First Supplement to Memorandum 88-64

Subject: Study H-111 - Commercial Lease Law (Assignment and Sublease--landlord remedies)

Suppose there is a valid provision in a lease restricting transfer by the tenant, but the tenant makes a transfer in violation of the restriction. What remedies does the landlord have? This is the subject of our consultant Professor Coskran's study "Lessor Remedies for Breach of Assignment and Sublease Restrictions", attached to this memorandum.

Professor Coskran's study finds that violation of a transfer restriction by the tenant enables the landlord either to terminate the lease and recover possession of the property, or to waive the termination remedy and allow the transfer to remain in effect.

If the landlord terminates the lease, the landlord is also entitled to any damages caused by the tenant's breach of the lease, including any loss measured by the difference between the contract rent and what the landlord is able to get on reletting the property.

But if the landlord waives the termination remedy and allows the lease to remain in effect, whether any other remedies are available to the landlord is not clear. May the landlord simply avoid the transfer without terminating the lease (i.e., may the landlord treat the transfer restriction as a "disabling" restraint rather than as a "forfeiture" restraint on alienation)? May the landlord recover damages caused by violation of the transfer restriction, while still allowing the transfer to stand? If so, is the transferee liable for damages?

Professor Coskran suggests that these matters should be clarified by statute. There are competing policy considerations on each issue, and the arguments are outlined by Professor Coskran in the study. We

will need to review these matters with Professor Coskran with some care before making any basic decisions.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

LESSOR REMEDIES FOR BREACH OF ASSIGNMENT AND SUBLEASE RESTRICTIONS*

by

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NOTE: The views expressed in this study are those of the author and should not be taken to reflect any opinion of the Commission or its members or staff.

LESSOR REMEDIES FOR BREACH OF ASSIGNMENT & SUBLEASE RESTRICTIONS

By William G. Coskran

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I. SCOPE OF STUDY.

This study is related to, and supplements, the principal study of restrictions on commercial lease assignments and subleases entitled "Restrictions on Lease Transfers: Validity and Related Remedies Issues" (#H-111).[1] That study deals with the validity of, and consent standard applied to, various types of leasehold transfer restrictions. The principal study also deals with the relationship between transfer restrictions and the "lock-in" remedy[2] which allows the lessor to continue enforcement of the lease after the tenant's breach and abandonment.

This study examines the remedies available to the lessor when a tenant wrongfully violates a transfer restriction in a commercial lease of real property.

Assume that a lessor and tenant enter into a commercial lease of real property. A clause in the lease restricts the tenant's ability to transfer to a third party without the lessor's consent.[3] Later, the tenant transfers or proposes to transfer all or part of the leasehold to a third party. The transfer will be in the form of either an assignment to an assignee, or a sublease to a subtenant. The lessor properly refuses consent to a proposed assignment or sublease. The propriety of the refusal assumes that the restriction clause is valid and that the lessor complies with the applicable consent

standard.[4] The tenant and the third party complete the assignment or sublease despite the lessor's objections (or it has been done without requesting the lessor's consent).

What are the lessor's remedies in California? Should the remedies be clarified or modified?

The same issues are involved when the transfer restriction is contained in a sublease from the tenant/sublessor to a subtenant, and the tenant/sublessor seeks remedies against the subtenant.

II. CALIFORNIA CASES.

There is a pertinent series of California cases extending back to the 1800s. The cases are consistent in their description of the effects of an unconsented transfer. Here are brief extracts from those cases.

In the 1893 Randol case, the California Supreme Court stated that "an assignment in violation of the covenant was not absolutely void" and that the "lessor did not have the option of declaring the assignment void", but the lessor could elect "to avoid the lease and end the term."[5] The case involved a lessor's action against the sureties on a rent bond. The sureties defended that rent had been properly tendered by an assignee and thus there was no default. The lessor argued that the assignment was without his consent, in violation of the lease, and thus a tender by the assignee was improper. Also, he seemed to argue that the assignee could have no leasehold rights except by a lease violation, and thus the sureties could not rely on the assignee's offer of performance. However, since the lessor did not terminate the lease, the assignee was the legal owner of the leasehold and the proper person to pay the rent.[6]

In the 1897 Garcia case, the California Supreme Court stated: "It seems to be the law that...the lessor has only the option to forfeit the lease for the breach of the condition, and

that the assignment is not void but passes the term, and the only remedy is for breach of the covenant..."[7] This was a claim and delivery action for goatskins brought by an assignee of a lease of Guadalupe island. The suit was against parties who had taken the skins from wild goats on the island. The defendants unsuccessfully argued that since the assignment had been without the lessor's consent, the assignee was not entitled to possession of the island at the time the skins were taken.

In the 1909 Potts Drug Co. case, the California Supreme Court stated that an assignment is not void if the lessor's consent has not been obtained.[8] The leased premises were totally destroyed by fire after the assignment but before the assignees took possession. The tenant sued the assignee for the balance due on the sale of the leasehold estate. The assignee unsuccessfully argued that the leasehold interest had not passed at the time of the fire, due to the lack of consent.

In the 1928 Buchanan case, the California Supreme Court stated that when there is a breach of the covenant not to assign without consent, "the lessor has only the option to forfeit the lease for such breach; the assignment is not void, but voidable only at the option of the lessor, which option he must exercise according to law (citations omitted)."[9] The lessor brought an unlawful detainer action against the defendants, claiming that they owed rent under a month to month tenancy after a lease

surrender. The defendants successfully asserted that they had the status of assignees of the lease and were therefore entitled to credit for prepaid rent under the lease.

