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OPINION	:	No. 80-417
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The Honorable Willie L. Brown, Jr., Speaker of the Assembly, has requested an opinion on the following questions:

1. When the 1979 amendment to Business and Professions Code section 655 becomes operative on January 1, 1983, will it prohibit an optician from leasing adjoining office spaces from a landlord and later unconditionally assigning the lease on one of them to an optometrist?

2. With regard to the office space so assigned to an optometrist, would a clause in the original lease with the landlord providing the optician with the right of first refusal to lease the office on default or vacation of it by the optometrist, violate section 655 as amended?

3. When the amended provisions of Business and Professions Code section 655 become operative on January 1, 1983, will they apply to all such lease and

sublease arrangements then existing between opticians and optometrists or only those entered into after that date?

CONCLUSIONS

1. When it becomes operative on January 1, 1983, the amended version of section 655 of the Business and Professions Code will prohibit an optician from leasing adjoining business office spaces from a landlord and later unconditionally assigning the lease on one of them to an optometrist, the absence of patient referrals between them notwithstanding.

2. With regard to the office space so assigned to an optometrist, a clause in the original lease with the landlord providing the optician with the right of first refusal to least that business office on default or vacation by the optometrist, will also violate section 655 as amended.

3. The amended provision of Business and Professions Code section 655 will apply to all such business lease and sublease arrangements that may exist between opticians and optometrists on January 1, 1983.

ANALYSIS

Under California law the right to dispense, sell or furnish prescriptions for eyeglasses and kindred optical products is limited exclusively to licensed physicians and surgeons, licensed optometrists, and registered dispensing opticians. (Bus. & Prof. Code, § 2543.)[1] Of these however, only physicians and surgeons or optometrists may determine the need for or prescribe lenses, since section 2540 provides that no person other than they "may measure the powers or range of human vision or determine the accommodative and refractive status of the human eye or the scope of its functions in general or prescribe ophthalmic or contact lenses." (§ 254O.)[2] "Dispensing opticians" are licensed under Chapter 5.5 of Division 2 of the Code by the Division of Allied Health Professions of the Board of Medical Quality Assurance, to:

> "[fill] prescriptions of physicians and surgeons licensed by the Division of Licensing of the Board of Medical Quality Assurance or

[1] All statutory references are to the Business and Professions Code unless stated otherwise.

[2] An ophthalmic lens is "any lens which has a spherical, cylindrical or prismatic power or value." (§ 3001.)

Ophthalmic and contact lenses are included within the broader definition of "prescription lens," which is "any device ordered by a physician and surgeon or optometrist, that alters or changes the visual powers of the human eye." (§ 2541.)

> optometrists licensed by the State Board of Optometry for prescription lenses and kindred products, and, as incidental to the filling of such prescriptions, [to do] any or all of the following acts, either singly or in combination with others, taking facial measurements, fitting and adjusting such lenses and fitting and adjusting spectacle frames . . ." (§ 2550.)

Only upon registration with the Division of Allied Health Professions and upon being issued of a "certificate of dispensing optician" by that Division, may a person engage in the business just described. (§ 2553; *cf.* § 2550.)

Optometrists are licensed under Chapter 7 of Division 2 of the Code by the State Board of Optometry. Their certificate of registration entitles them to engage in the practice of optometry (§ 3040) which is defined in section 3041 as the doing of any or all of the following:

> "(a) The examination of the human eye or eyes, or its or their appendages, and the analysis of the human vision system, either subjectively or objectively.
>
> "(b) The determination of the powers or range of human vision and the accommodative and refractive states of the human eye or eyes, including the scope of its or their functions and general condition.
>
> "(c) The prescribing or directing the use of, or using, any optical device in connection with ocular exercises, visual training, vision training, or orthoptics.
>
> "(d) The prescribing of contact and spectacle lenses for, or the fitting or adaptation of contact and spectacle lenses to the human eye, including lenses which may be classified as drugs by any law of the United States or of this state.
>
> "(e) The use of topical pharmaceutical agents for the sole purpose of the examination of the human eye or eyes for any disease or pathological condition. The State Board of Optometry, with the advice and consent of the Division of Allied Health Professions of the Board of Medical Quality Assurance, to be provided within six months of the effective date of this section, shall designate the specific topical pharmaceutical agents, known generically as mydriatics, cycloplegies and topical anesthetics, to be used."

Completing the troika, physicians and surgeons are licensed by the Board of Medical Quality Assurance under Chapter 5 of Division 2 of the Code. The practice of medicine is defined within its section 2052 which provides:

> "Any person, who practices or attempts to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury or other mental or physical condition of any person, without having at the time of so doing a valid, unrevoked certificate as provided in this chapter, or without being authorized to perform such act pursuant to a certificate obtained in accordance with some other provision of law, is guilty of a misdemeanor." (See also § 2053, formerly § 2141.5; *Bowland v. Municipal Court* (1976) 18 Cal. 3d 483, 485, 492–494.)

The definition perforce embraces the practice of optometry. This is recognized by section 3042 which provides that the provisions of Chapter 7 of Division 2 "do not prevent a duly licensed physician and surgeon from treating or fitting glasses to the human eye, or from doing any act within the practice of optometry." (*Cf. In re Rust* (1919) 181 Cal. 73.)

In short then, '[a]n ophthalmologist is a duly licensed physician who specializes in the care of the eyes.[3] An optometrist examines eyes for refractive error, recognizes (but does not treat) diseases of the eye, and fills prescriptions for eyeglasses. The optician is an artisan qualified to grind lenses, fill prescriptions, and fit frames." (*Williamson v. Lee Optical Co.* (1955) 348 U.S. 483, 486.)

Section 654 of the Code prohibits certain arrangements between dispensing opticians and physicians and surgeons,[4] and section 655, the subject of this opinion, does the same between dispensing opticians and optometrists. That section currently provides as follows:

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[3] "Ophthalmology" is defined as a branch of medical science concerned with the structure, function and diseases of the eye. (Webster's Third New International Dictionary, at p. 1582.)

[4] The section reads in full as follows:

"No person licensed under Chapter 5 (commencing with Section 2000) of this division may have any membership, proprietary interest or co-ownership in any form in or with any person licensed under Chapter 5.5 (commencing with Section 2550) of this division to whom patients, clients or customers are referred or any profit-sharing arrangements." (§ 654.)

