "by operation of law,"

[18] Despite these general principles, in *Associated Cotton Shops*, the lease specifically allowed the landlord to terminate the tenant's lease on 60-days notice if there was a transfer of a majority of the shares of a corporate tenant that resulted in a change in control. 170 N.E.2d at 37. The court noted this language was an appropriate means by which the landlord could adequately protect itself from what would otherwise, in effect, be a substitution of the lessee, and the corporate lessee was bound by the provisions as written. 170 N.E.2d at 39. The landlord's notice of its election to terminate the lease, which was given within 35 days after learning of the transfer of the stock, was within a reasonable period of time after the transfer, and the landlord did not waive its right to give the notice when it accepted rent after the transfer but before sending its notice of termination. 170 N.E.2d at 40.

the result may be different than the landlord had anticipated. *See Standard Operations, Inc.*, 758 S.W.2d at 443 (holding that a corporate merger is not a lease assignment; rather, merger causes all leasehold interests to pass to surviving corporation by operation of law). In *Standard Operations*, the Missouri Supreme Court noted that the disputed lease provision prohibited assignments "by operation of law," but held that language was intended to forbid only involuntary assignments, and therefore, the voluntary merger was not a prohibited assignment. *Id.* at 444. *See also TXO Prod. Co. & Marathon Oil Co. v. M.D. Mark, Inc.*, 999 S.W.2d 137, 139-40 (Tex. Ct. App. 1999) (asserting that corporate mergers have been found not to breach non-assignment provisions under other circumstances, such as in context of construction contracts, as well). The court supported its finding that the merger was not prohibited by the non-assignment provision by stating that, "forfeitures are viewed with disfavor and instruments should be construed to avoid the divestment or impairment of valuable rights unless the language is compelling." *Id.*

Thus, the courts holding that the corporate lessee's merger, consolidation, or stock transfer does not violate a commercial lease provision against assignments or subleases will generally emphasize that assignment restrictions are aimed at transfers of the leasehold interest (rather than transfers of stock control), and that the provision is not intended to include changes in the corporation's ownership. One precaution the landlord can take to avoid a situation in which its corporate tenant might circumvent the non-assignment provision by effecting a change in ownership is to include in its a lease a provision that restricts the transfer of any corporate stock. The landlord could restrict all stock transfers by the corporate tenant, or limit the restriction to transfers of a controlling interest. The landlord may also want to expressly restrict mergers, consolidations, or dissolutions effected without the landlord's consent.

On the other hand, corporate tenants will want to negotiate language that is as broad as possible to prevent a landlord from having a right to consent and a situation in which the landlord's failure to consent (at all or in a timely fashion) from preventing a major transaction that is important to the tenant's future business plans from being sidetracked, delayed or terminated just because a landlord for one of the tenant's important locations (or only location) refuses to consent. Exactly how the language is ultimately drafted will depend on a number of factors, including the relative negotiating power of the tenant, the size and importance of the tenant to the landlord, and overall market conditions. Appendix B contains sample clauses that are both landlord-oriented and more tenant-oriented, and are drawn from samples in Friedman on Leases, §7:3.3[E][3].

When negotiating leases on behalf of tenants, one should not focus on the anti-assignment provisions and neglect to address other lease provisions, however. For example, in *Cellular Telephone Co. v. 210 East 86th Street Corp.*, 44 A.3d 77 (N.Y. S.Ct. App. Div. 2007), the provision a lease provision required the tenant to obtain the landlord's consent for any assignment, and provided the landlord could withhold its consent for "any or no reason (whether reasonable, unreasonable or arbitrary)." *Id.* at 78. Assignments were defined in the lease to include transfers or other dispositions of more than 25% of the stock or other ownership interests of the tenant. *Id.* at 78-79. Through a series of corporate acquisitions and mergers, a new entity became the owner of the parent of a new entity that became the tenant, all without any formal assignment of lease document consented to by the landlord. *Id.* at 79-80.

After these transactions, the landlord sent the tenant a notice that it had elected to terminate the lease as a result of the assignment, and the landlord later filed suit to evict the tenant, arguing the purchase by the ultimate parent company was a transfer or assignment in violation of the prohibition in the lease. The New York court disagreed, and held that because the tenant itself was not involved in the series of corporate transactions that ultimately resulted in a new tenant, under the language of the lease, the landlord had no right to object to the assignments. *Id.* at 81. However, there was another clause in the lease that gave the landlord the right to terminate the lease in the case of an assignment, which the court held did apply and was an independent right from the right to consent. *Id.* at 79. As a result, the landlord was entitled to cancel the lease, and the tenant was "out in the cold." According to the court, the language allowing the landlord to terminate the lease and recapture the space was independent of the tenant's right to assign the lease. "Had [the tenant] wished to make the intracorporate right of assignment absolute, it could have so negotiated and drafted the appropriate language. The Court will not presume to rewrite the plain language of the lease that was negotiated between sophisticated business entities." *Id.* at 83.

B. Assignments and Subleases in the Context of Partnerships

Unless the language requiring the landlord's consent to an assignment is expressly worded to apply to assignment of partnership interests, additions of new partners or withdrawal of partners, such activities might not be prohibited under the same theories espoused in the corporate content.[19] Partnership law does vary from state to state, however, so the landlord seeking to restrict such transfers should include explicit language. Withdrawing general partners would normally want to be released from future liability under the lease. With express provisions prohibiting additions or withdrawals of partners without the landlord's consent, a landlord might agree to release withdrawing partners if the number or ownership interests of the withdrawing partners is limited in some fashion or the net worth of the tenant or substitute general partners is the same as that of the withdrawing general partner at the time the landlord evaluated its creditworthiness.

C. Other Types of Prohibitions on Assignments and Subleasing

Other types of lease prohibitions against assigning and subletting vary widely in their scope. For example, the prohibition may be against (a) assignment, conveyance, mortgage, pledge, hypothecation, encumbrance, or other transfer of the lease, in whole or in part, or any interest in the lease; (b) any subleasing of the premises, whether in whole or in part; (c) the use or occupancy of the premises by any party other than the tenant, its agents, and its employees; or (d) any combination of the other three prohibitions.

IV. Landlord's Right to Consent to an Assignment or Sublease

For all practical purposes, the rules of law governing a landlord's right to withhold its consent to a tenant's assignment of the lease or a subletting of the premises are identical. Because of the differences among courts in their interpretation of the rights of

[19] *See* Friedman on Leases, §7:3.3[B] and cases cited in n. 99.

landlords to consent to assignments and subleases and what constitutes an unreasonable withholding of consent, lease assignment and subleasing provisions tend to "grow like Topsy." Each time a landlord finds itself in a situation where it does not want to consent to a tenant's proposed assignment or sublease, or worse yet, refuses to consent, the tenant sues and the court determines the landlord wrongfully withheld its consent, new restrictions are added to landlord form leases. Tenants, likewise, need to review such clauses carefully and attempt to negotiate any modifications they believe are reasonable and will address their foreseeable needs.

By statute in California, leases may contain restrictions on assignments and subleases, including absolute prohibitions on such transfers, but any ambiguity in the language of the lease is to be construed in favor of transferability. Unless the lease contains a restriction, the tenant by statue has the unrestricted right to transfer its interest. In addition, the landlord may condition the right to assign or sublease, including a provision that the landlord is entitled to "some or all of any consideration the tenant receives from a transferee in excess of the rent under the lease." Also, the lease may contain restrictions on transfers, such as a requirement that the tenant obtain the landlord's consent, which itself may contain conditions such as not unreasonably withholding consent or the right to withhold consent based on "express standards or conditions," but if there is no express standard, then the restriction on transfer will be interpreted as including "an implied standard that the landlord's consent may not be unreasonably withheld." Finally, by statute the tenant has the burden of proving whether the landlord unreasonably withheld its consent, but the tenant may satisfy its burden if the tenant can show that landlord failed "within a reasonable time" after the tenant's written request for a statement of the reasons for the landlord's withholding of its consent, "to state in writing a reasonable objection to the transfer." *See* Cal. Civ. Code §§1995.010-1995.270.

These California statutory provisions are applicable to leases signed after certain dates specified in the statute. Other provisions of the statute contain specific remedies available to tenants if their landlords violate the statutes, including termination of the lease and damages. Still other provisions contain specific remedies available to landlords if their tenants breach the restrictions on transfer in the lease, including the right to damages and termination of the lease or termination of the transfer *(i.e.*, assignment or sublease) without terminating the lease. Any assignee (which presumably includes both an assignee and a subtenant) is jointly and severally liable with the tenant for the landlord's damages. These rights and remedies apply to the initial transfer and any subsequent transfer, unless the landlord's consent or the lease provides otherwise. *See* Cal. Civ. Code §§1995.300-1995.340.

By statute in Texas, a tenant is prohibited from renting its leasehold to any other person without the prior consent of the landlord. *See* Section 91.005 of the Texas Property Code. There is no parallel provision for assignments.

If a landlord determines it will consent to a proposed assignment or sublease, elaborate consent documents are often crafted to avoid the risk that once the landlord has consented to a particular assignment or sublease, it will be forced to consent to a subsequent one. Appendix C and Appendix D contain some sample forms of consents to assignments and subleases that could be reviewed by a landlord in comparison with its own forms or adapted to suit its situation.

A. Waiver of Right to Consent by Landlord's Failure to Object to Assignment

An assignment contrary to a lease provision is not void but voidable by the landlord. 24 I.L.P. *Landlord and Tenant* §104 (1980). *See also Woods v. North Pier Terminal Co.*, 131 Ill. App. 3d 21, 475 N.E.2d 568, 86 Ill. Dec. 354 (1st Dist. 1985).[20] This means if a landlord fails to timely object to an assignment, accepts rent from the assignee, and treats the assignee as a tenant, for example, the landlord may waive the right to enforce the lease's restrictions on assignment. *See American Nat'l Trust Co. of Chicago v. Kentucky Fried Chicken of Cal., Inc.*, 308 Ill.App.3d 106, 719 N.E.2d 201, 209, 24 Ill.Dec. 340 (1st Dist. 1999); *Kaybill Corp. v. Cherne*, 24 Ill. App. 3d 309, 320 N.E.2d 598, 606, 607 (1st Dist. 1974).

In the *Kentucky Fried Chicken* case, the court held the landlord had acquiesced to the assignment by original tenant when it accepted monthly rent from the assignee for five years, directed the assignee to sign real estate tax appeal affidavits stating the assignee was then the tenant, filed a proof of claim for rent in the assignee's bankruptcy case, signed a stipulation in the tenant's bankruptcy proceeding naming the assignee as tenant, and accepted payment under a stipulation stating it was in full satisfaction of its claims under lease. 719 N.E.2d at 209. As a result, the landlord could not seek a judgment against the original tenant for rent next paid by the bankrupt assignee.

In *Kaybill*, a landlord who leased tavern space to a husband and wife was held to have waived the right to consent to the tenants' subsequent assignment of the lease to a corporation they formed. 320 N.E.2d at 606 – 607. The landlord denied having consented to an assignment of the lease by the individual lessees to a corporate tenant formed by the individuals. However, the evidence at trial showed that the landlord had seen the name of the corporate tenant on a prominently displayed liquor license on the demised premises, had discussed the corporation with the individual tenants-assignors, and had accepted rent payments from the corporate assignee. Based on these facts, the court held that the landlord's acceptance of rent from the assignee waived the landlord's right to forfeit the lease for breach of a non-assignment provision in the lease. By his inconsistent conduct, the landlord was estopped from denying the assignment's validity. *Id.* at 607.

In *Waukegan Times Theatre Corp. v. Conrad*, 324 Ill. App. 622, 59 N.E.2d 308, 312 (2d Dist. 1945), the court held that a landlord waived the requirement that it consent in writing to any assignment of the lease when the landlord's agent told the tenant "to go ahead [with the assignment], and that it would be taken care of," and thereafter the landlord's agent

[20] In *Woods*, the court found there had been a valid assignment despite the fact that the landlord, a municipality, had not formally executed its consent to the lease assignment as required by the Illinois Municipal Code and the terms of the lease. The assignor presented evidence of a lease assignment, correspondence from a city official expressing an intent to consent to the proposed assignment, and a city council resolution authorizing the city official to consent to the assignment. Because the city did not treat the leasehold as void or otherwise object to the assignment, the court held that the city had waived its right to consent. 475 N.E.2d at 570. *See also American National Bank & Trust Company of Chicago v. Hoyne Industries, Inc.*, 738 F. Supp. 297 (N.D.Ill. 1990) (landlord's failure to consent to assignment did not negate assignment or release defaulting tenant from its lease obligations), *later proceeding*, No. 88 C 7756, 1990 U.S.Dist. LEXIS 9453 (N.D.Ill. Jul. 30, 1990), *aff'd*, 966 F.2d 1456, Rule 53 (7th Cir. 1992) (reported in full at 1992 U.S.App. LEXIS 13339).

knowingly accepted rent from the assignee. The court in *Waukegan Times* further held that a clause in the lease, which provided that the landlord's acceptance of rent after learning of a tenant's breach would not be construed as a waiver of the landlord's right to act, did not prevent the landlord's waiver of strict performance. A waiver of the written consent provision could be implied by law by both the landlord's conduct and its agent's oral statements, as could a waiver of the non-waiver clause. 59 N.E.2d at 312.

The *Waukegan Times* court also relied on the fact that the landlord knew about several prior assignments of the lease but never told the tenant or any of the assignees that it would terminate the lease if the tenant failed to procure its consent in writing to any future assignment. In fact, the court found it significant that the landlord treated the lease as remaining in effect after the assignment at issue (by accepting rent from the assignees). The court also agreed with the assignee's argument that the landlord was in no worse a position than if the assignee had obtained written consent to the assignment because the assignee had assumed and was fully prepared to comply with all of the terms of the lease, and the landlord had not attempted to declare the lease terminated until after the original tenant was declared bankrupt. 59 N.E.2d at 314.

In at least one case, similar actions on the part of the landlord meant it waived its right to object to the assignee's standing to sue it for a breach by the landlord of its covenant of quiet enjoyment under the lease when the assignee eventually sought injunctive relief in court to stop the landlord from continuing its work in the tenant's space. *See Infinity Broadcasting Corporation of Illinois v. Prudential Insurance Company of America*, 869 F.2d 1073, 1075 (7th Cir. 1989). Although the landlord in *Infinity Broadcasting* ultimately won on the merits of the tenant's breach of the covenant of quiet enjoyment claim,[21] the landlord might have avoided the lawsuit in the first place had it properly objected to the assignment of the lease to the new tenant at the time it was proposed. Whether the landlord would have had such a right was not at issue in the case, however, due to the landlord's delay in raising the objection.

If the landlord objects promptly after learning of a prohibited assignment, the court is less likely to find the landlord had waived its right to claim that the tenant breached the prohibition. For example, in *Ring v. Mpath Interactive, Inc.*, 302 F. Supp. 2d 301, 305 (S.D.N.Y.

[21] In *Infinity Broadcasting*, the tenant sought to block the landlord's construction of a 64-story office building next to a building in which the tenant operated a broadcasting facility. The tenant asserted that the 64-story office building would interfere with the tenant's operation of its broadcasting facility by blocking the radio frequencies and therefore would breach the landlord's covenant of quiet enjoyment. The court dismissed the tenant's complaint, noting that a decision in the tenant's favor would require the court to imply, contrary to Illinois law, an easement of air and light in the lease. The lease did not expressly grant the tenant an easement for radio wave transmissions. Because the tenant failed to protect its broadcasting concern through an explicit lease provision, the landlord did not breach its covenant of quiet enjoyment.

The dissent in *Infinity Broadcasting*, 869 F.2d at 1079, argued there was a breach by the landlord of its covenant of quiet enjoyment. It cited *American Dairy Queen Corp. v. Brown-Port Co.*, 621 F.2d 255 (7th Cir. 1980) (decided under Pennsylvania law), for the proposition that once a landlord grants a tenant a lease for a specific commercial use, the landlord has an obligation to refrain from unreasonable interference with the tenant's ability to conduct its business on the demised premises. This view was not adopted by the majority of the justices in *Infinity Broadcasting*, however.

2004), the landlord did not cash rent checks from the assignee and objected in writing to an assignment of a lease from a tenant to the new corporation that purchased a portion of the tenant's business operated from the premises. As a result, the court found the landlord had not waived its right to consent to the assignment.[22]

B. Does It Matter if Landlord Agrees Not to Unreasonably Withhold Consent?

Frequently in lease provisions addressing the tenant's right to assign or sublease, the landlord retains the right to consent to a proposed assignment or sublease, but agrees its consent will not be unreasonably withheld. Even if no provision prohibits the landlord from unreasonably withholding its consent, "[i]t is well established in Illinois that where a lease forbids any sublease or assignment without the consent of the lessor, the lessor cannot unreasonably withhold his consent to a sublease." *Jack Frost Sales, Inc. v. Harris Trust & Savings Bank,* 104 Ill. App. 3d 933, 433 N.E.2d 941, 949, 60 Ill. Dec. 703 (1st Dist. 1982). Thus, even if a lease contains a provision against subletting or assignment without a landlord's consent, Illinois law forbids a landlord from withholding its consent unreasonably if the tenant tenders a suitable subtenant or assignee to the landlord. *Vranas & Associates, Inc. v. Family Pride Finer Foods, Inc.*, 147 Ill. App. 3d 995, 498 N.E.2d 333, 101 Ill. Dec. 151 (2d Dist. 1986).

