

Minnesota Commercial Subleasing Law and Practice

Mark E. Hamel
Dorsey & Whitney LLP
Minneapolis

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Introduction:

Commercial tenants frequently find that they no longer need their premises or all of their premises. A commercial tenant may have sold its business or expanded to the point that it needs to relocate. In either case, it has no further need for its current space. Alternatively, a commercial tenant's space needs may have decreased resulting in excess space for which it would like a return. In any of these cases, the commercial tenant will want to consider subletting all or a portion of its space. Every real estate lawyer needs to master the fundamentals of commercial subleasing. This outline focuses on the fundamentals of commercial subleasing in Minnesota.

I. Definition of Subleasing

A sublease is a lease by a tenant of a whole or part of the premises for a portion of the unexpired balance of the tenant's term.¹ Only when a tenant transfers less than the remaining term of the lease can the transfer be a sublease.² The retention of even the smallest right to the term constitutes a reversionary interest which creates a sublease.³ The tenant's retention of an option to terminate, extend, or renew the prime lease has also been construed by courts to constitute a sublease.⁴ In the absence of restrictions between the landlord and tenant, the tenant may sublet the premises under the prime lease at will.⁵ When subleased, the premises cannot be used in a manner inconsistent with the terms of the prime lease.⁶

PRACTICE TIP: *A commercial landlord will prefer a lease provision that prohibits the assignment of the lease or subletting of the premises without the landlord's consent, which may be withheld for any or no reason. A commercial tenant will prefer a lease provision that contains no restrictions on assignment or subletting. A frequently negotiated middle ground provision permits assignment or subletting with landlord's consent, which shall not be*

¹ R.P. Davis, Subletting or renting part of premises as violation of lease provision as to subletting, 56 A.L.R.2d 1002, 1; Landlord and Tenant, 30 Dunnell Minn. Digest, §3.09 (2015).

² Ann Pedlo Cargile and Michael B. Noble, Features, Leasing and Property Management Assignments and Subleases: The Basics, 17 Probate & Property 40, 41 (2003).

³ Id.

⁴ Id.

⁵ Davis, supra note 1.

⁶ Id.

unreasonably withheld, conditioned or delayed. Landlords will often spell out in some detail criteria for an acceptable assignee or subtenant.

II. Types of Subleases

Two types of subleases are commonly used: 1) a sublease that incorporates the applicable terms of the prime lease and adds additional terms unique to the sublease; and 2) an entirely new agreement that does not incorporate any terms from the prime lease.⁷ The first type of sublease is more common.⁸

III. Differences from Assignment; Privity Explained

Any transfer by a tenant for less than the whole term for which the premises are leased constitutes a sublease, not an assignment.⁹ Lease provisions that differ in the most nominal way can constitute the difference between an assignment and a sublease.¹⁰ A transfer for an hour less than the full term will constitute a sublease, while a transfer for the entire term is an assignment.¹¹ What purported to be a sublease has been found by courts to be an assignment.¹²

PRACTICE TIP: *It is common practice to specify the expiration date of a sublease to be exactly one day sooner than the expiration of the prime lease.*

The difference between a sublease and an assignment depends upon the historical concept of privity.¹³ Privity of estate is the mutual or successive right to the same property.¹⁴ Privity of estate exists in a lease because the tenant has the right to possession of property and the landlord has a reversionary interest.¹⁵ Privity of contract exists through an agreement and does not run with land like privity of estate.¹⁶

⁷ Christopher S. Hayhoe, Assignments and Subletting 2 (September 21, 2010) (previous CLE materials on file with author).

⁸ Id.

⁹ See Davidson v. Minn. Loan & Tr. Co., 197 N.W. 833, 834-35 (Minn. 1924); Landlord and Tenant, supra note 1.

¹⁰ Cargile and Noble, supra note 2, at 43.

¹¹ Id.

¹² See e.g., Cameron Tobin Baking Co. v. Tobin, 116 N.W. 838, 839 (Minn. 1908).

¹³ Cargile and Noble, supra note 2.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.