The court in Buchanan referred to the 1927 Miller case by the California Court of Appeal.[10] Miller involved an unconsented transfer. The third party transferee ignored the lessor's demand that he vacate. The lessor accepted rent from the transferee, but attempted to reserve his rights. He put a statement on rent receipts stating that the rent was received without prejudice to the lessor's rights under the lease. The court in Buchanan quoted with approval from Miller: "'This was a clear attempt to eat the cake and still keep it. His actions belie his words. Waiver is a question of intention (citations omitted). For the lessors month after month to accept rents specified in the lease, and at the same time declare that there was a forfeiture, results in an irreconcilable inconsistency...If an unauthorized assignment had been made the lessors had the right to declare the term at an end, or they could have waived the breach and let the lease continue. Nowhere within that agreement nor in the law is there a stipulation or provision that they might do both.'"[11]

In the 1932 Chapman case, the California Supreme Court stated: "The assignment of a lease in violation of a covenant against assignment without the consent of the lessor is nevertheless a binding assignment which passes the leasehold estate...Such an assignment in violation of the covenant is,

however, subject to the option in the lessor to forfeit the lease. The only remedy for the breach of such a covenant would be the exercise by the lessor of his option to forfeit the lease."[12] The tenant, without lessor's consent, granted a lender a leasehold mortgage and it was recorded. Later, the tenant assigned the lease to an assignee with the lessor's consent. The assignee, with knowledge of the leasehold mortgage, exercised an option to purchase contained in the lease. The lessor conveyed to the assignee (and there were subsequent reconveyances). The mortgagee brought an action to establish that the lien of its mortgage still attached to the title when the assignee exercised the option to purchase. One of the arguments raised against the mortgagee was that the lien could not attach because the mortgage violated the clause prohibiting assignment without the lessor's consent. The court held that the mortgage did not violate this clause, and even if it did, it was valid in the absence of a lease forfeiture by the lessor.

In the 1944 Klopstock case, the California Supreme Court stated that a series of assignments without the lessor's consent "were merely voidable, not void; there was no ipso facto termination of the lease by reason of the lessee's failure to obtain the lessor's written consent to assignment. Since the lessor did not elect to exercise its option to avoid the original assignment in the manner prescribed by law, its notice...that it did not recognize the validity of the assignment gave no legal

force to its demand therein that such assignee remove all property owned by it from the leased premises...While the course of action pursued by the lessor...was sufficient to apprise the assignee that it might be dispossessed...the lessor's option to void the objectionable transfer depended upon its declaration of a forfeiture upon proper notice as provided by law. But the lessor did not take advantage of the exclusive remedy available to it for termination of the lease, and accordingly (the subsequent assignee) succeeded to all the rights of the lessee."[13] This case involved the assignee's successful claim of entitlement to compensation in an eminent domain action.

The court in Klopstock referred to the 1942 Northwestern Pacific case by the California Court of Appeal, involving the same lease and the same initial unconsented assignment.[14] Northwestern Pacific involved an unlawful detainer action by the lessor. The trial court denied possession to the lessor, but ordered the defendant assignee to pay the reasonable rental value of the premises, which was in excess of the rent provided in the lease. This award of rental value was reversed on appeal. Since the lease and the assignment remained in effect, the agreed rent still governed. The lessor refused consent to the assignment, refused tender of rent, and notified the assignee that it refused to recognize the validity of the assignment. The Klopstock court quotes with approval from Northwestern Pacific: "'If the lessor desired to stand upon the covenant against assignment, he could

have given notice of his election to declare a forfeiture of the lease and could have sued for breach of the covenant. He could also have had his remedy in unlawful detainer if possession had been thereafter withheld following proper notice. But we find no authority indicating that the lessor had the option of merely giving notice of the invalidity of the assignment without declaring a forfeiture,...'"[15]

In the 1964 Sexton case, the California Court of Appeal stated: "A lease is not terminated ipso facto upon its transfer in violation of a provision therein declaring its nontransferability...The breach of a provision against assignment confers upon the lessor, at his election, the right to effect a forfeiture of the lease in the manner authorized by law...If the lessor does not elect to declare a forfeiture because of such a breach, the assignment in question is valid. If he does elect to declare a forfeiture he must give notice of his intention in the premises."[16] The lessor brought an action seeking to have a lease declared terminated by reason of violation of a transfer restriction, among other reasons. There was no evidence that the lessor had attempted to declare a forfeiture. Even if the lessor had attempted to do so, the court held that a transfer of the tenant corporation's stock did not violate the transfer restriction.

In the 1965 Weisman case, the California Court of Appeal stated: "An assignment in violation of the covenant is not void and does not void the lease but passes the term, and the only

remedy for such a violation is an action for breach of covenant (citation omitted). Such a restriction against assignment is the personal covenant for the benefit of the lessor unless he elects to take advantage of the breach and thus the assignment remains valid until he does so." The court also said that the lessor "had the option to decide whether or not he wanted to declare a forfeiture or proceed with the lease."[17] The tenant formed a corporation, assigned the lease to the corporation in exchange for a portion of the stock. Later, the tenant and other stockholders sold their stock to defendant. A short time later, the restaurant being operated on the premises closed and the corporation was adjudged bankrupt. The tenant sued for the balance due on the stock sale. The defendant unsuccessfully claimed that there was a failure of consideration because the lessor had not consented to the transaction.