A landlord's duty to consent, however, is not triggered until a suitable proposed assignee or subtenant is tendered to the landlord. *Jack Frost Sales, supra. See also Golf Management Co. v. Evening Tides Waterbeds, Inc.*, 213 Ill. App. 3d 355, 572 N.E.2d 1000, 157 Ill. Dec. 536 (1st Dist. 1991) (because tenant tendered suitable subtenant, landlord's refusal to consent to sublease was unreasonable).

Disputes often arise as to what is a reasonable withholding of the landlord's consent. This debate has lead to the enunciation of certain standards of reasonableness in a number of Illinois cases. A proposed assignee or subtenant must meet certain "commercially reasonable standards," and whether these standards are met will vary depending on the peculiar facts of each lease arrangement. *Arrington v. Walter E. Heller International Corp.*, 30 Ill. App. 3d 631, 333 N.E.2d 50, 58 (1st Dist. 1975) ("Where the lease contains provisions giving further meaning to the clause granting a person the power to withhold consent, then the standard by which reasonableness is judged is varied accordingly."). However, at least one commentator has maintained that Illinois courts have not adopted a clear "standard for measuring the propriety of [a] landlord's refusal to consent." Murray S. Levin, *Withholding Consent to Assignment: The Changing Rights of the Commercial Landlord*, 30 DePaul L. Rev. 109, 132 (1980). The following cases illustrate some of the situations in which a landlord's failure to consent was considered unreasonable and the standards articulated by the courts in reaching their decisions.

In *Vranas,* the court construed a lease provision that permitted the tenant to assign the lease only upon the landlord's written consent (which the landlord was not to withhold

[22] The landlord in *Mpath* was, however, held to have unreasonably withheld its consent to the assignment when there was nothing in the record to suggest the landlord had objected to the proposed assignee's financial condition, and the evidence suggested the landlord was withholding its consent as a means to negotiate a higher rent from the assignee than was required to be paid by the tenant under the lease. *Id.* at 306. *See* further discussion of this case in Part IV.B below.

unreasonably nor delay) in the context of the tenant's desire to sell its business. The landlord's refusal to consent to the tenant's proposed assignment was held unreasonable and not based on a legitimate concern with the proposed assignee's acceptability as a tenant. The *Vranas* court identified several factors comprising the "commercially reasonable standard" as applied to a proposed assignee's or subtenant's: financial resources and responsibility, proposed business, potential competitive impact of business on the landlord or other tenants, impact on commercial environment or surroundings, willingness to comply with lease terms, and the contemplation of the sale of the tenant's business as reflected in the lease. 498 N.E.2d at 339. *But see Reget v. Dempsey-Tegler & Co.*, 70 Ill. App. 2d 32, 216 N.E.2d 500 (5th Dist. 1966) (in holding that landlord's refusal to consent to sublease was not unreasonable, court identified credit history, capital, stable labor force present on premises, and proposed use of premises as valid considerations).

In *Jack Frost Sales*, the First District Appellate Court reversed a judgment for the tenant, finding that although the landlord either refused or failed to consent to an assignment, the evidence was insufficient to determine that the proposed assignee was commercially reasonable. The tenant had the burden of proving that the tendered assignee was "ready, willing and able" to accept the lease and met "reasonable commercial standards." 433 N.E.2d at 949. In this case, the tendered assignee did not meet a reasonable standard of financial responsibility, being a corporation with stated capital of only $1,000, and the tenant failed to provide the landlord with the proposed assignee's pertinent financial information. Furthermore, some evidence indicated that the proposed assignee sought an option to extend the term, which apparently was not available, thus raising a further question as to whether the proposed assignee was actually willing to accept the assignment absent an option to extend.

The issue was slightly different in *Losurdo Brothers v. Arkin Distributing Co.*, 125 Ill. App. 3d 267, 465 N.E.2d 139, 80 Ill. Dec. 348 (2d Dist. 1984). The question was whether the landlord's failure to respond to the tenant's request for consent to a proposed sublease barred enforcement of the provision of the lease requiring the landlord's prior consent. The court found the tenant's repeated subletting of the premises without allowing the landlord time "to exercise any reasonable commercial judgment" as to whether the proposed subtenancy met commercially reasonable standards was a breach sufficient to justify an award of possession to the landlord on its forcible entry and detainer action. 465 N.E.2d at 143. The landlord's failure to consent to the tenant's requests to sublease was not unreasonable because the tenant in the first instance had defaulted due to the use of flammable materials on the property, in the second instance had provided the landlord only a 1-day notice of a proposed sublease, in the third instance had provided only an 11-day notice of a proposed sublease, and in all instances had substantially violated the use clause of the lease that restricted the use of the premises to toy distribution.

Illinois seems to follow the minority view in implying an obligation on the part of the landlord not to unreasonably withhold its consent even if such standard is not stated in the lease. Other states, such as New York, will not imply a duty on the part of the landlord not to unreasonably withhold its consent, but if "'a landlord affirmatively promises not to withhold its consent, its refusal can only be based on a consideration of objective factors,' such as the assignee's financial status, and the proposed use and nature of the new occupancy." *Ring v.*

Mpath Interactive, Inc., 302 F.Supp.2d 301, 306 (quoting *Astoria Bedding, Mr. Sleeper Bedding Center Inc. v. Northside P'ship*, 239 A.2d 775, 657 N.Y.S.2d 796,797 (3d Dep't 1997)).

In the *Mpath* case discussed in Part IV.A above, the tenant was held to have satisfied its burden of proof that the landlord had unreasonably withheld its consent to an assignment when the landlord never alerted the proposed assignee (a company that had purchased some of the assets of the prior tenant and retained the space for conducting the same business by the same employees as before the purchase) that it objected to the assignment to it or that it had any objection to the assignee's financial condition. Only in the summary judgment proceedings did the landlord assert its basis for withholding consent was that the landlord believed the proposed assignee would be a financial risk, but as evidence of that concern, the landlord produced only an affidavit signed by the landlord to the effect that the certain "documents showed [the assignee] 'was losing money but had some cash in the bank'" without attaching the documents. 305 F.Supp.2d at 306. Thus, as a matter of law, the court held this insufficient to constitute a genuine issue of fact for trial, and the landlord was held to have breached the lease by unreasonably withholding its consent. However, because the parties had "not sufficiently addressed the question of the proper remedy for such a breach," the court reserved a determination on that issue. *Id.*

In contrast, in *WHTR Real Estate Ltd. Partnership v. Venture Distributing, Inc.*, 63 Mass. App. Ct. 229, 825 N.E.2d 105 (Mass. Ct. App. 2005), even though the lease stated the landlord was not to unreasonably withhold or delay its consent, the court held as a matter of law on a motion to dismiss by the tenant that the landlord had not unreasonably withheld its consent to a proposed sublease. 825 N.E.2d at 109. The trial court ruling that the landlord had not unreasonably withheld its consent was based on the tenant's failure to actually procure a proposed subtenant that was "ready, willing and able to fulfill the [tenant's] obligations under the lease" when there never was a legally enforceable agreement between the tenant and its proposed subtenant because "there were too many uncertainties and unresolved issues." *Id.* at 110.

Other jurisdictions with cases interpreting provisions that require the landlord not to unreasonably withhold its consent to an assignment or sublease have applied reasoning similar to that of the court in New York in *Mpath*. For example, in *Parr v. Triple L&J Corp.*, 2004 WL 2610499, 107 P.3d 1104 (Colo. App.), the lease required the tenant to obtain the landlord's consent to any assignment, but required the landlord not to unreasonably withhold its consent. The tenant sought approval from the landlord for an assignment of the lease as part of the sale of its business, and provided to the landlord all personal and financial information on the proposed assignee the landlord requested, as well as the assignee's business plan, promptly after each request by the landlord. All of the information demonstrated the assignee's "perfect" credit standing and experience in restaurant management. 107 P.3d at 1106. As a result, when the landlord failed to consent, the landlord was held liable to the tenant under a breach of contract theory, as well as for lost profits on the sale of its business which fell through due to the landlord's delay. The court found no distinction between withholding consent and refusing to consent, although the landlord attempted to argue there was.[23] While the damages against the

[23] The court commented that it appeared the landlord's decision to simply delay in responding was not related to the buyer's qualifications. Rather, it appeared to be based on a prior lawsuit between tenant and landlord. 107 P.3d at 1107. The landlord in *Parr* was not liable to the tenant for damages under the tenant's tort claim for intentional (con't)

landlord in *Parr* were not particularly high ($20,000 for the contract claim, $1,500 for the personal injury claim of one of the tenant's owners, and $5,000 in exemplary (*i.e.*, punitive damages) for the personal injury claim), the case stands for the proposition that a landlord must have good reason to object to a proposed assignee or subtenant, and cannot arbitrarily withhold or delay its consent if the lease says the landlord will not unreasonably withhold consent. In addition, the *Parr* court found that under the lease the tenants were entitled to attorneys' fees and costs against the landlord on the appeal (but the president of the landlord was not liable for attorneys' fees and costs as he was not a party to the lease), and remanded the matter to the trial court to determine the amount. *Id.* at 1109-1110.

Likewise, *Tenet Healthsystem Surgical, L.L.C. v. Jefferson Parish Hospital Service District No. 1*, 426 F.3d 738 (5th Cir. 2005), involved a motion for summary judgment on a landlord's claim in a suit brought by its tenant where the issue was whether the landlord had unreasonably withheld it consent to a proposed subtenant. The Fifth Circuit, applying Louisiana law, held that an objective standard of a reasonably prudent man must be applied,[24] which meant "the personal taste and convenience of the landlord should ordinarily not be considered." 426 F.3d at 743. Under this test, the landlord's refusal to consent to a sublease by its outpatient surgery center tenant to an occupational medical clinic was unreasonable when the lease allowed "out patient surgical procedures and general medical and physician's offices, including related uses." *Id.* at 742-44. The only basis provided by the landlord (which was an assignee from the original landlord) was that the proposed subtenant's different use increased competition for the landlord, a reason viewed by the court as "wholly personal" to the landlord and unrelated to an objective evaluation of the proposed subtenant. Thus, the landlord was found to have been unreasonable in refusing to consent to the sublease. *Id.* at 744.

Along similar lines is a more recent Third Circuit decision in *Buck Consultants, Inc. v. Glenpointe Associates*, 2007 WL 431149 (3d Cir. N.J.), which applied New Jersey law to a dispute between a tenant and its landlord over whether the landlord had unreasonably withheld its consent to a sublease. When the landlord refused to lease additional space in a different nearby building to one of its existing tenants (Eisai) on terms acceptable to Eisai, Eisai approached a tenant (Buck) in a different building owned by the same landlord seeking to sublease a portion of Buck's space for a sublease term ending when Eisai's current lease term expired. The landlord then made a new proposal to Eisai on the terms Eisai had proposed, but adding a requirement that Eisai extend its lease term for 15 years beyond its then expiration date. When Buck gave notice to the landlord of its intent to enter into the sublease with Eisai, the

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interference with a prospective business advantage, under the "economic loss rule" (one suffering only economic loss from the breach of a contract may not also assert a tort claim for the loss, absent some independent duty of care under tort law). *Id.* at 1108. However, the court did allow a separate tort claim by one of the individual owners of the tenant (Dora Bailey) for damages for emotional distress both against the landlord and individually against the landlord's president because it was not an economic loss. In addition, while exemplary damages are not generally available for breach of contract claims, the court held they could be imposed in connection with the tort claim because the landlord acted "in a malicious manner toward Bailey." *Id.* at 1109.

[24] The only types of factors the court thought should be considered are those "that relate to the landlord's interest in preserving the leased property or in having the terms of prime lease performed," as well as "the financial responsibility of the proposed subtenant, the legality and suitability of proposed use and nature of the occupancy." 426 F.3d at 743.

landlord gave a new proposal to Eisai seeking an extension of Eisai's lease for six years beyond its then expiration date. Eisai rejected this proposal, as well as a subsequent one by the landlord to move it to a new building that was not yet available for occupancy. Buck and Eisai concluded their sublease negotiations and Buck notified the landlord and sought its consent to the Eisai sublease. *Id.* at *2.

After several rounds of communications back and forth between Buck and the landlord, the landlord ultimately refused to consent claiming both that the Eisai lease prohibited it from subleasing or occupying other space in the building occupied by Buck, which was not true, and that allowing Eisai to sublease additional space all with the same expiration date as its lease and several other subleases Eisai had previously entered into with other tenants of the landlord would result in too much space in the building becoming vacant at the same time and would make Buck and the landlord competitors on the Buck/Eisai sublease space. *Id.* at *3.

As a result of the landlord's refusal to consent, the Buck/Eisai sublease "fell apart" and Eisai leased other space elsewhere. Buck then sued the landlord for breach of contract, breach of the duty of good faith and fair dealing, and tortious interference with contract. Buck also stopped paying rent to the landlord on the space it had planned to sublease to Eiasi, and after notices to Buck that it was in default for failing to pay rent, the landlord filed a counterclaim for rent in Buck's suit against it. The District Court granted summary judgment in favor of Buck on its breach of contract and breach of the duty of good faith and fair dealing claims, and for the landlord on the claim for tortious interference. It also dismissed the landlord's claim for rent, holding ultimately that the landlord's failure to consent to the Eiasi sublease effectively terminated the Lease as to that space.[25] *Id.* at *4.

On appeal, the Third Circuit reviewed the issues *de novo* based on New Jersey law, which is similar to Louisiana law, as articulated in the *Tenet* case. The factors upon which a landlord may reasonably refuse to consent, according to the Third Circuit, included "(a) the financial solvency of the proposed subtenant; (b) the nature and suitability of the proposed subtenant's business for the premises and the business area; (c) the proposed subtenant's willingness to guarantee the payment of rent and performance of all other tenant covenants under the lease; and (d) the necessity of altering the premises to suit the subtenant's business." *Id.* at *6. Applying these factors to this case, the Third Circuit determined the landlord's efforts to obtain higher rents and a longer term on a direct lease from Eisai at the same time it had refused the consent to the sublease from Buck was unreasonable and was motivated either to extract an economic concession or to improve its economic position. It also found that neither reason was a reasonable basis to withhold consent under New Jersey law. *Id.* at *7.

However, the Third Circuit disagreed with the District Court's determination that the landlord had acted in bad faith (*i.e.*, had breached its duty of good faith and fair dealing), noting that under New Jersey law Buck should have had to show the landlord acted "arbitrarily, unreasonably or capriciously, with the objective of preventing the other party from receiving its

[25] There was some back and forth on reconsideration motions by both parties on various issues, including a demand for replevin by Buck of office furniture that remained in the sublease space, but ultimately the District Court ruled the lease had terminated as to the sublease space on the date of the order for replevin. *Id.* at *4.

reasonably expected fruits under the contract . . . . Without bad motive or intention, discretionary decisions that happen to result in economic disadvantage to the other party are of no legal significance." *Id.* at *8 (quoting *Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 773 A.2d 1121, 1130 (2001) (a price-setting case)). The Third Circuit also noted that the lack of facts available to the court on a motion for summary judgment left open the possibility that Buck could prove an improper motive on the part of the landlord on remand or at trial. *Id.* at *9. Because the Third Circuit found no basis for the termination of Buck's lease to all of its premises, and both parties had continued to perform as to the portion of the premises not part of the proposed Eisai sublease, it reversed the decision on the issues of bad faith and whether to terminate the lease, and remanded the case for further proceedings, including "whether, and to what extent, the issue of mitigation is appropriate." *Id.* at *10.

Where the lease does not contain a provision requiring the landlord not to unreasonably withhold its consent to an assignment or sublease, the majority rule among the jurisdictions appears to be that the landlord need not be reasonable in withholding its consent. For example, in *Tap Room, Inc. v. Peachtree TSG. Associates, LLC*, 270 Ga. App. 90, 606 S.E.2d 13 (Ga. Ct. App 2004), a tenant wanted to sell its business to another tenant of the landlord and assign its lease to the buyer. The landlord by a letter from the landlord's attorney to the tenant stated it would consent, but only if the tenant paid all amounts then due the landlord under the lease, and that consent would be withheld if the amounts were not paid. 606 S.E.2d at 15. When the tenant refused to pay the amounts claimed by the landlord and sued, the appellate court held the trial court correctly granted summary judgment to the landlord. *Id. See also*, other cases cited in Friedman on Leases, §7:3.4[A], [D], [E].

As this small sample of the many cases illustrate, it is important for the tenant to know what the law is in the state in which the premises are located before agreeing to a lease provision that does not have a reasonableness standard for the landlord's consent to any assignment or sublease. Otherwise, except in those states where there is an implied reasonableness standard (*e.g.*, Illinois), the tenant may have no basis to object if the landlord refuses to consent to its proposed assignee or subtenant.

C. Withholding Consent in Exchange for Concessions

A municipal corporation was found to have unreasonably withheld its consent to a sublease by attempting to condition its consent on a reappraisal of the property and renegotiation of the rent schedule established in the original lease. *See Chanslor-Western Oil & Development Co. v. Metropolitan Sanitary District of Greater Chicago*, 131 Ill. App. 2d 527, 266 N.E.2d 405, 408 (1st Dist. 1970). The court cited a New Jersey case that had found "arbitrary considerations" of a landlord's personal taste, sensibility or convenience were inadequate to discharge the standard of reasonableness required of the landlord's right of consent. 266 N.E.2d at 407 (citing *Broad & Branford Place Corp. v. J. J. Hockenjos Co.*, 132 N.J.L. 229, 39 A.2d 80, 82 (1944)). *See also Ring v. Mpath Interactive, Inc.*, 302 F.Supp.2d 301, 306 (landlord unreasonably withheld consent to lease assignment when it appeared landlord was withholding its consent to negotiate for higher rent from proposed assignee), and cases cited in Friedman on Leases, §7:3.4[D][3], n. 248, n. 249 and n. 250.

