

Memorandum 88-71

Subject: Study H-111 - Commercial Lease Law (Assignment and Sublease--
tentative recommendation)

The attached draft of the tentative recommendation relating to assignment and sublease incorporates decisions made at the September Commission meeting. The draft also incorporates the most recent comments we have received from our consultant Professor Coskran and from other interested persons who have been active in the project. The staff does not plan to raise any further issues concerning the draft at the October meeting, and believes that all concerns raised so far have been adequately addressed in the draft.

The draft is now in good shape to distribute for comment as a tentative recommendation; the staff is optimistic that this can be done with minimal discussion and revision at the October meeting. Indeed, if the Commission is to meet its goal of submitting legislation on this matter to the 1989 Legislature, it must approve the tentative recommendation at this time. Any further concerns can be considered at the time comments on the tentative recommendation are reviewed.

Respectfully submitted,

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#H-111
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09/27/88

Commercial Real Property Leases:
Assignment and Sublease

Background

Traditionally, if a lease required the landlord's consent to an assignment or sublease, the landlord had absolute discretion whether or not to consent. But in 1985, the California Supreme Court reversed this rule in *Kendall v. Ernest Pestana, Inc.*¹ Under *Kendall*, if a commercial real property lease provides no standard governing the landlord's consent, the landlord may not withhold consent to the tenant's assignment or sublease unless the landlord has a commercially reasonable objection.

The *Kendall* decision leaves unresolved a number of related issues. Among these issues are (1) whether the new rule should be applied to leases executed before the decision,² (2) whether the rule should be applied to residential leases,³ and (3) whether a lease may absolutely prohibit assignment or grant absolute discretion over assignment to the landlord.⁴ The uncertainty that now exists in the law relating to assignment and sublease will continue to cause problems in practice and disrupt normal commerce. The California Law Revision Commission has concluded that the law in this area should be codified and clarified.

1. 40 Cal. 3d 488, 220 Cal. Rptr. 818, 709 P. 2d 837 (1985).

2. Cf. Coskran, *Restrictions on Lease Transfers: Validity and Related Remedies Issues*, 82-90 (1988).

3. "We are presented only with a commercial lease and therefore do not address the question whether residential leases are controlled by the principles articulated in this opinion." *Kendall*, 40 Cal. 3d at 492 n. 1.

4. *Kendall*, 40 Cal. 3d at 499 n. 14.

Codification of Kendall

If a lease precludes the tenant from assigning or subletting without the landlord's consent, but is silent as to the standards governing the landlord's consent, should the landlord have absolute discretion or should the law imply a standard of reasonableness? Since December 5, 1985, the date of the *Kendall* decision, California law has implied a standard of reasonableness. Before that date, absolute discretion was the generally accepted rule.⁵

Both of these rules promote identifiable public policies. The *Kendall* rule is supported by the policy against unreasonable restraints on alienation⁶ and the implied contractual duty of good faith and fair dealing⁷. Considerations that support the previous rule of landlord discretion include the landlord's overriding interest in protecting the reversion and the uncertainty and litigation caused by a reasonableness standard.

In deciding between the competing policies, the decisive factor should be the reasonable expectations of the parties who negotiate a provision in a lease requiring the landlord's consent without further guidance. Certainty in the law and the ability to rely on a negotiated agreement are of primary importance in the commercial world. The parties need assurance that the rights and obligations under their tenancy agreement will be honored.

By now, parties who negotiate a lease understand the *Kendall* rule that if the lease is silent on standards for the landlord's consent, the law implies a reasonableness requirement. The parties' reliance on the *Kendall* rule should be protected. The Commission recommends that the *Kendall* rule be codified to confirm this reliance and protect

5. See Coskran, *Restrictions on Lease Transfers: Validity and Related Remedies Issues*, 37-45 (1988); *Kendall*, 40 Cal. 3d at 507-11 (dissent); *Kreisher v. Mobil Oil Corporation*, 198 Cal. App. 3d 389, 243 Cal. Rptr. 662 (1988), review den. May 5, 1988.

