

# THE TOP 10 MOST CONTENTIOUS ASSIGNMENT AND SUBLETTING PROVISIONS

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## Assignment and subletting clauses

in leases are often highly negotiated between landlords and tenants. In the simplest of terms, at the bottom of these negotiations is the tug of war between control and flexibility. Landlords desire to control the tenant mix in their shopping centers and to ensure that they will have tenants that will pay the rent. Tenants desire to have flexibility in their locations, operating models, and corporate structures.

Following is a brief list of some of the most contentious assignment and subletting provisions, and the arguments and rationale therefor that the Landlord and the Tenant may want to make. How hard each party will want to fight for a particular argument depends on the situational factors. For example, if the Tenant knows that it will likely enter into a merger in the next few years, it should ensure that it has the right to freely assign the Lease to an entity with which it merges or sales its assets. That same Tenant may give on post-assignment liability, especially if it knows that there will not be a surviving entity of any net worth after its merger or asset sale. In some instances below, compromises are also suggested.

Last, this article is not a primer on assignments versus subleases and often will use those terms interchangeably. In discussions below where only an assignment or a sublease is applicable rather than both, the distinction has been made.



## THE TOP 10 MOST CONTENTIOUS ASSIGNMENT AND SUBLETTING PROVISIONS

### 1. Requirement for Consent and Reasonableness of Such Consent

Landlords and Tenants will often argue over whether Landlord's consent to an assignment or subletting is required, and if so, whether Landlord may withhold its consent in its sole and absolute discretion or if it cannot be unreasonably withheld, conditioned, or delayed.

From the Landlord's perspective, the Landlord will not want the Tenant to assign its Lease or sublet its space to a third party. The Landlord probably has spent a lot of time and money pursuing the Tenant, paying a tenant improvement allowance, negotiating a Lease, paying a broker's commission, and waiting for the Tenant to complete its build out. The Landlord has a vested interest in keeping that Tenant open and operating in its Center. However, if the Tenant is insisting on assigning/subletting, and especially if there is a threat that the Tenant will go dark or worse yet, bankrupt, then the Landlord will want as much control as possible as to the replacement(s). The Landlord will want sufficient time after notice of the Tenant's desire to assign/sublet in order to review the assignee's/subtenant's financial statements and operations.

Also, the Landlord will want absolute control over the tenant mix and quality of tenants within the Center. Items that the Landlord should consider may include:

- Use/Tenant Mix. The Landlord should be able to consider whether the proposed use is inconsistent with the balance of the Center and/or violate any use restrictions. Also, the Landlord should be able to determine whether assignee/subtenant operates a business that is in keeping with the "class" of the Center.
- Reasonableness of Sublease/Assignment Terms. The Landlord should be able to review the proposed assignment or sublease terms. If in a sublease situation, the Tenant has retained any liability or obligations (*e.g.* repairs/maintenance) under the prime lease, the Landlord may have reasonable concerns that the Tenant may not promptly comply as an absentee sublandlord. Also, if the sublease terms are so onerous to one party or the other, there may be a likelihood of a future default under the sublease.
- Tenant experience and "reputation". It is important that the Tenant has experience as a retailer. National and regional chain retailers have track records for consistent operations, where local mom and pop stores may not. Also, national and regional chains may be more likely than a mom and pop operation (though not always) to have financial resources commensurate with their sublease obligations. The Landlord and the Tenant may argue over the definition of "national" and "regional," as well. Customarily, that term is settled by the parties negotiating how many stores need to be open and operating within a particular geographic area in order to qualify as "national" or "regional."
- Competition with Landlord for Space in the Center. The Landlord will argue that it should not have to consent if it has been in negotiations with the proposed assignee/subtenant for leasing of other space in the Center. Also, the Landlord may desire to have a direct lease with the assignee/sublessee, and terminate the Tenant's lease, in order to have direct privity with the new tenant, extend the term of the Lease, keep up the Center's rental rates, and otherwise control the relationship with the new tenant.