Chanslor-Western Oil certainly suggests that a landlord's attempt to condition its consent to an assignment or subletting on the exaction of greater rent is inappropriate under Illinois law, contrary to one commentator's contention. *See, e.g.,* Lee M. Smolen, *Filling the Gap in a Real Property Lease,* 35 DePaul L. Rev. 437, 451 (1985) ("A landlord is often able to obtain more favorable lease terms in exchange for allowing a tenant the right to assign a lease"). Perhaps, as a practical matter, the case and commentator can be reconciled by the observation that some tenants and assignees may be willing to agree to more favorable lease terms in order to avoid the risk of litigation or to avoid delays in obtaining the landlord's consent. In addition, some landlords expressly obligate the tenant to share any "net revenues" or "profits" obtained under a sublease with the landlord by means of a provision to that effect in the original lease. The issue of sharing in the profits from an assignment or sublease is discussed in greater detail in Part V below.

The principle that a landlord cannot withhold consent in order to obtain greater rent is also supported by *Toys "R" Us, Inc. v. NBD Trust Company of Illinois,* No. 88 C 10349, 1995 WL 591459, 1995 U.S. Dist. LEXIS 14878 (N.D. Ill. Sept. 29, 1995). In *Toys "R" Us,* the court held that when a lease forbids any sublease or assignment without the consent of the landlord, the landlord cannot unreasonably withhold consent to a sublease regardless of whether the lease addresses the landlord's reasonableness. 1995 U.S. Dist. LEXIS 14878 at *108. In order to have an action against the landlord under these circumstances, the tenant must prove that its subtenant was "ready, willing, and able to take over the lease" and "met reasonable commercial standards," which includes consideration of the subtenant's financial responsibility, the type of business to be conducted on the premises, and whether the subtenant's business competes against that of the lessor or another lessee. *Id.* (citing *Golf Management Co. v. Evening Tides Waterbeds, Inc.,* 213 Ill. App. 3d 355, 572 N.E.2d 1000, 1003, 157 Ill. Dec. 536 (1st Dist. 1991)). *But see* the *Tenant Healthcare* case discussed in Part IV.B above where increased competition for the landlord was considered an unreasonable basis for withholding consent.

The tenant then has the burden of proving that the lessor acted unreasonably by withholding consent in order to obtain a benefit not reflected in the terms of the original lease. The court must determine the true motivations of the landlord, discarding any pretextual motivations. 1995 U.S. Dist. LEXIS 14878 at *111 – 112. According to the court, the landlord in *Toys "R" Us* acted unreasonably by refusing to give his consent to the tenant's sublease in order to have a portion of the leased building returned to him, so that he could improve his status under the lease and rent directly to the subtenant. 1995 U.S. Dist. LEXIS 14878 at *114. The court noted that the landlord initially refused to consent to the sublease without any knowledge of or inquiry into the subtenant's finances or plans to use the space. 1995 U.S. Dist. LEXIS 14878 at *66.

The court determined that the landlord's justifications for withholding consent to the sublease were pretexts, finding no proof that they were considered at the time the landlord made the decision to reject the lease. However, the court noted that the justifications might have been reasonable had there been evidence that they were considered in determining whether to consent to the sublease. 1995 U.S. Dist. LEXIS 14878 at *114.

The court considered the issue of whether the sublease would affect the landlord's expectation of future percentage rent. The court stated that a landlord may act commercially reasonably in not consenting to a sublease or assignment that will not generate the amount of rent the landlord would have expected under the terms of the original lease. 1995 U.S. Dist. LEXIS 14878 at *117. In *Toys "R" Us*, however, assuming for the sake of argument that the landlord's percentage rent issue was not a pretext, the court determined that the landlord acted unreasonably because it had not received percentage rent under the original lease and had slim chances of ever receiving percentage rent. 1995 U.S. Dist. LEXIS 14878 at *119 – 120.

The court also rejected the landlord's other arguments as pretextual. It stated that the landlord's concerns about restoration costs might have been reasonable if it had determined the actual costs and the likelihood that they would be necessary, and communicated this concern as the reason for the rejection. However, in this case there was no proof restoration costs were considered at the time of the rejection. 1995 U.S. Dist. LEXIS 14878 at *125.

The landlord's concerns about exterior changes also were considered pretextual and unreasonable. The lease included a provision requiring the landlord's reasonable consent to exterior changes. The court reiterated that any consent provisions in leases have a reasonableness requirement imposed on them under Illinois law, whether or not it is explicitly required in the lease. 1995 U.S. Dist. LEXIS 14878 at *129. Since the landlord did not determine the actual costs and damages involved, its withholding of consent on this basis was deemed unreasonable. 1995 U.S. Dist. LEXIS 14878 at *125.

The court also disagreed with the landlord's argument that its rejection of the sublease was based on the subtenant's failure to obtain consent of the property's mortgage lender. In addition to being pretextual, the court stated that the argument was not valid because it was the landlord, not the tenant, who had the duty to seek the lender's approval. If the landlord had sought the lender's consent and the lender reasonably objected, the landlord's refusal to consent would have been "commercially reasonable." 1995 U.S. Dist. LEXIS 14878 at *129. However, because the landlord never approached the lender for consent, there was no evidence as to whether the lender would have consented.

Toys "R" Us should make landlords aware that they may suffer serious damages if they unreasonably withhold consent to a tenant's proposed assignment or sublease. The tenant in *Toys "R" Us* was awarded damages on the basis that the tenant and its sublessee would have occupied the space and exercised their lease options. The court noted that when there is uncertainty in construing provisions relating to renewals or extensions of leases, the tenant is favored, not the landlord. As a result, the court assumed that both the tenant and its sublessee would have exercised all of their available options. 1995 U.S. Dist. LEXIS 14878 at *137. The court also noted that under Illinois law, an award of future damages to a plaintiff must be reduced to present-day cash value. The court determined that an 8.6 percent prime rate should be used as the discount rate to calculate damages. 1995 U.S. Dist. LEXIS 14878 at *143.

However, the court requested further evidence to decide whether the tenant could prove its claimed damages for projected increases in common area maintenance and real estate taxes. The court also requested further evidence regarding prejudgment interest, but it awarded attorneys' fees to the tenant. 1995 U.S. Dist. LEXIS 14878 at *144 – 147. Finally, the court

agreed to accept supplemental evidence on the issue of whether the remaining 15,000 square feet of premises that would not have been subleased to the proffered sublessee had any residual value to offset the damages claimed by Toys "R" Us, but noted that the landlord, as the defendant, would bear the burden of proving that residual value because under Illinois law the defendant in a breach of contract action has the burden of proof on the issue of the plaintiff's failure to mitigate its damages. 1995 WL 591459 at *49 – 50.

In the decision rendered following the parties filing of their supplemental briefs, the district court found Toys "R" Us, Inc. had attempted to mitigate its damages caused by the landlord's breach in refusing to consent to the proffered sublessee by bringing suit to compel the landlord to consent to the sublease. Further, it noted that because the landlord had failed to provide any evidence (beyond a conclusory, unsupported affidavit from one of the landlord's beneficiaries) that the remaining space had any residual value, it accepted the tenant's evidence it had no residual value. *See Toys "R" Us, Inc. v. NBD Trust Company of Illinois*, No. 88C 10349, 1996 U.S. Dist. LEXIS 19177 at *7 (N.D. Ill. Dec. 20, 1996).

Likewise, the court accepted Toys "R" Us, Inc.'s historical data on increases in common area maintenance ("CAM") charges and real estate taxes, as the landlord offered only an affidavit with a lower average percentage increase without any supporting data or calculations. 1996 U.S. Dist. LEXIS 19177 at *9. Finally, the court awarded the tenant prejudgment interest pursuant to 815 ILCS 205/2, which provides for prejudgment interest at 5% on money due "pursuant to an 'instrument in writing.'" *Id.* In all, the total amount of the damages awarded to the tenant for the landlord's refusal to accept a subtenant proposed by the tenant was $1,575,754.40, plus $640,016.50 in attorneys fees and $84,208.45 in litigation expenses. 1996 U.S. Dist. LEXIS 19177 at *12. Thus, the landlord learned a very expensive lesson when it refused to consent to a proffered subtenant even when the lease did not address the standards for the landlord's consent.

V. Landlord's Sharing of "Profits" from Assignments and Subleases

Most landlords consider themselves to be in the business of leasing property, and their tenants are involved in their own businesses, and not the business of leasing property. Thus, landlords like to protect themselves from tenants taking advantage of rising rents by subleasing their space at higher rents than those required to be paid under their leases or by assigning their leases to space in the form of a lump sum cash payment or other type of consideration. Most likely as a result of cases such as those cited in Part IV.C above which prohibited a landlord from withholding consent to an assignment or sublease in order to extract more rent from the tenant, commercial leases often now contain provisions that require the tenant to pay to the landlord, all or some portion of the "excess rents," "profits" or other consideration from the sublease or assignment transaction to the landlord.

Care must be taken by a tenant to be sure the lease provision does not compute "excess rent" or "profit" in the case of a sublease or "consideration" for an assignment without taking into account the costs incurred by the tenant in entering into the sublease or assignment. Generally, the tenant has engaged a broker to find a subtenant or assignee, and then must incur legal fees to document the transaction, and possibly must pay to have the premises improved or remodeled to suit the subtenant or assignee. In a situation where the tenant is only subleasing a

portion of its space, the tenant must normally construct a demising wall (and other modifications required by local codes and ordinances) to separate the subleased space from the balance of the tenants premises. The tenant might also argue it should be entitled to compensation for the unamortized cost of the tenant's own improvements to the space made without the landlord's funds. In negotiating the lease, the tenant may argue that if landlord wants all of the "profits" from a sublease or assignment, landlord should release the tenant from future liability. Often the landlord will not agree to this, but if it does not, the tenant has a valid basis to argue it is entitled to a share (at least 50%) of any "profits" or "excess rent" if it must bear the risk of having excess space it has assigned or subleased to a person that later defaults.

In the context of an assignment of a lease that is part of a corporate transaction, such as a merger or sale of assets, determining the separate consideration for the assignment of the lease itself will be difficult if not impossible. Many other assets are typically being transferred with the lease and the parties seldom would assign a separate value to the lease itself. Thus, a tenant should be careful to carve these types of transactions out of the general clause that allows the landlord to share in the "excess rents" or consideration for the assignment. In at least one California case, *Ilkhchooyi v. Best*, 37 Cal. App. 4th 395, 45 Cal. Rptr. 766 (Cal. Ct. App. 1995), even when the lease contained a provision that allowed the landlord to share in the proceeds from as assignment, the court held the landlord's refusal to consent to an assignment of a lease unless it also received a share of the profits from the sale of the business was not warranted by the language in the lease, and it was also unconscionable. This case was decided after the effective date of the California statutory provisions described in Part IV above.

As a practical matter, the tenant seldom has any "profit" from subleasing and rarely any from an assignment. The only exceptions might arise in the context of long-term anchor leases for retail pads in large shopping centers or possibly office leases in Manhattan (where rents have risen quickly in the 7 years since the World Trade Center buildings collapsed on September 11, 2001) or in other tight real estate markets.

VI. Landlord's Right to "Recapture" Space to Be Assigned or Subleased

Sometimes leases will grant the landlord the right to terminate the lease and take back the tenant's space if the tenant wishes to assign its lease or sublease its space. When faced with such provisions, the tenant should attempt to negotiate a provision whereby the tenant gives the landlord notice of its intent to sublease, and the landlord has a fixed time period to recapture space. The tenant should avoid provisions requiring the tenant to find a ready, willing and able subtenant first. Otherwise, it will have effectively done the landlord's marketing for the landlord by spending time locating and negotiating a possible assignment or sublease, and continuing to pay rent on the space, only to have the landlord elect to terminate the lease with respect to the assigned or sublet space. There are some advantages to the tenant in having the landlord recapture the space. First, the tenant's lease obligations will be terminated with respect to all recaptured space. Second, because the lease will be terminated as to the tenant, the tenant will no longer have privity of contract or estate with the landlord, assignee or subtenant and thus the landlord will have no recourse to the tenant if the assignee or subtenant later defaults.

If the tenant is not assigning the lease or subletting only a portion of the space adjoining the space it will continue to occupy and considers the space it is seeking to sublease as

its future expansion space, it should try to negotiate limitations on the landlord's right to recapture that subleased space so that the landlord's rights apply only to situations where the tenant is subleasing more than 50% of its space. Alternatively, the tenant can attempt to negotiate a provision that gives it the right to withdraw its request for approval of a sublease if the landlord decides it wants to recapture the space. Under either approach, the tenant will avoid irrevocably losing part of its anticipated future expansion space, although the first alternative is clearly better for the tenant because it will not have to incur the expense to market the space, only to have to terminate those negotiations to avoid losing its expansion space.

VII. What Should a Landlord Do if a Tenant Breaches a Prohibition on Assignment or Subleasing?

A. Determine if the Assignee is Acceptable or Not, and If Not, Terminate the Lease or the Tenant's Right to Possession

When a tenant violates the terms of its lease that prohibit an assignment or sublease without the landlord's consent, as indicated in Part IV.A above, the landlord must act by sending a notice of default to the tenant and demanding the default be cured. If the tenant does not cure the default, and the landlord has concluded it will not approve (and has the right not to approve the assignee or subtenant), then the landlord must terminate the lease (or the tenant's right to possession if permitted by applicable law). If it fails to do anything it may be deemed to have waived the right to terminate as discussed in Part IV.A above. However, once the lease is terminated as a result of the default, the landlord must consider to what extent it might have an obligation to mitigate its damages.

B. Landlord's Duty to Mitigate Its Damages Following Termination

The Illinois legislature attempted to clarify the previously unsettled state of Illinois law on the landlord's duty to mitigate its damages caused by a defaulting tenant by enacting Section 9-213.1 of the Code of Civil Procedure ("CCP"). 735 ILCS 5/9-213.1. This Section simply provides:

> After January 1, 1984, a landlord or his or her agent shall take reasonable measures to mitigate the damages recoverable against a defaulting lessee.

While seeming to finally resolve any question as to a landlord's duty to mitigate damages as the result of a defaulting tenant, the statute has been criticized for failing to address certain issues inherent in the duty to mitigate.

First, CCP §5/9-213.1 provides no definition of what constitutes "reasonable measures." Anthony J. Aiello, Legislative Note, *Illinois Landlords' New Statutory Duty To Mitigate Damages: Ill. Rev. Stat. Ch 110, § 9-213.1*, 34 DePaul L. Rev. 1033, 1034 (1985). It would not be unreasonable, however, to believe that Illinois courts would turn to the standards established in the case law developed in the context of lease assignments when determining the reasonableness of a landlord's withholding of consent under the statute.

Second, the CCP statute alone does not specify whether it applies retrospectively or prospectively. However, in the absence of legislative intent, Illinois courts will apply the

statute to leases executed after January 1, 1984. Prospective application to such leases, of course, fails to address a landlord's duty to mitigate damages suffered after January 1, 1984, under leases executed prior to January 1, 1984. Anthony J. Aiello, Legislative Note, *Illinois Landlords' New Statutory Duty To Mitigate Damages: Ill. Rev. Stat. Ch 110, § 9-213.1,* 34 DePaul L. Rev. 1033, 1034 (1985).

After the date CCP §9-213.1 was adopted in Illinois, there have been a number of reported cases that have interpreted this statute under Illinois law.[26] These cases have begun to answer the unanswered questions at the time CCP §9-213.1 first became effective, but in some cases with conflicting results. Thus, issues still remain unresolved.

The opinion in *Stein v. Spainhour,* 167 Ill. App. 3d 555, 521 N.E.2d 641, 118 Ill. Dec. 359 (4th Dist. 1988), suggests that CCP §9-213.1 may be applicable to breaches occurring after its enactment regardless of when the lease was executed. In *Stein*, the court observed that the statutory obligation to mitigate damages became effective after the breach under consideration, but that the statute did not apply to a situation in which the tenant continued to tender minimum rent and failed to surrender the premises. 521 N.E.2d at 644.

Texas has a statute similar to Illinois CCP §9-213.1 that is found in Section 91.006 of the Property Code. In addition to requiring all landlords to mitigate their damages if a tenant abandons its premises, Section 91.006 goes further than its Illinois counterpart by adding a statement that any provision of a lease that purports to waive a right or to exempt a landlord from this statutory liability or duty to mitigate its damages is void. Section 91.006 reads as follows:

> § 91.006. LANDLORD'S DUTY TO MITIGATE DAMAGES.
>
> (a) A landlord has a duty to mitigate damages if a tenant abandons the leased premises in violation of the lease.
>
> (b) A provision of a lease that purports to waive a right or to exempt a landlord from a liability or duty under this section is void.