6. *Kendall*, 40 Cal. 3d at 498-500.

7. *Kendall*, 40 Cal. 3d at 500.

parties from future changes in the currents and tides of judicial philosophy.

Application to Pre-Kendall Leases

The *Kendall* rule should be codified only as to leases executed on or after December 5, 1985, the date of the *Kendall* decision. The interest of parties who relied on the pre-*Kendall* rule of absolute landlord discretion is also entitled to protection. This recommendation is consistent with narrow judicial construction of pre-*Kendall* leases by post-*Kendall* cases,⁸ and with case law expressly limiting retroactivity of *Kendall*.⁹

Impact of Kendall on Landlord Remedies

Under Civil Code Section 1951.4, the landlord may keep the lease in force and require continued payment of rent notwithstanding abandonment by the tenant. This remedy is available only if the lease expressly incorporates the remedy and only if the lease allows the tenant to assign or sublet. If the landlord's consent is required to assign or sublet, the lease must also provide that the landlord's consent may not unreasonably be withheld. This statute was based on the assumption of prior law that the landlord's consent is not subject to a reasonableness requirement unless the lease imposes it.

With the change in California law to imply a reasonableness requirement in the absence of an express standard for consent in the lease, Section 1951.4 should also be revised. The landlord's right to keep the lease in force should be available if a reasonableness standard is implied, as well as if the lease expressly imposes a reasonableness

8. See, e.g., *John Hogan Enterprises, Inc. v. Kellogg*, 187 Cal. App. 3d 589, 231 Cal. Rptr. 818 (1985); *Airport Plaza, Inc. v. Blanchard*, 188 Cal. App. 3d 1594, 234 Cal. Rptr. 198 (1987).

9. *Kreisher v. Mobil Oil Corporation*, 198 Cal. App. 3d 389, 243 Cal. Rptr. 662 (1988), review den. May 5, 1988.

standard. Other technical and clarifying amendments should also be made in Section 1951.4.¹⁰

Other Lease Restrictions on Transfer

Kendall dealt only with a lease clause that requires the landlord's consent but that fails to state a standard for giving or withholding consent. However, the reasoning of the decision raises issues concerning the validity of other types of lease restrictions on transfer. The court's concern over unreasonable restraints on alienation and the court's importation of the good faith and fair dealing doctrine into lease law could easily affect other types of restrictions on lease transfer.¹¹ The Commission believes a systematic statutory exposition of the governing law in this area is necessary to avoid many years of litigation and uncertainty.

The statute should reaffirm the governing principle of freedom of contract between the parties to a lease and honor the reasonable expectations of the parties based on their agreement. The parties should be able to negotiate any restrictions on transfer that are

10. Changes in Section 1951.4 recommended by the Commission include:

(1) The remedy should be available to the landlord if the lease does not prohibit, rather than "if the lease permits," assignment or sublease.

(2) Any lease standards and conditions for transfer should be presumed reasonable, although the tenant should be able to show that a particular standard or condition is unreasonable under the circumstances when it is applied.

(3) The statute should state clearly that, if a condition on transfer has become unreasonable due to a change in circumstances, the landlord may waive the condition and still take advantage of the Section 1951.4 remedy.

(4) The statute should state clearly that the remedy is not denied to a landlord because of the presence in a lease of a provision giving the landlord the right to recover the premises in case of a transfer. Exercise of such an election, however, terminates the lease and precludes the landlord's use of the Section 1951.4 remedy.

(5) The existence or exercise of a provision in a lease that gives the landlord the right to recapture any benefits realized by the tenant as a result of a transfer should not preclude the landlord's use of the Section 1951.4 remedy.

