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Insights

Do Change of Control Transactions Constitute an Assignment by Operation of Law?

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Commercial landlords often rely on anti-assignment provisions to restrict the ability of tenants to assign their interest in a lease to a third party. Such provisions will often explicitly restrict assignments by "operation of law," which are generally considered involuntary assignments mandated via a court order. Commercial landlords may assume that a change of control transaction violates a basic anti–assignment clause, but clear drafting is necessary for Landlords to protect their interests. Landlords wishing to restrict change of control of a tenant entity, should have clear anti-assignment provisions in their leases that expressly restrict such transactions and characterize such "changes of control" as assignments.

A change of control is a significant change in the equity, ownership, or management of a business entity. This can occur through a merger, consolidation or acquisition.

The general rule is that change of control of a corporate entity is not an assignment by operation of law, and therefore does not violate a basic anti-assignment provision. Courts have reasoned that a landlord entering into a lease with a corporate tenant should be aware that a corporation, or limited liability company, is an entity which exists separate and apart from its ownership, and that a change in ownership of the corporate entity does not change the tenant entity under the lease.

Courts in many states including Florida, New York and Delaware have held that a change of control is not an assignment by operation of law. In *Sears Termite & Pest Control, Inc. v. Arnold*, a Florida court held, "[t]he fact that there is a change in the ownership of corporate stock does not affect the corporation's existence or its contract rights, or liabilities." Further, in *Meso Scale Diagnostics LLC v. Roche Diagnostics GMBH*, a Delaware court ruled, "[g]enerally mergers do not result in an assignment by operation of law of assets that began as property of the surviving entity and continued to be such after the merger."

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Importantly, the rule is different if the tenant entity does not survive the transaction. In *MTA Canada Royalty Corp. v. Compania Minera Pangea*, a Delaware Superior Court held that a merger in which the contracting entity does not survive may be held to be an assignment by operation of law.

If a landlord intends for a change of control of a tenant to violate the anti-assignment clause in its lease, the landlord should ensure that its lease expressly states that a change of control constitutes an assignment.