

A landlord owned a house in fee simple. He leased the house to a tenant for a term of 10 years by properly executed written instrument. The lease was promptly and properly recorded. It contained an option for the tenant to purchase the house by tendering \$250,000 as purchase price any time "during the term of this lease." One year later, the tenant, by a properly executed written instrument, purported to assign the option to her daughter, expressly retaining all of the remaining term of the lease. The instrument of assignment was promptly and properly recorded. Two years later, the landlord contracted to sell the house to a broker and to convey marketable title "subject to the rights of [the tenant] under her lease." The broker refused to close because of the outstanding option assigned to the daughter.

The landlord brought an appropriate action against the broker for specific performance. If judgment is rendered in favor of the landlord, it will be because the relevant jurisdiction has adopted a rule on a key issue as to which various state courts have split.

Which of the following identifies the determinative rule or doctrine upon which the split occurs, and states the position favorable to the landlord?

- A. In a contract to buy, any form of "subject to a lease" clause that fails to mention expressly an existing option means that the seller is agreeing to sell free and clear of any option originally included in the lease.
- B. Marketable title can be conveyed so long as any outstanding option not mentioned in the purchase contract has not yet been exercised.
- C. Options to purchase by lessees are subject to the Rule Against Perpetuities.
- D. Options to purchase contained in a lease cannot be assigned separately from the lease.

Explanation:

Types of option contracts

Option to purchase	Gives exclusive right to purchase property at specified price, usually within specified time
Right of first refusal	Gives first opportunity to purchase property if it ever goes up for sale

A contract for the sale of land impliedly warrants that the seller will convey marketable title to the buyer at the time of closing. If the seller cannot do so, then the buyer can rescind (ie, cancel) the contract and refuse to close. Here, the broker has refused to close because of the outstanding option to purchase assigned to the daughter.

The holder of an **option to purchase** has the exclusive right to purchase the property during a specified time (eg, "during the term of this lease"). Jurisdictions are split as to whether an option **contained in a lease agreement** can be assigned separately from the lease:

Minority rule – an option is an independent provision that *can* be assigned separately from the lease

Majority rule – an **option** is an **integral part** of the lease agreement that ***cannot be separately assigned***

Since the majority rule would render the assignment of the option to the *daughter* invalid, this rule supports the landlord's action against the broker. However, title may remain unmarketable because the option to purchase is still held by the *tenant*. This is true regardless of whether the option is mentioned in the purchase contract **(Choice B)**.

(Choice A) A contract with a "subject to a lease" clause means that the land is being sold *subject to* an option to purchase included in the lease, even if the contract does not expressly mention an existing option.

(Choice C) An option to purchase is subject to the [Rule Against Perpetuities](#), which voids an option if there is any possibility that it could vest more than 21 years after some relevant life in being at the creation of the interest. The option here will vest (or not vest) by the end of the tenant's 10-year lease, so it satisfies this rule.

Educational objective:

An option to purchase gives the option-holder the exclusive right to purchase the property during a specified time. If the option is contained within a lease, it cannot be assigned separately from that lease in most jurisdictions.

Copyright © 1997 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.