The Weisman court also commented on waiver by the lessor's conduct. "There is no waiver on the part of the lessor due to an acceptance of rent without actual knowledge of the assignment or sublease...Such knowledge must be actual, not constructive."[18]

In the 1966 Karbelnig case, the California Court of Appeal dealt with an issue of waiver and stated: "If the lessor accepts payments of rent from the assignee, even under a stipulation reserving the right to declare a forfeiture, the right is waived."[19] However, the court held that an express non-waiver clause allows the lessor to accept rent while deciding whether to forfeit the lease.

III. LEASE TERMINATION REMEDY.

The basic principles developed in the California cases mentioned above can be summarized as follows:[20]

1. A prohibited transfer is voidable, not void. Thus, the interest passes from the tenant to the third party, subject to the right of the lessor to take remedial action.

2. A prohibited transfer does not automatically terminate the lease.

3. The lessor can elect to terminate the lease and recover possession of the property.

   Note that a prohibited assignment or sublease provides statutory grounds for an unlawful detainer action by the lessor to terminate the lease and recover possession from the tenant, an assignee, or a subtenant.[21]

4. If the lessor fails to terminate the lease, the transfer remains effective.

5. A lessor may waive the right to terminate the lease by conduct, for example by accepting rent with actual knowledge of the transfer.[22] A "non-waiver" clause may protect the lessor from this type of implied waiver.[23]

The major California cases developing these principles involve assignments, not subleases. There are, however, cases which indicate that a sublease will be treated in the same manner.[24] There does not appear to be any substantial reason why the same rules concerning the validity of the transfer, the lessor's election to forfeit the lease or let the transfer stand, and waiver by conduct should not also apply to a sublease. Although there are significant differences between an assignment and a sublease,[25] these differences do not affect the basic alternatives of forfeiting the lease or leaving the lease and the transfer in effect. This similarity in treatment for remedy purposes is consistent with the similarity in treatment for purposes of determining the validity and consent standard of the transfer restriction.[26]

However, if the lessor sues the third party for breaches of the lease covenants, the differences between an assignment and a sublease can have an effect. There is no privity of contract or estate between the lessor and a subtenant (absent an assumption by the subtenant), but there is privity of estate between the lessor and an assignee (and also privity of contract if there is an assumption by the assignee.)[27] This is discussed below in the section on damage remedies.

VI. DAMAGE REMEDIES.

A. In Connection With Lease Termination.

When the lessor terminates the lease because of the tenant's breach, Cal. Civ. Code Section 1951.2 provides that the lessor may recover the worth at the time of award of the following items.

1. Rent Before Termination: "unpaid rent which had been earned at the time of termination;"[28]
2. Deficiency Damages Between Termination and Award: "the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount of such rental loss that the lessee proves could have been reasonably avoided;"[29]
3. Deficiency Damages After Award: "the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of such rental loss that the lessee proves could have been reasonably avoided;"[30]
4. Miscellaneous Damages: "Any other amount necessary to compensate the lessor for all the detriment proximately caused by the lessee's failure to perform his

> obligations under the lease or which in the ordinary course of things would be likely to result therefrom."[31]

I have not found any case directly applying section 1951.2 in connection with a lease termination following a wrongful transfer. However, there is no apparent reason why it would not apply. Lease termination and damages are consistent remedies.[32]

If the lessor brings an unlawful detainer action to terminate the lease and recover possession, an additional action to recover damages may be necessary. The items of money recovery allowed in an unlawful detainer action are quite limited in order to preserve its summary nature.[33] The lessor can bring a separate action for damages not recoverable in the unlawful detainer action.[34]

B. Absent Lease Termination.

Suppose that the lessor elects not to terminate the lease, or engages in conduct which results in a waiver of the right to terminate the lease. The wrongful assignment or sublease remains in effect. Is the lessor entitled to recover damages, if any, caused by the assignment or sublease? These damages might result from such facts as a loss of percentage rentals, or the transferee's change in use causing increased insurance premiums,[35] fire damage,[36] or hazardous substance liability.[37] There might be a violation of a use restriction clause as well as a transfer restriction clause. Generally, a lessor is entitled to leave a lease in effect and recover damages for breach of a covenant.[38] There seems to be no reason to make a distinction when a transfer restriction clause is involved.

The California cases discussed above state that the assignment or sublease is valid unless the lessor elects to terminate the lease. Language in some of the cases implies that the only way for the lessor to enforce a transfer restriction clause is to terminate the lease. For example, the court in the Buchanan case stated that when the transfer restriction covenant is breached, "the lessor has only the option to forfeit the lease for such breach..."[39] In the Chapman case, the court stated: "The only remedy for the breach of such a covenant (a covenant not to

assign without the lessor's consent) would be the exercise by the lessor of his option to forfeit the lease."[40] However, the cases did not involve claims for damages without lease termination. The use of the terms "only option" or "only remedy" were used in connection with the question whether the unconsented transfer could be treated as void absent a lease termination. Thus, the damage issue was not directly addressed.