The combination of Section 91.005 (which prohibits a tenant from "renting its leasehold" to any other person without the prior consent of the landlord) and 91.006 of the Texas Property Code might then give the landlord a limited obligation to mitigate its damages if a tenant, in violation of its lease, subleased the property to a third party without the landlord's

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[26] *See St. George Chicago, Inc. v. George J. Murges & Associates, Ltd.*, 296 Ill. App. 3d 285, 695 N.E.2d 503, 230 Ill. Dec. 1013 (1st Dist. 1998); *St. Louis North Joint Venture v. P & L Enterprises, Inc.*, 116 F.3d 262 (7th Cir. 1997) (applying Illinois law); *MXL Industries, Inc. v. Mulder*, 252 Ill. App. 3d 18, 623 N.E.2d 369, 191 Ill. Dec. 124 (2d Dist. 1993); and *JMB Properties Urban Co. v. Paolucci*, 237 Ill. App. 3d 563, 604 N.E.2d 967, 178 Ill. Dec. 444 (3d Dist. 1992). *See also American National Bank & Trust Company of Chicago v. Hoyne Industries, Inc.*, 738 F. Supp. 297 (N.D.Ill. 1990), *later proceeding*, No. 88 C 7756, 1990 U.S.Dist. LEXIS 9453 (N.D.Ill. Jul. 30, 1990), *aff'd*, 966 F.2d 1456, Rule 53 (7th Cir. 1992) (reported in full at 1992 U.S.App. LEXIS 13339); and *MBC, Inc. v. Space Center Minnesota, Inc.*, 177 Ill. App. 3d 226, 532 N.E.2d 255, 126 Ill. Dec. 570 (1st Dist. 1988), which are discussed in Part VII.D below; and *Stein v. Spainhour*, 167 Ill. App. 3d 555, 521 N.E.2d 641, 118 Ill. Dec. 359 (4th Dist. 1988).

consent, vacated the premises and then the subtenant never took occupancy. Normally, this would not be the case.

C. Burden of Proof

A landlord bears the burden of proving that it mitigated damages under CCP §9-213.1. *Snyder v. Ambrose*, 266 Ill. App. 3d 163, 639 N.E.2d 639, 203 Ill. Dec. 319 (2d Dist. 1994). In deciding this issue of first impression in a suit by a landlord against its tenant for unpaid rent, the court held that the trial court committed prejudicial error by excusing the landlord from presenting any evidence that he had attempted to mitigate his damages when the landlord was in the better position to prove he complied with the statute. The fact that the defendant had failed to answer the complaint or plead mitigation as an affirmative defense did not bar evidence on the subject, because the landlord had a statutory duty to mitigate and shouldn't be surprised by having to prove something he or she was obligated to do by statute. 639 N.E.2d at 640.

In *St. George Chicago, Inc. v. George J. Murges & Associates, Ltd.*, 296 Ill. App. 3d 285, 695 N.E.2d 503, 230 Ill. Dec. 1013 (1st Dist. 1998), the court addressed whether a landlord's failure to mitigate damages precluded or reduced its recovery. The *St. George Chicago* court stated that a landlord's failure to mitigate reduces the landlord's damages. The court rejected the tenant's argument, which was based on *Snyder, supra*, 639 N.E.2d at 641, that a landlord's failure to mitigate precludes any recovery by the landlord. 695 N.E.2d at 508. The court also rejected *St. Louis North Joint Venture v. P&L Enterprises, Inc.*, 116 F.3d 262 (7th Cir. 1997), which interpreted *Snyder* as placing the burden of proof of mitigation on the landlord as a "prerequisite for recovery." 116 F.3d at 265. Rather, the *St. George Chicago* court stated that nothing in the statute indicated the legislature intended to depart from common law, which treats an obligation to mitigate as solely concerning the measure of damages, not the right to recover damages. 695 N.E.2d at 508.

D. What Constitutes "Reasonable Measures" to Mitigate Damages

In discussing the language of CCP §9-213.1, the district court in *American National Bank & Trust Company of Chicago v. Hoyne Industries*, 738 F. Supp. 297 (N.D. Ill. 1990), *later proceeding*, No. 88 C 7756, 1990 U.S. Dist. LEXIS 9453 (N.D. Ill. Jul. 30, 1990), *aff'd*, 966 F.2d 1456, Rule 53 (7th Cir. 1992) (reported in full at 1992 U.S. App. LEXIS 13339), noted that it does not specify what are "reasonable measures" and, as a result, does not prohibit or curtail parties from defining such a standard within their lease agreement. 738 F. Supp. at 302. The district court characterized the statute as "phrased in flexible and general terms" and held its application did not necessarily mandate the result reached in *MBC, Inc. v. Space Center Minnesota, Inc.*, 177 Ill. App. 3d 226, 532 N.E.2d 255, 126 Ill. Dec. 570 (1st Dist. 1988). *Id.* The Seventh Circuit in *Hoyne Industries* disagreed with the *MBC* court's determination that the landlord's attempt to re-let the premises at a market rate higher than the rent otherwise payable under the lease was not a reasonable attempt to mitigate. Nonetheless, it applied *MBC* because that case was at that time the only Illinois precedent addressing the dispute. 1992 U.S. App. LEXIS 13339 at *16 – 17.

In *JMB, Properties Urban Co. v. Paolucci*, 237 Ill. App. 3d 563, 604 N.E.2d 967, 178 Ill. Dec. 444 (3d Dist. 1992), the Illinois appellate court held the landlord properly mitigated its damages caused by a tenant's default when it re-let the tenant's abandoned space for rent less than that paid by the defaulting tenant. 604 N.E.2d at 970 – 971. In *JMB Properties*, a jewelry store tenant (Paolucci) defaulted on its lease for premises in a retail store by abandoning the premises two years prior to the expiration of the lease and opening another jewelry store within a five-mile radius of the mall. The manager of the retail mall (JMB), and Carlyle Real Estate Limited Partnership XIV, the retail mall owner, sued Paolucci for past due rent and damages. Paolucci filed an affirmative defense alleging that the plaintiffs had failed to mitigate their damages. 604 N.E.2d at 968. The court concluded that not only did the plaintiffs make reasonable efforts to re-let the vacated premises, they re-let them to the first available tenant within seven months of the defaulting tenant's departure. Moreover, they re-let this space prior to leasing other available spaces in the mall. 604 N.E.2d at 970.

While the plaintiffs re-let the abandoned premises for only one-half the rent Paolucci was obligated to pay under his lease, the *JMB Properties* court held this was not a *per se* failure to mitigate damages. The court noted that the new tenant, an operator of a discount store, generated sales at a much lower rate per square foot than the jewelry store. By renting to the discount store, the plaintiffs obtained a suitable tenant for their available space, and securing such a tenant manifested reasonable efforts to mitigate damages. 604 N.E.2d at 971. Had the plaintiffs failed to rent to the discount store, the space may have remained empty, resulting in no mitigation of damages at all. Thus, under the circumstances, the court held that the landlord satisfied its duty to mitigate damages by not simply permitting abandoned property to remain vacant and relying on collecting damages from the defaulting tenant. Rather, the landlord's actively seeking and obtaining "a suitable replacement tenant to occupy the vacant space" meant it had reasonably attempted to mitigate its damages. *Id.*

In *St. George Chicago, Inc. v. George J. Murges & Associates, Ltd.*, 296 Ill. App. 3d 285, 695 N.E.2d 503, 230 Ill. Dec. 1013 (1st Dist. 1998), a landlord and tenant entered into a ten-year lease in October 1988. The tenant vacated the leased premises in April 1992. In August 1992, the landlord terminated the lease for nonpayment of rent and subsequently filed suit for damages. The tenant asserted the landlord's failure to mitigate damages as an affirmative defense. The appellate court cited Illinois' statutory requirement that a landlord take reasonable steps to mitigate damages. 735 ILCS 5/9-213.1. The lease included a provision regarding the damages the landlord could recover in the event that it terminated a defaulting tenant's lease. Under that provision, the landlord was entitled to (a) unpaid rent and operating expenses through the date of the termination of the lease, (b) unamortized costs of tenant improvements, (c) a "rent differential," and (d) attorneys' fees and court costs. The parties disagreed over the interpretation of the "rent differential" provision, which entitled the landlord to the present value of the lease rent for the rest of the unexpired lease term, minus the present value of the fair rental value (the fair market rent) over the unexpired lease term. The court concluded that this section of the lease satisfied the plaintiff's statutory duty to mitigate for the period from the termination of the lease to the end of the lease term since it assured the tenant the maximum amount of mitigation possible. 695 N.E.2d at 507. However, the court stated that the "rent differential" section did not apply to the period from the tenant's breach until the termination of the lease, and the landlord was required to demonstrate actual reasonable measures to mitigate. 695 N.E.2d at 508.

In *St. Louis v. North Joint Venture v. P&L Enterprises, Inc.*, 116 F.3d 262 (7th Cir. 1997), a shopping mall landlord brought suit for damages when its tenant vacated the leased premises, without notice, prior to the termination of its lease agreement. Once the tenant left, the landlord hired a leasing agent to re-let the premises. The agent placed advertisements in national shopping center trade publications, identified prospective tenants, and contacted national tenants and local retailers at other locations in search of a substitute. Despite these efforts, the property remained vacant for approximately one year. 116 F.3d at 264. In affirming the federal district court's order granting summary judgment to the landlord, the court rejected the tenant's argument that it had been constructively evicted due to a decrease in foot traffic because of the landlord's ongoing parking lot construction over an eight-month period. The court also rejected the tenant's assertion that it was entitled to a hearing on the issue of whether the landlord took reasonable steps to mitigate its damages. The court noted that under CCP §9-213.1, the landlord has the burden of proving mitigation of damages as a prerequisite to recovering damages. 116 F.3d at 265. The court reasoned that because the tenant took no steps to offer evidence to refute the landlord's claims that it had mitigated or the reasonableness of the landlord's actions, no material fact existed that would prevent the court from granting summary judgment in favor of the landlord. 116 F.3d at 266.

In *MXL Industries, Inc. v. Mulder*, 252 Ill. App. 3d 18, 623 N.E.2d 369, 191 Ill. Dec. 124 (2d Dist. 1993), the court held that the landlord had taken reasonable steps to mitigate its damages by erecting a sign, placing calls to bankers, real estate brokers, and developers, and running newspaper advertisements in regional and local newspapers. 623 N.E.2d at 378.

E. Landlord's Contractual Obligation to Mitigate Damages

Regardless of whether CCP §9-213.1 applies, the debate over whether and to what extent the landlord has a duty to mitigate damages survives in those instances in which the lease imposes on the landlord the contractual obligation to mitigate damages resulting from a tenant's default or abandonment. In *MBC, Inc. v. Space Center Minnesota, Inc.*, 177 Ill. App. 3d 226, 532 N.E.2d 255, 126 Ill. Dec. 570 (1st Dist. 1988), the court interpreted a lease provision reserving to the landlord the right to re-let the premises upon reentry, at the rental rate, for the lease term and on conditions determined in the landlord's sole discretion. Furthermore, the lease provided the landlord was not required to accept any substitute tenant offered by the tenant. Citing an old Illinois case, *Harmon v. Callahan*, 286 Ill. 59, 121 N.E. 194 (1918) (although landlord has no general duty to mitigate damages by re-letting upon tenant's abandonment, lease at issue obligated landlord to exercise reasonable diligence to re-let premises), the *MBC* court held that the landlord's attempts to re-let the premises at a rental considerably higher than that of the original lease and failure to offer the premises to prospective tenants on the same terms that were applicable to the original tenant created a breach of the landlord's duty to exercise reasonable diligence to mitigate damages. 532 N.E.2d at 260 – 261.

In meeting a contractual duty to mitigate, the landlord must make reasonable efforts to re-let the premises. "Reasonable diligence," as interpreted by the *MBC* court, would include attempts to re-let at the original rental rate and acting in good faith for the benefit of the defaulting tenant, regardless of whether a higher rental rate would reflect market rates or sound business judgment. Although this decision illuminates what efforts are required of the landlord to meet a contractual or statutory duty to mitigate, the opinion does not shed any light on what

rule of law applies in the absence of a contractual obligation to mitigate damages in leases executed prior to the enactment of CCP §9-213.1.

In *American National Bank & Trust Company of Chicago v. Hoyne Industries, Inc.,* 738 F. Supp. 297 (N.D. Ill. 1990), *later proceeding,* No. 88 C 7756, 1990 U.S. Dist. LEXIS 9453 (N.D. Ill. Jul. 30, 1990), *aff'd,* 966 F.2d 1456, Rule 53 (7th Cir. 1992) (reported in full at 1992 U.S. App. LEXIS 13339), the lease permitted the landlord, upon the tenant's abandonment of the premises, to "use reasonable efforts to mitigate its damages" and to re-let the premises at a rental higher than that paid by the tenant in its effort to mitigate its damages. Based on this language, the court determined that the landlord had not breached its obligation to mitigate damages under the lease by attempting to rent the property at a rate considerably higher than the tenant was obligated to pay under the lease. 738 F. Supp. at 301.

For further guidance as to the legal standard in Illinois pertaining to the landlord's obligation to mitigate, *see also Chicago Title & Trust Co. v. Baskin Clothing Co.,* 219 Ill. App. 3d 726, 579 N.E.2d 1045, 1052 – 1053, 162 Ill. Dec. 231 (1st Dist. 1991) (landlord sought declaratory judgment that tenant remained liable under lease after tenant's assignee was released from lease obligations by bankruptcy court). With respect to the issue of mitigation, the *Baskin Clothing* court held that, although the landlord's efforts to re-let the space proved fruitless, these efforts, nonetheless, met the landlord's lease obligation to mitigate. The Seventh Circuit in *Hoyne Industries, supra,* stated that "*Baskin* most likely stands only for the proposition that *MBC* does not apply when a landlord is merely entertaining offers and does not expressly ask for a substantially higher price than the defaulting tenant had been paying." 1992 U.S. App. LEXIS 13339 at *17. For a state-by-state analysis of the case law or statutes that apply to a landlord's duty to mitigate damages, *see* Friedman on Leases, App. 16A.

F. Confusion Between Mitigating Damages and Withholding Consent to Assignments and Subleases

One commentator has noted a judicial tendency to confuse a landlord's duty to mitigate damages upon a tenant's abandonment by re-letting the premises with the landlord's right to withhold its consent to assignment or subletting. *See generally* Murray S. Levin, *Withholding Consent to Assignment: The Changing Rights of the Commercial Landlord,* 30 DePaul L. Rev. 109 (1980); Friedman on Leases, §7:3.4[A]. Certainly this confusion is evident in that line of Illinois cases represented by *Wohl v. Yelen,* 22 Ill. App. 2d 455, 161 N.E.2d 339 (1st Dist. 1959), which held that when a defaulting tenant presents the landlord with a suitable substitute tenant, the landlord has an obligation to mitigate its damages. Indeed, it has been noted, "the Illinois rule expresses the landlord's duty to mitigate in terms of the landlord's approval of transfer." 30 DePaul L. Rev. at 130 n.116.

Given this tension in Illinois case law, it is fair to conclude that at least prior to the enactment of CCP §9-213.1, Illinois law imposed no duty on the landlord to seek actively to re-let vacated premises when the lease failed to evidence the parties' intent as to the issue of mitigation and when the defaulting tenant failed to tender to the landlord a prospective substitute tenant. Section 9-213.1 of the CCP may simply be a legislative statement imposing on the landlord an affirmative duty to take active steps to re-let the premises in order to mitigate the damages it might otherwise seek to recover against the defaulting tenant.

Thus, after January 1, 1984, a landlord no longer has the luxury to sit idly by while damages against a defaulting tenant accrue. This interpretation of CCP §9-213.1 gives credence to the suggestion in *Stein v. Spainhour*, 167 Ill. App. 3d 555, 521 N.E.2d 641, 118 Ill. Dec. 359 (4th Dist. 1988), that it may be applicable to lease abandonments occurring after this date. Such an interpretation would resolve the question as to retrospective or prospective application of CCP §9-213.1 by applying it to all breaches occurring after its effective date. Such an application of CCP §9-213.1 would preserve party expectations that otherwise would be disrupted by retrospective application. It would also avoid the somewhat unsatisfactory result that would occur if CCP §9-213.1 were applied only prospectively. Indeed, CCP §9-213.1 itself discredits the case law suggesting a landlord has no affirmative obligation to mitigate damages.

VIII. Bankruptcy Proceedings

Unfortunately for landlords, the general rule is that the best written clauses in leases prohibiting assignments will not be binding in the wake of a tenant's bankruptcy. 11 U.S.C. §365(f)(1). Under Section 365(d)(4) of the Bankruptcy Code, the trustee for the bankrupt tenant has 60 days to decide whether to assume or reject a lease. 11 U.S.C. §365(d)(4). Typically, unless the tenant is planning to reorganize not liquidate and the lease is for a property vital to the tenant's ongoing operations, the trustee will assume the lease only if it believes value can be added to the bankrupt estate from assigning the lease. This is so if the lease is a for a below market rent and there are likely assignees anxious to take over the premises. If the lease is to be assumed, the Bankruptcy Code requires the trustee in bankruptcy to (i) cure or provide adequate assurance that it will properly cure the lease defaults, (ii) compensate or provide adequate assurance it will compensate the landlord for its actual pecuniary losses, and (iii) provide adequate assurance of future performance of the lease. 11 U.S.C. §365(b)(1).

