Crusto, Property, Subleases and Assignments
August 31, 2006

I.   1. **Topic** should be broader than subleases and assignments;
     2. Topic should be “Transfer of Interests”.

II.   The **sources of law** are the same, the lease, state statutory law, and state common law cases.

III/IV. **Issues and Rules:**

   Overview:  
   1. The original tenant remains liable to the landlord, unless an assignment and release, and the landlord remains liable to the tenant.  
   2. In an assignment (privity of estate) the subtenant is liable to both the landlord and the tenant, and the landlord is liable to both the tenant and subtenant.  
   3. In a sublease, there is no privity of contract or of estate between the landlord and the subleasee.  
   4. The distinction between the two is based on the fact that in a sublease, the original tenant maintains some reversionary interest, time or otherwise.  
   5. Issue: When, if ever, is the subtenant liable directly to the landlord?  

      Rule 1: (Rogers may not be financially creditworthy or outside the jurisdiction.) If an assignment, not matter what words the parties used, then the subtenant is directly liable to the landlord (and to the tenant.) *Ernst*  

      Rule 2: Common law distinction, if transferring all, then an assignment; if partial, a sublease. *Ernst, Jaber.*  

      Rule 3: Modern rule distinction, assess the intention (from the court’s objective viewpoint) of the parties (in construing an instrument). *Ernst, Lawrence.*  

      Rule 4: That the secondary agreement continued to hold the old tenant still liable did not make the transfer a sublease, nor did they use of the word sublease. *Ernst. It is an assignment and the assignee is directly liable to the landlord. Ernst.*  

   6. Issue: Can a landlord who is a commercial lease reserved the right to approve an assignment unreasonable withhold approval? (Is it an unlawful restraint on alienation?)  

      Rule 1: Common law rule favors transfer (alienation) of property interests. *Kendall*  

      Rule 2: Contractual restraints on alienation of leasehold interests are permitted. *Kendall*  

      Rule 3: Majority rule: landlord can withhold approval, under attack. *Kendall*
Rule 4: Landlord in a commercial lease that provides for assignment if approval can only disapprove if landlord has a commercially reasonable objection to the assignee. *Kendall*

Rule 5: California legislature adopted the rule in *Kendall*, but also confirmed that there could be an absolute prohibition to transfer a lease. Note 1, p. 400

7. Issue: Does the reasonable standard in *Kendall* apply to residential leases?
   Rule 1. Generally no. *Slavin*

8. Issue: Does the landlord have a duty to mitigate if tenant breaches lease and abandons the property?
   Rule 1. Yes, so why not allow assignment? Note 3, p. 401

I1. Are there any legal restrictions on the ability of a landlord or a tenant to transfer (alienate, sale, gift, or will) their interest to another party?
R1.1. General rule, for a term of years and a periodic tenancy, both the landlord’s reversionary interest and the tenant’s leasehold interest can be freely alienated (transferred) unless the lease or a statute provides otherwise.
R1.2. **If a tenancy at will, any attempt by either the landlord or tenant to transfer their interest is usually considered as an expression of the intent to terminate the tenancy.** Of course, the new landlord or the new tenant can create a new tenancy at will, but the old landlord and/or the old tenant are relieved of any past obligations.

I2. Are there any legal restrictions on a landlord’s ability to transfer landlord’s interests, the reversionary interest, the rent, and any other lease benefits? And what is the relationship between the new landlord and the tenant?
R2.1. The landlord may transfer her interest freely to another owner.
R2.2. The new landlord takes the old landlord’s legal title free of the tenant’s leasehold, unless the new landlord as actual or constructive (legal) notice of the tenant’s interest, e.g. if the lease is recorded with the Registrar of Deeds.

I3. Are there legal restrictions on the tenant’s ability to transfer (alienate, sale, gift, or will) her interest in a leasehold?
R3.1. Unless the lease or a statute provides otherwise, there are no legal restrictions on a tenant’s ability to transfer her leasehold.
R3.2. A tenant may dispose of her interest either by (1) assignment or (2) lease.
R3.3. Most standard leases expressly require that the tenant cannot transfer the tenant’s interest without the consent of the landlord.