11. See, e.g., Coskran, *Restrictions on Lease Transfers: Validity and Related Remedies Issues*, 59-63 (1988).

appropriate for the particular transaction with the assurance that the restrictions will be enforced. While this fundamental principle assumes some bargaining ability by both parties to the lease, it does not necessarily assume equality of bargaining position. Either the landlord or the tenant may have superior bargaining power depending on its financial condition, its representation by legal counsel, the economics of the commercial lease market, and other factors. Where the situation is such that the lease is a contract of adhesion or the particular clause is unconscionable, for example, general principles limiting freedom of contract will govern.¹²

The statute should codify the common law rules that the tenant may assign or sublet freely unless the parties agree to a limitation on the right of the tenant to assign or sublease,¹³ and that any ambiguities in a limitation are to be construed in favor of transferability.¹⁴ The statute should make clear that the right to agree to limitations on transferability includes the right to agree that the tenant's interest will be absolutely nontransferable, or that the tenant's interest may not be transferred without the landlord's consent, which may be given or withheld in the landlord's sole and absolute discretion.

The parties should also be able to agree on standards and conditions for transfer, and those standards and conditions should be enforceable. The conditions might include, for example, that the landlord is entitled to recapture any consideration realized by the tenant as a result of a transfer, or that the landlord may elect either to consent to a transfer or to terminate the lease. So long as these limitations satisfy the general restrictions on freedom of contract, they should be recognized as valid.

12. See, e.g., 1 B. Witkin, *Summary of California Law Contracts* §§ 23-36 (9th ed. 1987) (adhesion and unconscionable contract doctrines).

13. See, e.g., *Kassan v. Stout*, 9 Cal. 3d 39, 507 P. 2d 87, 106 Cal. Rptr. 783 (1973).

14. See, e.g., *Chapman v. Great Western Gypsum Co.*, 216 Cal. 420, 14 P. 2d 758 (1932).

Application to Commercial and Not Residential Leases

The recommendations made in this report relate only to commercial real property leases, not to residential leases. While it might be beneficial to clarify the law relating to residential leases and to maintain some degree of uniformity between the residential and commercial lease law of the state, different policy considerations (particularly relating to bargaining position of the parties) affect commercial and residential lease law. Moreover, transfer issues arise less frequently in connection with residential leases because they are generally short in duration and rarely develop a large transfer value. A residential tenant may not expect to receive consideration on assignment or sublease of the tenancy to the same extent a commercial tenant may be seeking consideration as part of the lease transaction.

For these reasons, the Commission believes the recommendations made in this report should be limited to commercial leases at this time. The Commission plans to give further study, in a later report, to the issue of whether some or all of the recommendations should be made applicable to residential leases.

An act to amend Section 1951.4 of, and to add Chapter 6 (commencing with Section 1995.010) to Title 5 of Part 4 of Division 3 of, the Civil Code, relating to commercial real property leases.

The people of the State of California do enact as follows:

Civil Code § 1951.4 (amended). Continuance of lease after breach and abandonment

SECTION 1. Section 1951.4 of the Civil Code is amended to read:

1951.4. (a) The remedy described in this section is available only if the lease provides for this remedy.

(b) Even though a lessee of real property has breached his the lease and abandoned the property, the lease continues in effect for so long as the lessor does not terminate the lessee's right to possession, and the lessor may enforce all his the lessor's rights and remedies under the lease, including the right to recover the rent as it becomes due under the lease, if the lease permits the lessee, or the lessee otherwise has the right, to do any of the following:

(1) Sublet the property, assign his the lessee's interest in the lease, or both.

(2) Sublet the property, assign his the lessee's interest in the lease, or both, subject to standards or conditions, and the lessor does not, at the time the lessee seeks to sublet or assign, require compliance with any unreasonable standard for, nor any unreasonable condition on, such subletting or assignment. The lessee has the burden of proof that the lessor requires compliance with a standard or condition that is unreasonable.

(3) Sublet the property, assign his the lessee's interest in the lease, or both, with the consent of the lessor, and ~~the lease provides that such consent shall~~ may not unreasonably be withheld while the lessor enforces the remedy described in this section.

(c) For the purposes of subdivision (b), the following do not constitute a termination of the lessee's right to possession:

(1) Acts of maintenance or preservation or efforts to relet the property.

(2) The appointment of a receiver upon initiative of the lessor to protect the lessor's interest under the lease.