A treatise on California law supports the right to a damage action for breach of covenant even in the absence of a lease forfeiture. It states: "If the lessor elects not to declare a forfeiture, his only remedy is for breach of covenant against the lessee, which does not affect the validity of the assignment."[41] Unfortunately, the case cited as authority did not involve a lessor's action for damages for breach of the transfer restriction covenant.[42] The treatise also states: "The breach of a covenant against assignment also gives the lessor the option to sue for damages for breach, or in unlawful detainer if possession is withheld after notice to vacate."[43] Again, the case cited as authority did not involve a lessor's action for damages for breach of the transfer restriction.[44]

I have not found any California case expressly allowing or expressly denying damages to the lessor who fails to terminate the lease. There is a case which denied damages based on reasonable rental value. The lessor sued for possession and reasonable rental value damages in excess of the agreed rent.

Since the lease was not terminated, the lessor was not entitled to possession, and could not collect rental value in excess of the rent provided in the lease.[45] This case did not involve an action for damages caused by breach of the transfer restriction covenant itself. Distinguish an action for damages based on the transferee's reduced production of percentage rentals. Such an action would directly involve the transfer restriction breach.

There is support for damages without termination in out of state cases and texts.[46]

A clause restricting transfer of the leasehold is typically worded as a covenant by the tenant. A lease is considered to be a contract as well as a conveyance in California.[47] The Civil Code provides for damages for breach of a contract covenant as follows: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."[48]

It seems that the lessor should be entitled to recover damages caused by a breach of the covenant restricting transfer, unless the lessor has waived the breach (or has engaged in conduct which estops the lessor from asserting a breach.[49])

"Waiver is the intentional relinquishment of a known right after knowledge of the facts."[50] If we view the lessor's failure to terminate the lease as a waiver of the breach, the lessor

would not be able to enforce a damage remedy. However, if we view it as a waiver of a particular remedy for the breach, the lessor should be able to enforce a different remedy--the right to damages. Termination of the lease and collection of damages are two distinct remedies. The lessor might waive both remedies. However, waiver of one does not necessarily mandate the loss of the other.

Is there a compelling reason to treat the lessor's waiver of the right to terminate the lease as a mandatory waiver of the right to damages, regardless of the lessor's contrary intent? This result would have the benefit of putting an end to the transfer dispute. On the other hand, the lessor would be forced to choose between the harsh remedy of forfeiture or no remedy at all. The lessor may be willing to forego termination of the lease if he remains protected by the right to recover damages for the breach.

A decision to allow the lessor to recover damages even if the lessor elects not to terminate will not eliminate factual ambiguities. Absent express language, it may be unclear from the facts whether the lessor intends to waive one or both of the remedies. For example, the lessor's acceptance of rent with knowledge of the transfer is a waiver of the right to terminate the lease (absent a non-waiver clause).[51] Will this also result in an implied waiver of the right to damages? Absent other facts, the acceptance of rent should not be treated as a waiver of the

right to damages. Since the lease is not terminated, the lessor is entitled to the rent. He should not have to forgo that entitlement in order to preserve his remedy for damages.

It is curious that there are no California cases expressly dealing with these damage issues. Perhaps this is the "sleeping dog" problem that seldom arises. Perhaps the prospect of serious damages from the transfer motivates lessors to elect to terminate. If that prospect is not present, perhaps lessors just ignore the situation rather than end up with an expensive quest for nominal damages.[52]

C. Liability of Third Party.

The tenant made the transfer restriction covenant to the lessor, and is liable for damages resulting from the breach. Also, the tenant remains liable for other breaches of the lease which occur after either an assignment or a sublease. This is based on privity of contract between the lessor and tenant which continues absent a release of the tenant.[53] Is the third party also liable to the lessor for breach of the transfer restriction covenant?

Generally, absent an assumption agreement, a subtenant is not directly liable to the lessor for breaches of the prime lease. There is no privity of estate or contract between them.[54] However, a subtenant can be held liable for actual or punitive damages for wrongfully withholding possession.[55]

An assignee is directly liable to the lessor for breaches of the lease occurring after the assignment. There is privity of estate between the lessor and assignee during the time the assignee holds the leasehold estate.[56] However, unless there is an assumption agreement, the assignee is not liable for a breach which occurred before he acquired the leasehold.[57] The act of transfer, by which the assignee acquired the leasehold, constitutes the breach. This is true although the damages may be suffered later. It is not clear whether the breach will be

treated as occurring before or after the assignee has acquired the leasehold. It can be argued that it is the tenant's wrongful act of transferring which constitutes the breach, and the assignee should not be liable. On the other hand, it can be argued that a transfer is necessary for a breach to occur, and the assignee must acquire the leasehold before there is a transfer. Thus, it is the assignee's acquisition of the leasehold which completes the breach and the tenant and assignee are co-actors in the breach.

A related problem occurs if the assignee wrongfully reassigns in violation of a lease covenant.[58] The assignee is not liable for breaches occurring after he has parted with the leasehold estate, absent an assumption.[59] A technical argument could be made that the assignee has parted with the estate before the transfer is perfected. However, it does not seem realistic to adopt a theory which would absolve the assignee from liability for a wrongful transfer where he is the active transferor.

