

Sixth Supplement to Memorandum 88-64

Subject: Study H-111 - Commercial Lease Law (Assignment and Sublease--
comments on draft)

Attached to this memorandum as Exhibit 1 is a letter from Howard Lind relaying technical corrections on the draft statute submitted by members of the Commercial and Industrial Subsection of the Real Property Section of the State Bar.

§ 1995.020. Definitions

Subdivision (a) ("landlord" defined). The definition of "landlord" in subdivision (a) would be revised to read:

(a) "Landlord" includes a tenant who makes is a sublandlord under a sublease or other person in the position of a landlord under a lease.

The staff agrees with this change.

Subdivision (c) ("restriction on transfer" defined). Subdivision (c) defines "restriction on transfer" as follows:

(c) "Restriction on transfer" means a provision in a lease that limits free transfer of the tenant's interest in the lease.

It was suggested that this definition is too broad. It could be construed to include lease provisions that are not limitations on the right to transfer, such as a requirement of notice, a requirement that the assignor not be released of its obligations, or a requirement that the assignee assume the obligations of the lease. No alternative language was suggested.

The staff sees four options, any of which is acceptable:

(1) Narrow the definition, e.g., "'Restriction on transfer' means a provision in a lease that ~~limits-free~~ restricts the right of transfer of the tenant's interest in the lease."

(2) Add language to the Comment that transfer conditions that do not impair the right of transfer are not covered by the statute.

(3) Do nothing; the definition doesn't appear to the staff to cause any problems as used in the statute.

(4) Delete the definition, allowing the phrase "restriction on transfer" to speak for itself.

Subdivision (d) ("tenant" defined). Under the statute as drafted, "tenant" includes a subtenant or other person in the position of a tenant under a lease. What about a licensee, concessionaire, mortgagee in possession, or trustee in bankruptcy? This question raises substantive issues that should not be dealt with in a definition. Whether the lease transfer statute should apply to a license or concession is a decision we cannot make without an analysis of the policies that apply to each type of property interest; it is beyond the scope of the present study, but we could pursue it if the Commission is interested. The rights of creditors such as a mortgagee in possession or a trustee in bankruptcy under a lease restriction is the subject of a separate study by Professor Coskran. See the Third Supplement to Memorandum 88-64 (involuntary transfers).

§ 1995.070. Implied standard for landlord's consent

Paragraph (5) of subdivision (b) of this section applies the new statute to leases executed after December 5, 1985. "For purposes of this paragraph, if the terms of a lease are fixed by an option or other agreement, the lease is deemed to be executed on the date of execution of the option or other agreement." Suppose the commencement date is not "fixed" because of intervening factors such as construction obligations, permit requirements, or zoning approvals? Have the terms of the lease been "fixed" within the meaning of this provision?

The staff is not concerned about this issue. The statutory language is drawn from Civil Code Section 1952.2, which has been in effect for 16 years and apparently not presented any problems, even though its application has been much broader than the application of the present statute.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

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August 10, 1988

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RECEIVED

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Re: Study H-111
Commercial Lease Law
Assignment and Subletting

Dear Nat:

You asked that I relay to you the technical corrections which members of the Commercial and Industrial subsection of the Real Property Section of the State Bar had after having read Memorandum 88-44.

Section 1995.020(a): It is suggested that this definition read "landlord" includes a tenant who is a sublandlord under a sublease or other person in the position of a landlord under a lease."

(c): It is thought that the restriction on transfer definition is far too broad. It was thought that the definition could include a requirement of notice, a requirement that the assignor not be released of its obligations, or a requirement that the assignee assume the obligations of the lease. The question was raised as to whether these constituted restrictions on a transfer.

(d): It was asked whether "tenant" should include a licensee, concessionaire, a mortgagee in possession or a trustee in bankruptcy.

Section 1995.050(b)(5)(A): It was questioned as to whether all of the terms of the lease had to be fixed. What would happen if the commencement date was not as yet fixed because of construction obligations or permit requirements or zoning approvals? In other words, what does "fixed" mean?

Nathaniel Sterling
August 10, 1988
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WENDEL, ROSEN, BLACK, DEAN & LEVITAN

The other technical correction that was forwarded to me was addressed and handled at the last meeting of the Commission.

Very truly yours,

WENDEL, ROSEN, BLACK, DEAN & LEVITAN

Howard W. Lind /ph

Howard W. Lind

HWL/ph