(3) A provision in the lease that the lessor may elect either to consent to a subletting or assignment or to terminate the lessee's right to possession, so long as the lessor does not make the election to terminate the lessee's right to possession.

(d) Neither the presence nor the exercise of a provision in a lease that, if the lessee receives from a sublessee or assignee consideration in excess of the rent under the lease, the lessor is entitled to some or all of the consideration, precludes the lessor's use of the remedy described in this section.

Comment. The introductory portion of subdivision (b) of Section 1951.4 is amended to recognize that a lessee may sublet the property or assign the lessee's interest in the lease whether or not the lease permits it, so long as the lease does not prohibit it. Cf. Section 1995.210 (right to transfer commercial lease absent a restriction).

Subdivision (b)(2) is amended to impose on the lessee the burden of proof of unreasonableness of a standard or condition at the time and in the manner it is applied. The parties may agree to standards and conditions for assignment and sublease. Section 1995.260 (transfer restriction subject to standards and conditions). Imposing the burden of proof on the lessee is consistent with cases involving the reasonableness standard generally and with the underlying philosophy of this chapter. See Coskran, *Restrictions on Lease Transfers: Validity and Related Remedies Issues*, 100 (1988). See also subdivision (d).

Subdivision (b)(2) also is amended to clarify existing law that the lessor may waive a standard or condition on subletting or assignment that is or has become unreasonable and still take advantage of the remedy provided in Section 1951.4. See *Recommendation Relating to Real Property Leases*, 9 Cal. L. Revision Comm'n Reports 153, 168 (1969) ("Occasionally, a standard or condition, although reasonable at the time it was included in the lease, is unreasonable under circumstances existing at the time of the subletting or assignment. In such a situation, the lessor may resort to the remedy provided by Section 1951.4 if he does not require compliance with the now unreasonable standard or condition."). Under subdivision (b)(2) a standard or condition may be reasonable or unreasonable, so long as the lessor does not require compliance with a condition that is unreasonable at the time of the proposed subletting or assignment.

Subdivision (b)(3) is amended to recognize that the lessor's consent to an assignment or subletting may not unreasonably be withheld, even though the lease does not require reasonableness, if the lease provides no standard for giving or withholding consent. Section 1995.250 (implied standard for landlord's consent in commercial lease). A lease may provide that the lessor may unreasonably withhold consent if the remedy provided in this section is not being exercised, but that the landlord may not unreasonably withhold consent if the remedy provided in this section is being exercised.

Subdivision (c)(3) is added to recognize that the existence of an unexercised right of the lessor to terminate the lessee's right to possession does not prejudice the lessor's right to the remedy under this section. Cf. Section 1995.240 (express standards and conditions for landlord's consent).

Subdivision (d) is new. See Section 1995.260 and Comment thereto (transfer restriction subject to standards and conditions).

The other changes in Section 1951.4 are technical, intended to render the provision gender-neutral.

Civil Code §§ 1995.010-1995.260 (added). Assignment and sublease

SEC. 2. Chapter 6 (commencing with Section 1995.010) is added to Title 5 of Part 4 of Division 3 of the Civil Code, to read:

CHAPTER 6. ASSIGNMENT AND SUBLEASE

Article 1. General Provisions

§ 1995.010. Scope of chapter

1995.010. This chapter applies to transfer of a tenant's interest in a lease of real property for other than residential purposes.

Comment. Section 1995.010 limits the scope of this chapter to commercial real property leases. Assignment and sublease issues concerning personal property leases and residential real property leases involve different public policies than commercial real property leases, and therefore are governed by the common law and not by this chapter.

§ 1995.020. Definitions

1995.020. As used in this chapter:

(a) "Landlord" includes a tenant who is a sublandlord under a sublease.

(b) "Lease" means a lease or sublease of real property for other than residential purposes, and includes modifications and other agreements affecting a lease.

(c) "Restriction on transfer" means a provision in a lease that restricts the right of transfer of the tenant's interest in the lease.

(d) "Tenant" includes a subtenant or assignee.