Even though the third party may avoid liability to the lessor for damages, the third party is still at risk of lease termination by the lessor.[60]

V. THE MISSING REMEDY--"DISABLING" RESTRAINT

The California cases discussed in Section II above make it clear that the lessor cannot on the one hand keep the lease in effect, and on the other hand treat the unconsented transfer as void. It is unlikely that a lessor would draft this as his exclusive remedy even if it were available. However, it would be a desirable alternative remedy for the lessor. It would allow the lessor to preserve favorable lease terms while blocking the disapproved transfer.

A remedy which treats an unconsented transfer as void is called a "disabling" restraint on alienation.[61] Also, the use of an injunction to enforce a promise not to transfer without the lessor's consent has a similar disabling effect.[62] The disabling restriction has the obvious result of blocking the transfer. It may have less obvious results which can trap the unwary. For example, the third party in unconsented possession may not have a sufficient insurable interest to recover on his insurance policy for fire damage.[63]

A remedy which treats an unconsented transfer as voidable, and effective unless the lessor elects to terminate the lease, is called a "forfeiture" restraint on alienation.[64] California treats the restraint as a forfeiture restraint, not as a disabling restraint. This is consistent with the traditional view

that a "disabling restraint is more objectionable from a public policy standpoint because it imposes a complete freeze on the movement of ownership."[65]

If the jurisdiction allows disabling restraints, it is technically possible to draft and enforce a transfer restriction in a manner which would allow the lessor to block the transfer without terminating the lease.[66] It is a policy decision whether or not a disabling restraint should be allowed as an alternate remedy.

Restraints on alienation, although permitted, are a disliked interference with commerce.[67] The lessor can terminate the lease and recover damages, or leave the lease in effect and recover damages.[68] It can be argued that the lessor is adequately protected without providing for a freeze on the movement of leasehold ownership. On the other hand, it might be argued that a historic perception of evil resulting from a disabling restraint does not justify denial of a logical remedy to block a prohibited transfer. The remedy allows the lessor to retain the benefits of the existing lease while avoiding an unconsented transfer.

In addition to a policy of dislike for restraints on alienation, it seems that a basic policy of contract remedies is involved in the decision. The present California approach is consistent with the view that a contracting party has the choice between performance or payment of compensation for failure to perform. This view was concisely stated in Justice Bird's concurring and dissenting opinion in the Seaman's case:

> Indeed, the assumption that parties may breach at will, risking only contract damages, is one of the cornerstones of contract law. '(I)t is not the policy of the law to compel adherence to contracts, but only to require each party to choose between performing in accordance with the contract and compensating the other party for injury resulting from a failure to perform. This view contains an important economic insight. In many cases it is uneconomical to induce completion of the contract after it has been breached.' (Posner, Economic Analysis of Law (1972) p. 55.) In most commercial contracts, recognition of this economic reality leads the parties to accept the possibility of breach, particularly since their right to recover contract damages provides adequate protection.[69]

It seems that forfeiture and damages are generally adequate to protect the lessor, but that they may be inadequate in some situations. Perhaps a reasonable compromise would treat the transfer as voidable, but allow the lessor to nullify the transfer while keeping the lease in effect if the lessor can show the inadequacy of the other remedies.

If the California law is changed to allow the lessor to dispossess the third party without terminating the lease, certain other statutory clarifications will be required. The lessor will have to be given the right to bring an unlawful detainer action

to dispossess the third party while recognizing the paramount right to possession in the tenant.[70] Also, the relationship to the basic remedies code provisions will have to be clarified by providing that the third party can be dispossessed without terminating the tenant's right to possession.[71] The basic remedies codes are discussed in Section VI below.

VI. DILEMMA OF THE ILLUSORY "LOCK-IN" REMEDY.

California has adopted a comprehensive set of remedies for tenant breaches.[72] The basic plan of the legislation, contained in Cal. Civ. Code Section 1951.2, is to have an immediate termination of the lease and an immediate cause of action for damages. Under this basic plan, the lease is terminated in either of the following situations: 1. the tenant breaches the lease and abandons the premises; or, 2. the tenant breaches the lease and the lessor terminates the tenant's right to possession.[73]

The tenant can unilaterally terminate the lease by committing a breach and abandoning the property. The lessor has given the opportunity to prevent the tenant from triggering termination. The lessor can use the lock-in remedy contained in Cal. Civ. Code Section 1951.4. If the lease specifically provides for the remedy, and the section is complied with, the lessor can lock-in the lease. This means that the lessor can keep the lease in effect and enforce its provisions. Relief is provided to the locked-in tenant by requiring that the lease permit the tenant to assign or sublet (or both), subject only to reasonable restrictions.

Consider the following sequence:

1. The tenant breaches a lease covenant (other than the transfer restriction) and abandons the premises.

2. The lessor elects to keep the lease in effect and exercises the lock in remedy under Section 1951.4.

3. The tenant makes an unconsented transfer over the reasonable objections of the lessor.

The lessor can either terminate the lease and get rid of the undesirable transferee, or leave the lease and the transfer in effect. The lessor cannot keep the lease in effect and block the reasonably objectionable transfer. The lessor, faced with the unreasonable transfer in violation of the lease, must either give up the lock-in remedy of Section 1951.4 or permit the transfer. The only way he can get the transferee out of possession is to terminate the tenant's right to possession. As soon the lessor does this, the lease is terminated.[74]

This imposes a serious limitation on the effectiveness of the lock-in remedy. A tenant might breach and abandon with the expectation of terminating the lease. If the lessor tries to block that expectation by exercising the lock-in, the tenant might knowingly make an unreasonable transfer so that the lessor will terminate the lease. This is not without risk to the tactical tenant. The lessor may leave the lease and transfer in effect and sue the tenant for damages caused by breach of the covenant.[75]

A possible solution would be to allow the lessor to keep the lease in effect and nullify the transfer. However, this would involve the policy considerations mentioned in Section V. above.