Other materials for this seminar cover bankruptcy issues in more detail. Any landlord with a tenant in a shaky financial condition would be well-advised to seek counsel from its attorneys before billing that tenant for taxes or other amounts due under the lease or, at a minimum, to review the tenant's lease to determine whether it is possible to engage in any preventive or preemptive planning. Once the tenant files for bankruptcy, the landlord must also engage in some quick planning in order to determine what amounts might be due under the tenant's lease during the post-petition, pre-rejection period of time. The time period for payments under Section 365(d)(3) is only 60 days from the order for relief unless the court extends the time period for acceptance or rejection of the lease on a motion made during the 60-day time period. Otherwise the lease is deemed rejected at the end of the 60-day period and, at least according to some bankruptcy courts, all obligations owed to the landlord under Section 365(d)(3) are fixed as of that date.

A. Effect of a Tenant's Bankruptcy on the Lease Provisions Restricting Assignments

There are some limitations on the general rule that a trustee for a tenant a bankruptcy may assign the lease, but these limitations are very limited for commercial real estate leases that are not for space in a shopping center. Under Section 365(b)(3), the only real exception is if the lease has been terminated under applicable non-bankruptcy law before the order for relief is entered. Thus, if a landlord has a tenant that is in default under its lease,

proceeding rapidly to put the tenant on notice so that any cure periods will expire and then sending the required notice to terminate the lease before the tenant files for bankruptcy may avoid the involvement of the landlord in the bankruptcy proceeding except to recover post-petition rent. Whether this is effective will depend on state law regarding whether a lease is deemed terminated upon a proper notice from the landlord or whether the landlord must also have obtained a court order for a forcible entry or an eviction granting possession to the landlord.

The Bankruptcy Code does contain separate provisions specifically to address the concerns of shopping center landlords that a bankrupt tenant that closes its doors will cause other tenants to suffer while it is dark, and to freely allow it to assign the lease to any other tenant can violate use restrictions, but these do not apply to landlords of other types of space. *See* 11 U.S.C. 365(b)(3). Under these provisions, adequate assurance of future performance of such a lease includes a requirement that all provisions of a shopping center lease, including for example, those provisions dealing with "radius, location, use or exclusivity" will be performed and the exclusive use rights of any other tenants in the shopping center will be protected. 11 U.S.C. §365(b)(3)(C). Also, the assignment must not disrupt any tenant mix or balance in the Shopping Center. 11 U.S.C. §365(b)(3)(D), Finally, the financial condition and operating performance of the proposed assignee and its guarantors, if any must be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease.

In *Trak Auto Corp. v. W. Town Center LLC (In re Trak Auto Corp.),* 367 F.3d 237 (4th Cir. 2004), the court held the lessee could not assign a shopping center lease in violation of the use restriction contained in the lease. Trak Auto Corporation, the owner of a chain of auto parts stores, filed a bankruptcy petition to reorganize under Chapter 11. It obtained court approval to close a store located in West Town Center, a shopping center in Chicago, Illinois, and sought to assume and assign its West Town Center lease. The lease restricted use of the premises to the sale of automobile parts and accessories. The auto parts retailer engaged a real estate firm to advertise the availability of the lease and to obtain bids. No auto parts retailer submitted a bid. The bankruptcy court approved an assignment for $80,000 to the high bidder, who proposed to sell family apparel at discount prices. The district court affirmed, but the court of appeals reversed. The court noted that although Section 365(f)(1) of the Bankruptcy Code allows a debtor to assign a lease notwithstanding assignment restrictions in the lease, Section 365(b)(3)(C) requires an assignee of a shopping center lease to obey a clause restricting the use of the premises. The court concluded that the latter provision, being more specific, controlled over the general invalidation of anti-assignment clauses. According to the court, Congress intended to allow shopping center landlords to preserve the tenant mix that they bargained for in the process of leasing. The right tenant mix is a key to a shopping center's financial success. A change in the tenant mix can reduce overall patronage and revenues at stores in the center. At the time of the *Trak Auto* case, there were other bankruptcy courts that had allowed an assignee of a shopping center lease to violate a use restriction on the theory that the restriction constitutes a de facto anti-assignment clause.

B. Liability of Tenant or Prior Assignee Upon Bankruptcy of Assignee

In *American National Trust Company of Chicago v. Kentucky Fried Chicken of California, Inc.*, 308 Ill.App.3d 106, 719 N.E.2d 201 (1st Dist. 1999), the lease provided the

original tenant remained primarily liable following the assignment. 719 N.E.2d at 206. Nonetheless, the trial court dismissed the landlord's amended complaint seeking rent and real estate taxes from the original tenant for the remainder of the lease term and damages for failure to maintain the premises after the assignee filed for bankruptcy protection and the landlord had accepted a lump sum payment from the assignee pursuant to a stipulation that released the assignee and all "predecessors in interest." 719 N.E.2d at 206 – 207. According to the court, the original tenant was a predecessor in interest to the assignee, and had the landlord intended to preserve its claim against the original tenant, it could have expressly excluded the original tenant from the release it signed in the assignee's bankruptcy proceedings or explicitly stated its action against the original tenant would survive the stipulation filed with the bankruptcy court. 719 N.E.2d at 212.

In the *Vallely Investments* case discussed in Part II.A.1 above, when the landlord (ground lessee), sued the leasehold mortgagee that had taken an assignment of a ground lessee's ground leasehold interest (BACC) for the remaining rent due under ground lease, BACC argued that the prior rejection of the ground lease in bankruptcy by the bankruptcy trustee for Edgewater (the entity to which BACC assigned the lease) also terminated its obligations as a prior assignee from the original ground lessee. 88 Cal. App.4th at 828. The California court rejected this argument, holding the bankruptcy lease rejection, which was on behalf of the ground lessee/assignee did not alter the contract rights of the landlord against BACC, which were not dependant on the validity of the lease. *Id.* at 828-29. "BACC assumed the lease obligations without qualification, and those contractual duties did not end with the foreclosure. It could have structured the transaction so that it shed all liability with the foreclosure, by taking the assignment without assuming the lease. But that is not what it did." The lesson learned for leasehold mortgagees is simple – do not that an assignment of a lease in lieu of foreclosing unless the landlord agrees you will be liable only for the period of time during which you actually are the tenant. It is much more difficult for tenants who assign leases to obtain such an agreement from their landlord, but subsequent assignees might wish to consider including this in an estoppel or consent to the assignment they receive from the landlord in order to protect themselves from future liability under the lease if a subsequent assignee later files for bankruptcy.

For further information and advice on assignments of retail leases when the tenant declares bankruptcy, see the two articles written by Susan G. Talley and Harris Ominsky, Assignments of Retail Leases in Bankruptcy, Part 1 – What's Left of the Lease?, 19 Prob. & Prop. 19 (Jan./Feb. 2005), and Part 2 – On the Right Track?, 19 Prob. & Prop. 42 (Mar./Apr. 2005).

C. Effect of a Tenant's Bankruptcy on a Subtenant

In *Syufy Enterprises, L.P. v. City of Oakland*, 104 Cal. App. 4th 869 (2002), the Port of Oakland ground leased a 10-acre site to Transwestern Hotels for development of a hotel. Several assignments of the lessee's interest occurred with the Port's consent. About 8 years into the 50-year term, the then lessee and the Port amended the ground lease to add an adjoining parcel of land that was to be developed for a movie theatre. The amendment specifically acknowledged the movie theatre would be constructed by the sublessee, Syufy, and the Port

consented to the sublease. The Port also passed a resolution consenting to the subtenancy of Syufy. *Id.* at 874.

Over the next several years Syufy built the theatre, extended its sublease term, and expanded and modified the building, all with the Port's consent, and the hotel lessee assigned the ground lease to others. A few years later, the Port and the then hotel lessee were embroiled in disputes involving operation, maintenance and repair issues related to the hotel. When Syufy received a copy of a notice of default that had been sent to the hotel lessee and inquired, it was told by a Port representative no-action was necessary because the Port did not intent to take any action against Syufy, and the Port never sent any default notices directed to Syufy. *Id.* at 874-75.

Eventually, the Port filed an unlawful detainer action against the hotel tenant. It did not name Syufy in the complaint or serve it on Syufy. After the Port obtained a default judgment against the tenant, the tenant filed for bankruptcy, and asked the bankruptcy court to allow it to assume the lease, but that request was denied by the bankruptcy court. The court ordered the tenant to vacate the premises. Syufy did not receive notice of this order, nor was it or its sublease mentioned in the order. *Id.* at 875.

Several months later, the Port notified Syufy that it's sublease was effectively terminated by the order terminating the hotel tenant's ground lease. However, the Port's notice said it was prepared to allow Syufy to remain as a month-to-month tenant on the same terms as its sublease, explaining they intended to formalize this in a new lease, to avoid any argument the rent being paid to the landlord was an asset of the hotel tenant's bankruptcy estate, which never was done. Several years later (after operating the hotel through a management company during that period of time), the Port demolished the hotel to prepare the site for a new commercial development. The Port gave Syufy notice of termination of its tenancy (after Syufy asked the Port to extend its lease for 12 more years), ordering it to vacate within 30 days. Syufy sued the Port for a declaratory judgment that its lease remained in effect, and the Port filed an unlawful detainer action against Syufy seeking possession of the premises. *Id.* at 875-76.

The court noted the difference of opinions among various courts as to whether the rejection of a lease in bankruptcy terminates the lease and the rights of any subtenants, or is a breach of the lease that does not adjudicate their rights of third parties, and that there did not appear to be any Ninth Circuit cases that addressed the issue. *Id.* at 880-81. However, the court did note several lower court findings in the Ninth Circuit and found a trend toward the idea that the rejection was a breach, not a termination of the lease, which meant the court had to look to California law to determine what had happened to the sublease. Under California law, the court held, because the subtenant's rights "are dependent upon and subject to the sublessor's rights" and "stand or fall with those of the sublessor," the Syufy sublease was terminated by operation of law when the lease was terminated. *Id.* at 883-84.

Although Syufy attempted to argue it was a third party beneficiary of the hotel ground lease, and attempted to argue the principles in the *Vallely* case discussed in Part VIII.B above applied, the Court disagreed. It held the right of Syufy to remain in possession was based solely on the rights of the tenant under the ground lease with the Port, and when that right was terminated by the rejection of the lease, privity of estate ended and the Port was entitled to

possession from the tenant and Syufy. The court noted that the Port had not agreed in the lease or in any argument with Syufy not to disturb its possession if the ground lease was terminated and Syufy had not agreed to attorn to the Port. It also distinguished the *Vallely* case on the basis it was an argument over rent obligations, not possession. *Id.* at 884-86

The *Syufy* case was decided under California law, but relied to some extent on the principles in the *48th Street Steakhouse* case discussed in Part VIII.D below. While the party that had filed for bankruptcy in the *48th Street Steakhouse* case was the subenant, not the tenant, the Second Circuit looked to New York law to determine whether the sublease would be terminated if the lease was terminated, and held it would have. As a result, it prohibited the landlord from terminating the lease to avoid the resulting termination of the bankrupt subtenant's sublease. In *Syufy*, because under California law the termination of a tenant's lease through bankruptcy or otherwise will terminate a sublease, and the tenant's lease had already been terminated by the rejection of the lease in the tenant's bankruptcy proceeding, the court had no choice but to hold the sublease had also been terminated. The lesson to be learned for subtenants is that they must be vigilant about the financial condition of the tenant and the status of its lease and they must be proactive to attempt to protect their rights as soon as (and presumably even before) the tenant files for bankruptcy. The law in other jurisdictions may vary, but the general common law rule in most jurisdiction is that the termination of the lease terminates the sublease, absent another agreement between the landlord and subtenant, such as a non-disturbance agreement. *See* Friedman on Leases, §7:7.3.

D. Effect of a Subtenant's Bankruptcy

A Second Circuit appeal in a bankruptcy case offers some insight into the unexpected or unanticipated results for landlords when a subtenant files for bankruptcy. In the case *In re 48th Street Steakhouse, Inc.*, 825 F.2d 427 (2d Cir. 1987), *cert. denied sub nom. Rockefeller Group, Inc. v. 48th Street Steakhouse*, 485 U.S. 1035, 108 S.Ct. 1596 (1988), the landlord was stayed from pursuing the termination of its lease with a tenant by reason of a bankruptcy proceeding involving the tenant's subtenant.[27] The facts of the case are a bit unusual. The subtenant was a subtenant by reason of its agreement to purchase the business assets of the tenant at that location. It could have been argued the lease assignment from the subtenant to the tenant and sublease back to the subtenant (which followed immediately after the tenant's initial assignment to the subtenant) was for collateral purposes and not an outright assignment. However, all of these various assignments and the sublease were consented to by the landlord, including a future re-assignment to the subtenant once its debt to the tenant was paid in full. 835 F.2d at 428-29. However, the Second Circuit was careful to point out that none of this mattered because the sublease was an asset of the bankrupt subtenant's estate. Under New York law, a termination of the lease automatically terminated the sublease. This meant any action by the landlord to terminate the lease would destroy the subtenancy of the bankrupt subtenant. Thus, the landlord's termination notice as to the lease violated the automatic stay with respect to the

[27] The *48th Street Steakhouse* case is discussed in detail in Geoffrey Hargreaves-Heald, Bankruptcy in the Context of the Sublease: The *48th Street Steakhouse* Zinger and Other Woes, 17 Prob. & Prop. 57 (Sept./Oct. 2003).

subtenant even though the tenant had not filed for bankruptcy and the tenant had failed to pay the rent. *Id.* at 430-31.

The lesson from the *48th Street Steakhouse* case for the landlords is clear – the creditworthiness of your tenants' subtenants does matter. In this case, because the landlord had agreed to accept payments of rent directly from the subtenant, the tenant had no ongoing connection to the building, and when it did not pay the past due rent owed by the subtenant to preserve the lease, the landlord was "out" the rent owed – at least until it became clear whether any payment would be forthcoming out of the bankruptcy estate. The case did not address whether the landlord still had a direct contract cause of action for rent against the tenant and whether it opted to pursue that relief.[28]

In most sublease situations, the subtenant pays the rent due under the sublease to the tenant who then pays the rent due under the lease to the landlord. In those circumstances, the tenant has only itself to blame if it fails to pay the rent under the lease, but the net result for the landlord would be the same regardless of who pays the rent to the landlord if the jurisdiction follows the holding in the *48th Street Steakhouse* case. Under that case, the landlord still could not terminate the lease if the subtenant has filed for bankruptcy.

E. Effect of a Landlord's Bankruptcy

A shocking case to most tenants if they are ever faced with the bankruptcy of one of their landlords is *Precision Industries v. Qualitech Steel*, 327 F.3d 537 (7th Cir. 2003). The *Qualitech* case addressed the relationship between two different sections of the Bankruptcy Code. One is Section 365(h), which permits a tenant to retain possession of its leased premises if its landlord files a petition in bankruptcy and then rejects the lease. The other is Section 363(f), which the Seventh Circuit held permits the bankruptcy court and trustee in bankruptcy to sell a debtor's property free and clear of leasehold interests. *See* 11 U.S.C. §§365(f), (h). In the *Qualitech* case, the court decided the landlord could sell property leased to a tenant free and clear of the tenant's lease – in other words, Section 363(f) took precedent over Section 365(h).

The *Qualitech* case did present an unusual set of facts that perhaps can explain the decision. First, the tenant, Precision, had entered into two agreements with Qualitech. One was a land lease for a nominal rent of $1 per year under which Qualitech had the option to purchase the building at the end of the term for $1. The other was a supply agreement under which Precision agreed to "construct a supply warehouse [on the land] and operate it for ten years, so as to provide on-site, integrated supply services for Qualitech." Precision did construct the building and Qualitech started buying goods from Precision, but Qualitech filed for bankruptcy a few months later. 327 F.3d at 540.

[28] Presumably the landlord could still pursue a contract claim for rent against the tenant, assuming the landlord had not released the tenant upon the initial assignment to the subtenant. For a case where the landlord did (perhaps inadvertently) release the tenant. See the *Kentucky Fried Chicken* case discussed in Part VIII.B above. For a case where an assignee from the original tenant remained liable because it had not been released, see the *Vallely Investments* case also discussed in Part VIII.B above.

The other unusual aspect of the facts in the *Qualitech* case was that Precision failed to object to the sale order at the hearing on the sale of Qualitech's assets (even though it had received notice of the sale) "free and clear of all liens, claims, encumbrances, and *interests*." 327 F.3d at 541 (italics in original). Instead, Precision discovered the sale after the buyer changed the locks and then filed suit for a declaration that changing the locks violated Precision's possessory rights. When the buyer filed with the bankruptcy court a request for clarification of the sale order's effect on Precision's rights, the bankruptcy court held Precision's possessory interest in the land and building had been extinguished by the sale order. *Id.*

For a discussion of the potential impact of the *Qualitech* decision on tenants generally, *see* Christopher C. Genovese, Note, Easing the Tension Between Sections 363 and 365 of the Bankruptcy Code?, 39 Real Prop. Prob. & Tr. J. 627-649 (Fall 2004).

IX. Assignments by Landlords

A landlord's assignment of a lease will not disrupt the privity of contract or privity of estate existing at the time of the assignment with a tenant or a tenant's successors. Thus, the distinctions between privity of contract and privity of estate that exist in the context of a tenant's assignment or sublease do not necessarily dictate the extent of the obligations of the landlord's successor. "[T]he obligations of a successor lessor differ from those of a successor lessee." *Montgomery Ward & Co. v. Wetzel*, 98 Ill.App.3d 243, 423 N.E.2d 1170, 1175, 53 Ill.Dec. 366 (1st Dist. 1981). A lease's obligations and benefits will inure to the benefit of the landlord's assignee. *Bruno v. Gabhauer*, 9 Ill.App.3d 345, 292 N.E.2d 238, 240 (1st Dist. 1972). This fact, of course, is a double-edged sword.