- Sovereign Immunity. The Landlord may argue that it should not be forced to accept a government entity as an assignee/subtenant which might be able to take advantage of sovereign immunity in the event of any claims by the Landlord. Governmental entities may also have “most favored nations” clauses whereby if a lower rent is offered to another tenant in the Center, then the governmental entity’s rental rate will have to be decreased to match the lower rate.
- Profit Sharing. To the extent that the Lease provides that the Landlord has a share of any “profits” of an assignment or subletting (see below), the Landlord may wish to refuse consent for a proposed assignment/sublease if the Landlord reasonably determines that the Tenant has accepted a low-ball offer and the opportunity exists for a greater rent yield.

From the Tenant’s perspective, in an ideal world the Tenant would not need to obtain Landlord consent for any assignment or subletting (and this may in fact be appropriate in some circumstances). However, if Landlord consent is required, the following may be the primary Tenant concerns:

- Timing. The Tenant needs the Landlord to turn around any response on a request for consent quickly. If the Tenant has a potential assignee/subtenant, any significant delay in obtaining the Landlord’s consent will result in that assignee/subtenant likely seeking an alternate location.
- Reasonableness. The Landlord should be reasonable in its review of a proposed assignee/subtenant. The Landlord should not be able to condition its consent on financial or other lease concessions, nor should Landlord be permitted to refuse consent at Landlord’s whim or for reasons having no bearing on the proper operation and leasing of the Center.
- Remedy. The Tenant needs a fast and prompt remedy in the event that the Landlord (1) fails to timely respond to the Tenant’s request for consent; or (2) the Tenant believes the Landlord’s refusal of consent is unreasonable. The appropriate remedy for the Landlord’s failure to respond would be that consent is deemed given if the Landlord has not responded within \_\_\_\_ days after notice of the proposed assignment/sublease. The Tenant should request an expedited arbitration provision, whereby the Tenant is permitted to submit any disputes over the Landlord’s refusal of consent to an expedited arbitration process. While expedited arbitration is not necessarily a panacea, in many jurisdictions, it does present a better, faster, and cheaper remedy for the Tenant than litigating the dispute in a courtroom.

## 2. Permitted Assignments (e.g., intra-corporate assignments, mergers, sale of assets)

Often, Landlords and Tenants will negotiate a carve out to the Landlord’s ability to consent to an assignment or a sublease in the event the Tenant enters into a corporate restructuring or if the Tenant sells its business as a whole.

From the Landlord’s perspective, a change of control in the Tenant’s ownership or corporate structure can raise significant concerns about the Tenant’s financial wherewithal to cover its Lease obligations, as well as whether the new entity has the experience to operate well within the Landlord’s Center. The Tenant should anticipate that the Landlord may attempt to place conditions on such transactions, such as:

- No release. The original Tenant under the Lease may not be released by any intra-corporate assignments or mergers.

- Net worth. The *tangible* net worth of the surviving entity or assignee as determined in accordance with Generally Accepted Accounting Principles, or other industry-standard accounting principles, must be at least as much as that of the original Tenant on the date immediately prior to the merger or assignment. Alternatively, some Tenants will argue that the date the net worth is benchmarked should be date of the Lease, since that is the amount of Tenant net worth that Landlord found acceptable when entering into the Lease.
- Guaranty. In the case of an assignment to a third party, the original Tenant should guarantee the assignee's lease obligations. This can be problematic in some instances if the original Tenant and the assignee have a contentious relationship.
- Industry expertise. The surviving/acquiring entity must have a minimum number of stores and/or a minimum amount of experience in operating retail facilities similar to original Tenant's operations.
- Change of use. The use of the space must not change or, if the use will change, then the Landlord would have the springing consent rights, as would be the case in the event of an assignment/sublease to a third party.

