

Memorandum 89-8

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 argument 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.

A related matter that the Commission has reserved for discussion in connection with landlord remedies is whether the tenant's failure to request the landlord's consent before making a transfer amounts to a breach that entitles the landlord to remedies in a situation where, had the tenant requested consent, the landlord would have had to give it anyway.

Respectfully submitted,

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