In a prime lease, the landlord and tenant have both privity of estate and privity of contract.¹⁷ An assignment transfers privity of estate, but not privity of contract.¹⁸ It creates a landlord-tenant relationship between the prime landlord and the assignee.¹⁹ Thus, the prime landlord has the right to enforce the original lease against the assignee.²⁰ Meanwhile, the prime tenant remains bound by the contract with the prime landlord.²¹

PRACTICE TIP: *Because a prime tenant remains bound to a prime landlord in the case of either an assignment or a sublease (absent a release of the prime tenant by the prime landlord—i.e. a novation), a prime tenant will often prefer to enter into a sublease rather than an assignment with a party interested in taking over the premises, because the prime tenant has the right to reenter the premises in the case of a breach of a sublease by a subtenant, but a prime tenant has no right to reenter the premises in the case of a breach of the prime lease by an assignee. The ability to reenter the premises of a subtenant is often a better remedy than a suit for damages against an assignee, if the assignee doesn't have the financial wherewithal to pay a judgment.*

In a sublease, both privity of estate and privity of contract continue to exist between the prime landlord and the prime tenant.²² No privity exists between the prime landlord and the subtenant.²³ A sublease does not transfer any of the prime tenant's rights or obligations under the lease to the subtenant.²⁴ The prime landlord cannot hold the subtenant liable for breach of the prime lease nor can the subtenant enforce the terms of the prime lease against the prime landlord.²⁵ A sublease is a new lease and creates privity of estate and privity of contract between the prime tenant and the subtenant.²⁶

Payment of rent by a subtenant directly to the prime landlord does not establish as a matter of law that there was an assignment.²⁷ The entire portion of the premises leased does not need to be transferred for a purported sublease to constitute an assignment.²⁸ When even a

¹⁷ Id.

¹⁸ See Davidson, 197 N.W. at 834-35; Landlord and Tenant, supra note 1.

¹⁹ Davidson, 197 N.W. at 834-35.

²⁰ See id.

²¹ Id.

²² Hayhoe, supra note 7.

²³ Warnert v. MGM Props., 362 N.W.2d 364, 367 (Minn. Ct. App. 1985) (citation omitted).

²⁴ Cargile and Noble, supra note 2, at 43.

²⁵ Id.

²⁶ Id.

²⁷ See Anderson v. Ries, 24 N.W.2d 717, 721 (Minn. 1946).

²⁸ See Kostakes v. Daly, 75 N.W.2d 191, 193-94 (Minn. 1956).

portion of the premises is transferred for the remainder of the prime tenant's term, the legal effect is also that of an assignment as to the transferred portion of the premises.²⁹

Because no privity exists between a prime landlord and subtenant under a sublease, a prime landlord may only look to the prime tenant for performance under the prime lease.³⁰ The subtenant is dependent on the prime tenant's performance under the prime lease.³¹ If the prime lease is terminated, the sublease is also automatically terminated.³² If the prime tenant breaches the prime lease, the prime landlord may evict the subtenant.³³

PRACTICE TIP: *A commercial prime landlord will frequently require, as a condition to consenting to a sublease, that the subtenant agree to perform the terms of the prime lease (at least as to the portion of the premises subject to the sublease) for the benefit of the prime landlord. Such an agreement by a subtenant creates privity of contract between the prime landlord and the subtenant.*

IV. Reversionary Interest Required

A transfer cannot be a sublease unless the sublessor (i.e. prime tenant) retains a reversionary interest.³⁴ A purported sublease for the full term of the prime lease is actually an assignment.³⁵ The reversionary interest retained by the sublessor is not required to be any significant length in time.³⁶ A sublessor's retention of an option to terminate, extend, or renew the prime lease also has been construed by courts to be a sufficient interest for a transfer to constitute a sublease.³⁷

V. Sublessor's Right of Reentry

In a normal sublease, as opposed to an assignment, the sublessor retains an interest in the premises being subleased, thus reserving a right of reentry upon breach of the sublease. Early Minnesota courts held that when a purported sublease instead assigns the whole term of a

²⁹ Landlord and Tenant, supra note 1.

³⁰ Hayhoe, supra note 7, at 3-4.

³¹ Id.

³² Id.

³³ Id.

³⁴ Landlord and Tenant, supra note 1.

³⁵ O'Neil v. A. F. Oys & Sons, 13 N.W.2d 8, 11 (Minn. 1944); see Craig v. Summers, 49 N.W. 742, 743 (Minn. 1891).

³⁶ See Davidson, 197 N.W. at 833.

³⁷ Cargile and Noble, supra note 2.

lease, no right of reentry for a breach of the purported sublease is retained.³⁸ Those courts held that a right of reentry could not exist as an independent condition, but only incident to an interest in an estate.³⁹

Minnesota courts eventually began to hold differently. Even if a sublease leaves no reversionary interest in the sublessor, if it contains covenants to the sublessor's advantage and gives the sublessor a right of reentry for a breach of such covenants, the sublessor is allowed to enforce this right.⁴⁰ Courts gave effect to the assignment by law as between the original landlord and the sublessee, but also recognized the intent of the sublessor and sublessee.⁴¹