I4. What is an assignment of a tenant’s interest?
R4.1. In an assignment, a tenant transfers all of her interest in the leasehold to another, both the balance of the length of time and any control over the
premises (privity of estate). **But the tenant remains in privity of contract.** Some say that an assignment depends on the quality of the interest assigned not the length of time.

**R4.2.** In an assignment, the new tenant (assignee) has direct obligations (privity of estates) to both the landlord and the tenant and the landlord has direct obligations to the tenant and the assignee tenant. Assignee tenant can sue the landlord and can be sued by the landlord.

**I5.** Is the old tenant still liable to the landlord following an assignment?

**R5.1.** After an assignment, both the old tenant and the new tenant are liable under the terms of the lease, including the duty to pay the rent.

**R5.2.** The old tenant has the right to reimbursement from the new tenant for the paid rent (right of subrogation).

**I6.** Can a landlord restrict a tenant’s right to assign the tenant’s interest?

**R6.1.** Under the terms of the lease, if the tenant agrees, the landlord can restrict the tenant’s ability to assign her interest.

**R6.2.** The landlord can waive the restriction expressly or by conduct, such as accepting the rent from the assignee.

**I7.** What is a sublease of a tenant’s interest?

**R7.1.** In a sublease, a tenant transfer less than what the tenant’s rights under the lease, e.g. four months remaining and three months are transferred.

**R7.2.** Legal effects of a sublease greatly differ from those of an assignment. **Mainly, in a sublease, the subleasee has no obligation to the landlord; the subleasee’s obligation runs solely to the tenant.**

**R7.3.** The subleasee cannot sue the landlord, nor can the subleasee be sued by the landlord.

**R7.4.** Tenant is not relieved of any of her obligations under the lease and is still liable for rent and other lease obligations.

**I8.** Does an express restriction against an assignment also automatically restrict a sublease and visa versa?

**R8.1.** No, if there is an express restriction against one type of transfer, the majority rule is that it does not automatically prohibit the other type.

**I9.** Is there a third type of transfer option that the tenant has that will completely relief the one tenant from any further obligation to the landlord for the actions of the transferee?

**R9.1.** Yes, the tenant can negotiate an assignment and release with the landlord, in which the landlord expressly agrees to look only to the assignee and to release the tenant from any further liability. That is at the landlord’s option, and the landlord is not obligated to do so. Once done, the landlord
agrees to look only to the new tenant for any lease obligations including
the payment of rent.

I10. How does one distinguish between an assignment and a sublease?

R10.1. Look to the actual elements of the type of transfer; what a party labels the
transfer to be does not control.
R10.2. Original common law rule looks to the length of time being transferred; if
all remaining, then an assignment; if partial remaining, then a sublease.
R10.3. Modern rule is to look to the intent of the parties, the tenant and transferee.
R10.4. **Biggest problem is where the tenant transfers the balance of the term
to the transferee but retains a right to re-entry. Some hold this to be a
sublease.**

I11. Can a landlord and tenant agree to restrict a tenant’s right to transfer?
R11.1 Generally, if not expressed agreed to, there is no restriction.
R11.2. Landlords often seek to restrict and tenants often agree; often in forfeiture
language. Courts generally narrowly construe.
R11.3 Some leases require landlord’s consent to assign; some courts state that
the assignment cannot be unreasonably withheld.

V. **Rationale:** The rationale for the rules of transfer of title is to promote clearly defined
paths of alienation of leasehold while permitting the landlord and tenant to
adopt reasonable restraints.

VIII. **Comment:** This area of law is very confused, relying on a false distinction over
privity of estate vs privity of contract, and on the intention of the parties
(albeit through the lens of the judge). It would be better to develop rules
truly promoting a tenant’s absolute right to alienate a leasehold. How
does this issue relate to unlawful discrimination in tenant selection?