



A PRACTICAL GUIDE TO ASSIGNMENTS AND SUBLEASING

By: Reid Wilson, Candace Baggett, and Nisha Jain

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Tenant's Alternatives

A tenant in economic duress often finds itself liable for one or more leases for space which is no longer appropriate. Tenants have a few practical and legal options under the foregoing circumstances.

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Default

In rare circumstances, a tenant may determine it is in its best interest to simply default under the lease and hope for the best.

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Bankruptcy

When a tenant files bankruptcy, it has the absolute right to reject a lease and terminate liability, subject to a limited right for the landlord to recover damages.

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Lease Workout/Buyout

In today's uncertain economic times, some landlords may work with the tenant to restructure a lease in a way which is economically acceptable to both landlord and tenant.

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Assignment or Subleasing

Generally, a tenant's best solution for excess leased space is to either:
a) Assign the lease to a third party, or
b) Sublease all, or a portion of, the premises.

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Assignment and Subletting

Assignment and subleasing have specific legal implications. Understanding the distinctions between them is crucial in leasing.

Assignment

- The transfer of the entire interest of the tenant without the tenant retaining any reversionary interest.
- Creates privity of estate and contract between landlord and assignee.
- An assignee is responsible for compliance with all terms of the assigned lease and may be sued by the landlord directly in the event of any non-compliance.
- The assignor does not retain any rights under the lease.
- Substance not form determines whether an assignment occurs.

Subleasing

- Where an “assigning” tenant retains their right to re-enter the premises, the tenant possesses a reversionary interest that creates a sublease.
- No privity of estate or contract between landlord and sublessee.
- The subtenant is not directly liable to the landlord unless it specifically assumes the obligations under the prime lease.
- If subtenant assumes the obligations under the prime lease, and the landlord consents to the sublease, then the landlord is considered a third-party beneficiary of the subtenant’s assumption such that the landlord may sue the subtenant for lease violations.

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Landlord Consent

Tex. Prop. Code §91.005: Applies to assignments and subleases alike.

- During the term of a lease, the tenant may not rent the leasehold to any other person without the prior consent of the landlord. *This is avoidable if the lease clearly expresses such an intent.*
- Landlord consent is required for assignments and subleases, unless expressly stated otherwise in the lease.
- If the lease requires consent, a landlord’s decision to withhold consent to a requested assignment/sublease is not required to be reasonable. There is no implied duty of good faith and fair dealing in Texas applied to the landlord/tenant relationships.
- If a tenant desires to require a reasonableness standard for a landlord’s consent, it must be clearly included in the lease.
- Where a landlord’s consent to an assignment or subletting is “not to be unreasonably withheld,” there is no clear standard from Texas cases.
- Landlords can waive the consent requirement by accepting rent from an assignee or sublessee.

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Duties of a Landlord to a Subtenant/Assignee in Possession Without Consent

- A party that signs a sublease or an assignment agreement without landlord's consent is considered a trespasser.
- A landlord's only duty owed to a trespasser is to avoid willful, wanton or grossly negligent harm.
- A prohibited assignment does not invalidate the lease or relieve the tenant/assignee of liability arising therefrom, but the landlord may void it.

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Quasi-estoppel

- "Quasi-estoppel" refers to various equitable defenses that may apply to lease assignments and subleases.
 - Equitable Defenses: Ratification, Election, Acquiescence, Waiver, or Acceptance of Benefits
- Once an assignee/subtenant pays rent to a non-consenting landlord, they have availed themselves of the lease's benefits and may no longer deny liability arising therefrom.
- A landlord who accepts rent from an assignee/subtenant without providing consent waives their right to object and exercise its remedies under the lease.
- In a commercial transaction, an assignment is assumed when the tenant sells their business assets to a buyer that takes possession of the business premises and commences paying rent.

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