(e) "Transfer" of a tenant's interest in a lease means an assignment, sublease, or other voluntary or involuntary transfer or encumbrance of all or part of a tenant's interest in the lease.

Comment. Section 1995.020 provides definitions for drafting convenience.

Subdivision (b) is consistent with Section 1995.010 (scope of chapter). A restriction separately agreed to by the parties that affects a lease is part of the lease for purposes of this chapter. The provisions of this chapter apply between parties to a sublease and between parties to an assigned lease, as well as between original parties to a lease.

Subdivision (e) makes clear that the statute applies not only to assignments and subleases but also to encumbrances of the tenant's interest, by way of mortgage, trust deed, assignment for security purposes, or other creation of a security interest, and to involuntary transfers of the tenant's interest, including transfer pursuant to execution sale or tax sale.

Note. The definition of "transfer" in subdivision (e) is expanded to include "encumbrance". The staff had resisted this terminology at the September meeting out of concern that it could be construed to include an easement or other physical encumbrance of the tenant's interest, but further research has satisfied us that usage in the commercial lease law area limits "encumbrance" to creation of a security interest. We have reinforced this construction in the Comment.

Article 2. Restrictions on Transfer

§ 1995.210. Right to transfer absent a restriction

1995.210. (a) Subject to the limitations in this chapter, a lease may include a restriction on transfer of the tenant's interest in the lease.

(b) Unless a lease includes a restriction on transfer, a tenant's rights under the lease include unrestricted transfer of the tenant's interest in the lease.

Comment. Subdivision (a) of Section 1995.210 is a specific application of general principles of freedom of contract. Subdivision (a) is limited by the provisions of this chapter governing restrictions on transfer. See, e.g., Section 1995.250 (implied standard for landlord's consent). The provisions of this chapter are intended to completely supersede the law governing unreasonable restraints on alienation (see, e.g., Civil Code § 711) and the law governing good faith and fair dealing (see, e.g., California Lettuce Growers v. Union Sugar Co., 45 Cal. 2d 474, 289 P. 2d 785 (1955)) as they relate to restrictions on transfer of a tenant's interest in a lease. See Comment to Section 1995.250. It should be noted, however, that subdivision (a) remains subject to general principles limiting freedom of contract. See, e.g., 1 B. Witkin, Summary of California Law Contracts §§ 23-36 (9th ed. 1987) (adhesion and unconscionable contract doctrines).

Subdivision (b) codifies the common law rule that a tenant may freely assign or sublease unless the right is expressly restricted by the parties. See, e.g., *Kassan v. Stout*, 9 Cal. 3d 39, 507 P. 2d 87, 106 Cal. Rptr. 783 (1973).

§ 1995.220. Transfer restriction strictly construed

1995.220. An ambiguity in a restriction on transfer of a tenant's interest in a lease shall be construed in favor of transferability.

Comment. Section 1995.220 codifies the common law. See, e.g., *Chapman v. Great Western Gypsum Co.*, 216 Cal. 420, 14 P. 2d 758 (1932).

§ 1995.230. Transfer prohibition

1995.230. A restriction on transfer of a tenant's interest in a lease may absolutely prohibit transfer.

Comment. Section 1995.230 settles the question raised in *Kendall v. Ernest Pestana, Inc.*, 40 Cal. 3d 488, 220 Cal. Rptr. 818, 709 P.2d 837 (1985), of the validity of a clause absolutely prohibiting assignment or sublease. 40 Cal. 3d at 499, n. 14. A lease term absolutely prohibiting transfer of the tenant's interest is not invalid as a restraint on alienation. Such a term is valid subject to general principles governing freedom of contract, including the adhesion contract doctrine, where applicable. See Section 1995.210 and Comment thereto (right to transfer absent a restriction). It should be noted that an absolute prohibition on transfer precludes the landlord's use of the remedy provided in Section 1951.4 (continuance of lease after breach and abandonment). See Section 1951.4 and Comment thereto.