A sublessee cannot deny that its sublessor possesses a sufficient interest in the property to support the relation of landlord and tenant between them.⁴² The prime landlord can only reenter for breaches of the prime lease which would oust both the prime tenant and the sublessee.⁴³ Thus, a breach of only the purported sublease allows the sublessor the right to reenter and repossess its premises for the remainder of the leased term.⁴⁴ However, absent a "substantial advantage" of a covenant to reenter which benefits the sublessor, the sublessor may not reenter and retake possession of the premises when the sublessor has left itself no reversion.⁴⁵

VI. Types of Tenancies

A tenant for years may sublet for any less amount of time than the tenant holds unless prohibited by a covenant with the prime landlord.⁴⁶

A tenant at will may sublease at the election of the prime landlord.⁴⁷ A sublessee's interest can last only as long as the tenancy at will, which may be terminated at any time by

³⁸ See Ohio Iron Co. v. Auburn Iron Co., 67 N.W. 221, 221 (Minn. 1896); Craig, 49 N.W. at 744.

³⁹ See id.

⁴⁰ See Davidson, 197 N.W. at 833; Landlord and Tenant, supra note 1.

⁴¹ See Davidson, 197 N.W. at 835.

⁴² Id. at 839.

⁴³ Id.

⁴⁴ Id.

⁴⁵ Landlord and Tenant, supra note 1.

⁴⁶ See Gould v. Sub-Dist. of Eagle Creek Sch. Dist., 8 Minn. 427, 431 (1863).

⁴⁷ See Landlord and Tenant, supra note 1.

the prime landlord.⁴⁸ The prime landlord may ignore a sublease altogether, treat it as a valid sublease, or terminate the tenancy at will.⁴⁹

VII. Covenants Prohibiting Specific Use of Premises

A covenant that a tenant or its heirs, administrators, or assigns will not put the leased premises to a specified use is enforceable by an injunction against a subtenant.⁵⁰ When a tenant has no right to use the leased premises for a specified act, the tenant may not give such right to anyone else.⁵¹

PRACTICE TIP: *The use clause in a commercial lease is critical, because a restrictive use clause will effectively prohibit an assignment or subletting to a transferee that would violate the use clause, even if the prime lease freely permits an assignment or subletting.*

VIII. Covenants not to Sublet

Leases often contain covenants against subletting.⁵² Courts do not favor such covenants.⁵³ While courts do not favor these covenants, they are valid under ordinary circumstances.⁵⁴ Some courts will strictly construe covenants against subletting, while others will opt for a more liberal interpretation.⁵⁵ Courts that liberally construe covenants against subletting focus on the intention of the parties and the purpose of the covenant.⁵⁶

IX. Landlord Consent

A lease that requires the consent of the landlord to sublease does not require the landlord to accept a suitable subtenant or to mitigate damages if the tenant abandons the premises.⁵⁷ This is because: 1) the landlord has already exercised personal choice in selecting a tenant for

⁴⁸ See id.

⁴⁹ Anderson, 24 N.W.2d at 720.

⁵⁰ Steas v. Kranz, 20 N.W. 241, 241 (Minn. 1884).

⁵¹ Id. at 243.

⁵² Landlord and Tenant, supra note 1.

⁵³ Davis, supra note 1.

⁵⁴ J.H. Tigges, Validity, construction, and effect of lessor's covenant against use of his other property in competition with the lessee-covenantee, 97 A.L.R.2d 4, 2; James C. McLoughlin, When lessor may withhold consent under unqualified provision in lease prohibiting assignment or subletting of leased premises without lessor's consent, 21 A.L.R.4th 188, 3

⁵⁵ Tigges, supra note 54.

⁵⁶ Id.

⁵⁷ Gruman v. Inv'rs Diversified Servs., Inc., 78 N.W.2d 377, 378 (Minn. 1956).

a definite term and provided that no substitution was acceptable without written consent; 2) a lease is a conveyance of an interest in real property; and 3) the tenant is bound to the landlord by privity of estate and privity of contract.⁵⁸

When landlord consent is required and not given, a sublease by the tenant is a violation of the prime lease for which a breach may be declared.⁵⁹ The prime landlord may recover full rent from the tenant as it becomes due.⁶⁰ The terms of the lease may also permit a landlord to declare the sublease void, sue the tenant for breach of covenant, or obtain an injunction.⁶¹

When the prime lease requires written consent of the prime landlord to a sublease signed on the prime lease itself, and the prime lease does not contain such written consent, it has been held to be prima facie evidence that the prime landlord never consented to a sublease.⁶² Any showing that the specific method for obtaining landlord consent, as provided in the prime lease, has not been complied with may constitute prima facie evidence that landlord consent has not been obtained.⁶³

Most leases provide that the landlord's consent to a sublease may not be unreasonably withheld.⁶⁴ Courts have held that when the primary purpose of the prime lease is endangered by a proposed sublease, landlord consent may be reasonably withheld.⁶⁵ Consent may be reasonably withheld when a tenant wishes to sublease to a competitor of the prime landlord.⁶⁶ A landlord is not required to consent when the prime lease restricts the use of the premises to one use and the proposed sublease would be for another use.⁶⁷ Economic reasons have also been found to be a sufficient reason to deny landlord consent.⁶⁸

⁵⁸ McLoughlin, supra note 55 (citing Gruman, 78 N.W.2d 377).

