

Memorandum 89-80

Subject: Study H-111 - Assignment and Sublease (Residential Tenancies--
draft of tentative recommendation)

At the September 1989 meeting the Commission directed the staff to prepare for its consideration a draft of a tentative recommendation to extend the commercial assignment and sublease rules to residential tenancies. The staff draft is attached.

The staff recommends against adoption of this tentative recommendation for the following reasons:

(1) There is little use for the rules in most residential tenancies, since most are of shorter duration and develop less bonus value than commercial tenancies. The major impact would be in rent control jurisdictions, and those jurisdictions should regulate assignment and subletting in whatever manner is appropriate to the character of the particular rent control law.

(2) There is little likelihood that the Commission will be able to achieve a consensus among interested persons that the rules it proposes are satisfactory for residential tenancies. The State Bar Landlord/Tenant Subsection is split on this issue, and this experience will certainly be replicated throughout the legal community.

(3) The main concern we encountered in the Legislature with the commercial assignment and sublease rules is that they unduly favor landlords in a setting where a small tenant is at a bargaining disadvantage. Extending these rules to the residential situation will certainly provoke even greater legislative concern about this recommendation.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Tentative Recommendation

relating to

ASSIGNMENT AND SUBLEASE OF RESIDENTIAL TENANCIES

The law governing assignment and sublease of residential tenancies is unclear. The newly-enacted assignment and sublease statute is by its terms limited to commercial tenancies.¹ The common law of assignment and sublease also has developed in the context of commercial tenancies rather than residential tenancies. Although the common law presumably would apply to tenancies of all types, some of the key California cases limit themselves to commercial tenancies.²

The reasons for this disparity are that commercial tenancies have tended to be longer in duration than residential tenancies and have developed substantial bonus values that become the subject of litigation. However, similar circumstances are now beginning to occur in residential tenancies in rent control jurisdictions, where clear

1. 1989 Cal. Stats. ch. [SB 536]. Civil Code Section 1995.010 limits the chapter to transfer of a tenant's interest in a lease of real property "for other than residential purposes." See also Civ. Code § 1995.020(b) ("lease" defined).

The California Law Revision Commission's *Recommendation Relating to Commercial Real Property Leases: Assignment and Sublease*, 20 Cal. L. Revision Comm'n Reports XXXX (1990), the source of the new statute, states, "While it might be beneficial to clarify the law relating to residential leases and to maintain some degree of uniformity between the residential and commercial lease law of the state, different policy considerations (particularly relating to bargaining position of the parties) affect commercial and residential lease law. Moreover, transfer issues arise less frequently in connection with residential leases because they are generally short in duration and rarely develop a large transfer value. A residential tenant may not expect to receive consideration on assignment or sublease of the tenancy to the same extent a commercial tenant may be seeking consideration as part of the lease transaction."

2. See discussion in Coskran, *Assignment and Sublease Restrictions: The Tribulations of Leasehold Transfers*, 22 Loy. L.A.L. Rev. 405, 476-77 (1989).

rules governing assignment and sublease would be useful. In addition, although the problem arises infrequently in residential tenancies outside of rent control, it would be useful to have an applicable body of law when a dispute does arise. For these reasons, the Law Revision Commission recommends that the law governing assignment and sublease of residential tenancies be prescribed by statute.

The social policies that encourage the availability of housing, and that favor the ability of an individual to move freely, mandate the following principles:

(1) A residential tenant should be able freely to assign or sublet unless the parties expressly agree in the lease to restrict this right.

(2) Any ambiguity in an express agreement in the lease restricting the right to assign or sublet should be construed in favor of allowing the tenant to assign or sublet.

(3) If the parties agree in the lease that the right to assign or sublet is subject to the landlord's consent but fail to provide an express standard for giving or withholding consent, the law should imply a requirement that the landlord's consent may not unreasonably be withheld.

The social policies that favor the right of a property owner to control use of the property, and to protect the income flow and reversion, mandate the following principle:

(1) A residential landlord should be able to limit or prohibit the right to assign or sublet, where the limitation or prohibition is agreed to by the tenant and is not unconscionable or part of a contract of adhesion.