"No person licensed under Chapter 7 (commencing with Section 3000) of this division [i.e., no optometrist] may have any membership, proprietary interest, co-ownership, landlord-tenant relationship, or any profit-sharing arrangement in any form, directly or indirectly, either by stock ownership, interlocking directors, trusteeship, mortgage, trust deed, or otherwise, (a) with any person licensed under Chapter 5.5 (commencing with Section 2550) of this division [i.e., with any dispensing optician] to whom patients, clients or customers are referred by such person licensed under Chapter 7 (commencing with Section 3000) [i.e., by an optometrist], or who refers patients, clients, or customers to such person licensed under Chapter 7 (commencing with Section 3000) [i.e., to such optometrist] or (b) with any person who is engaged in the manufacture, sale, or distribution to physicians and surgeons, optometrists, or dispensing opticians of lenses, frames, optical supplies, optometric appliances or devices or kindred products.

"The provisions of subdivision (b) do not apply to any corporation all of the shares of which are, and have been, wholly owned for more than one year immediately preceding April 8, 1969, by persons licensed under Chapter 7 (commencing with Section 3000) of this division [i.e., by optometrists] or by any spouse of such person or to any person so licensed if such corporation or licentiate has been engaged in the manufacture, sale, or distribution to physicians and surgeons, optometrists, or dispensing opticians of lenses, frames, optical supplies, optometric appliances or devices, or kindred products in the State of California continuously for more than one year immediately preceding April 8, 1969. That exception shall be effective as to any corporation so owned only so long as all shares thereof continue to be wholly owned by any person licensed under Chapter 7 (commencing with Section 3000) of this division or his spouse or issue, provided that such spouse or issue are not persons within the definitions and limitations set forth in subdivision (a) or (b).

"Any violation of this section constitutes a misdemeanor as to such person licensed under Chapter 7 (commencing with Section 3000) of this division and as to any and all persons, whether or not so licensed under this division, who participate with such licensed person in a violation of any provision of this section."

In 1979 however, the section was substantially amended by the Legislature to read as follows effective January 1, 1983:

"(a) No person licensed under Chapter 7 (commencing with Section 3000) of this division [i.e., no optometrist] may have any membership, proprietary interest, coownership, landlord-tenant relationship, or any profit-sharing arrangement in any form, directly or indirectly, with any person licensed under Chapter 5.5 (commencing with Section 2550) of this division [i.e., with any dispensing optician].

"(b) No person licensed under Chapter 5.5 (commencing with Section 2550) of this division [i.e., no dispensing optician] may have any membership, proprietary interest, co-ownership, landlord-tenant relationship, or any profit-sharing arrangement in any form directly or indirectly with any person licensed under Chapter 7 (commencing with Section 3000) of this division [i.e., with any optometrist].

"(c) No person licensed under Chapter 7 (commencing with section 3000) of this division [i.e., no optometrist] may have any membership, proprietary interest, coownership, landlord-tenant relationship, or any profit-sharing arrangement in any form, directly or indirectly, either by stock ownership, interlocking directors, trusteeship, mortgage, trust deed, or otherwise with any person who is engaged in the manufacture, sale, or distribution to physicians and surgeons, optometrists, or dispensing opticians of lenses, frames, optical supplies, optometric appliances or devices or kindred products.

"Any violation of this section constitutes a misdemeanor as to such person licensed under Chapter 7 (commencing with Section 3000) of this division and as to any and all persons, whether or not so licensed under this division, who participate with such licensed person in a violation of any provision of this section." (Stats. 1979, ch. 975, § 1, pp. 3669–3670.)

Section 3 of the Act provided: "This act shall become operative January 1, 1983." (*Id*., § 3, p. 3670.) Briefly summarized the amendment will change existing law in the following respects germane to this opinion:

(1) Whereas section 655 currently prohibits an optometrist from having the specified arrangements with any dispensing optician to whom patients, clients or customers are referred, or who refers patients, clients or customers to the optometrist, as amended, the statute will prohibit all such arrangements, referrals notwithstanding. (§ 655, subd. (a).)

(2) Whereas existing law only provides that optometrists could not have those specified arrangements with dispensing opticians, as amended, the law will

specifically prohibit dispensing opticians from having them with optometrists. (§ 655, subd. (b).)[5]

(3) Whereas existing law provides that an optometrist could have certain enumerated business and proprietary interests with a corporation engaged in the manufacture, sale or distribution of lenses, frames, optical supplies or kindred products to dispensing opticians *if* the optometrist or his spouse owned all the shares of such entity for one year preceding April 8, 1969, or the entity was so operating at that time, the amendment removes that exemption, and will totally prohibit the relationship. (§ 655, subd. (c).)

Again, the Legislature has specifically directed that the terms of the amended section "become operative January 1, 1983." (Stats. 1979, ch. 975, p. 3670, § 3.)

We are asked three questions regarding the effect the new law will have on certain lease arrangements between dispensing opticians and optometrists. Specifically we are asked whether it will prohibit an optician from leasing adjoining office spaces from a landlord and later unconditionally assigning the lease on one of them to an optometrist. We are also asked whether section 655 as amended would prohibit an optician from entering into such a lease with a landlord but with a clause therein giving the optician a right of first refusal to lease the office on default or vacation of it by the optometrist. Finally we are asked whether the section will apply to all leases existing on January 1, 1983 (when it takes effect), or just to leases entered into thereafter.

We conclude that as of January 1, 1983, the amended version of section 655 will prohibit an optician from leasing adjoining office spaces from a landlord and thereafter unconditionally assigning the lease on one of them to an optometrist, that a clause in the original lease giving the optician a right of first refusal to lease the office on default or vacation by the optometrist does not change that result, and that the prohibitions in section 655 will apply to all such lease and sublease arrangements existing on that date.

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[5] Subdivision (b) might appear superfluous but was added in light of the Legislature's being informed through the Senate Committee on Business and Professions Staff's Analysis and AB 1125, that it had been argued that a dispensing optician could be the landlord of an optometrist tenant and engage him in referrals, under its current terms, and that a superior court had ruled in 1976 "that only a 'licensed optometrist may be in violation of [section 655]'." (Staff Analysis, *supra*, at pp. 1–2.) (*Cf. Alter v. Michael* (1966) 64 Cal. 2d 480, 482–483 ("Statutes are to be interpreted by assuming that the Legislature was aware of the existing judicial decisions. [Citation.]"); see also *People v. St. Martin* (1970)1 Cal. 3d 524.) If it was not a concurrence in the validity of that argument and interpretation of section 655, the addition of subdivision (b) would at least be an attempt by the Legislature to clarify the meaning of the section as it understood it. (*Koenig v. Johnson* (1945) 71 Cal. App. 2d 739, 753.)