VII. SUMMARY OF CONCLUSIONS.

A. Lease Termination.

1. A prohibited transfer in the form of an assignment or sublease is voidable, not void. The interest passes from the tenant to the third party, subject to the right of the lessor to take remedial action.

2. A prohibited transfer does not automatically terminate the lease.

3. The lessor can elect to terminate the lease and recover possession of the property.

4. If the lessor fails to terminate the lease, the transfer remains effective.

5. A lessor's waiver of the right to terminate the lease may be express or implied from conduct.

B. Damages.

1. If the lessor elects to terminate the lease, the lessor should be able to recover from the tenant the damages suffered, if any, in accordance with Cal. Civ. Code Section 1951.2.

2. If the lessor elects not to terminate the lease, or waives the right to terminate the lease, the lessor should be able to recover from the tenant the damages suffered, if any, in accordance with the usual rules for breach of contract.

3. It should be possible for the lessor to waive the right to terminate the lease without waiving the right to damages.

4. The subtenant who receives the wrongful sublease from the tenant is not liable to the lessor for the tenant's breach of the transfer restriction in the prime lease.

5. It is unclear whether the assignee, who receives the wrongful assignment from the tenant is liable to the lessor for the tenant's breach of the transfer restriction. There are competing arguments. This should be clarified.

6. It is unclear whether the non-assuming assignee who wrongfully reassigns is liable to the lessor for breach of the transfer restriction. There are competing arguments. This should be clarified.

C. Disabling Restraint.

1. The lessor is not allowed to keep the lease in effect and treat the transfer as void. There are competing arguments concerning the allowance of this remedy.

2. Consideration should be given to allowing the lessor to block or nullify the transfer, without terminating the lease, if the lessor establishes that other remedies are inadequate.

3. If the law is changed to allow the lessor to nullify the transfer and dispossess the transferee, the statutes dealing with unlawful detainer and basic lease breach remedies should be conformed.

D. Lock-In Remedy Dilemma.

1. The requirement that the lessor terminate the lease in order to avoid a wrongful transfer places a serious limitation on the effectiveness of the lock-in remedy in Cal. Civ. Code Sec. 1951.4.

2. The limitation could be avoided by allowing the lessor to nullify the transfer and dispossess the transferee, without terminating the lease. However, allowing this remedy would involve the competing consideration related to the disabling restraint type remedy.

1 This study is also related to separate studies on assignment and sublease topics entitled: *Tenant Remedies For Wrongful Enforcement of Assignment & Sublease Restrictions*; *Involuntary Leasehold Transfers: Effect of Restrictions Against Assignment & Sublease*; *Use Restrictions In Leases: Relationship to Restrictions Against Assignment & Sublease*; and, *Enforcement of Leasehold Transfer Restriction Against Tenant's Successor: Should Dumpor's Case Be Dumped?*

2 Cal. Civ. Code Sec. 1951.4 (West 1985).

3 For a discussion of the types of restriction clauses, see Sec. IV of the principal study. Coskran, *Restrictions on Lease Transfers: Validity & Related Remedies Issues*, Study H-111.

4 The principal study discusses clause validity and consent standards. Coskran, *Restrictions on Lease Transfers: Validity & Related Remedies Issues*, Study H-111.

5 *Randol v. Tatum*, 98 Cal. 390, 396-397, 33 P. 433 (1893).

6 *Randol v. Tatum*, 98 Cal. 390, 398, 33 P. 433 (1893).

7 *Garcia v. Gunn*, 119 Cal. 315, 318, 51 P. 684. (1897).

8 *Potts Drug Co. v. Benedict*, 156 Cal. 322, 327, 104 P. 432 (1909).

9 *Buchanan v. Banta*, 204 Cal. 73, 76-77, 266 P. 547 (1928).

10 *Miller v. Reidy*, 85 Cal. App. 757, 260 P. 358 (1927).

11 *Buchanan v. Banta*, 204 Cal. 73, 77-78, 266 P. 547 (1928).

12 *Chapman v. Great Western Gypsum Co.*, 216 Cal. 420, 427, 14 P.2d 758 (1932).

13 *People v. Klopstock*, 24 Cal. 2d 897, 901-902, 151 P.2d 641 (1944).

14 *Northwestern P. R. Co. v. Consumers Rock & Cement Co.*, 50 Cal. App. 2d 721, 123 P.2d 872 (1942).

15 *People v. Klopstock*, 24 Cal. 2d 897, 901, 151 P.2d 641 (1944).

16 *Sexton v. Nelson*, 228 Cal. App. 2d 248, 258, 39 Cal. Rptr. 407 (1964).

17 *Weisman v. Clark*, 232 Cal. App. 2d 764, 768, 43 Cal. Rptr. 108 (1965).

18 *Weisman v. Clark*, 232 Cal. App. 2d 764, 769, 43 Cal. Rptr. 108 (1965).

19 *Karbelnig v. Brothwell*, 244 Cal. App. 2d 333, 341, 53 Cal. Rptr. 335 (1966).

