

# Assignments Pro Tanto, And Why To Avoid Them

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Sublease? Assignment? Assignment pro tanto? Maybe a sublease or an assignment, but an assignment pro tanto is an invitation to fracture occupancy (and a few other things).

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**A LEASE** is both a contract and a conveyance. It is a conveyance of a real property interest for a term of years involving the possession, use and enjoyment of a defined area of space subject to payment of rent and the continued performance of duties affecting such space and, in most commercial leases, additional contractual promises.

When a tenant wants to put a third party in possession of all or part of the leased space, it must choose the method most advantageous to it, considering all the circumstances. Assuming, and it is a significant assumption, there are no restrictions on assignment or subletting in the lease, a tenant may:

Assign its entire interest in the lease for the whole premises to another;  
Sublease all or part of the leased premises to another; or  
Grant concessions, licenses, or other limited rights to another.

**UNDERSTANDING THE DISTINCTION** • The main distinction between a sublease of all or part of the premises and an assignment of the lease is that:

- In a sublease the tenant becomes a sublandlord and maintains a reversionary interest, placing it in a position between the new occupant and the prime landlord. Under a sublease, the tenant/sublandlord has a "reversion" in that it has not divested itself of its interest in the leased premises for the entire remaining duration of the term of the lease and it will again resume possession when the term of the sublease ends. The subtenant does not have direct liability to the prime landlord for the payment of rent or performance of other covenants;
- In an assignment, however, the new occupant steps into the shoes of the tenant and therefore has privity of estate with the landlord, and the tenant/assignor divests itself of all of its right, title, and interest under the lease, thereby severing the privity of estate. Under an assignment, the tenant/assignor no longer has a reversionary interest in the space as it does not have the right to retake possession because the assignee's rights end simultaneously with the end of the term of the lease. The new occupant does have liability for the payment of rent while it is in privity of estate with the prime landlord.
- In both cases, the original tenant remains fully liable for the performance of all the provisions of the lease.

### **The Realities**

Regardless of what the parties call it, most courts will re-characterize a "sublease" that ends on the last day of the term of the prime lease as an "assignment" and will re-characterize an "assignment" pursuant to which the tenant/assignor has not divested itself of its entire temporal interest in the space as a "sublease." In each case, there will be unanticipated consequences for the parties. Logic might suggest that a transfer of possessory rights to less than all of the tenant's premises would always be a sublease since the tenant has not transferred its entire interest "in the lease" to another. There are several cases that hold precisely that. "The rule is well-settled that if a tenant underlets the premises for a shorter term than that for which they are to him granted, or if he underlet a part only of the premises, the original lessor cannot sustain an action for rent against the sublessee." *Shannon v. Grindstaf*, 40 P. 123, 124 (Wash.1895). "It seems to be settled, that where a tenant assigns his lease for any shorter period of time than that for which the lease was granted, the lessor cannot sustain an action of covenant against the assignee upon the lease; because this is considered, not an assignment of the whole term, but an underletting. The principle applies with at least equal force to the case of an assignment, or underletting of part of the premises only." *Fulton v. Stewart*, 2 Ohio 215 (Ohio 1825).

### The Characterization Follows The Effect

A majority of states continue to follow the common law rule that distinguishes assignments from subleases by their legal effect, rather than by their form or the parties' intentions for the transaction. If a tenant conveys all of the property interest in the estate for the entire duration to a third party, then the transaction is construed to be an assignment of the lease; but, if the tenant retains some interest in the estate, such as a reversion before the expiration of the original lease, then the transaction is construed to be a sublease. 52 C.J.S. *Landlord and Tenant* §43 (2003); 49 Am. Jur. 2d *Landlord and Tenant* §1077 (1995). The effect of transferring less than the entire physical premises to a third party for the entire balance of the term of the lease creates interesting and difficult problems for the parties. The following chart illustrates a comparison of several elements of assignments, subleases, and "assignments pro tanto":

ITEM	ASSIGNMENT	SUBLEASE	PARTIAL ASSIGNMENT
Space	All of the space	May be all or less than all of the space	Less than all of the space
Privity of Estate	Assignee has privity of estate as to all of the space	Subtenant never has privity of estate	Partial assignee has privity of estate but only as to the space assigned
Privity of Contract	Depends on whether assignee has "assumed the lease."	Subtenant does not "assume" the lease	Depends on whether assignee has "assumed the lease." Can an assignee only "assume" part of a lease?
Rent	Assignee liable for 100 percent of the underlying rent; and for any additional sums payable to	Subtenant only liable for rent specified in the sublease, not liable for underlying rent	Assignee only liable for a share of the underlying rent under the prime lease; and for 100 percent of any additional consideration payable