In so concluding, we are careful to emphasize that two important limitations are inherent in the questions posed, namely that the arrangement that is entered into between the dispensing optician and the optometrist is business related and that it is formed on an active, willing, conscious and voluntary basis. Our answers to the questions are similarly limited.

Section 655 describes the types of relationships which it prohibits (i.e., common memberships, common proprietary interests, co-ownerships, landlord-tenant relationships and profit sharing arrangements) but it does not specify "in what area" they are proscribed. We perceive serious constitutional problems to arise were Section 655, which has penal implications, to be read open-endedly and applied in a broad context. For example, the section *could be* read to prohibit a dispensing optician and an optometrist from having a common membership in the same church, lodge, or other organization, and it *could be* read to apply immediately to the situation where a dispensing optician becomes a landlord of an optometrist because of a testamentary devise or other bequest (Prob. Code § 28; *Mears v. Jeffry* (1947) 80 Cal. App. 2d 610, 617) thus making them involuntary misdemeanants without opportunity for divestiture or other adjustment. But such a construction, which the questions posed do not admit, goes too far in restricting private activity and its prohibitions have no rational relationship to a valid state concern. Thus, even without the two limitations appearing in the questions posed, we would be forced to read the statute and adopt an interpretation that, consistent with the statutory language and purpose, (a) eliminates doubts as to its constitutionality (*In re Kay* (1970) 1 Cal. 3d 930, 940–942; see also *Braxton v. Municipal Court* (1972) 10 Cal. 3d 138, 145), (b) favors its validity (*Conservatorship of Hofferber* 980) 28 Cal. 3d 161, 175; *Turner v. Board of Trustees* (1976) 16 Cal. 3d 818, 827; *County of Madera v. Gendrou* (1963) 59 Cal. 2d 798, 801; *cf*. Code of Civ. Proc. § 1866) and (c) avoids the constitutional issue inherent in a contrary construction (*Department of Corrections v. Workers' Comp. Appeals Bd.* (1979) 23 Cal. 3d 197, 207; *cf*. *Cemetery Board v. Telophase Society of America* (1978) 87 Cal. App. 3d 847, 857). Therefore, although section 655 does not specifically require that the relationships involved be consciously and voluntarily created or that they be business related and have some connection with an activity for which the professional license was issued, were the issue squarely raised we would imply those requirements as intended elements of the statute to preserve its constitutionality. (*Cf*. *Braxton v. Municipal Court*, *supra*, at pp. 145–146, 150; *In re Kay*, *supra*, at p. 946; *In re Rudolfo A*. (1980) 110 Cal. App. 3d 845, 851, fn. 3.)

I

We are first asked whether the amendment to Business and Professions Code section 655 will prohibit an optician from leasing adjoining office spaces from a landlord and later unconditionally assigning the lease on one of them to an optometrist. We conclude

that it will.

It is the fundamental principle of statutory construction that the primary and controlling consideration in the construction of a statute is the determination of and the giving effect to the legislative intent behind its enactment. (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal. 3d 247,256; *Great Lakes Properties, Inc. v. City of El Segundo* (1977) 19 Cal. 3d 152, 163; *Select Base Materials v. Board of Equal* (1959) 51 Cal. 2d 640, 645.) The words in question must be construed with the nature and purpose of the statute in mind. (*West Pico Furniture Co. v. Pacific Finance Loans* (1970) 2 Cal. 3d 594, 608; *Rich v. State Board of Optometry* (1965) 235 Cal. App. 2d 591, 604.) Toward this end both the legislative history of a statute and the wider historical circumstances surrounding its enactment are legitimate and valuable aids in divining the statutory purpose (*California Mfrs. Assn. v. Public Utilities Com*. (1979) 24 Cal. 3d 836, 844; citing *Steilberg v. Lackner* (1977) 69 Cal. App. 3d 780, 785; *Alford v. Pierno* (1972) 27 Cal. App. 3d 682, 688; *Kelly v. Kane* (1939) 34 Cal. App. 2d 588, 591–592; see also *Grannis v. Superior Court* (1905) 146 Cal. 245, 248 and *People v. Ventura Refining Co.* (1928) 204 Cal. 286, 291) and this is particularly true where, as here, a statute is amended to abolish an evil or "mischief" and to correct an undesirable practice (*Koenig v. Johnson* (1945) 71 Cal. App. 2d 739, 750–751; *County of San Diego v. Milotz* (1953) 119 Cal. App. 2d Supp. 87 1, 881). The original purpose and object of the legislation must be considered, and it must then be read and liberally construed to give those effect. (*County of San Diego v. Milotz*, *supra*, at p. 880; *People v. Ventura Refining Co*., *supra*, at p. 292.)

We do have clear indication of the reasons for the Legislature amending section 655: it was "prompted by a 1975 Attorney General's Task Force report on Inflationary Effects Upon Eye Care Services . . . [which] suggested statutory reform to preclude relationships between optometrists and registered dispensing opticians." (Staff Analysis for AB 1125, Senate Committee on Business and Professions, "History," p. 1.) That Report thus constitutes a valuable source for ascertaining the legislative purpose in amending section 655 (*cf. Van Arsdale v. Hollinger* (1968) 68 Cal. 2d 245, 249; *Kaplan v. Superior Court* (1971) 6 Cal. 3d 150, 157–158 & 158, fn. 4; *People* v. Wiley (1976) 18 Cal. 3d 162, 171) and we therefore refer to it. With regard to arrangements between opticians and optometrists, it stated:

> "SEPARATION OF OPTOMETRISTS AND OPTICIANS
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> "Evidence received at this committee's hearings indicates the need to strengthen the statutes intended to guarantee *the total separation and independence between registered dispensing opticians and optometrists.* Section 2556 currently prohibits a registered dispensing optician from directly or indirectly employing or maintaining an optometrist on or near the premises used for optical dispensing. Section 655 prohibits any proprietary

interest or landlord-tenant relationship or profit sharing arrangement between registered dispensing opticians and optometrists, but only if there are referrals between the optician and the optometrist. *It is the opinion of this committee that the potential harm to the consumer inherent in any such relationship between optician and optometrist is so great that proof of any specific referral should not be a requisite to the prohibition of such relationships.* Elimination of the "referral" requirement of section 655(a) will strengthen the statute immensely. Endless litigation over the existence of a referral operation will be avoided, *and the situation whereby an optician and a captive optometrist have a financial interest in the optometrist issuing a prescription which will be filled by his landlord-optician will be expressly prohibited.*" (*Id*., *Majority Report* at pp. 10–11.) (Emphases added.)