⁵⁹ Goe. Benz & Sons v. Hassie, 294 N.W. 412, 412 (Minn. 1940).

⁶⁰ Landlord and Tenant, supra note 1.

⁶¹ Cargile and Noble, supra note 2, at 43.

⁶² See Berryhill v. Healey, 95 N.W. 314, 315 (Minn. 1903).

⁶³ See id. at 315.

⁶⁴ Sidney G. Saltz, Features, Landlord Impediments to Subleasing and Assignment Issues with Landlord Consent, 21 Probate & Property 36 (2007).

⁶⁵ Medinvest Co. v. Methodist Hosp., 359 N.W.2d 714, 717 (Minn. Ct. App. 1984)

⁶⁶ Landlord and Tenant, supra note 1.

⁶⁷ See Gary L. Hall, Construction and effect of provision in lease that consent to subletting or assignment will not be arbitrarily or unreasonably withheld, 54 A.L.R.3d 679, 7 (citing Leonard, Street & Deinard v. Marquette Associates, 353 N.W.2d 198 (Minn. Ct. App. 1984)).

⁶⁸ Am. Fed. Bank v. F & W Props., 2007 Minn. App. Unpub. LEXIS 831, *11 (Minn. Ct. App. Aug. 14, 2007).

Although courts can and have applied the reasonableness standard, the vagueness of the standard often results in landlords including a list of criteria which, if applicable, would permit a landlord to reasonably deny consent.⁶⁹ A list of common criteria includes:

- Tenant may not be in default under the lease.
- The proposed use of the premises may not be detrimental to the property.
- The proposed subtenant must be acceptable, financially and otherwise.
- The proposed subtenant may not be a governmental agency.
- The proposed subtenant may not already be a tenant in the building.
- The proposed subtenant may not then be negotiating with the landlord for a lease on the property and may not have negotiated with the landlord for space within the property within the prior 12 months.
- The proposed rental rate in the sublease may not be lower than that quoted by the landlord for comparable space within the property.⁷⁰

These criteria often relate to the character of the proposed subtenant or are anticompetitive in nature.⁷¹

Commercial leases often mandate that the prime tenant pay a “processing” or “review” fee in connection with the landlord’s review and potential approval of the subletting.⁷² It is also commonplace for a commercial lease to require a prime tenant to pay the prime landlord’s attorneys’ fees in reviewing a proposed sublease.⁷³

X. Landlord Waiver of Consent

A landlord may waive the consent requirement expressly or by implication.⁷⁴ Any action by the landlord which implies that a breach of the covenant not to sublease has been waived may waive the landlord’s ability to enforce the covenant.⁷⁵ If a landlord knowingly accepts rent from a subtenant, this may constitute waiver and prevent the landlord from declaring the

⁶⁹ Saltz, supra note 65.

⁷⁰ Id.

⁷¹ See id.

⁷² Hayhoe, supra note 7, at 5.

⁷³ Id.

⁷⁴ See Devlin v. Le Tourneau, 142 N.W. 155, 155 (Minn. 1913); Cargile and Noble, supra note 2, at 43.

⁷⁵ Cargile and Noble, supra note 2, at 43.

lease void.⁷⁶ This has been found to include the acceptance of rent via electronic fund transfer.⁷⁷ However, acceptance of a subtenant's rent by a landlord's clerk who had no authority to waive terms of the lease has been held not to be a waiver of consent when the landlord promptly returns the rent payment.⁷⁸

The fact that a subtenant is allowed to remain in possession of the leased premises for a significant period of time (e.g. one year) does not constitute a waiver of the covenant against subletting if the landlord did not collect or receive rent during such period.⁷⁹

When a landlord, after waiving the consent requirement to a sublease, later transfers its title "subject to the rights of tenants in possession," the landlord's successors are bound by the waiver.⁸⁰ A sublease of property without consent which occurs after the transfer of such property to a new owner would constitute a new violation of the lease.⁸¹

XI. Tenant Remedies for Landlord Unreasonably Withholding Consent

A tenant may seek damages, specific performance, or termination of the lease when a landlord unreasonably withholds its consent.⁸² Many leases are silent on tenant remedies.⁸³ None of the potential remedies are ideal for a tenant, who will have to spend time and money to pursue a lawsuit while also potentially losing its subtenant.⁸⁴ Thus, a tenant should consider attempting to negotiate a provision in the prime lease addressing its remedies if the landlord unreasonably withholds its consent to sublease.⁸⁵

⁷⁶ See Christy v. Berends, 2008 Minn. App. Unpub. LEXIS 855, *1, 2008 WL 2796663 (Minn. Ct. App. July 22, 2008); Cargile and Noble, supra note 2, at 43.