20 The following cases mention principles numbered 1 through 4: *Randol v. Tatum*, 98 Cal. 390, 396-397, 33 P. 433 (1893); *Garcia v. Gunn*, 119 Cal. 315, 318, 51 P. 684. (1897); *Potts Drug Co. v. Benedict*, 156 Cal. 322, 327, 104 P. 432 (1909); *Buchanan v. Banta*, 204 Cal. 73, 76-77, 266 P. 547 (1928); *Chapman v. Great Western Gypsum Co.*, 216 Cal. 420, 427, 14 P.2d 758 (1932); *People v. Klopstock*, 24 Cal. 2d 897, 901-902,

151 P.2d 641 (1944); *Miller v. Reidy*, 85 Cal. App. 757, 762, 260 P. 358 (1927); *Weisman v. Clark*, 232 Cal. App. 2d 764, 768, 43 Cal. Rptr. 108 (1965); and, *Sexton v. Nelson*, 228 Cal. App. 2d 248, 258, 39 Cal. Rptr. 407 (1964).

21 Cal. Code of Civ. Proc. Secs. 1161(4), 1162, 1164 (West 1982) and 1174 (West Supp. 1988).

22 *Miller v. Reidy*, 85 Cal. App. 757, 762, 260 P. 358; *Weisman v. Clark*, 232 Cal. App. 2d 764, 769, 43 Cal. Rptr. 108 (1965) (1927).

23 *Karbelnig v. Brothwell*, 244 Cal. App. 2d 333, 341, 53 Cal. Rptr. 335 (1966).

24 *Guerin v. Blair*, 33 Cal. 2d 744, 746-747, 204 P.2d 884 (1949) (Personal property lease); *Licht v. Gallatin*, 84 Cal. App. 240, 245, 257 P. 914 (1927) (Although the court treated the transaction as a sublease, it might have been a partial assignment); *Gray v. Maier etc. Brewery*, 2 Cal. App. 653, 658, 84 P. 22 (1906). See also: 49 Am. Jur. 2d, *Landlord and Tenant*, Sec. 494; and, M. Friedman, *Friedman on Leases*, Sec. 7.304d (2d ed. 1983).

25 For a discussion of the differences, see Section III of the principal study. Coskran, *Restrictions on Lease Transfers: Validity & Related Remedies Issues*, Study H-111.

26 *Kendall v. Ernest Pestana, Inc.*, 40 Cal. 3d 488, fn. 2 at 492, 220 Cal. Rptr. 818, fn. 2 at 820 (1985).

27 See Section III of the principal study. Coskran, *Restrictions on Lease Transfers: Validity & Related Remedies Issues*, Study H-111.

28 Subsection (a) (1) of Cal. Civ. Code Section 1951.2 (West 1985). Note that Subsection (b) calls for the addition of interest to provide the "worth at the time of the award."

29 Subsection (a) (2) of Cal. Civ. Code Section 1951.2 (West 1985). Note that subsection (b) calls for interest to provide the "worth at the time of the award."

30 Subsection (a) (3) of Cal. Civ. Code 1951.2 (West 1985). Note that subsection (b) calls for a discount to provide the "worth at the time of award."

31 Subsection (a) (4) of Cal. Civ. Code Section 1951.2 (West 1985).

32 Restatement Second Property (*Landlord and Tenant*) Sec. 13.1 (1977). There is dictum in the *Northwestern Pacific* case, discussed in the section on California cases, that the lessor "could have given notice of his election to declare a forfeiture of the lease and could have sued for breach of the covenant." *Northwestern P. R. Co. v. Consumers Rock & Cement Co.*, 50 Cal. App. 2d 721, 723, 123 P.2d 872 (1942).

33 Cal. Code of Civ. Proc. Section 1174 (b) (West Supp. 1988); *Vasey v. California Dance Co.*, 70 Cal. App. 3d 742, 139 Cal. Rptr. 72 (1977).

34 Cal. Civ. Code Section 1952 (b) (West 1985); Cal Code of Civ. Proc. Section 1174.5 (West Supp. 1988); *Danner v. Jarrett*, 144 Cal. App. 3d 164, 192 Cal. Rptr. 535 (1983).

35 *Rouiaine v. Simpson*, 84 N.Y.S. 875 (1903).

36 *Lepla v. Rogers*, 1 Q.B. 31 (1893).

37 Reid and Trapp, *Liability for Release of Hazardous Substances Under CERCLA: Landlord and Tenant Issues*, 6 Cal. Real Prop. J. 23, 25 (No.2, Spring, 1988).

38 Restatement Second Property (*Landlord and Tenant*) Sec. 13.1(2) (1977).

39 *Buchanan v. Banta*, 204 Cal. 73, 266 P. 547 (1928).

40 *Chapman v. Great Western Gypsum Co.*, 216 Cal. 420, 427, 14 P.2d 758 (1932).

41 42 Cal. Jur. 3d, *Landlord and Tenant*, Sec. 199, p.232.

42 *Licht v. Gallatin*, 84 Cal. App. 240, 257 P. 914 (1927). The court in *Licht* quoted from *Garcia v. Gunn*, 119 Cal. 315, 318, 51 P. 684. (1897). *Garcia* did not involve a lessor's action for damages for breach of the transfer restriction covenant.

43 42 Cal. Jur. 3d, *Landlord and Tenant*, Sec. 199, p.232.