From this history we safely presume that the Legislature enacted the amended version of section 655 to prohibit the enumerated business relationships between dispensing opticians and optometrists in order to eliminate the potential conflicts of interest inherent in them. It is against this background that our analysis proceeds.

Turning first to the words of the amendment itself (*People v. Knowles* (1950) 35 Cal. 2d 175, 182), we are reminded that "when a statute is amended to abolish an evil or correct an undesirable practice in existence, effect must be given to each section phrase and word of the amendment." (*County of San Diego v. Milotz*, *supra*, 119 Cal. App. 2d Supp. at p. 881.) Since we are also reminded in conjunction with this that the previous state of legislation on a particular subject is most helpful in construing a remedial statute (*Mooney v. Pickett* (1971) 4 Cal. 3d 669, 677, fn. 9; *County of Los Angeles v. Frishie* (1942) 19 Cal. 2d 634, 639) we set forth a comparative text:

"655. (a) No person licensed under Chapter 7 (commencing with Section 3000) of this division [i.e., no optometrist] may have any membership, proprietary interest, coownership, landlord-tenant relationship, or any profitsharing arrangement in any form, directly or indirectly, ~~either by stock ownership, interlocking directors, trusteeship, mortgage, trust deed, or otherwise~~, (a) with any person licensed under Chapter 5.5 (commencing with Section 2550) of this division [i.e., with any dispensing optician] ~~to whom patients, clients or customers are referred by such person licensed under Chapter 7 (commencing with Section 3000), or who refers patients,, clients, or customers to such person licensed under Chapter 7 (commencing with Section 3000) or (b) with any person who is engaged in the manufacture, sale, or distribution to physicians and surgeons, optometrists, or dispensing opticians of lenses, frames, optical supplies, optometric appliances or devices or kindred products.~~

~~"The provisions of subdivision (b) do not apply to any corporation all of the shares of which are, and have been, wholly owned for more than one year immediately preceding April 8, 1969, by persons licensed under Chapter 7 (commencing with Section 3000) of this division or by any spouse of such person or to any person so licensed if such corporation or licentiate has been engaged in the manufacture, sale, or distribution to physicians and surgeons, optometrists, or dispensing opticians of lenses, frames, optical supplies, optometric appliances or devices, or kindred products in the State of California continuously for more than one year immediately preceding April 8, 1969. That exception shall be effective as to any corporation so owned only so long as all shares thereof continue to be wholly owned by any person licensed under Chapter 7 (commencing with Section 3000) of this division or his spouse or issue, provided that such spouse or issue are not persons within the definitions and limitations set forth in subdivision (a) or (b).~~

"(b) No person licensed under Chapter 5.5 (commencing with Section 2550) of this division [i.e., no dispensing optician] may have any membership, proprietary interest, coownership, landlord-tenant relationship, or any profits sharing arrangement in any form directly or indirectly with any person licensed under Chapter 7 (commencing with Section 3000) of this division [i.e., with any optometrist].

"(c) No person licensed under Chapter 7 (commencing with Section 3000) of this division [i.e., no optometrist] may have any membership, proprietary interest, coownership, landlord-tenant relationship, or any profit-sharing arrangement in any form, directly or indirectly, either by stock ownership, interlocking directors, trusteeship, mortgage, trust deed, or otherwise with any person who is engaged in the manufacture, sale, or distribution to physicians and surgeons, optometrists, or dispensing opticians of lenses, frames, optical supplies, optometric appliances or devices or kindred products.

"Any violation of this section constitutes a misdemeanor as to such person licensed under Chapter 7 (commencing with Section 3000) of this division [i.e., as to such optometrist] and as to any and all persons, whether or not so licensed under this division, who participate with such licensed person in a violation of any provision of this section."

We thus see that the amended version of section 655 prohibits any optometrist from having "*any* . . . proprietary interest, coownership, [or] landlord-tenant

relationship . . . in any form directly or indirectly with *any* [*dispensing optician*]" (§ 655, subd. (a)), and *vice versa* (§ *id*., subd. (b))—the absence of patient referrals between them notwithstanding. Looking at these words and the changes that were made, we perceive the deletion of the requirement that there be patient referrals for the described relationships between dispensing opticians and optometrists to be proscribed (indicating a repealer thereof (1 A Sutherland, *Statutory Construction* (4th ed.) § 23.12, p. 236)), coupled with the continued use of the indefinite adjective "*any*" to describe those proscribed relationships, to mean that the amendment "was intended, as were the other amendments made at the same time, to broaden the Act's coverage or to assure its broad coverage. . . . (*United States v. Brown* (1947) 333 U.S. 18, 25 ("*any* sentence").) So too do we perceive the addition of the seemingless superfluous subdivision (b). As noted before, by its addition the Legislature intended either to rectify an erroneous limited interpretation that had been given to the section, or to clarify its original broader meaning. (See fn. 5, *ante*.) The deletion of the exemption for optometrists who previously held stock in corporations previously engaged in the manufacture and distribution of optical products from having an interest in those operations, is also evidence of a legislative intention to broaden the scope of proscription on the optician-optometrist connection. And, we are also ever mindful that the historical circumstances surrounding the enactment of Assembly Bill 1125 require that the amended version of section 655 be liberally construed to fully ameliorate those mischiefs to which the amendment was directed. (*County of San Diego v. Milotz*, *supra*, 19 Cal. App. 2d Supp. at p. 880; *People v. Ventura Refining Co*., *supra*, 204 Cal. at p. 292; *Koenig v. Johnson*, *supra*, 71 Cal. App. 2d 739, 750–75 1; *West Pico Furniture Co. v. Pacific Finance Loans*, *supra*, 2 Cal. 3d at p. 608; *Rich v. State Board of Optometry*, *supra*, 235 Cal. App. 2d at p. 604.) Given the amendment's wording and its history we conclude that an assignment of an office lease by a dispensing optician to an optometrist falls within the statute's prohibition on the establishment of a landlord-tenant relationship between them.