⁷⁷ Christy v Berends, 2008 Minn. App. Unpub. LEXIS 855, *11, 2008 WL 2796663 (Minn. Ct. App. July 22, 2008).

⁷⁸ Goe. Benz & Sons, 294 N.W. at 412-13.

⁷⁹ See Clark v. Clark, 204 N.W. 936, 937 (Minn. 1925)

⁸⁰ Devlin, 142 N.W. at 155.

⁸¹ Id. at 156.

⁸² Hayhoe, supra note 7, at 7.

⁸³ Id.

⁸⁴ Id.

⁸⁵ Id.

XII. Recapture, Sharing Sublease Profits, and Limiting Tenant Options

Leases may contain other provisions making it difficult for tenants to sublease, including: the landlord's right to terminate the lease or exclude the portion of the premises proposed to be sublet (usually referred to as a right to recapture), the landlord's right to profits derived from the sublease, and a prohibition on the tenant's ability to exercise options if the tenant itself does not occupy all of the premises.⁸⁶

If a lease permits recapture, it permits the landlord to terminate the lease if the tenant proposes to sublet the premises.⁸⁷ This may benefit each party.⁸⁸ Once notified that a tenant intends to sublease, a recapture provision allows the landlord to terminate the lease as to the premises to be sublet.⁸⁹ The tenant no longer is obligated to perform under the lease (or as to the portion of the premises recaptured, if less than all of the premises) and the landlord has the opportunity to put the premises to a better use.⁹⁰ There may also be circumstances where a recapture is harmful to the tenant if it wishes to reuse the space when business improves or its needs change.⁹¹

A lease may require the tenant to share all or a portion of its profit made from a sublease with the landlord.⁹² A common provision would provide for a 50/50 split of the "net profit" between the two parties.⁹³

Many leases that contain options for the tenant to extend also provide that the option may only be exercised by the original tenant and only if the tenant is in possession of the premises at the time it wishes to exercise the option.⁹⁴ These limitations work to prevent the tenant from passing on what may be very favorable option terms to another party.⁹⁵

⁸⁶Sidney G. Saltz, Features, Landlord Impediments to Subleasing and Assignment Recapture, Profit Sharing, and Restrictions on the Exercise of Options, 21 Probate & Property 42, 42 (2007).

⁸⁷ Id. at 43.

⁸⁸ Id.

⁸⁹ Hayhoe, supra note 7, at 6.

⁹⁰ Saltz, supra note 86, at 43.

⁹¹ Hayhoe, supra note 7, at 6.

⁹² Saltz, supra note 86, at 44.

⁹³ Hayhoe, supra note 7, at 6.

⁹⁴ Saltz, supra note 86, at 44.

⁹⁵ Id.

XIII. Possession by the Subtenant

Possession by the subtenant is construed as possession by the prime tenant.⁹⁶ Continued possession by a subtenant subjects the prime tenant to the same liability as if it were in possession of the premises.⁹⁷

If neither the prime tenant nor the subtenant gives written notice of termination to the prime landlord under a month-to-month prime lease, the subtenant's vacation of the premises is construed as a mere abandonment of the premises and not a valid termination of the prime lease.⁹⁸

A subtenant may not remain in possession of leased premises without paying rent in order to recoup damages from the value of its use of such premises and later seek rescission of the sublease due to the prime landlord's alleged fraud.⁹⁹ Future damages do not serve as an offset to current rent.¹⁰⁰

XIV. Prime Lease Termination

Upon a breach of the prime lease by a tenant or a subtenant, a landlord may terminate the prime lease.¹⁰¹ Such a termination terminates the tenant's and subtenant's rights.¹⁰² Generally, a subtenant may be dispossessed, even though it has not breached the sublease.¹⁰³ However, in certain cases, the subtenant may be allowed to retain a possessory right even when the prime tenant surrenders its lease to the prime landlord.¹⁰⁴ The theory behind this doctrine is that the prime tenant is unable to surrender to the prime landlord the part of the estate that has been transferred via the sublease.¹⁰⁵ Further, a subtenant is entitled to protection from acts by its sublessor which impair the subtenant's rights transferred in the

⁹⁶ Weiss v. Zenith Realty Co., 152 N.W. 869, 869 (Minn. 1915).