From the Tenant's perspective, the Tenant cannot permit the Landlord to be the "tail that wags the dog" of the larger corporate objectives and initiatives of the Tenant, including the restructuring of the Tenant's internal corporate structure, a large-scale sale of a business or Tenant's assets, and/or a merger and acquisition transaction. The Tenant will want to ensure that it has the right, without any Landlord consent, to engage in any and all types of internal re-organizations, such as intra-corporate assignments, assignments to corporate affiliates, parents or subsidiaries, as well as allow for the merger or other combination of internal corporate affiliates and subsidiaries. If there is a third party involved (such as the case of an equity sale or sale of assets) including the Lease at the Landlord's Center, then the Landlord may be reasonable in withholding its consent if the assignee/sublessee is not comparable to the Tenant.

### 3. Change of Use and Competitive Uses

When discussing assignment and subletting, people often do not consider the impact of the permitted use provision in the Lease. Use restrictions and exclusive use provisions can also heavily impact the Tenant's ability to assign its Lease or sublet the space. If the Lease is written narrowly and restricts the Tenant to operating only for a very specific use or with a specific menu, then the number of assignment/subletting prospects for Tenant will be extremely limited.

From the Landlord's perspective, there are two main reasons why it is critical for the list of permitted uses in a Lease to be as narrow as possible. First, for the Landlord to maintain a full, vibrant Center, the Landlord will want to craft the Center's mix of tenants. Shoppers want a variety of stores and stores of a certain quality. For instance, if the Landlord wants to create a high-end, luxury Center, it will want to make sure that Nieman-Marcus will not sublet its space to Dollar General. Further, the Landlord will want to make sure that it does not have too many of the same type of store, so that its Center will have a balanced mix of good and services.

Also, the Landlord must be careful to protect the exclusive use rights it has granted to other tenants. If the Landlord has granted a tenant an exclusive use for the sale of shoes in the Center, the Landlord may have a lawsuit on its hands if a pet food shop assigns its lease to Famous Footwear. In all

circumstances, the Landlord should carve out the uses of the then-existing tenants, as well as the uses of those tenants' assignees and subtenants, from exclusive use rights it grants to other tenants.

From the Tenant perspective, there are two main reasons why a broad set of permitted uses in the Lease are critical. First, the Tenant needs to understand at the time of the Lease execution the "rules of the game". If it becomes necessary for the Tenant to assign/sublet the space, the Tenant needs to market the property and therefore needs a good understanding of what successor uses will be permitted and which will not. Not knowing in advance what uses would be permitted, in practice, makes the property unmarketable for assignment/subletting. Second, the permitted uses for assignment/sublet need to be sufficiently broad and flexible for reasonable changes in use. A narrow list of permitted uses can also cause issues with marketability of the space.

Hidden or ancillary restrictions, such as continuous operations clauses, trade name covenants, and tight replacement timing for co-tenancies can also act to restrict the Tenant's ability to market its space. Continuous operations clauses do not permit a time period for the Tenant to cease operations, vacate, build out the space for the new tenant, and for the new tenant to stock and staff the space. Trade name covenants only permit the Tenant to operate under a certain name, unless the Tenant is able to obtain the Landlord's approval of a name change. Unless there is just a change of control in the Tenant, usually an assignee/subtenant is going to need to change the trade name under which it will be operating in the space. Last, the Landlord will usually have the right to approve signage and exterior elevation changes. Consequently, any assignee/subtenant will have to seek the Landlord's approval if it wants to install its own signs or change the exterior appearance of the space.