An assignment of a leasehold has been described as "a transaction whereby a lessee transfers his entire interest in demised premises, or a part thereof, for the unexpired term of the original lease, thereby parting with all of the reversionary estate on the property. . . . (42 Cal. Jur.3d, *Landlord and Tenant*, § 184, p. 220.) At first blush it may be thought that the assignment of an office by a dispensing optician to an optometrist would be permitted because it would transfer all of the dispensing optician's interest for the unexpired term of the lease, and would terminate the privity of estate originally existing between him and the lessor (42 Cal. Jur. 3d *Landlord and Tenant*, *supra*, § 187, at p. 222; *Barkhaus v. Producers Fruit Co.* (1923) 192 Cal. 200, 203), thus making him a person supposedly no longer "interested" in those premises. But this is not the case; the dispensing optician would still remain very much involved with the office-property after his assignment of it to the optometrist, which involvement we perceive to be within the rubric of the landlord-tenant relationship the statute prohibits.

Following an assignment, a lessee-assignor has continuing obligations to his lessor-landlord (*Meredith v. Dardarian* (1978) 83 Cal. App. 3d 248, 252) with whom he continues to remain in privity of contract (*Schebr v. Berkey* (1913) 166 Cal. 157, 160), and to whom he remains a primary obligor under his lease (*DeHart v. Allen* (1945) 26 Cal. 2d 829, 832; *Meredith v. Dardarian*, *supra*; *Lopizich v. Salter* (1920) 45 Cal. App: 446, 449). He does not "by assigning his lease rid himself of liability under the covenants [with the landlord]" (*Samuels v. Ottinger*, *supra*, 169 Cal. at p. 212 quoting *Brosnan v. Kramer* (1901) 135 Cal. 36, 39) and he still remains a proper and necessary party to any action taken by the landlord for a breach of the lease by the assignee (*Peiser v. Mettler* (1958) 50 Cal. 2d 594, 602).[6] As was said in *Lobzich v. Salter*, *supra*:

> "Upon default [the landlords] were entitled to stand upon the terms of the lease and the contract made between the lessee and his assignee for the lessor's benefit, and sue both parties . . . in the same manner and to the same extent *as though both parties were the original obligors under the terms of the lease*." (45 Cal. App. at pp. 449–450.) (Emphasis added.)

Needless to say under such circumstances the assignor-optician would still be very-much involved vis-a-vis the office property with the assignee-optometrist for by virtue of the assignment he becomes a guarantor for the latter's performance of his obligations under the assignment (*Lopzich v. Salter*, *supra*; *Samuels v. Ottinger* (1915) 169 Cal. 209, 212) which would include at the very least, an obligation to pay rent (*Bonetti v. Treat* (1891) 91 Cal. 223, 229). Surely we must conclude that that coeval relationship between the assignor-lessee optician and the assignee-optometrist would be within the ambit of the landlord-tenant relationship proscribed by section 655.

Again, that section forbids any dispensing optician from having "*any* landlord-tenant relationship . . . in any form directly or indirectly" with an optometrist, and vice versa. While the relationship created by an assignment may not be literally one of landlord-tenant, in the situation described it would bear those incidents of the latter which spawn the evils the amendment was designed to prevent. In this regard, we must not forget that "[t]he complexities of the social problems dealt with by the Legislature require that a practical construction be given to the language employed by the draftsmen of legislation lest their purposes be too easily nullified by overrefined inquiries into the meanings of

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[6] Should the landlord accept the "assignment" *and* relieve the assignor-optician of all his obligations under his lease, we no longer would have a true assignment, but rather a novation which rescinds the old lease between the landlord and the optician and establishes a new one between the landlord and the assignee-optometrist. (*Douglas v. Schlindler* (1930) 209 Cal. 616, 619–620; *Beckjord v. Slusher* (1937) 22 Cal. App. 2d 559, 566–567.) We do not consider this possibility to be within the framework of the question asked.

words." (*People v. Deibert* (1953) 117 Cal. App. 2d 410, 418.) Constrained as we are to construe the terms of the ameliorative statute broadly to promote its purpose, we believe that the conflict inherent in the intertwined relationship between a dispensing optician and an optometrist created by an assignment between them is sufficiently akin to that created by a lease between them, as to be brought within the embrace of the "landlord-tenant relationship" the statute prohibits being created "in any form directly or indirectly." Accordingly, we conclude that when the amended version becomes operative on January 1, 1983, it will prohibit a dispensing optician from leasing adjoining business office spaces from a landlord and later unconditionally assigning the lease on one of them to an optometrist, patient referrals between them notwithstanding.

II

We are next asked, with regard to the office space so assigned whether a clause in the original lease providing the dispensing optician with the right of first refusal to lease the office on default or vacation of it by the optometrist, would violate section 655 as amended. We conclude that it would.

In answering the first question we concluded that section 655 would preclude a dispensing optician from leasing adjoining business office spaces from a landlord and thereafter assigning one of them to an optometrist, for such an assignment would be tantamount to the landlord-tenant relationship proscribed by the statute. A clause in the original lease which would give the dispensing optician a right of first refusal to possess the premises on their surrender or vacation by the optometrist would not produce a different result. The initial assignment would be proscribed, and the additional clause would not cure the violation. Indeed, such a provision would make it more pronounced for now the dispensing optician's involvement in the property would be further enhanced by the original lease itself. By ensuring him a possibility of actual (re)possession of the premises, the lease would grant the dispensing optician a "proprietary" or "ownership" interest in them which would exist at the same time as the optometrist's possession.

Strictly speaking, a transaction whereby the optician would reserve a right of first refusal to lease the office on its vacation or surrender by the optometrist in the original lease, would not constitute an *assignment* but instead a *sublease*, because rather than transferring the whole of his unexpired term, the dispensing optician would be reserving a contingent reversionary interest in the form of a right of reentry for breach of conditions. (*Hartman Ranch Co. v. Associated Oil Co.*, (1937) 10 Cal. 2d 232, 243; accord, *Kendis v. Cohn* (1928) 90 Cal. App. 41, 58–59; *Williams v. Hinkley* (1930) 109 Cal. App. 574, 575–576.) As was explained in *Barkhaus v. Producers Fruit Co.* (1923) 192 Cal. 200, for a transfer to constitute an assignment [t]he term to be transferred . . . must be for a period of time at least equal to the remainder of the term of the original lease. . . . If by the terms of

the conveyance, be it in the form of a lease or an assignment, new conditions *with a right of entry* or new causes of forfeiture are created, then the tenant holds by different tenure, and a new leasehold interest arises, which cannot be treated as an assignment or a continuation to him of the original term." (192 Cal. at p. 206; emphases added.) It is instead, a sublease. (*Hartman Ranch Co. v. Associated Oil Co.*, *supra*.) In any event, we are not concerned with the designation given the instrument by which the dispensing optician's and the optometrist's respective rights would be defined, but must look to the substance thereof. (*Kendis v. Cohn*, *supra*, 90 Cal. App. 41, 58; *cf. In re City and County of San Francisco*, 195 Cal. 426; *Mahoney v. San Francisco*, 201 Cal. 248, 258.) "When we do, it is quite apparent that [they would each be] vested with a valuable interest in [the] property." (*Estate of Pitts* (1933) 218 Cal. 184, 191.) Therefore, whatever its designation, we conclude that the transaction would be proscribed by section 655 as amended.