⁹⁷ Id.

⁹⁸ Landlord and Tenant, supra note 1.

⁹⁹ E. E. Atkinson & Co. v. Neisner Bros., Inc., 258 N.W. 151, 156 (Minn. 1935)

¹⁰⁰ Id.

¹⁰¹ Stephen T. Kaiser, Note, Giving Up On Voluntary Surrender: The Rights of a Sublessee When the Tenant and Landlord Cancel the Main Lease, 24 Cardozo L. Rev. 2149, 2149-50 (2003).

¹⁰² Id.

¹⁰³ See Warnert v. MGM Props., 362 N.W.2d at 367 (citations omitted); Kaiser, supra note 101.

¹⁰⁴ Warnert, 362 N.W.2d at 368.

¹⁰⁵ See id.

sublease.¹⁰⁶ Thus, the law in Minnesota is that when a prime tenant surrenders the prime lease to the prime landlord (but the prime landlord doesn't terminate the prime lease), any sublease remains valid and the prime landlord becomes the direct landlord under the sublease.¹⁰⁷

Minnesota courts have found that a tenant's surrender of its leasehold interest for failure to pay rent did not entitle the prime landlord to dispossess the subtenant because the subtenant's interest was not extinguished under a permitted sublease.¹⁰⁸ One Minnesota court found that when a prime landlord agrees to honor a sublease upon a tenant's default, it must also honor the tenant's obligation under a restaurant agreement when those agreements were "entire and indivisible."¹⁰⁹

PRACTICE TIP: *To avoid a termination of a prime lease due to a breach by a prime tenant effecting an automatic termination of a sublease (even though the subtenant is not in default under the sublease), a lawyer representing a subtenant should attempt to obtain a non-disturbance agreement from a prime landlord which provides that the prime landlord will not dispossess the subtenant so long as the subtenant is not in default under the terms of the sublease.*

XV. Subtenant's Right to Enforce an Option to Renew or Purchase Property

Generally, a subtenant does not acquire, by virtue of a sublease alone, any right to enforce covenants or agreements contained in the prime lease.¹¹⁰ This is because there is no privity of estate or privity of contract between the prime landlord and the subtenant.¹¹¹ Thus, courts have generally held that a subtenant has no right of action against the prime landlord regarding a renewal option contained in the prime lease.¹¹²

When the prime tenant has exercised its option to renew and the subtenant has a similar option under the sublease, the subtenant is entitled to specific performance of the renewal provisions of the prime lease or sublease as against the prime landlord.¹¹³ When the prime tenant chooses not to exercise its renewal option under the prime lease, the subtenant has no right to demand renewal.¹¹⁴ Some courts have found that a subtenant is entitled to specific

¹⁰⁶ See id.

¹⁰⁷ See Landlord and Tenant, supra note 1. See id.

¹⁰⁸ See Warnert, 362 N.W.2d at 365.

¹⁰⁹ MTS Co. v. Taiga Corp., 365 N.W.2d 321, 322 (Minn. Ct. App. 1985)

¹¹⁰ Andrea G. Nadel, Sublessee's rights with respect to primary lessee's option to renew lease, 39 A.L.R.4th 824, 3.

¹¹¹ Id.

¹¹² Id. at 2a.

¹¹³ Id.

¹¹⁴ Id.

performance of its option to renew when the prime tenant has taken a new lease from the prime landlord or promised the subtenant it would renew the primary lease but failed to do so.¹¹⁵

In one Minnesota case, the court held that the subtenant was entitled to exercise its option to renew under the sublease when the prime tenant had exercised its option to renew under the prime lease.¹¹⁶ In that case, the prime lease provided for a renewal period with the same time period and renewal option being substantially incorporated into the sublease in the event the prime tenant renewed its lease.¹¹⁷ Where a tenant sublets a portion of the leased premises and covenants for a renewal thereof conditioned on the renewal of the prime lease, it is not material whether the prime lease is renewed by formal written contract or operation of law.¹¹⁸ No matter the form of renewal exercised to renew the prime lease, a subtenant is entitled to a renewal of its sublease as a matter of right.¹¹⁹

By contrast, when the prime lease and sublease contain different renewal terms, courts have found that the subtenant does not have a right to enforce an option to renew.¹²⁰ However, merely slight modifications in a new lease or creating a new corporation to form a new lease with the prime landlord are not enough to evade a tenant's renewal obligation to its subtenant.¹²¹

If an option to renew is important, a prospective transferee should seek an assignment of the prime tenant's right under the lease as opposed to a sublease, because an option to renew contained in the prime lease may be enforced by an assignee against the landlord.¹²² If this is not feasible, then a subtenant should include in the sublease a provision requiring the prime tenant to renew the prime lease in the event that the subtenant renews the sublease.¹²³ A subtenant may also seek to enter into a separate contract with the prime landlord providing that if the prime tenant fails to renew the prime lease, the subtenant may still renew.¹²⁴

¹¹⁵ Id.