There are numerous potential solutions and compromises that the Landlord and the Tenant may pursue in order to finalize a deal:

- "Prohibited Assignee/Subtenant" List. The parties can identify in the Lease a list of uses to which the Tenant may not assign or sublet. This sets the rules of the game in advance, providing certainty to the Tenant while at the same time providing a moderate level of protection to the Landlord, at least for those uses which the Landlord knows at the time of lease execution would be unacceptable.
- Then-Existing Exclusive Carve Out. The parties can add a clause in the Lease stating that assignees or subtenants are subject to any then-existing exclusive uses which the Landlord may have granted to other tenants in the Center. This gives the Landlord the freedom to ensure that future tenants' exclusive use rights will not be impacted by any change of use, while at the same time enabling the Tenant to assign or sublet for a change of use that is not competitive.
  - It is important to note that if the Tenant agrees to this clause, the Tenant will want to insert language into the Lease requiring that the Landlord, at any time upon written request, will provide Tenant with a list of any then-existing exclusives granted to other tenants in the Center, along with verbatim copies of the exact exclusive language from those tenant leases. Also, the Tenant will want to obtain a "narrowly tailored" clause, so that the future exclusives the Landlord grants to other tenants will be reasonably narrowly tailored to the use for which the exclusive is granted. For example, the Landlord's grant of an exclusive use to a men's big and tall clothing store should not be for "all clothing sales," nor should a fast-food hamburger restaurant get an exclusive for "any restaurant." Last, the Tenant may argue that the quid pro quo for agreeing not to assign/sublet in violation of any future exclusives should be that the Landlord consent for

assignment/subletting should not be required in the first place; however, this would be a tough argument for most Landlords to accept.

- From the Landlord's perspective, a provision which prohibits a Tenant from assigning/subletting in violation of future exclusive uses may not be sufficient for the Landlord. The Landlord will try to expand this to prohibit assignment/subletting to any use which would be competitive with the primary use of any then-existing tenant uses, regardless of whether Landlord has actually granted an exclusive use to Tenant. For instance, if the Center is anchored by a theater, the Landlord may want to restrict any type of entertainment uses in the Center. The Landlord will ideally want a provision prohibiting Tenant from assigning/subletting to any use which, in Landlord's reasonable opinion, would be inconsistent with the tenant mix in the Center.

## 4. Landlord Recapture Rights and Exceptions Thereto

One of the last things a Landlord wants is for its Center to be filled with vacancies. Shoppers do not like shopping in places that are half empty. One way to ensure that this problem does not strike a Center is for the Landlord to negotiate recapture rights in the event the Tenant goes dark. If the Tenant is still paying rent and does not have a continuous operations clause, the Tenant will have the legal right to maintain a dark storefront in the Center. To prevent this from happening, the Landlord will negotiate a recapture right for the space. A recapture right provides a mechanism for the Landlord to terminate the Lease for the dark Tenant's space and regain possession. Landlords will also use recapture rights to enable a direct lease with potential subtenants with which the dark Tenant is negotiating sublease.

From the Tenant's perspective, recapture rights can be a useful tool to rid itself of an unwanted lease, but alternatively, recapture rights can disrupt the Tenant's plans.

- Tenant Exit Strategy. Often (perhaps most often), a Tenant is seeking to assign or sublease as an exit strategy from a location it no longer wants or needs. In such a circumstance, the Tenant needs speed and certainty of outcome, and thus the Tenant would greatly prefer for Landlords to have a recapture right than to have a right to consent to a proposed assignment or sublease. In fact, the Landlord's exercise of a recapture right is perhaps the best thing that could happen, because then the Tenant is completely relieved of all its obligations under the Lease. Thus, during Lease negotiations, Tenants often view recapture rights as a viable alternative to the Landlord's consent rights. In such circumstances, the Tenant may have the following additional considerations:
  - Timing. How much time does the Landlord have to exercise the recapture right? The longer the time period, the more difficult it will be to market the property for assignment/sublease.
  - Leasehold Improvements. Did the Tenant invest substantial sums in leasehold improvements which impact the fair market rental value? Worse, did Tenant construct the entire building and site improvements (*e.g.*, a ground lease)? If so, then Tenants may try to negotiate, as a condition of Landlord's exercise of a recapture right, that the Landlord must pay the Tenant the unamortized value of the Tenant's leasehold improvements. From the Landlord's perspective, it is important to cap the amount of the value of leasehold improvements it will be required to pay. One compromise is to cap the



amount of the amortized leasehold improvements to the amount of the Tenant's average investment in its prototypical stores.