Illinois case law suggests that a landlord's assignee owes the tenant all of the landlord's duties and liabilities under the lease. *Montgomery Ward & Co., supra*, 423 N.E.2d at 1175. "[T]he right of the lessee is unaffected by the lessor's assignment of the lease and alienation of the premises; and the alienee is subject to all the rights and equities of the lessee against the lessor." *Id.* When a landlord has failed to fulfill its lease obligations to its tenant and has ignored the tenant's complaints, the landlord's assignee will be charged with notice of the alleged problems because "an assignee stands in the shoes of the assignor." *American National Bank & Trust Company of Chicago v. Sound City, U.S.A., Inc.*, 67 Ill.App.3d 599, 385 N.E.2d 144, 146, 24 Ill.Dec. 377 (2d Dist. 1979). *See also Montgomery Ward & Co., supra* (landlord's assignee liable to tenant for amount of tenant's overpayment of its share of real estate taxes). Thus, all of the landlord's duties and obligations under the assigned lease will become the duties and obligations of the landlord's successor.

Even in the absence of an express assignment, a successor to the landlord will be bound by the terms of a lease if the contested covenant runs with the land. *Nassau Terrace Condominium Association, Inc. v. Silverstein*, 182 Ill.App.3d 221, 537 N.E.2d 998, 1000, 130 Ill.Dec. 669 (1st Dist. 1989). In *Nassau Terrace*, a condominium association (the successor to the original landlord) filed suit against a commercial tenant, a washer and dryer business, for a declaration that the condominium association was not bound by the lease terms, there having been no formal assignment of the lease from the original landlord to its successors. The court determined that the language of the lease evidenced an intent that the lease covenants run with the land. In so holding, the court relied on two clauses in the lease, one that made the lease

"binding upon all future owners, and the heirs, executors, and assigns of the Lessor" and another that stated that the lease ran with the land and buildings. *Id.* Possession of the premises, presumably a laundry room, because it was necessary to the tenant's business, was found to touch and concern the land. Finally, the court found that privity of estate existed between the original landlord's successors and the tenant. 537 N.E.2d at 1001. Thus, the tenant was entitled to possession of the premises. 537 N.E.2d at 1002.

Under Section 9-215 of the Illinois Code of Civil Procedure, 735 ILCS 5/9-215, all remedies available to the original landlord are also available to a landlord's successor. This section provides as follows:

> The grantees of any leased lands, tenements, rents or other hereditaments, or of the reversion thereof, the assignees of the lessor of any lease, and the heirs, legatees and personal representatives of the lessor, grantee or assignee, shall have the same remedies by action or otherwise, for the non-performance of any agreement in the lease, or for the recovery of any rent, or for the doing of any waste or other cause of forfeiture, as their grantor or lessor might have had if such reversion had remained in such lessor or grantor. 735 ILCS 5/9-215.

The law varies from state to state, but generally most states have laws similar to the Illinois statute. The source of these statutes is a statute adopted in 1541 by King Henry VIII to force the tenants of confiscated church property to pay rent to the new owners. *See* Friedman on Leases, §36:1, and sources cited therein.

X. Conclusion

The law with respect to assignments and subleases of commercial leases is quite complex, and varies from state to state. Some states have little case law on the key issues concerning the respective rights and duties of the landlord and the tenant when the tenant seeks to assign its lease or sublease all or a portion of its premises. Some, like Illinois, have considerable case law to guide the parties. However, the best approach for both parties is to address the issues in the manner they want them to be addressed with as clearly written provisions as possible to avoid problems or disputes at a later date.

Appendix A
Differences Between Lease Assignments, Subleases and Partial Lease Assignments[1]

ITEM	ASSIGNMENT	SUBLEASE	PARTIAL ASSIGNMENT
Space	All of the space	May be all or less than all of the space	Less than all of the space
Privity of Estate	Assignee has privity of estate with Landlord as to all of the space	Subtenant never has privity of estate with Landlord	Partial Assignee has privity of estate with Landlord but only as to the space assigned
Privity of Contract	Depends on whether Assignee has "assumed the Lease"	Subtenant does not "assume" the Lease	Depends on whether Assignee has "assumed the Lease." Can an Assignee "assume" only part of a Lease?
Rent	Assignee liable for 100 percent of the underlying rent; and for any additional sums payable to Tenant/Assignor, in a lump sum or over time under assignment	Subtenant only liable for rent specified in the sublease, not liable for underlying rent	Assignee only liable for a share of the underlying rent under the Lease; and for 100 percent of any additional consideration payable to Tenant/Assignor in a lump sum or over time
Term	100 percent of balance of term of Lease	At least one day less than balance of term under Lease	100 percent of balance of term under Lease, but only as to the portion of the premises assigned
Landlord's remedies for rent	May sue Assignee for 100 percent of rent and may sue Tenant/Assignor for 100 percent of rent (unless Assignor has been released)	May not sue Subtenant for rent; may only sue Tenant/Sublandlord for rent	May sue Assignee for its pro rata share of rent; may still sue Tenant/Assignor for 100 percent of the rent (unless Assignor has been released as to assigned portion)
Landlord's remedies for possession	May evict Assignee for breach of Lease	May evict Subtenant if Lease provision is breached either by Tenant/Sublandlord or by Subtenant	May evict Assignee from its portion of the space for breach of Lease; unclear if Landlord may evict Tenant/Assignor and others from other portions of the space if there is no breach regarding other portions of the space
Tenant's remedies for breach by transferee	May sue Assignee for damages, but not to recover possession or for rent	May sue Subtenant for rent and for recovery of possession	May sue partial Assignee for damages, but not to recover possession or for rent

[1] This table was adapted from a table appearing in the following article: Thomas C. Barbuti, *Assignments Pro Tanto And Why To Avoid Them*, 22 The Practical Real Estate Lawyer 21, 23 (September 2006).

ITEM	ASSIGNMENT	SUBLEASE	PARTIAL ASSIGNMENT
Transferee's liability	Assignee's liability for rent ends when it assigns the Lease to another and no longer has privity of estate unless it has assumed the Lease	Subtenant's liability to Sublandlord does not end if Subtenant assigns or further sublets (i.e., privity of contract)	Partial Assignee's liability for rent ends when it assigns its interest to another and no longer has privity of estate (typically there has been no assumption because parties assumed it was a sublease). Can partial Assignee "assume" only part of a Lease?

Appendix B
Sample Lease Language -- Landlord's Right to Consent to Assignments and Subleases

__. ASSIGNMENT AND SUBLETTING (Short Form)

__. Tenant shall not, without the prior written consent of Landlord, (i) assign, convey, grant a security interest in or mortgage this Lease or any interest hereunder; (ii) suffer to occur or permit to exist any assignment of this Lease or any lien upon Tenant's interest, whether voluntarily, involuntarily or by operation of law; (iii) sublet the Premises or any part thereof; or (iv) permit the use of the Premises by any person other than Tenant and its employees. Landlord's consent to any assignment, subletting or transfer shall not constitute a waiver of Landlord's right to withhold its consent to any future assignment, subletting or transfer.

__. [**For purposes of this Section ___, an assignment that is forbidden within the meaning of this Section __, includes, without limitation, 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 stock and in the same proportion as such holder previously owned in the corporation), or the transfer of any interest in the Tenant if the Tenant is a partnership or joint venture, whether by sale, exchange, merger, consolidation, or otherwise.] [Landlord's consent shall not be withheld in the case of an assignment or subletting to an affiliate of Tenant, meaning any entity controlling, controlled by or under common control with Tenant, or to any successor to Tenant by merger. – Tenant-oriented provision.] or [An assignment, forbidden within the meaning of this Section ___, includes, without limitation, one or more sales or transfers, by operation of law or otherwise, or issuance of new stock, in any case whereby an aggregate of more than 50% of Tenant's stock becomes vested in a party or parties who are not stockholders as of the date of that Lease.] [This Section ___ shall not apply if Tenant's stock is listed on a recognized security exchange.]**

__. Tenant shall give Landlord written notice of any proposed sublease or assignment which notice shall contain the name of the proposed subtenant or assignee and the proposed principal terms thereof. Upon receipt of such notice, Landlord shall have the option to terminate this Lease in its entirety, or, if Tenant proposes to sublease less than all of the Premises, to terminate this Lease with respect to the portion to be so subleased, in which latter event, the [Base Rent] and [Additional Rent] and any other charges shall be adjusted on the basis of the square feet of the leased area which remain under this Lease. If Landlord wishes to exercise such option to terminate, Landlord shall, within thirty (30) days after Landlord's receipt of such notice from Tenant, send to Tenant a notice so stating and specifying the date as of which such termination is effective, which date shall be not less than thirty (30) and not more than ninety (90) days after the date on which the Landlord sends such notice. Landlord may, at its option, lease the space so recaptured by Landlord to Tenant's proposed subtenant or assignee.

__. If Landlord does not elect to terminate this Lease as provided in Section __ above, Landlord may, in its sole judgment, withhold its consent to any proposed assignment or subletting for reasonable business concerns and purposes.

__. Notwithstanding anything to the contrary contained herein, if Landlord does not elect to terminate this Lease as provided in Section __ above, but approves a proposed assignment or

subletting by Tenant, the original Tenant shall not be released from any covenant or obligation under this Lease.

___. ASSIGNMENT AND SUBLETTING (Long Form)[1]

__.__ 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 Premises or permit the 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 Landlord's 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 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 or occupants. If this Lease is assigned, Landlord may and is hereby empowered to collect rent from the assignee; if the Premises or any part thereof are sublet, underlet or occupied by any person other than Tenant, and Landlord, in the event of Tenant's default, may, and is hereby empowered to, collect rent from the subtenant, under-tenant 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, subletting or underletting, or the acceptance of the assignee, subtenant, under-tenant or occupant as tenant, or a release of Tenant from the further performance of the covenants contained in this Lease on the part of Tenant.

__.__ Notwithstanding the foregoing provisions of this Section __, this Lease may be assigned, or the 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 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 of the type referred to in the immediately preceding sentence, the foregoing provisions of this Section __ with respect to assignment or subletting shall then apply to such corporation or partnership.

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

__.__ For the purpose of this Section __, the following terms shall have the following meanings:

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[1] Adapted from Friedman on Leases, §7:3.3[E]

(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 those 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 $____.[2]

__.__ If Tenant shall desire to assign this Lease or sublet the Premises, in whole or in part, to an assignee or subtenant where Landlord's consent is required. 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.

(b) Prior to delivery of Landlord's consent, Tenant shall deliver to Landlord:

(i) A counterpart executed copy of any the proposed assignment, which shall include an assumption by the assignee, from and after the effective date of such assignment,

[2] Some comparable clauses specify that the net worth of an acceptable corporate successor be no less than the original tenant's worth immediately prior to the merger, consolidation, acquisition, or assumption. If the original tenant is one with substantial assets, this language would bar most prospective successors though their net assets would ordinarily be deemed satisfactory.

of the performance and observance of the covenants and conditions contained in this Lease on Tenant's part to be performed and observed; or

(ii) 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], that such sublease shall not be assigned, by operation of law or otherwise, nor shall the Premises be further sublet [nor such use changed][, without in each case the prior written consent of the Landlord herein named]. No sublease shall be for a term that shall extend beyond one day prior to the expiration of this Lease.

(c) If Tenant shall give Landlord notice of a desire to assign this Lease, or to sublet 50% or more of the Premises, Landlord shall be entitled to terminate this Lease on at least 30 days' prior written notice thereof, in which event this Lease shall terminate on the date specified in such notice, with the same force and effect as if such date were the date herein specified for the expiration of Term and the [Rent], and [Additional Rent], including any [Additional Rent] provided for under Sections ___ and ___ [escalation clauses] of this Lease shall be apportioned and adjusted as of the effective date of such termination. [If Landlord shall give such notice of termination, 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 termination shall be nullified. The provisions of this Section __.__(c) shall nevertheless apply to any future notice or notice by Tenant of a desire to assign or sublet.]

__.__ Whenever Tenant shall claim, under this Section __ [Assignment and Subletting clause], 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 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.

__.__ Notwithstanding the foregoing provisions of this Section ___ [Assignment and Subletting clause], if Tenant shall enter a contract to sell its business at the 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 Premises, to the purchaser named in said contract, and shall concurrently 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 consent, Tenant shall deliver to Landlord:

(a) 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 contained in this Lease on Tenant's part to be performed and observed; or

(b) 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 [the ___

business], that such sublease shall not be assigned nor the Premises further sublet [nor such use changed, without the prior written consent of the Landlord]. No sublease shall be for a term that shall extend beyond one day prior to the termination of this Lease.

___. ASSIGNMENT AND SUBLETTING (Alternative Form)

__. **Notice to Landlord; Options in Landlord.** Except in connection with an assignment of this Lease or a sublease to any successor or Affiliate (as hereinafter defined) of Tenant, in which case Landlord's consent shall not be required, if Tenant shall at any time or times during the term of this Lease desire to assign this Lease or sublet all or part of the Premises, Tenant shall give notice thereof to Landlord, (the "Space Disposition Notice"). The Space Disposition Notice shall notify the Landlord of the Tenant's desire to assign the Lease or sublease the whole or a portion of the Premises, and if a sublease of a portion of the Premises, identify the approximate portion of the Premises to be subleased), and the maximum length of time of such sublease. Such notice shall be deemed an offer from Tenant to Landlord whereby Landlord (or Landlord's designee) may, at its option, (i) sublease such space (hereinafter called the "Leaseback Space") from Tenant upon the terms and conditions hereinafter set forth (if the proposed transaction is a sublease of all or part of the Premises), (ii) terminate this Lease if the proposed transaction is an assignment or a sublease (whether by one sublease or a series of related or unrelated subleases) of all or substantially all of the Premises for all or substantially all of the remaining term of this Lease, or (iii) terminate this Lease with respect to the Leaseback Space (if the proposed transaction is a sublease of part of the Premises) for all or substantially all of the remaining term of this Lease. Said options may be exercised by Landlord, if at all, by notice to Tenant at any time within twenty (20) days after the Space Disposition Notice has been received by Landlord; and during such twenty (20) day period Tenant shall not assign this Lease nor sublet such space to any person.

__. **Termination of Lease as to All of Premises.** If Landlord exercises its option to terminate this Lease in the case where Tenant desires either to assign this Lease or sublet (whether by one sublease or a series of related or unrelated subleases) all or substantially all of the Premises for all or substantially all of the remaining term of this Lease, then this Lease shall end and expire on the date that such assignment or sublet was to be effective or commence, as the case may be, and the minimum rent and additional rent shall be paid and apportioned to such date.

__. **Termination of Lease as to Leaseback Space.** If Landlord exercises its option to terminate this Lease in part in any case where Tenant desires to sublet the Leaseback Space for all or substantially all of the remaining term of this Lease then (a) this Lease shall end and expire with respect to the Leaseback Space on the date that is sixty (60) days after the date that Landlord exercises its option to so terminate this Lease; and (b) from and after such date the minimum rent and additional rent shall be adjusted, based upon the proportion that the rentable area of the Premises remaining bears to the total rentable area of the Premises; and (c) Tenant shall pay to Landlord, within twenty (20) days of demand, the reasonable costs incurred by Landlord in physically separating the Leaseback Space from the balance of the Premises and in complying with any laws and requirements of any public authorities relating to such separation.

__. **Sublease of Leaseback Space by Landlord.** If Landlord exercises its option to sublet the Leaseback Space, such sublease to Landlord or its designee (as subtenant) shall be at the lower of (i) the rental rate per rentable square foot or minimum rent and additional rent then payable pursuant to this Lease or (ii) the rentals set forth in the proposed subleases, and shall be for the same term as that of the proposed subletting, and such sublease;

(a) shall be expressly subject to all of the covenants, agreements, terms, provisions and conditions of this Lease except such as are irrelevant or inapplicable, and except as otherwise expressly set forth to the contrary in this Section;

(b) shall give the subtenant the unqualified and unrestricted right, without Tenant's permission, to assign such sublease or any interest therein and/or to sublet the Leaseback Space and to make any and all changes, alterations, and improvements in the space covered by such sublease at no costs or liability to Tenant and if the proposed sublease will result in all or substantially all of the Premises being sublet for all or substantially all of the remaining term, grant Landlord or its designee the option to extend the term of such sublease for the balance of the term of this Lease less one (1) day;

(c) shall provide that any assignee or further subtenant, of Landlord or its designee, may, at the election of Landlord, be permitted to make alterations, decorations and installations in the Leaseback Space or any part thereof and shall also provide in substance that any such alterations, decorations and installations in the Leaseback Space therein made by any assignee or subtenant or Landlord or its designee may be removed, in whole or in part, by such assignee or subtenant, at its option, prior to or upon the expiration or other termination of such sublease provided that such assignee or subtenant, at its expense, shall repair any damage and injury to that portion of the Leaseback Space so sublet caused by such removal; and

(d) shall also provide that (i) the parties to such sublease expressly negate any intention that any estate created under such sublease be merged with any other estate held by either of said parties, (ii) any assignment or subletting by Landlord or its designee (as the subtenant) may be for any purpose or purposes that Landlord, in Landlord's uncontrolled discretion, shall deem suitable or appropriate, (iii) Tenant, at Tenant's expense, shall and will at all times provide and permit reasonable appropriate means of ingress to and egress from the Leaseback Space so sublet by Tenant to Landlord or its designee, (iv) provided that Tenant's customary business operations in the Premises are not materially adversely disturbed, Landlord may make such alterations as may be required or deemed necessary by Landlord to physically separate the Leaseback Space from the balance of the Premises and to comply with any laws and requirements of public authorities relating to such separation, and (v) that at the expiration of the term of such sublease, Tenant will accept the Leaseback Space in its then existing condition, provided that the subtenant performs all required repairs thereto as may be necessary to preserve the Leaseback Space in good order and condition to the satisfaction of Landlord.