44 *People v. Klopstock*, 24 Cal. 2d 897, 151 P.2d 641 (1944).

45 *Northwestern P. R. Co. v. Consumers Rock & Cement Co.*, 50 Cal. App. 2d 721, 123 P.2d 872 (1942).

46 *Food Pantry, Ltd. v. Waikiki Business Plaza, Inc.*, 575 P.2d 869, 877 (Hawaii Sup. Ct. 1978); *Wollard v. Schaffer Stores Co.*, 5 N.E. 2d 829, 832 (Ct. App. New York, 1936); *Rouiaine v. Simpson*, 84 N.Y.S. 875, 875-876 (1903); *Lepla v. Rogers*, 1 Q.B. 31 (1893). See also M. Friedman, *Friedman on Leases* Sec. 7.304a (2d ed. 1983); and, 1 *American Law of Property*, § 3.58 (A.J. Casner ed. 1952).

47 Cal. Civ. Code Sec. 1925 (West 1982); *Medico-Dental Bldg. v. Horton & Converse*, 21 Cal. 2d 411, 132 P.2d 457 (1942).

48 Cal. Civ. Code Section 3300 (West 1977).

49 For a discussion of the relationship between waiver and estoppel, see *Salton Community Services District v. Southard*, 256 Cal. App. 2d 526, 64 Cal. Rptr. 246 (1967).

50 *Karbelnig v. Brothwell*, 244 Cal. App. 2d 333, 341, 53 Cal. Rptr. 335 (1966).

51 *Karbelnig v. Brothwell*, 244 Cal. App. 2d 333, 341, 53 Cal. Rptr. 335 (1966).

52 See e.g. *Food Pantry, Ltd. v. Waikiki Business Plaza, Inc.*, 575 P.2d 869 (Hawaii Sup. Ct. 1978).

53 See Section III of the principal study. Coskran, *Restrictions on Lease Transfers: Validity & Related Remedies Issues*, Study H-111.

54 See Section III of the principal study. Coskran, *Restrictions on Lease Transfers: Validity & Related Remedies Issues*, Study H-111.

55 Cal. Code of Civ. Proc. 1174 (West Supp. 1988); *Roth v. Morton's Chefs Services, Inc.*, 173 Cal. App. 3d 380, 218 Cal. Rptr. 684 (1985); *Fifth & Broadway Partnership v. Kimny, Inc.*, 102 Cal. App. 3d 195, 162 Cal. Rptr. 271 (1980); *Richard v. Degen &*

Brody, Inc., 181 Cal. App. 2d 289, 5 Cal. Rptr. 263 (1960). See also *Syracuse Assoc. v. Touchette Corp.*, 73 A.D. 2d 813, 424 N.Y.S.2d 72 (N.Y., 1979).

56 See Section III of the principal study. Coskran, *Restrictions on Lease Transfers: Validity & Related Remedies Issues*, Study H-111.

57 Cal. Civ. Code Sec. 1466 (West 1982).

58 There may be an issue of whether the transfer restriction obligation is binding on the assignee. This is discussed in another study dealing with the rule in *Dumpor's Case*.

59 Cal. Civ. Code Sec. 1466 (West 1982).

60 See above, III. Lease Termination Remedy.

61 Restatement Second Property (*Landlord and Tenant*) Sec. 15.2, comment c. (1977); 6 *American Law of Property*, § 26.7 (A.J. Casner ed. 1952).

62 6 *American Law of Property*, § 26.51, p. 490 (A.J. Casner ed. 1952).

63 *Splish Splash Waterslides, Inc. v. Cherokee Insurance Company*, 167 Ga. App. 589, 307 S.E.2d 107 (Georgia, 1983). A Georgia statute provided that a lease of less than 5 years was a use right which could not be transferred without the lessor's consent.

64 Restatement Second Property (*Landlord and Tenant*) Sec. 15.2, comment b. (1977); 6 *American Law of Property*, § 26.8 (A.J. Casner ed. 1952).

65 Restatement Second Property (*Landlord and Tenant*) Sec. 15.2, comment c. (1977); 6 *American Law of Property*, § 26.9, p. 419 (A.J. Casner ed. 1952).

66 M. Friedman, *Friedman on Leases*, Sec. 7.304a, p. 262 (2d ed. 1983); 2 *Powell on Real Property*, Sec. 246[1], p. 372.103 (Patrick J. Rohan rev'n. ed. 1986); 49 Am.Jur. 2d. *Landlord and Tenant*, Secs. 408 & 494.

67 See Section VII of the principal study. Coskran, *Restrictions on Lease Transfers: Validity & Related Remedies Issues*, Study H-111.

68 See Sections III and IV above.

69 *Seaman's Direct Buying Services, Inc. v. Standard Oil Co.*, 36 Cal. 3d 752, 778, 206 Cal. Rptr. 354 (1984).

70 Cal. Code of Civ. Proc. Sec. 1161 *et. seq.* (West 1982).

71 Cal. Civ. Code Secs 1951.2 and 1951.4 (West 1985).

72 Cal. Civ. Code Secs. 1951-1951.6 (West 1985).

73 Cal. Civ. Code Sec. 1951.2(a) (West 1985).

74 Cal. Civ. Code Secs. 1951.2(a) and 1951.4(b) West 1985).

75 See Section IV.B. above.