§ 1995.240. Express standards and conditions for landlord's consent

1995.240. A restriction on transfer of a tenant's interest in a lease may require the landlord's consent for transfer subject to any express standard or condition for giving or withholding consent, including but not limited to any of the following:

(a) The landlord's consent may not be unreasonably withheld.

(b) The landlord's consent may be withheld subject to express standards or conditions.

(c) The landlord has absolute discretion to give or withhold consent, including the right to unreasonably withhold consent.

(d) The landlord may elect either to consent or to terminate the tenant's right to possession.

Comment. Section 1995.240 is a specific application of the broad latitude provided in this chapter for the parties to a lease to contract for express restrictions on transfer of the tenant's interest

in the lease. Such restrictions are valid subject to general principles governing freedom of contract, including the adhesion contract doctrine, where applicable. See Section 1995.210 and Comment thereto (right to transfer absent a restriction). It should be noted that the landlord's requirement of compliance with an unreasonable restriction on transfer precludes the landlord's use of the remedy provided in Section 1951.4 (continuance of lease after breach and abandonment). See Section 1951.4 and Comment thereto.

The meaning of "unreasonably withheld" under subdivision (a) is governed by the intent of the parties.

Subdivision (b) makes clear that the lease may condition the landlord's consent in any manner. Standards and conditions for the landlord's consent may include, for example, a provision that, if the lessee receives consideration for the transfer in excess of the rent under the lease, the landlord may recover some or all of the consideration. Cf. Section 1995.260 (transfer restriction subject to standards and conditions).

Subdivision (c) settles the question raised in *Kendall v. Ernest Pestana, Inc.*, 40 Cal. 3d 488, 220 Cal. Rptr. 818, 709 P.2d 837 (1985), of the validity of a clause granting absolute discretion over assignment or sublease to the landlord. 40 Cal. 3d at 499 n. 14. A lease clause of the type described in subdivision (c) is not invalid as a restraint on alienation, and its exercise by the landlord is not a violation of the law governing good faith and fair dealing.

The inclusion in the lease of a provision described in subdivision (d), which gives the landlord an election to consent to a transfer or to terminate the tenant's right to possession, does not preclude the landlord's use of the remedy provided in Section 1951.4, so long as the landlord does not exercise the election to terminate the right to possession. See Section 1951.4 and Comment thereto.

§ 1995.250. Implied standard for landlord's consent

1995.250. (a) If a restriction on transfer of the tenant's interest in a lease requires the landlord's consent for transfer but provides no standard for giving or withholding consent, the restriction on transfer shall be construed to include an implied standard that the landlord's consent may not be unreasonably withheld. Whether the landlord's consent has been unreasonably withheld in a particular case is a question of fact on which the tenant has the burden of proof. The tenant may satisfy the burden of proof by showing that, in response to the tenant's written request for a statement of reasons for withholding consent, the landlord has not stated in writing a reasonable objection to the transfer or has not acted reasonably in stating in writing a reasonable objection to the transfer.

(b) The Legislature finds and declares:

(1) It is the public policy of the state and fundamental to the commerce and economic development of the state to enable and facilitate freedom of contract by the parties to commercial real property leases.

(2) The parties to commercial real property leases must be able to negotiate and conduct their affairs in reasonable reliance on the rights and protections given them under the laws of the state.

(3) Until the case of *Kendall v. Ernest Pestana, Inc.*, 40 Cal. 3d 488, 220 Cal. Rptr. 818, 709 P.2d 837 (1985), the parties to commercial real property leases could reasonably rely on the law of the state to provide that if a lease restriction requires the landlord's consent for transfer of the tenant's interest in the lease but provides no standard for giving or withholding consent, the landlord's consent may be unreasonably withheld.

(4) The *Kendall* case reversed the law on which parties to commercial real property leases executed before December 5, 1985, the date of the *Kendall* case, could reasonably rely, thereby frustrating the expectations of the parties, with the result of impairing commerce and economic development.