These principles are the same that apply to assignment or sublease of a commercial tenancy under the new statute.³ The Commission recommends that the commercial tenancy assignment and sublease statute

3. See Civ. Code §§ 1995.010-1995.270 (effective January 1, 1990).

be extended to residential tenancies.⁴ This will have the effect of making the state law uniform for all real property tenancies.⁵

The Commission's recommendation would be implemented by enactment of the following measure.

4. The application of the law to existing residential leases should be the same as for existing commercial leases. Although existing law governing residential leases is not clear, there is at least a presumption that the law may be the same for all leases, and parties should be considered as having acted in light of this presumption.

5. The statute should not be extended to residential personal property leases (mobilehomes), which are governed by special rules. See Civ. Code §§ 798.73-74, 798.78-79.

An act to amend Sections 1995.010, 1995.020, and 1995.270 of the Civil Code, relating to real property leases.

The people of the State of California do enact as follows:

Civil Code § 1995.010 (amended). Scope of chapter

SECTION 1. Section 1995.010 of the Civil Code [as enacted by 1989 Cal. Stat. ch. (SB 536)] is amended to read:

1995.010. This chapter applies to transfer of a tenant's interest in a lease of real property ~~for other than residential purposes~~.

Comment. Section 1995.010 is amended to delete the limitation of this chapter to commercial leases. See *Recommendation Relating to Assignment and Sublease of Residential Tenancies*, 20 Cal. L. Revision Comm'n Reports XXXX (1990).

Civil Code § 1995.020 (amended). Definitions

SEC. 2. Section 1995.020 of the Civil Code [as enacted by 1989 Cal. Stat. ch. (SB 536)] is amended to read:

1995.020. As used in this chapter:

(a) "Landlord" includes a tenant who is a sublandlord under a sublease.

(b) "Lease" means a lease or sublease of real property ~~for other than residential purposes~~, and includes modifications and other agreements affecting a lease.

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

(d) "Tenant" includes a subtenant or assignee.

(e) "Transfer" of a tenant's interest in a lease means an assignment, sublease, or other voluntary or involuntary transfer or encumbrance of all or part of a tenant's interest in the lease.

Comment. Subdivision (b) of Section 1995.020 is amended to conform to Section 1995.010 (scope of chapter).

Civil Code § 1995.270 (amended). Limitation on retroactivity of Section 1995.260

SEC. 3. Section 1995.270 of the Civil Code [as enacted by 1989 Cal. Stat. ch. (SB 536)] is amended to read:

1995.270. (a) The Legislature finds and declares:

(1) It is the public policy of the state and fundamental to the commerce and economic development of the state to enable and facilitate freedom of contract by the parties to ~~commercial~~ real property leases.

(2) The parties to ~~commercial~~ real property leases must be able to negotiate and conduct their affairs in reasonable reliance on the rights and protections given them under the laws of the state.

(3) Until the case of Kendall v. Ernest Pestana, Inc., 40 Cal. 3d 488 (1985), and its predecessor, Cohen v. Ratinoff, 147 Cal. App. 3d 321 (1983), the parties to commercial, and by implication residential, real property leases could reasonably rely on the law of the state to provide that if a lease restriction requires the landlord's consent for transfer of the tenant's interest in the lease but provides no standard for giving or withholding consent, the landlord's consent may be unreasonably withheld.

(4) The Kendall and Cohen decisions reversed the law on which parties to commercial, and by implication residential, real property leases executed before September 23, 1983, the date of the Cohen decision, could reasonably rely, thereby frustrating the expectations of the parties, with the result of impairing commerce and economic development.

(b) Section 1995.260 applies to a restriction on transfer executed on or after September 23, 1983. If a restriction on transfer executed before September 23, 1983, requires the landlord's consent for the tenant's transfer but provides no standard for giving or withholding consent, the landlord's consent may be unreasonably withheld. For purposes of this subdivision, if the terms of a restriction on transfer are fixed by an option or other agreement, the restriction on transfer is deemed to be executed on the date of execution of the option or other agreement.

Comment. Subdivision (a) of Section 1995.270 is amended to conform to Section 1995.010 (scope of chapter).