Again, section 655 prohibits a dispensing optician from having "any proprietary interest [or] co-ownership . . . in any form, directly or indirectly with any optometrist." Webster's Third New International Dictionary defines "own" as "to have or hold as property" or to "have a rightful title whether legal or natural" (p. 1612), and it defines "proprietary" as having "characteristics of or appropriate to an owner" (p. 1819).[7] With more particularity, the Civil Code defines "ownership of property" as "the right of one or more persons to possess it and use it to the exclusion of others" (Civ. Code § 654) and provides that such ownership may be either absolute or qualified (*id*., § 678). It is absolute "when a single person has the absolute dominion over it, and may use it or dispose of it according to his pleasure subject only to general laws" (*id*., § 679), and is qualified when it is shared with one or more persons, when the time of enjoyment is deferred or limited, or when the use is restricted (*id*., § 680).

Section 688 of the Civil Code provides that, with respect to the time of its enjoyment, an interest in property may be either present or future (*id*., § 688). A present interest entitles the owner to the immediate possession of the property (*id*., § 689), while a future interest entitles him to its possession only at a future period (*id*., § 690). Although no future interest in property is recognized by the law except as it may be defined in Division 2 (§§ 654–1426) of the Civil Code (§ 703), that Division recognizes that a future estate may be limited by the act of the parties to commence in possession at a future day, either without the intervention of a precedent estate, or on the termination, by lapse of time or *otherwise*, of a precedent estate created at the same time (*id*., § 767) and it specifically recognizes that the time when the enjoyment of property is to begin may be upon condition, i.e., it may be made to depend on events (§ 707). In this regard conditions are precedent

[7] The original Restatement of Torts defines, for conversion purposes, a proprietary interest as" any right in relation to a chattel which enables a person to retain its possession indefinitely or for a period of time." (Restatement of Torts, § 223, Comment (d).)

when they fix the beginning of the right and are subsequent when they fix its ending (§ 708). Section 1046, relating to transfer of interests, provides that "a right of reentry, or of repossession for breach of conditions subsequent, can be transferred." (§ 1046; see also § 1085.)

A right of first refusal for the dispensing optician to reenter the property on its surrender or vacation by the optometrist gives him, as we have seen, a contingent reversionary interest in the property. (*Hartman Ranch Co. v. Associated Oil Co*., *supra*.) It permits actual possession. While it is true that that possession will only occur at a future time when the optometrist perforce will no longer be on the premises—still the dispensing optician's right to avail himself of it is a recognizable present and transferable interest in the property which is created and exists *at the same* time as the optometrist's possession. (See Verrall, "Future Interests in California," published in West's Annotated California Codes, Civil, Vol. 7, at pp. 5,15–17, cited in *Alamo School District v. Jones* (1960) 182 Cal. App. 2d 180, 183–184.) As we have also seen, the ownership of property may be shared (Civ. Code § 654) and is deemed qualified when it is so shared or when the time of enjoyment of its use is deferred (*id*., §§ 678, 680). The dispensing optician's future estate created by a lease that would give him a right of first refusal to reenter the office on an optometrist's vacating or surrendering it, thus gives him a qualified "ownership" interest in the premises and a "proprietary" interest in them that is created and *shared* concurrently with the "ownership" and proprietary interest of the optometrist. The existence of those concurrent interests fall within the proscriptions of section 655.

III

We turn now to the final question of whether the amended version of section 655 will apply to all lease and sublease arrangements for business offices that may still exist between dispensing opticians and optometrists when it becomes operative on January 1, 1983, or only those entered into after that effective date. We conclude that the statute will apply to *all* such lease and sublease arrangements remaining between dispensing opticians and optometrists on January 1, 1983.

Two issues must be addressed in answering this question:—first, whether the 1979 amendment to section 655 (AB 1125) was intended to apply to all remaining office lease arrangements that might still exist on January 1, 1983, or only to those entered into thereafter[8]—and second, whether there is any legal impediment to the Legislature effecting the former result if that was its desire. (*Industrial Indem. Co. v. Teachers' Retirement Bd.*

[8] There is no question that the Legislature had the power to prescribe that the act go into effect on a date subsequent to the date when legislative enactments ordinarily become effective (*People v. Sterling Refining Co.* (1927) 86 Cal. App. 558, 569.)

(1978) 86 Cal. App. 3d 92,97.)

We first address the issue of statutory construction: was the amendment to section 655 meant to govern office lease and sublease arrangements between dispensing opticians and optometrists existing on its effective date, or only those entered into thereafter? In this regard, as before in interpreting the substantive meaning of the amendment, ascertainment of the intent of the Legislature is our primary task. The considerations for so doing with respect to the retroactivity of legislation[9] were succinctly stated by our Supreme Court in In re Marriage of Bouquet (1976) 16 Cal. 3d 583, thus:

> "Although legislative enactments are generally presumed to operate prospectively and not retroactively (*Interinsurance Exchange v. Ohio Cas. Ins. Co.* (1962) 58 Cal. 2d 142, 149 [23 Cal. Rptr. 592, 373 P. 2d 640], *DiGenoza v. State Board of Education* (1962) 57 Cal. 2d 167, 176 [18 Cal. Rptr. 369, 367 P. 2d 865]), this presumption does not defy rebuttal. We have explicitly subordinated the presumption against the retroactive application of statutes to the transcendent canon of statutory construction that the design of the Legislature be given effect. (*Mannheim v. Superior Court* (1970) 3 Cal. 3d 678, 686 [9] Cal. Rptr. 585, 478 P. 2d 17].) The central inquiry, therefore, is whether the Legislature intended the amendment to section 5118 to operate retroactively. [¶] . . . In *In re Estrada*, *supra*, 63 Cal. 2d 740, we clothed an amendment to the Penal Code with retroactive effect despite the silence of its language on the issue and the presumption against retroactive application. We explained: 'The rule of construction, however, is not a straightjacket. Where the Legislature has not set forth in so many words what it intended, the rule of construction should not be followed blindly in complete disregard

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[9] While it will not take effect until a future date, the legislation will have a "retroactive' effect at that time. A statute is said to have a retroactive or retrospective effect "when it is construed so as to relate back to a previous transaction and give the transaction a legal effect different from that which prevailed under the law when it occurred [Citation]." (*Industrial Indem. Co. v. Teachers' Retirement Bd.*, *supra*, 86 Cal. App. 3d at p. 97; see also 58 Cal. Jur. 3d, Statutes § 23 (Retroactivity) p. 336, ("A retrospective or retroactive statute is one that operates on matters that occurred, or on rights, obligations, and conditions that existed, before the time of its enactment, giving them an effect different from that which they had under previously existing law.").)