(5) For these reasons, the Legislature declares the law as follows. Subdivision (a) of this section applies to a restriction on transfer executed on or after December 5, 1985. If a restriction on transfer executed before December 5, 1985, requires the landlord's consent for the tenant's transfer but provides no standard for giving or withholding consent, the landlord's consent may be unreasonably withheld, except that in an action concerning the restriction commenced before the operative date of this section, the law applicable at the time of trial of the action governs. For purposes of this paragraph, if the terms of a restriction on transfer are fixed by an option or other agreement, the restriction on transfer is deemed to be executed on the date of execution of the option or other agreement.

Comment. Section 1995.250 codifies the rule of *Kendall v. Ernest Pestana, Inc.*, 40 Cal. 3d 488, 709 P. 2d 837, 220 Cal. Rptr. 818 (1985), and limits its retroactive application.

Under subdivision (a), whether a landlord's consent has been unreasonably withheld may be a question of procedure or substance or both. A landlord may act unreasonably in responding or failing to respond to a request of the tenant for consent to a transfer, or the landlord may not have a reasonable objection to the transfer. Either

of these circumstances may give rise to a determination that the landlord has not acted reasonably in stating a reasonable objection to the transfer within the meaning of subdivision (a). Subdivision (a) provides the tenant a means of satisfying the burden of proof on this matter by making a written request for a statement of reasons. However, this is not the exclusive means of satisfying the burden of proof that the landlord's consent has been unreasonably withheld in a particular case.

Although *Kendall* states as a matter of law that denial of consent solely on the basis of personal taste, convenience, or sensibility, and denial of consent in order that the landlord may charge a higher rent than originally contracted for, are not commercially reasonable (40 Cal. 3d at 501), Section 1995.250 rejects this absolute rule. Whether a particular objection is reasonable within the meaning of subdivision (a) is a question of fact that must be determined under the circumstances of the particular case.

The date of applicability of subdivision (a) is December 5, 1985, the date of the *Kendall* opinion. If there is a sublease on or after December 5, 1985, under a lease executed before that date, the rights as between the parties to the sublease are governed by subdivision (a). See Section 1995.020(b) ("lease" means lease or sublease).

Limitation of retroactive operation of *Kendall* is supported by the public policy stated in subdivision (b), including the need for foreseeability, reliance, and fairness. See Coskran, *Restrictions on Lease Transfers: Validity and Related Remedies Issues*, 37-45, 82-90 (1988); *Kendall*, supra, 40 Cal. 3d at 507-11 (dissent); *Kreisher v. Mobil Oil Corporation*, 198 Cal. App. 3d 389, 243 Cal. Rptr. 662 (1988).

§ 1995.260. Transfer restriction subject to standards and conditions

1995.260. A restriction on transfer of a tenant's interest in a lease may provide that transfer is subject to any standard or condition, including but not limited to a provision that the landlord is entitled to some or all of any consideration the tenant receives from a transferee in excess of the rent under the lease.

Comment. Section 1995.260 codifies the rule stated in *Kendall v. Ernest Pestana, Inc.*, 40 Cal. 3d 488, 220 Cal. Rptr. 818, 709 P.2d 837 (1985), that "nothing bars the parties to commercial lease transactions from making their own arrangements respecting the allocation of appreciated rentals if there is a transfer of the leasehold." 40 Cal. 3d at 505 n. 17.

The authority provided in this section for the parties to agree to an express lease provision governing allocation of consideration for transfer of the tenant's interest in a lease is not intended to create an implication that absent an express provision the landlord is not entitled to demand all or part of the consideration as a condition for consenting to the transfer in a case where the lease requires the landlord's consent. Whether such a demand would be "unreasonable" within the meaning of Section 1995.240(a) (express standards and conditions for landlord's consent) or 1995.250 (implied standard for

landlord's consent) is a question of fact that must be determined under the circumstances of the particular case. See Comments to Sections 1995.240 and 1995.250.

Section 1995.260 is a specific application of subdivision (a) of Section 1995.210 (lease may include transfer restriction). It should be noted, however, that Section 1995.260 remains subject to general principles limiting freedom of contract. See Section 1995.210 and Comment thereto.