¹¹⁶ See Hotel Allen Co. v. Estate of Allen, 135 N.W. 812 (Minn. 1912).

¹¹⁷ See id.

¹¹⁸ Id. at 812.

¹¹⁹ See id.

¹²⁰ Nadel, supra note 110, at 2a.

¹²¹ Id. at 2b.

¹²² Id.

¹²³ Id.

¹²⁴ Id.

It has been held that an express transfer in the sublease of the option to purchase the leased property constitutes an assignment of the option and entitles the subtenant the right to enforce the option.¹²⁵

XVI. False Representations by a Sublessor

The general rule is that when a lease has been entered into in reliance upon representations regarding the subject matter of the lease which are false, the party deceived may rescind.¹²⁶ A showing of loss or damages is not required, but rather it is enough that the deceived party did not receive what it would have received had the representations been true.¹²⁷

In a Minnesota case, where a sublessor falsely represented that it was worth over \$1,000,000, that it owned an adjacent department store, and that it owned and controlled the heating plant to furnish heat for the subtenant, the subtenant affirmed the sublease by remaining in possession of the premises for nine months after discovering the false representations.¹²⁸ Normally, false representations in reference to nearby property that would affect the value or use of the leased property would be, if relied upon, material.¹²⁹ However, representations as to the present and future financial standing of a sublessor are to be regarded as immaterial and not obviously relied upon by a subtenant where the subtenant remained in possession such nine month period.¹³⁰

XVII. Prudent Subleasing Practices for Subtenants, Sublessors, and Prime Landlords

A subtenant's approach to evaluating a prospective sublease should differ from that for evaluating a direct lease, because a fixed situation is already in place.¹³¹ A subtenant should determine as early as possible the prime landlord's willingness to deal with the sublease request.¹³² This may often be done through a review of the terms of the prime lease.¹³³ A list of factors a subtenant should consider includes: review of the existing lease terms and

¹²⁵ M.O. Regensteiner, Right of assignee or sublessee to enforce option contained in lease for purchase of property, 45 A.L.R.2d 1034, 2.

¹²⁶ See E. E. Atkinson & Co., 258 N.W. at 154.

¹²⁷ See id.

¹²⁸ Id. at 152.

¹²⁹ See id. at 154.

¹³⁰ Id. at 155.

¹³¹ Brent C. Shaffer, Features, Leasing and Property Management Sublease Due Diligence, 17 Probate & Property 44, 45 (2003).

¹³² See id.

¹³³ See id.

amendments, the physical condition of the premises, the compliance of the premises with applicable laws (including environmental laws), confirmation of the status of ownership, determination of the existence and status of service contracts, determination whether the prime lease could be terminated or subject the subtenant to unknown legal liabilities, and determination of the authority and ability of the parties to be contractually bound.¹³⁴ A subtenant should obtain an estoppel certificate from the prime landlord to verify the status of the prime lease and of the sublessor's performance under the prime lease.¹³⁵ A subtenant should also:

- Obtain express written consent of the sublease from the prime landlord.¹³⁶
- Obtain a waiver of subrogation and claims from the sublessor and, if possible, from the prime landlord.¹³⁷
- Obtain a non-disturbance agreement from the prime landlord so that the prime landlord may not disturb subtenant's possession under the sublease so long as subtenant performs its obligations under the sublease.¹³⁸
- Require the sublessor to expressly transfer to the subtenant all elections (e.g. options to renew, expand, contract, etc.) that the sublessor may have under the prime lease.¹³⁹
- Require the right to approve any amendment to the prime lease that will affect its rights or obligations.¹⁴⁰
- Require the sublessor to covenant to perform its obligations under the prime lease.¹⁴¹

Similar to a subtenant, a sublessor should perform due diligence to make sure it achieves its end goal of subleasing its leased space.¹⁴² This process should include the sublessor familiarizing itself with the leased space and its prime lease obligations.¹⁴³ A list of duties for

¹³⁴ Id. at 45-48.

¹³⁵ Hayhoe, supra note 7, at 7.

¹³⁶ Andrea M. Carruthers, Assignments and Subletting in Commercial Real Estate Leasing 5 (October 4, 2006) (previous CLE materials on file with author).