__. **Landlord's Obligations Regarding Leaseback Space.**

(a) If Landlord exercises its option to sublet the Leaseback Space, Landlord shall indemnify and save Tenant harmless from all obligations under this Lease as to the Leaseback Space during the period of time it is so sublet to Landlord.

(b) Performance by Landlord, or its designee, under a sublease of the Leaseback Space shall be deemed performance by Tenant of any similar obligation under this Lease and any default under any such sublease shall not give rise to a default under a similar obligation contained in this Lease, nor shall Tenant be liable for any default under this Lease or deemed to be in default hereunder if such default is occasioned by or arises from any act or omission of any occupant holding under or pursuant to any such sublease.

(c) Tenant shall have no obligation, at the expiration or earlier termination of the term of this Lease, to remove any alteration, installation or improvement made in the Leaseback Space by Landlord.

__. **Standards for Landlord's Consent.** In the event Landlord does not exercise an option provided to it pursuant to Section __ and provided that Tenant is not in default in any of Tenant's obligations under this Lease beyond notice and the expiration of the applicable grace and cure period, Tenant may thereafter proceed to endeavor to assign the Lease or to sublease all or a portion of the Premises as indicated in the Space Disposition Notice and Landlord shall not unreasonably withhold or delay its consent to any such assignment or sublease, provided that:

(a) Tenant shall deliver to Landlord (i) a conformed or photostatic copy of the proposed assignment or sublease, which shall be reasonably acceptable to Landlord, together with an abstract of the material terms of the proposed sublease or assignment, the effective or commencement date of which shall be not less than thirty (30) nor more than one hundred eighty (180) days after the date that Landlord shall receive the Approval Request Notice (as hereinafter defined), (ii) the calculations of the anticipated sums, if any, to be payable to Landlord pursuant to the provisions of Section __, (iii) a statement in reasonable detail identifying the nature of the proposed assignee's or subtenant's business and proposed use, and (iv) current financial information with respect to the proposed assignee or subtenant, including without limitation, its most recent financial report (collectively, the "Approval Request Notice");

(b) In Landlord's reasonable judgment, the proposed assignee or subtenant is engaged in a business and the Premises, or the relevant part thereof, will be used in a manner which (i) is limited to the use expressly permitted under Sections __ and __ of this Lease; and (ii) is in keeping with the then standards of the Building;

(c) The proposed assignee or subtenant is a reputable person of good character and with sufficient financial worth considering the responsibility involved, and Landlord has been furnished with reasonable proof thereof;

(d) Neither (i) the proposed assignee or subtenant nor (ii) any person which, directly or indirectly, controls, is controlled by or is under common control with, the proposed assignee or subtenant, is then an occupant of any part of the Building, provided there is then comparable space in the Building available for leasing by Landlord;

(e) The proposed assignee or subtenant is not a person with whom Landlord is currently negotiating to lease space in the Building, provided there is then comparable space in the Building available for leasing by Landlord;

(f) The proposed sublease shall be in form reasonably satisfactory to Landlord and shall comply with the provisions of this Article;

(g) At any one time there shall not be more than two (2) subtenants (including Landlord or its designee) in the Premises;

(h) Tenant shall reimburse Landlord on demand for any reasonable costs actually incurred by Landlord in connection with said assignment or sublease, including, without limitation, the reasonable costs actually incurred in making investigations as to the acceptability of the proposed assignee or subtenant, and reasonable legal costs actually incurred in connection with the granting of any requested consent;

(i) Tenant shall not have (i) advertised the Premises for subletting or assignment without prior notice to Landlord, or (ii) advertised the same at a rental rate less than the minimum rent or additional rent at which Landlord is then offering to lease other space in the Building;

(j) The proposed subtenant or assignee shall not be entitled, directly or indirectly, to diplomatic or sovereign immunity and shall be subject to the service of process in and the jurisdiction of the courts of _____.

__. **Effect of Sublease.** Except for subletting by Tenant to Landlord or its designee pursuant to the provisions of this Section __, each subletting pursuant to this Section __ shall be subject to all of the covenants, agreements, terms, provisions and conditions contained in this Lease. Notwithstanding any such subletting to Landlord or any such subletting to any other subtenant and/or acceptance of rent or additional rent by Landlord from any subtenant, except as otherwise provided herein and in Section __, Tenant shall and will remain fully liable for the payment for the [minimum rent] and [additional rent] due and to become due hereunder and for the performance of all the covenants, agreements, terms, provisions and conditions contained in this Lease on the part of Tenant to be performed and all acts and omissions of any licensee or subtenant or anyone claiming under or through any subtenant which shall be in violation of any of the obligations of this Lease, and any such violation shall be deemed to be a violation by Tenant. In subletting to Landlord, any failure to pay sublet rent or any other default by Landlord or its subtenant shall not be a default by Tenant hereunder (and sublease rent reduces Tenant's obligation to pay rent whether or not sublease rent is paid). Tenant further agrees that notwithstanding any such subletting, no other and further subletting of the Premises by Tenant or any person claiming through or under Tenant (except as provided in Section __) shall or will be made except upon compliance with and subject to the provisions of this Section __. If Landlord shall, in accordance with the provisions of this Lease, decline to give its consent to any proposed assignment or sublease, or if Landlord shall exercise its option under Section __, Tenant shall indemnify, defend and hold harmless Landlord against and from any and all loss, liability, damages, costs and expenses (including reasonable counsel fees) resulting from any claims that

may be made against Landlord by the proposed assignee or subtenant or by any brokers or other persons claiming a commission or similar compensation in connection with the proposed assignment or sublease. Notwithstanding the foregoing, subject to the provisions of this Section __, Tenant, without Landlord's consent, may sublet all or any part of the Premises to any individual, person, corporation, partnership, joint venture, association, joint stock company, trust, unincorporated organization or any other form of business or legal association or entity who, or which, directly or indirectly, controls, is controlled by or is under common control with Tenant (collectively, an "Affiliate"), provided a duly executed copy of such sublease, in form acceptable to Landlord, is delivered to Landlord at least ten (10) days prior to its effective date.

__. **Requirement to Give-Notice Landlord.** In the event that (a) Landlord fails to exercise its options under Section __ and consents to a proposed assignment or sublease, and (b) Tenant fails to execute and deliver the assignment or sublease to which Landlord consented within one hundred twenty (120) days after the giving of such consent, then, Tenant shall again comply with all of the provisions and conditions of Section __ before assigning this Lease or subletting all or part of the Premises.

__. With respect to each and every sublease or subletting authorized by Landlord under the provisions of this Lease, it is further agreed:

(a) No subletting shall be for a term ending later than one day prior to the expiration date of this Lease;

(b) No sublease shall be valid, and no subtenant shall take possession of the sublet premises or any part thereof, until an executed counterpart of such sublease has been delivered to Landlord;

(c) Each sublease shall provide that it is subject and subordinate to this Lease and to the matters to which this Lease is or shall be subordinate, and that in the event of termination, re-entry or dispossess by Landlord under this Lease Landlord may, at its option, take over all of the right, title and interest of Tenant, as sublessor, under such sublease, and such subtenant shall, at Landlord's option, attorn to Landlord pursuant to the then executory provisions of such sublease, except that Landlord shall not (i) be liable for any previous act or omission of Tenant under such sublease, (ii) be subject to any offset, not expressly provided in such sublease, which thereto accrued to such subtenant against Tenant, or (iii) be bound by any previous modification of such sublease or by any previous prepayment of more than one month's rent.

__. **Consideration for Landlord's Consent.** If Landlord gives its consent to any assignment of this Lease or to any sublease, Tenant shall, in consideration therefor, pay to Landlord, as additional rent:

(a) in the case of an assignment of this Lease or an assignment by any subtenant of any sublease, an amount equal to one-half of all sums and other considerations paid to Tenant from the assignee for such assignment or paid to Tenant by any subtenant or other person claiming through or under Tenant for such assignment (including, but not limited

to sums paid for the sale of Tenant's or subtenant's fixtures, leasehold improvements, less, in case of a sale thereof, the then fair market value thereof determined on the basis of an independent appraisal made by Tenant at its expense). The sums payable to Landlord under this Section __ shall be paid to Landlord as and when paid by such assignee to Tenant; and

(b) in the case of a sublease, an amount equal to one-half of the rents and charges and other consideration payable under the sublease to Tenant by the subtenant or paid to Tenant by any such subtenant or other person claiming through or under Tenant in connection with such subletting which is in excess of the [minimum rent] and [additional rent] under Section __ accruing during the term of the sublease in respect of the subleased space (at the rate per square foot payable by Tenant hereunder or such subtenant) pursuant to the terms of this Lease (including, but not limited to, sums paid for the sale or rental of Tenant's fixtures, leasehold improvements, less, in the case of the sale thereof, the then fair market value thereof determined on the basis of an independent appraisal made by Tenant at its expense). The sums payable to Landlord under this Section __ shall be paid to Landlord as and when paid by such subtenant to Tenant.

(c) For the purposes of computing the sums payable by Tenant to Landlord under Sections __(a) and __(b) hereof, there shall be excluded from the consideration payable to Tenant by any assignee or subtenant any transfer taxes, rent concession, reasonable attorneys' fees, reasonable brokerage commissions, advertising costs and fix-up costs paid by Tenant with respect to such assignment or subletting, but only to the extent any such sums are properly allocable to the term of this Lease (in the case of any assignment), or the term of any sublease.

__. **Transactions Requiring Consent or Exempt from Consent Requirements.** If Tenant or any subtenant is a corporation, partnership, limited liability company or other entity, the provisions of Section __ shall apply to a transfer (by one or more transfers) of a majority of the stock partnership (other than a change in the partners of the Tenant resulting from the admission of a new partner, the termination of a membership of a partner by reason of death, resignation or other cause, or the incorporation of any partner of the Tenant, membership or other ownership interests of Tenant or such subtenant, as the case may be, as if such transfer of a majority of the stock, partnership, membership or other ownership interests of Tenant or such subtenant were an assignment of this Lease; but said provisions and the provisions of Sections __ and __ shall not apply to (i) transactions with a corporation, partnership, limited liability company or other entity into or with which Tenant or such subtenant is merged or consolidated, or (ii) to a transaction in which substantially all of Tenant's or such subtenant's assets, stock, partnership, membership or other ownership interests are sold or transferred, or (iii) to an assignment of this Lease arising out of a reorganization of Tenant from a corporation or partnership to another form of partnership or other entity (each of the foregoing, a "Reorganization"); provided that in any such event such Reorganization is for a good business purpose and not principally for the purpose of transferring the leasehold estate created by this Lease and, provided, further, (a) such surviving or acquiring corporation or entity (sometimes hereinafter referred to as a "Successor") shall be of a character, shall be engaged in a business and shall use the Premises in compliance with the terms and provisions of this Lease; (b) such

Successor has a net worth computed in accordance with generally accepted accounting principles at least equal to or greater than the net worth of Tenant or such Reorganization, (c) such Successor continues to operates substantially the same business as that operated by Tenant prior to such Reorganization, and (d) proof satisfactory to Landlord of such net worth shall have been delivered to Landlord at least ten (10) days prior to the effective date of any such transaction. In addition the provisions of Section __ shall not apply to an assignment of this Lease to or with an Affiliate, subject to the provisions of Section __.

__. **Written Consent Required.** Any assignment or transfer, whether made with Landlord's consent pursuant to Section __ or without Landlord's consent pursuant to Section __, shall be made only if, and shall not be effective until, the assignee shall execute, acknowledge and deliver to Landlord an agreement in form and substance reasonably satisfactory to Landlord whereby the assignee shall assume the obligations of this Lease on the part of Tenant to be performed or observed and whereby the assignee shall agree that the provisions in this Section __ shall, notwithstanding such assignment or transfer, continue to be binding upon it in respect of all future assignments and transfers. The original named Tenant covenants that, notwithstanding any assignment or transfer, whether or not in violation of the provisions of this Lease, and notwithstanding the acceptance of [minimum rent] and/or [additional rent] by Landlord from an assignee, transferee, or any other party, except as otherwise provided in Sections __, the original named Tenant shall remain fully liable for the payment of the [minimum rent] and [additional rent] and for the other obligations of this Lease on the part of Tenant to be performed or observed.

__. **Ongoing Liability of Tenant.** The joint and several liability of Tenant and any immediate or remote successor in interest of Tenant and the due performance of the obligations of this Lease on Tenant's part to be performed or observed shall not be discharged, released or impaired in any respect by any agreement or stipulation made by Landlord extending the time of, or modifying any of the obligations of, this Lease, or by any waiver or failure of Landlord to enforce any of the obligations of this Lease.

__. **Building Directory Listings Not Controlling.** The listing of any name other than that of Tenant, whether on the doors of the Premises, or the Building directory, if any, or otherwise, shall not operate to vest any right or interest in this Lease or in the Premises, nor shall it be deemed to be the consent of Landlord to any assignment or transfer of this Lease, to any sublease of the Premises, or to the use or occupancy thereof by others.

Appendix C
Sample Lease Assignments

SAMPLE 1 -- ASSIGNMENT AND ASSUMPTION OF LEASE
(For Use in Context of A Corporate Sale of Assets)

THIS ASSIGNMENT AND ASSUMPTION OF LEASE ("Assignment") is made this ___ day of _____, 20___ ("Effective Date"), by and between _____, a ____ ___ ("Assignor"), and _____, a _____ ("Assignee").

RECITALS:

A. Assignor is the lessee under that certain [Lease/Lease Agreement] with _____ _____ for premises located at _____ and dated _____ (the "Lease"); and

B. As of the date hereof, Assignor is selling to Assignee substantially all of the assets of the business that Assignor conducts pursuant to a [Purchase Agreement], dated as of _____, 2006 (the "Purchase Agreement"), by and among Assignor[, certain affiliates of Assignor] and Assignee; and

C. It is the desire of the parties hereto that Assignor assign all Assignor's right, title and interest in and to the Lease to Assignee and that Assignee accept such assignment and assume such Lease under the terms and conditions set forth.

Accordingly, for good and valuable consideration, the receipt and sufficiency of which is acknowledged by the parties, IT IS AGREED as follows:

1. **ASSIGNMENT**

Assignor hereby sells, transfers, sets over and assign unto Assignee, effective as of the Effective Date, all of Assignor's right, title and interest in and to the Lease.

2. **ACCEPTANCE AND ASSUMPTION**

Effective upon the Effective Date, Assignee, for itself and its successors and assigns, hereby accepts the foregoing assignment of the Lease and assumes and agrees to perform and be bound by all of the covenants, agreements, provisions, conditions and obligations of the tenant arising under the Lease on and after the Effective Date, including but not limited to, the obligation to pay Landlord for all adjustments of rent and other additional charges payable pursuant to the terms of the Lease. Nothing contained in the Assignment Agreement shall be deemed to amend, modify or alter in any way the terms, covenants and conditions set forth in the Lease.

3. [**PURCHASE/OTHER] AGREEMENT**[1]

The provisions of this Assignment are subject, in all respects, to the terms and conditions of the [Purchase] Agreement, including, without limitation, all of the covenants, representations and warranties contained therein, all of which shall survive the execution and delivery of this Assignment to the extent indicated in the [Purchase] Agreement. Nothing contained in this Assignment shall be deemed to modify, amend or supersede any of the terms or conditions of the [Purchase] Agreement. In the event of any conflict or inconsistency between the terms and conditions of this Assignment and the terms and conditions of the [Purchase] Agreement, the terms and conditions of the [Purchase] Agreement shall prevail.

4. **SUCCESSORS**

This Assignment and the rights and liabilities contained herein shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

5. COUNTERPARTS

This Assignment may be executed in counterparts and shall constitute an agreement binding on all parties notwithstanding that all parties are not signatories to the original or the same counterpart provided that all parties are furnished a copy or copies thereof reflecting the signature of all parties.

IN WITNESS WHEREOF, the parties have set their hands as of the date and year first above written.

Assignor: _____

By: _____

Name: _____

Title: _____

Assignee: _____

By: _____

Name: _____

Title: _____

[1] Note: If there is no separate agreement that sets out the other issues to be addressed in the assignment, then additional provisions would need to be added in place of this more general provision.

SAMPLE 2 -- ASSIGNMENT AND ASSUMPTION OF LEASE
(For Use in Separate Assignment of Lease to Third Party; Includes Consent by Landlord)[2]

THIS ASSIGNMENT AND ASSUMPTION OF LEASE ("Assignment") is made this ___ day of _____, 20___ ("Effective Date"), by and between _____, a _____ ("Assignor"), and _____, a _____ ("Assignee").

RECITALS:

A. On or about _____, 20__, Landlord, as landlord, and Assignor, as tenant, entered into a lease, dated said date, with respect to premises at _____ ("Lease");

B. Assignor desires to assign, and Assignee desires to acquire signor's interest in and to the Lease;

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

Accordingly, for good and valuable consideration, the receipt and sufficiency of which is acknowledged by the parties, IT IS AGREED as follows:

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

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

3. Assignee assumes the 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 the Lease shall be joint and several with Assignor.