- **M&A and "Package" Deals.** The Tenant may be seeking to sell its business and/or exit a particular market, in which case the Tenant may be seeking to complete the assignment/sublease of a large number of locations. In such a circumstance, the exercise by the Landlord of a recapture right is bad and worse news for the Tenant. Not only does the recapture right kill Tenant's merger/acquisition or package deal, but to add insult to injury, the Tenant will also lose its Lease and the ability to operate a business at the Center.
  - The compromise solution for this is that the Tenant should require a "package deal exception" to the recapture right. In other words, the Landlord should not have a recapture right in the event of a proposed assignment/sublease where that transaction is part of a larger transaction involving \_\_\_\_ or more locations in a particular geographic area.
- **Subleases for Profit.** It is possible that the Tenant holds a long term lease in a Center, where the rent paid by the Tenant is substantially below market rates. In such a situation, it may be more profitable to the Tenant to sublease the space than to keep operating its store, which also may be profitable. In such a circumstance, the exercise by the Landlord of a recapture right would both eliminate the recovery of sublease profit *and* cause the Tenant to lose its profitable store at the location. In this circumstance, the existence of a Landlord recapture right places the Tenant in a difficult position. The Tenant cannot complete its desired assignment/sublease without sending the recapture notice, but neither can the Tenant ensure continued occupancy of the Lease term while at the same time sending the recapture notice.

## 5. Release of Assignor/Liability of Assignor Post-Assignment

Whether or not the Tenant should remain liable to Landlord for any all or any portion of the Lease obligations after the Tenant assigns the Lease to a third party is often highly negotiated. This issue is not applicable to a sublease situation as the master lease (and all of the Tenant's obligations) between the Landlord and the Tenant remains intact.

It is in the best interest of the Landlord to keep as many parties liable, for as much as possible, of the Tenant's obligations under the Lease. Consequently, Landlords will want to keep the original Tenants/assignors liable for not only for additional financial security, but Landlords will want the original Tenants/assignors to stay liable for operational covenants under the Lease. Financial covenants may not be sufficient protection of the Landlord if the assignee is not an experienced operator (or is just a bad one). Tenants, of course, prefer the opposite and want to be fully released upon the assumption of the Lease by an assignee.

There are several common solutions and compromises that the Landlord and the Tenant may pursue in order to get a deal done:

- **Net Worth Threshold.** The Landlord can require the assignee to have a certain net worth, usually at least as much as the original Tenant under the Lease had (a) at the time the Lease was executed, or (b) at the time the Lease is assigned. The Landlord may also want to specify that it is the *tangible* net worth of the assignee that is being compared, as often times

Tenants may carry significant “goodwill” and other intangible assets on their books and include that in their net worth.

- **Time and Dollar Limitations.** If the Landlord will not budge on insisting upon the original Tenant/assignor remaining liable post-assignment, the Tenant can try to limit the time and/or amount of liability. For instance, the Tenant may agree to remain liable for \_\_\_\_\_% of the rent for the first \_\_\_\_ months after the assignment of the Lease.

## 6. Non-Disturbance of Subtenant

Often times, a subtenant will insist on obtaining a non-disturbance agreement from the master Landlord whereby the master Landlord will agree to recognize the subtenant’s interest in the space in the event there is a default under or termination of the master Lease between the master Landlord and the master Tenant. The last thing the subtenant will want is for its sub-leasehold rights to be extinguished because the master Lease is terminated. A non-disturbance agreement directly between the Landlord and the subtenant will preserve the subtenant’s rights to the space. The terms of that non-disturbance agreement are often highly negotiated.