Such will certainly be the case of the operation of the amended version of section 655 on any remaining relationships between dispensing opticians and optometrists which it prohibits, when it becomes operative on January 1, 1983, (Stats. 1979, ch. 975. p. 3670. § 3; *cf. Kennelly v. Lowery* (1944) 64 Cal. App. 2d 903. 904–905). For example, whereas lease arrangements between a dispensing optician and an optometrist who do not engage in mutual patient referrals may be permissible now under the current version of section 655, on January 1, 1983, they will no longer be permitted, and the contractual arrangements establishing them will become illegal.

> of factors that may give a que to the legislative intent. It is to be applied only after, *considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent.'* (63 Cal. 2d 740, at p. 746 (italics added); accord *City of Sausalito v. County of Mann* (1970) 12 Cal. App. 3d 550, 557 [90 Cal. Rptr. 8431.)
>
> "Consistent with *Estrada's* mandate, we must address 'all pertinent factors' when attempting to divine the legislative purpose. A wide variety of factors may illuminate the legislative design, 'such as context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, and contemporaneous construction.' (*Alford v. Pierno* (1972) 27 Cal. App. 3d 682, 688 [104 Cal. Rptr. 110]; *Estate of Ryan* (1943) 21 Cal. 2d 498 [133 P. 2d 6261.) The issue in the present case is a close one, but we conclude that the Legislature did intend the amendment to section 5118 to apply retroactively." (16 Cal. 3d at pp. 586–587.) (Fns. omitted.)

(See also *Mannheim v. Superior Court* (1970) 3 Cal. 3d 678, 686–687; *Industrial Indem. Co. v. Worker's Comp. Appeals Bd.* (1978) 85 Cal. App. 3d 1028, 1031.)

Unlike *Bouquet*, we do not perceive the issue in our case to be a close one, for a consideration of the pertinent factors can only lead us to conclude that the statute was intended to apply retroactively on its effective date to all lease and sublease agreements that might remain between dispensing opticians and optometrists on January 1, 1983. When Assembly Bill 1125 was originally introduced in the Legislature it made no provision for an effective date of operation. When it was amended in the Senate on August 28, 1979 however, its section 3 was added to provide that "This act shall become operative January 1, 1983." (Stats. 1979, ch. 975, p. 3670, § 3.) This legislative history gives us our first que that the Legislature intended the operative date of the statute to have some special significance. (*California Mfrs. Assn. v. Public Utilities Com.,* 24 Cal. 3d 836, 844.) Moreover, we must also note that this pronouncement stood in stark contrast to the expression of legislative intent which accompanied the passage of the current version of section 655 in 1969, where it was specifically stated that:

> "It is not the intention of the Legislature to destroy any business relationships which might have existed in this state when the proposal to regulate this area was first proposed to the Legislature." (Stats. 1969, ch. 1333, p. 2681, § 2.)

And it is also noteworthy that while in 1969 the terms of the statute specifically *exempted* optometrists who owned corporations engaged in optical manufacture for the year

preceding April 8, 1969, from its prohibition on their having the proscribed financial and proprietary interests with those manufacturers, that exemption was deleted by Assembly Bill 1125. These comparisons between the wording of Assembly Bill 1125 and the previous legislation is useful to our construing the Legislature's intention for the former's operation (*Mooney v. Pickett* (1971) 4 Cal. 3d 669, 677, fn. 9; *County of Los Angeles v. Frisbie* (1942) 19 Cal. 2d 634, 639) and from the differences in wording between them we may assume that the Legislature meant them to have different operative effects. (*Safer v. Superior Court*, *supra*, 15 Cal. 3d 230, 238; *In re Dees* (1920) 50 Cal. App. 11, 19; *McCarthy v. Board of Fire Commrs*. (1918) 37 Cal. App. 495, 498.) From those differences we glean another indication that, unlike the situation in 1969 where the Legislature did not intend to interfere with certain business relationships between dispensing opticians and optometrists existing at the time of the passage of the current version of section 655, the Legislature did expect that its passage of AB 1125 would interfere with those relationships remaining on the date it takes effect.

Considerations of the objective of the legislation, the evils and mischief to which it was addressed, the public policy vindicated by its enactment, and the historical circumstances surrounding its enactment (*In re Marriage of Bouquet*, *supra*, 16 Cal. 3d at pp. 586–587; *West Pico Furniture Co. v. Pacific Finance Loans*, *supra*, 2 Cal. 3d at p. 608; *People v. Ventura Refining Co., supra*, 204 Cal. at p. 292; *County of San Diego v. Milotz*, *supra*, 119 Cal. App. 2d Supp. at p. 880) also compels the conclusion that the Legislature meant for the amendatory and ameliorative provisions of Assembly Bill 1125 to apply to business lease and sublease arrangements between dispensing opticians and optometrists existing on its effective date. We quickly recall that the geneses of the bill were findings that business, financial and proprietary relationships between those licensees that were and are presently permitted, were producing harmful effects on the consumers of this State by creating a situation where optometrists were placed in a position of having to deal with the potentially conflicting interests of their patients on the one hand and the proprietor-opticians to whom they would be beholden, on the other. Assembly Bill 1125 was passed to prevent the situation from arising in the first place.