¹³⁷ Hayhoe, supra note 7, at 6.

¹³⁸ Carruthers, supra note 136.

¹³⁹ Id. at 3.

¹⁴⁰ Hayhoe, supra note 7, at 6.

¹⁴¹ Carruthers, supra note 136, at 2.

¹⁴² Schaffer, supra note 131, at 48.

¹⁴³ Id.

the sublessor to perform includes: determination of the financial strength of the subtenant, review of the prime lease to determine the rights and leverage it has as the sublessor, determination of its ability to make representations, warranties, and estoppel statements which may be required by the subtenant, determination as to whether future activities of the subtenant could render the prime lease in default, determination of the authority and ability of the subtenant to be contractually bound, and determination of the status of existing service contracts.¹⁴⁴ A sublessor should also:

- Require a covenant that the subtenant must comply with the prime lease, as applicable to the subleased premises, during the sublease term.¹⁴⁵
- Obligate the subtenant to provide insurance and indemnify sublessor against subtenant's defaults under the prime lease or the sublease.¹⁴⁶
- Require that it be named as an additional insured under subtenant's insurance.¹⁴⁷
- Obtain a waiver of subrogation and claims from subtenant.¹⁴⁸
- Require that a prime landlord may use only objective criteria to review and approve potential subtenants so that a prime landlord may not subjectively withhold consent.¹⁴⁹
- Reserve some or all of its elections under the prime lease.¹⁵⁰

Sublessor and subtenant will also want to create remedies directly between the two parties.¹⁵¹

Prime landlords may be reluctant to approve a sublease transaction because the prime landlord has already drafted and negotiated the prime lease and has incurred transaction costs in doing so.¹⁵² However, a prudent prime landlord may use the sublease request as an opportunity to better protect itself.¹⁵³ A prudent prime landlord will: determine the financial strength of the sublessor, determine the financial strength of the subtenant, determine whether

¹⁴⁴ Id. at 48-49.

¹⁴⁵ Carruthers, supra note 136, at 2.

¹⁴⁶ Id.

¹⁴⁷ Id.

¹⁴⁸ Id.

¹⁴⁹ Hayhoe, supra note 7, at 6.

¹⁵⁰ Id.

¹⁵¹ Carruthers, supra note 136, at 2.

¹⁵² See Schaffer, supra note 131, at 49.

¹⁵³ See id.

the subtenant's use will render the premises in violation of zoning or land use laws, review the prime lease to determine the rights and leverage of the prime landlord, determine its ability to make representations, warranties, and estoppel statements required by the subtenant, obtain a contractual agreement with the sublessor to pay prime landlord's expenses, and determine the authority and ability of the parties to be contractually bound.¹⁵⁴ A prime landlord should also:

- Include a prime lease provision that allows the landlord to terminate the lease at the landlord's election upon an unauthorized transfer.¹⁵⁵
- Require its consent prior to any sublease and enable it to increase the rent and security deposit upon doing so or to share in any net profits of prime tenant.¹⁵⁶
- Be indemnified under the subtenant's insurance.¹⁵⁷
- Require the prime tenant to expressly affirm its obligations under the prime lease.¹⁵⁸
- Confirm that the subtenant expressly assumes certain obligations under the prime lease.¹⁵⁹ The prime landlord will want the subtenant to assume most of the obligations under the prime lease; meanwhile, the subtenant will want to assume as few obligations as possible.¹⁶⁰
- Confirm that nothing in the sublease amends or modifies the prime lease.¹⁶¹
- Disclaim any obligation to recognize the terms of the sublease.¹⁶²
- Specify that the subtenant has no right to non-disturbance if the prime tenant is in default, even if the subtenant is not in default.¹⁶³
- Reserve its right to consent to any further subleases.¹⁶⁴

¹⁵⁴ Id. at 50.

¹⁵⁵ Cargile and Noble, supra note 2, at 43.

¹⁵⁶ Diane Rosenberg and Jeffrey Rosenberg, Feature, Representing the Landlord in Commercial Lease Negotiations and Disputes, 33 GPSolo 10, 13 (2016).

¹⁵⁷ Carruthers, supra note 136, at 3.

¹⁵⁸ Id. at 4.

¹⁵⁹ Id.

¹⁶⁰ Id.

¹⁶¹ Id.

¹⁶² Id.

¹⁶³ Id.

- Seek reimbursement for its expenses in reviewing and approving the sublease.¹⁶⁵
- Seek indemnification against any claim for brokerage commissions on account of the sublease.¹⁶⁶

¹⁶⁴ Id.

¹⁶⁵ Id.

¹⁶⁶ Id.