Landlord may not want to enter into such a non-disturbance agreement because it will restrict the Landlord’s ability to market the space to whomever the Landlord wants after the termination of the master Lease. Also, an upfront non-disturbance agreement will diminish Landlord’s leverage over the subtenant. A default under or termination of the master Lease will leave the subtenant particularly vulnerable because the subtenant’s rights to the space under the sublease will automatically terminate upon the termination of the master Lease. This especially becomes a problem if the Tenant has heavily invested in improvements to the space, if the space is in high demand, and/or if the subtenant is paying below-market rates.

If Landlord does agree to a non-disturbance agreement, the Landlord will often want the subtenant to step into the master Tenant’s shoes under master Lease, and will obligate the subtenant to cure the master Tenant’s defaults. Landlord will also want the master Lease to control its relationship with the subtenant as rental rates under subleases are usually lower than the rent due under master Leases. It is important to note that this may not be the case with master ground leases, and subleases between a developer master Tenant that constructed the subtenant’s premises and the subtenant.

Subtenants will usually want the sublease terms to control as the rental rate is usually lower and the sublease will contain all of the terms negotiated by the subtenant. However, if the rental rate and the master Tenant’s obligations under the master Lease are lower, the subtenant may be willing to assume the master Tenant’s obligations under the master Lease.

## 7. Sharing of Profits/Consideration for Assignment or Subletting

Landlords and Tenants squabbling over profits in the event of an assignment or subletting often happens, but in reality, profits are rare in sublease deals as the rental rates are usually lower than those under the master Lease. This is due to the inherent risk in subleases whereby a subtenant can easily lose its rights to the space, at no fault of its own, upon the master Tenant’s default under the master Lease.

From the Landlord’s perspective, the Tenant should not be taking on Landlord’s role of aggressively marketing the space. The Landlord rented the space to the Tenant to operate in, not for the Tenant to make money off higher rents it might achieve by leasing the space to subtenants or assigning the Lease to third parties.

From the Tenant's perspective, the Tenant is going to argue that it should be able to make as much money as possible from any location and by any means. If it is more profitable for the Tenant to become a sublandlord than to operate in certain space, the Tenant should be able to do that. Also, the Tenant will have a strong argument that any sublease profits made because of the improvements the Tenant made to the space (as would be the case if the master Landlord ground leased land to a master Tenant developer, and such developer then leased the land and the improvements it built thereon to a subtenant), should be retained by the Tenant. The ground lease rent for the unimproved land should be considerably lower than the rent for improved parcel.

If the profits are part of a larger corporate deal and an assignment of the Lease is in connection therewith, it can be difficult to assess assignment consideration and profits which are applicable and/or allocated to a particular lease. The Tenant will also protest the fact that the Landlord should not be entitled to receive a portion of the profits from the sale of Tenant's business. The Tenant can argue that the sale of Tenant's business is unrelated to Landlord's Center, and therefore, the Landlord should not be able to use the Lease to collect a portion of the sale proceeds.

Regardless of the arguments and the situation surrounding an assignment and subletting, most parties will agree that any profits to be shared with the Landlord should be net of brokerage costs and costs to improve the space for the assignee/subtenant.

## 8. Extension Options, Rights of First Refusal and Other Tenant-Favorable Clauses

Arguments between the Landlord and the Tenant will often arise regarding whether or not extension options, rights of first refusal, and other tenant-favorable clauses should be personal to initially-named tenant only, or if they should carry over to the assignee/subtenant.

The Landlord will argue that it made the original lease deal with the original Tenant, and that others should not benefit from that bargain. If the Landlord is successful in this argument, it gives the Landlord much more leverage over assignee/subtenant as the Lease term nears expiration. It also allows the Landlord to freely market the space without the dampening factor of the Tenant having a right of first refusal or right of first offer.

