

**Assignments, Sublets, and  
the Importance of Reasonableness**

By Dave Melin\*

A principle of landlord-tenant law is the power of the tenant to transfer all or part of its lease unless the lease includes provisions that limit that power. The law of assignments and subleases seeks to strike a balance between the tenant's interest in the alienability of its legal rights under the lease and the landlord's interest in having a desirable and financially responsible occupant. Today, most commercial leases include covenants that govern both parties' rights with regard to an assignment or sublease. Those covenants should not be viewed as "boilerplate" provisions given the need for the landlord to act reasonably when denying consent to assign or sublet and given the strict review of those covenants by the courts.

**Assignment Versus Subletting**

By way of introduction, there is a key distinction between an assignment and a sublease. An assignment occurs when the tenant transfers its entire interest under the lease to a third-party, the assignee. Often, the original tenant remains liable under the lease, however, an assignment creates a contractual relationship between the assignee and the original landlord, meaning only the landlord can evict the assignee. This arrangement can create issues for the original tenant if the assignee stops paying the original tenant, leaving the original tenant on the hook with the landlord but unable to evict the assignee to return to the space or find another assignee.

Subletting, however, occurs when the tenant transfers something less than its entire interest under the lease. For example, the sublease could govern a fraction of the time of the original tenant's lease or could govern a fraction of the

space for the entire term of the lease. Subletting normally does not create a contractual relationship between the landlord and the subtenant.

**Reasonably Refusing Consent**

Leases often contain covenants that prohibit the tenant's ability to sublet or assign its interest without the consent of the lessor, and those covenants are legally enforceable – though North Carolina courts muddied the waters in this area between leases that expressly state that consent will not be unreasonably withheld and leases that require the tenant to obtain the landlord's consent but do not reference a particular standard governing the landlord's determination.

In a 1978 case from the North Carolina Court of Appeals, the court set forth four factors that a landlord should consider when confronted with a proposed sublease where the lease expressly provides that consent will not be unreasonably withheld: (1) the financial responsibility of the proposed subtenant; (2) the identity or business character of the subtenant; (3) the legality of the proposed use of the premises; and (4) the nature of the occupancy. Although the case involved consent to a sublease, the standards should apply equally to assignments.

In 1981, the North Carolina Court of Appeals complicated the issue by refusing to insert a requirement into the lease that the landlord *not* unreasonably withhold its consent in a case where the lease was silent on the issue of reasonableness. The Court's decision seems to stand for the proposition that consent can be withheld for any reason, whether reasonable or not, unless the lease explicitly calls for the landlord to act reasonably. However, the best practice is to assume that our courts will imply a reasonableness requirement to a landlord's determination whether to approve or deny a requested assignment or sublease. For example, a basic tenet of contract law requires good faith

---

\* Dave Melin is a shareholder at Rayburn Cooper & Durham, P.A. His practice is primarily focused on business litigation and commercial real estate leasing.

and fair dealing between the parties, which could be breached if a landlord unreasonably withholds its consent.

To avoid uncertainty in any legal challenge to a proposed assignment or sublease, best practices encourage landlords to explicitly state in the lease that consent may be withheld in the landlord's sole and absolute discretion. However, landlords should review any requested assignment or sublease with the four factors listed in the 1978 case in mind.

### **Parsing the Covenants**

As a final note, the North Carolina Supreme Court has reviewed assignment and subletting provisions strictly because such provisions restrict a tenant from transferring its interest under the lease. This strict construction means that a prohibition against "subletting" would not prohibit the tenant's "assignment" of the lease and vice versa. When reviewing these provisions, landlords and tenants should parse the language carefully—because a court certainly will—to ensure that each of their interests is protected.

---

*The information in this article is not, nor is it intended to be, legal advice. You should consult an attorney for advice regarding your individual situation.*