4. Landlord hereby consents to the aforesaid assignment of the Lease by Assignor to Assignee upon the express condition that no further assignment of the Lease shall hereafter be made without prior written consent of the Landlord.

5. Assignor shall remain liable for the performance and observance of the covenants and conditions in the 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 liability under the Lease shall be primary, and Assignee shall hold Assignor harmless from all further liability thereunder.

[2] This form can be used where there is no separate agreement, such as a corporate asset purchase agreement, that contains material terms.

6. This Assignment 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 have set their hands as of the date and year first above written.

Assignor: _____

By: _____

Name: _____

Title: _____

Assignee: _____

By: _____

Name: _____

Title: _____

Landlord: _____

By: _____

Name: _____

Title: _____

Appendix D
Landlord Form Consents to Assignments or Subleases

SAMPLE 1
LANDLORD CONSENT TO
ASSIGNMENT AND ASSUMPTION OF LEASE

This LANDLORD CONSENT TO ASSIGNMENT AND ASSUMPTION OF LEASE (the "Consent") is entered into as of _____, 20__, by and among **[INSERT NAME OF LANDLORD]**, a _____ ("Landlord"), **[INSERT NAME OF CURRENT TENANT]**, a _____ ("Assignor") and **[INSERT NAME OF NEW TENANT]**, a _____ ("Assignee").

RECITALS:

A. Landlord, as landlord, and Assignor, as tenant, are parties to that certain [Lease/Office Lease/Lease Agreement] dated _____, 20__, which lease has been previously amended by that certain _____ dated _____, 20__ (collectively, the "Lease"). Pursuant to the Lease, Landlord has leased to Assignor space currently containing approximately _____ rentable square feet (the "Premises") described as Suite No. ___ on the ___ floor of the building commonly known as _____, _____, _____ (the "Building").

B. Assignor and Assignee intend to enter into that certain agreement ("Assignment Agreement") attached hereto as Exhibit A whereby Assignor shall assign all of its right, title and interest in and to the Lease to Assignee.

C. Assignor and Assignee intend the assignment and assumption provisions of this Consent to become effective [upon the date the Assignment Agreement is executed/as of _____, 20__] (the "Effective Date").

D. Assignor and Assignee have requested Landlord's consent to the Assignment Agreement and the transaction described therein.

E. Landlord has agreed to give such consent upon the terms and conditions contained in this Consent.

Accordingly, in consideration of the foregoing recitals which by this reference are incorporated herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Landlord, Assignor and Assignee agree and represent as follows:

1. Assignment Agreement. Assignor and Assignee hereby represent and warrant that: (a) a true, complete and correct copy of the proposed Assignment Agreement is attached hereto as Exhibit A; and (b) upon execution and delivery thereof the Assignment Agreement will fully assign all of Assignor's right, title and interest in the Lease to Assignee (the "Assignment").

2. Representations. Assignor hereby represents and warrants that Assignor (i) has full power and authority to assign its entire right, title and interest in the Lease to Assignee; (ii) has not transferred or conveyed its interest in the Lease to any person or entity, collaterally or otherwise; (iii) has full power and authority to enter into the Assignment Agreement and this Consent; and (iv) upon execution and delivery of the Assignment Agreement, will have assigned the entire Security Deposit, if any, as described in Section __ of the Lease, to Assignee on the Effective Date, and Assignor has full power and authority to do the same. Assignee hereby represents and warrants that Assignee has full power and authority to enter into the Assignment Agreement and this Consent.

3. No Release. Nothing contained in the Assignment Agreement or this Consent shall be construed as relieving or releasing the Assignor from any of its obligations under the Lease. In furtherance of the foregoing, it is expressly understood that Assignor shall remain liable for all such obligations notwithstanding the Assignment or any subsequent assignment, sublease or transfer of the interest of the tenant under the Lease. In no event shall the Assignment Agreement or this Consent be construed as granting or conferring upon the Assignor or the Assignee any greater rights than those contained in the Lease nor shall there be any diminution of the rights and privileges of the Landlord under the Lease, nor shall the Lease be deemed modified in any respect. It is specifically understood and agreed that Landlord is not a party to the Assignment Agreement and, notwithstanding anything to the contrary contained in the Assignment Agreement, is not bound by any terms, provisions, representations or warranties contained in the Assignment Agreement and is not obligated to Assignor or Assignee for any of the duties and obligations contained therein.

4. Review Fee. In consideration for the execution of this Consent by Landlord, Assignor hereby agrees to pay to Landlord a fee of $_____, which fee shall be due and payable on the Effective Date.

5. Landlord's Consent. Landlord hereby consents to the Assignment. This Consent shall not constitute a waiver of the obligation of the tenant under the Lease to obtain the Landlord's consent to any subsequent assignment, sublease or other transfer under the Lease, nor shall it constitute a waiver of any existing defaults under the Lease.

6. Notice Address. From and after the Effective Date, any notices any party may wish to serve on Assignee shall be given to Assignee at the address of the Premises and otherwise in accordance with the provisions for notices pursuant to the Lease. From and after the Effective Date, any notices any party may wish to serve on Assignor shall be given in the manner provided in the Lease for notices pursuant to the Lease, except that the following address shall be used: _____, _____, _____, _____, Attention: _____ _____.

7. Authority. Each signatory to this Consent represents hereby that he or she has the authority to execute and deliver the same on behalf of the party hereto for which such signatory is acting.

8. Counterparts. This Consent may be executed in counterparts and shall constitute an agreement binding on all parties notwithstanding that all parties are not signatories to the

original or the same counterpart provided that all parties are furnished a copy or copies thereof reflecting the signature of all parties.

IN WITNESS WHEREOF, Landlord, Assignor and Assignee have executed this Consent on the day and year first above written.

LANDLORD: _____

By: _____

Name: _____

Title: _____

ASSIGNOR: _____

By: _____

Name: _____

Title: _____

ASSIGNEE: _____

By: _____

Name: _____

Title: _____

SAMPLE 2 (SHORT FORM)

LANDLORD'S CONSENT TO SUBLEASE

The foregoing agreement is a sublease of a portion of the space covered by the [primary lease agreement], by and between **[Landlord's name here]** ("Landlord"), and **[Tenant's name here]** ("Tenant"), dated _____, ____ (hereinafter "Primary Lease") **[pursuant to that certain Sublease dated _____, ___/for a term expiring _____, ___]** ("Sublease"). Landlord consents to said Sublease as indicated by the signature below.

As conditions to the Landlord's consent to the sublease of the Demised Premises, it is understood and agreed as follows:

1. No Release. This Consent shall in no way release the Tenant, or any other person or entity claiming by, through or under Tenant including, without limitation, **[Subtenant's Name Here] "**Subtenant", from any of its covenants, agreements, liabilities and duties under the Lease (including, without limitation, all duties to cause and keep Landlord and others named or referred to in the Lease fully insured and indemnified with respect to any acts or omissions of Subtenant or its agents, employees or invitees, or other matters arising by reason of the Sublease or Subtenant's use or occupancy of the Demised Premises), as the same may be amended time to time, without respect to any provision to the contrary in the Sublease. In no event shall anything contained in this Consent be deemed a waiver of any of Landlord's rights under the Primary Lease.

2. No Approval of Sublease. This Consent shall does not constitute approval by Landlord of any of the provisions of the Sublease or agreement thereto or therewith, but only approval of the sublet of the Demised Premises to Subtenant.

3. Limited Consent. This Consent shall be deemed limited solely to the Sublease, and Landlord reserves the right to consent or to withhold consent with respect to any other matters under the Lease including, without limitation, any proposed alterations to the Demised Premises and to any further or additional sublets, assignments or other transfers of the Lease or any interest therein or thereto, including, without limitation, a sub-sublet or any assignment of the Sublease and any modifications to or extensions of the Sublease.

4. Sublease is Subordinate to Lease. This Sublease is, in all respects, subordinate and subject to the Lease, as the same may be amended. Furthermore, in case of any conflict between the provisions of this Consent or the Lease and the provisions of the Sublease, the provisions of this Consent or the Lease, as the case may be, shall prevail unaffected by the Sublease.

5. Termination of Lease. If at any time prior to the expiration or termination of the Sublease, the Lease shall expire or terminate for any reason, the Sublease shall simultaneously expire or terminate. **[However, Subtenant agrees, at the election and upon the written demand of and not otherwise, to attorn to Landlord for the remainder term Sublease, such Attornment to be upon all of the terms and conditions of the Lease except**

that rental shall be as set forth in the Sublease – Landlord should consider if this is appropriate, based on rent paid under Sublease.]

6. Consent Conditioned: Parties Bound. Tenant and Subtenant understand that Landlord has agreed to consent to the sublet of the Demised Premises to Subtenant conditioned upon Tenant's and Subtenant's express acknowledgement of and agreement to be bound by all of the terms and conditions hereof.

IN WITNESS WHEREOF, the parties hereto have duly executed and delivered this Consent as of _____, 20__.

LANDLORD: [NAME AND ADDRESS HERE]

By: _____

Name: _____

Title: _____

WE AGREE TO THE TERMS AND CONDITIONS OF THE ABOVE CONSENT:

TENANT: **[TENANT NAME HERE]**

By: _____

Name: _____

Title: _____

Date: _____

SUBTENANT: **[NAME HERE]**

By: _____

Name: _____

Title: _____

Date: _____

SAMPLE 3 (LONG FORM)
LANDLORD'S CONSENT TO SUBLEASE

[Landlord Name Here], having an office at **[Address Here]** (herein called "Landlord"), hereby consents to the subletting by **[Name Here]** having offices at **[Address Here]** (herein called "Tenant"), to **[Subtenant Name Here]** (herein called "Subtenant") of the space within the building commonly known as **[Property Address]** (such space hereinafter called the "Sublet Space" and such building hereinafter called the "Building") for a term expiring not later than **[Date Here]** (which such subletting is hereinafter referred to as the "Sublease") which premises are now leased and demised by Landlord to Tenant by that certain lease dated **[Date Here]** and further amended as of **[Amended Date Here]** (the "Lease"), as amended by such consent being subject to and upon the following terms and conditions, to each of which Tenant and Subtenant expressly agree:

1. **No Waiver or Modification of Lease.** Nothing herein contained shall be construed to modify, waive, impair or affect any of the covenants, agreements, terms, provisions or conditions contained in the Lease (except as may be herein expressly provided), or to waive any breach of Tenant in the due keeping, observance or performance thereof.

2. **No Release.** This Consent shall not be deemed a release of Tenant or any other person, including Subtenant, from any of the obligations under the Lease. Tenant shall be and remain liable and responsible for the due keeping, performance and observance throughout the term of the Lease, of all of the covenants, agreements, terms, provisions and conditions therein set forth on the part of Tenant to be kept, performed and observed and for the payment of the fixed rent, additional rent and all other sums now and/or hereafter becoming payable thereunder, expressly including as such additional rent, any and all charges (as well as Tenant charges) for any property, material, labor, utility or other services furnished or rendered by Landlord in or in connection with the Sublet Space, whether for, or at the request of, Tenant or Subtenant.

3. **Sublease Is Subordinate to Lease.** The Sublease shall be subject and subordinate at all times to the Lease, and to all of the covenants, agreements, terms, provisions and conditions of the Lease and of this Consent, and Subtenant shall not do, permit or suffer anything to be done in, or in connection with Subtenant's use or occupancy of, the Sublet Space which would violate any of said covenants, agreements, terms, provisions and conditions. In the event of termination, re-entry or dispossession by Landlord under the Lease, Landlord may at its option, take over all of the right, title and interest of Tenant as Tenant under the Sublease and in any such event Subtenant shall, at Landlord's option, attorn to Landlord pursuant to the then executory provisions of the Sublease, except that Landlord shall not (a) be liable for any previous act or omission of Tenant under the Sublease, (b) be subject to any offset which theretofore accrued to Subtenant against Tenant or (c) be bound by any previous modification of the Sublease to which Landlord has not consented or by any previous pre-payment of more than one month's fixed rent or additional rent.

4. **Consent Limited to This Sublease.** This Consent shall not be construed as consent by Landlord, to, or as permitting, any other or further subletting by either Tenant or Subtenant or any assignment of the Lease or Sublease.

5. **No Change In Use.** The Sublet Space shall (subject to all of the covenants, agreements, terms, provisions and condition of the Lease) be used solely for the use permitted under the Lease.

6. **Termination of Lease.** Upon the expiration or any earlier termination of the term of the Lease with respect to the Sublet Space or in case of the surrender of the Lease by Tenant to Landlord, the Sublease and the term and estate thereby granted shall terminate as of the effective date of such expiration, termination or surrender, and Subtenant shall vacate the Sublet Space on such date. If Subtenant does not vacate the entire Sublet Space on or before such date, then, without limiting Landlord's rights and remedies as against Tenant or Subtenant on account of such failure to vacate as provided in **[Article/Section ___]** of the Lease, such failure shall be deemed a holding over by Tenant in the entire premises leased to Tenant under the Lease, and Tenant shall indemnify, defend and hold harmless Landlord from and against all claims, damages, losses, costs and expenses (including, without limitation, reasonable attorneys fees and expenses) resulting from any such holding over. The foregoing provisions of this paragraph 6 shall not waive or prejudice any rights or remedies that Subtenant or Tenant may have against the other, pursuant to the Sublease or otherwise, by reason of any such expiration, termination or surrender of the Lease or holdover by Tenant.

7. **Sublease Terms.** A true and complete fully executed counterpart of the Sublease has been delivered to Landlord prior to the effective date of this Consent and is also attached hereto as Exhibit A; it being understood that Landlord shall not be deemed to be a party to the Sublease nor bound by any of the covenants. agreements, terns, provisions or conditions thereof and that neither the execution and delivery of this Consent nor the receipt by Landlord of an executed counterpart of the Sublease shall be deemed to change any provision of this Consent or to be a consent to, or an approval by Landlord of, any covenant, agreement, term, provision or condition contained in the Sublease. The Sublease shall not be modified or amended without the prior written consent of Landlord. Subtenant covenants and agrees not to sub-sublease all or any part of the Sublet Space.

8. **Insurance.** Subtenant agrees to maintain the same insurance required to be carried by the Tenant under the Lease, naming Landlord and Landlord's designees as set forth on Exhibit B attached hereto as additional named insureds under Subtenant's policies of insurance and Subtenant further agrees to waive subrogation in favor of Landlord to the same extent required of Tenant under said Lease. Subtenant further agrees to provide to Landlord a certificate of insurance containing a separately signed endorsement naming Landlord and Landlord's designees as additional named insureds as set forth on said Exhibit B one (1) day prior to the date on which Subtenant occupies all or any part of the Sublet Space for any purpose whatsoever or do any work therein.

9. **No Recordation.** Neither the Sublease, this Consent to Sublease, or any other document setting forth any of the information contained therein shall be recorded.

10. **Indemnification.** Wherever in the Lease or herein Tenant has agreed to indemnify, defend, save and hold Landlord harmless from and against any action, claim or proceeding brought against Landlord by third parties, Subtenant hereby agrees jointly and severally with Tenant to so indemnify, defend, save and hold Landlord harmless with respect to

any such claim which arises out of or in connection with Subtenant's use and occupancy of the Sublet Space. The foregoing provisions of this paragraph 10 are without prejudice to the rights of Subtenant and Tenant against each other under the provisions of the Sublease.

11. **No Brokers' Commissions Due By Landlord.** Tenant and Subtenant agree that Landlord is not responsible for the payment of any commissions or fees in connection with this transaction and they each jointly and severally agree to indemnify and hold Landlord harmless from and against any claims, liability, losses or expenses, including reasonable attorneys' fees, incurred by Landlord in connection with any claims for a commission by any broker or agent in connection with this transaction.

12. **No Work Allowed.** Subtenant shall not make any installations, alterations or improvements (collectively the "Improvements") in the Sublease Premises for its occupancy without obtaining Landlord's prior written approval of Subtenant's final plans and specifications for the Improvements, and the review and approval of the same by Landlord's designated consultants whose fees shall be paid by Subtenant in advance. Subtenant has been advised and hereby confirms that there is no additional capacity of electricity available in the Building to be furnished to the Sublet Space and that there is no additional condenser water available in the Building to be furnished to the Sublet Space.

13. **Subtenant's Cooperation with Landlord.** As a material inducement for Landlord to enter into this Consent, during the term of the Sublease, Tenant and Subtenant agrees to cooperate with Landlord and Landlord's agents and designated parties in connection with exhibiting the Sublease Premises, or any part thereof, to prospective tenants at any time, on at least one (1) hour notice, provided the same shall be done in a manner that will not unreasonably interfere with the normal conduct of Subtenant's business.

14. **Subtenant Employee Identification Cards.** Subtenant agrees to obtain identification cards to be issued by Landlord for each employee, who may also be required to sign in and sign out. Subtenant shall pay in advance the Landlord's Building standard charge for such cards.

15. **Subtenant to Comply with Landlord's Rules and Regulations.** Subtenant at all times during the term of the Sublease, shall comply with the Building's Rules and Regulations, as the same may be amended from time to time, as provided in the Lease.

IN WITNESS WHEREOF, the parties have caused this Consent to be duly executed as of **[Date]**.

Landlord: **[Landlord's Name Here]**
By: _____
[Name]
[Title]

Tenant: **[Tenant's Name Here]**
By: _____
[Name]
[Title]

Subtenant:

[Subtenant's Name Here]
By: _____
[Name]
[Title]

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