In some instances, especially when the assignee/subtenant will be investing larger amounts in the space, the Tenant and the assignee/subtenant will insist on having the right to extend the term, any rights of first refusal, any rights of first offer, and such similar tenant-favorable clauses. The subtenant/assignee may be leery of investing in a space for which it may lose control sooner than it is willing to do so. Also, the Tenant will want these tenant-favorable rights to transfer to the assignee/subtenant because the Lease is more valuable to assignee/subtenant if they have these additional rights and the Tenant will be able to extract a higher rental rate or profit. Tenants may argue that, at a minimum, the tenant-favorable rights should apply to the assignee/subtenant that arises from intra-corporate assignments, mergers, and sale of all of Tenant's assets.

Alternatively, a Tenant may not want extension rights to flow to an assignee. In instances where the Tenant remains liable under the post-assignment, or if a subtenant is not fully compensating the Tenant for the Tenant's monetary obligations under the Lease, the Tenant will want to ensure that the Lease expires as early as possible in order to terminate its liability for the Lease and stop its monetary losses.

## 9. Concessionaires and Pop-Up Stores

Department stores have a long history of having concessionaire licensees operate within their spaces. They often will run specialty departments within the department store and may have their own employees staffing those departments. Pop-up stores are similar. Increasingly, department stores may have a “fast fashion” or other trendy guest retailer open for a short period of time within their stores. The pop-up stores may or may not utilize the department store’s employees. Both concessionaires and pop-up stores provide operational flexibility for a Tenant and can help drive traffic.

To protect both the Landlord and the Tenant, the license agreements for both concessionaires and the pop-up stores should contain language whereby the concessionaire and pop-up store will indemnify both the Landlord and the Tenant, as well as provide insurance coverage for both. To ensure that this happens, the Landlord will want to include the insurance and the indemnification requirements in the Lease.

From the Landlord’s perspective, the licensees should operate only within the interior of the Tenant’s space, the Tenant should be responsible for maintaining control over the licensee and, the Tenant should retain liability over the licensed space. Also, the Landlord will want all sales from the licensee to be included in gross sales for the determination of percentage rent.

From the Tenant’s perspective, the licensees are a way to bring more customers into their stores and they should be permitted to operate in a manner that they feel would accomplish that. Maximizing traffic may include different or temporary exterior (and interior) signage. Tenant may also want the sales to occur outside the four walls of the leased space, such as sidewalk sales and tent sales. Both of these issues would usually require obtaining the Landlord’s approval, and the Tenant may want to include pre-approval for such issues in the Lease.

## 10. Carving Up Big Boxes

As more large tenants are vacating their spaces, and the big boxes they leave behind are being carved up for several smaller tenants, it is important to determine upon an assignment or subletting which transferee is entitled to exercise the Lease rights of the original, large tenant and how such rights are split among all of the transferees.

By way of example, a large retailer may have negotiated for consent rights over any changes to the parking area in front of its space, as well as for a prime panel location on a pylon sign. If the big box tenant sublets to three smaller retailers, it is important to designate which subtenant should have the right to place its panel on the pylon sign. The Landlord will also want to make sure that the consent right is personal to the original named Tenant. However, if the Landlord was unsuccessful in making the consent right personal to the original Tenant, the Landlord will want to ensure that as few of the subtenants as possible have continuing consent rights over the parking area. It is difficult enough to operate having to obtain one consent for each change you want to make, but having to obtain three subtenants’ approval will significantly hamper all of Landlord’s efforts to enact changes.



Negotiations over assignment and subletting provisions are often contentious. The fight between

Landlord's desire to control its Center and Tenant's need for operational flexibility can stop a deal in its tracks. The foregoing provides a short list of the issues about which the Landlord and the Tenant should concern themselves with, along with some suggestions and alternatives that should be helpful in getting through these issues.





## About Husch Blackwell's Retail Institute

Husch Blackwell's Retail Institute was created with the belief that in-depth industry knowledge creates value, and knowledge is created through an open exchange of ideas, innovations and experiences. Our Retail Institute partners with leaders in business, public policy, education and professional associations to create knowledge and deliver value by putting industry first.

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