While it has been said that "something more than a desirable social objective served by the Legislation is . . . required if we are to infer a legislative intent of retroactivity. . . . (*Industrial Indem. Co. v. Worker's Comp Appeals Bd.*, *supra*, 85 Cal. App. 3d at p. 1032) the foregoing indicates that we do have that "something more." Further, it is inconceivable that the Legislature intended the four year delay in the operation of the statute to allow licensees time to make long term arrangements which would nullify its purpose. Rather, we believe the Legislature provided that delay in order to enable dispensing opticians and optometrists who would be affected by its provisions to extricate themselves from any relationship which its terms would prohibit.[10] Viewing it as such further confirms our conclusion that the Legislature did in fact intend to have the statute apply to all such lease and sublease relationships existing on its effective date. Further, had the Legislature not meant to regulate the pre-January 1, 1983 lease relationships it could easily have prohibited their formation after January 1, 1983, rather than prohibiting their existence altogether. Or, it could have provided a "grandfather clause" exemption, as it did in 1969, for proprietary relationships existing on a certain date. But it did not do so.

In light of all of these factors we can but conclude that the Legislature intended the amendments to section 655 to apply to all office lease and sublease arrangements (and to all other relationships which its terms prohibit) between dispensing opticians and optometrists, that will exist on January 1, 1983. Any such business arrangement extant on that date when the statute becomes operative will be in violation of law.

Having deduced that the Legislature did in fact intend for the amended version of section 655 to apply to all lease and sublease arrangements between dispensing opticians and optometrists for business office spaces that might still exist on January 1, 1983, the presumption against its retroactivity becomes "completely irrelevant" (*In re Marriage of Bouquet*, *supra*, 16 Cal. 3d at p. 591, & p. 591, fn. 6) and we must now address the remaining issue of whether there is any constitutional impediment to its so applying.

When they become operative on January 1, 1983, the amended provisions of section 655 will "impair" contractual arrangements then existing between dispensing opticians and optometrists which it prohibits (*Home Bldg. & L. Assn. v. Blaisdell* (1934)

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[10] This is not an uncommon use of a future effective date in drafting a statute (2 Sutherland, *Statutory Construction, supra*, § 33.07 at p. 12: "The purpose of the future effective date is to inform persons of the provisions of a statute before it becomes effective in order that they may take steps to protect their rights and discharge their obligations" (fn. omitted); but see *Commonwealth v. Griffin* (Pa. 1959) 149 A. 2d 656, 658; "An Act which fixes a future day as its effective date stamps its prospective character on its face"). As we shall also see, a future effective date avoids constitutional impediments to a statute's being applied retroactively.

290 U.S. 398, 431) as well as any "vested rights" secured by them (*cf. In re Marriage of Bouquet*, (1976) 16 Cal. 3d 583, 592, fn. 9). Constitutional considerations come to mind: the United State Constitution prohibits the states from passing any law "impairing the obligation of contracts or from depriving a person of property without due process of law, and the California Constitution contains like prohibitions. (Compare U.S. Const., art. I, § 10 with Cal. Const., art. I, § 9; and compare U.S. Const., Amend. XIV with Cal. Const., art. I, § 7, respectively.) "But," as the California Supreme Court said recently with respect to the Contract Clause,

> "the fact that the state has impaired the obligations of these agreements by enactment of section 16280 is the beginning rather than the end of our analysis, for it has long been settled that although the constitutional provision, literally read, proscribes 'any' impairment of contract it is 'not an absolute one and is not to be read with literal exactness like a mathematical formula.' (*Home Building & Loan Assn. v. Blaisdell* (1934) 290 U.S. 398, 428 [78 L. Ed. 413, 423, 54 S. Ct. 231, 88 A.L.R. 1481].) The state's police power remains paramount, for a legislative body "cannot 'bargain away the public health or the public morals.'" (*Id*., at p. 436 [78 L. Ed. at p. 4281.)[11] Obviously, however, if the contract clause is to have any effect, it must limit the exercise of the police power to some degree. Our inquiry, then, concerns not whether the state may in some cases impair the obligation of contracts, but the circumstances under which such impairment is permissible." (*Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal. 3d 296, 305.)

Similarly the "due process" clauses have been held not to constitute an absolute bulwark against retroactive legislation that affects "vested property rights." As was said by the California Supreme Court in another recent matter:

> "The vesting of property rights . . . does not render them immutable. "'Vested rights, of course, may be impaired "with due process of law" under many circumstances. The state's inherent sovereign power includes the so-called "police power" right to interfere with vested property rights whenever reasonably necessary to the protection of the health, safety, morals, and general well being of the people . . . The constitutional question, on principle, therefore, would seem to be, not whether a vested right is impaired by a marital property law change, but whether such a change reasonably could be believed to be sufficiently necessary to the public welfare as to justify the impairment.'" (*Addison v. Addison*, [1965] 62 Cal. 2d at p. 566. (*In re*

[11] "See also *Allied Structural Steel Co v. Spannaus* (1978) 438 U.S. 234, 240.

Marriage of Bouquet, *supra*, 16 Cal. 3d at p. 592.))

The issue in both instances thus involves the question of whether the Legislature, by its exercise of the "police power" in amending section 655 and making it applicable to all business lease and kindred arrangements between dispensing opticians and optometrists on January 1, 1983, was justified in "impairing" the contractual obligations and property rights inherent in those arrangements that might exist on that date. We believe that it was.

As alluded to above, justification for retroactive application of a statute which would have the effect of impairing existing contractual arrangements or vested property rights has been readily found where the Legislature, in the exercise of the police power of a state, enacts legislation that it deems necessary to ameliorate or redress an unwanted condition proven to be inimical to the public at large, and where the legislation is reasonable and necessary to serve that important public purpose. As was said in the seminal case in the area:

> "Not only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect. *Stephenson v. Binford*, 287 U.S. 251, 276. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court."

(*Home Bldg. & L. Assn. v. Blaisdell*, *supra*, 290 U.S. 398, 434–435 (contract clause). Accord, *Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 242–244 (contract clause); *United States Trust Co. v. New Jersey* (1977) 431 U.S. 1, 22, 25 (contract clause); *Sonoma County Organization of Public Employees v. County of Sonoma, supra*, 23 Cal. 3d at pp. 305–307 and cases cited therein (contract clause); *Addison v. Addison*, *supra*, 62 Cal. 2d at p. 566 (due process clause); *In re Marriage of Walton*, *supra*, 28 Cal. App. 3d 108,112–113 (contract clause-due process clause); *In re Marriage of Bouquet*, *supra*, 16 Cal. 3d at p. 592 (due process clause); 59 Ops. Cal. Atty. Gen. 542, 543–544 (1976).)

Moreover, review of legislation enacted pursuant to "the police power" is limited in scope: "Courts do not sit as super-legislatures to determine the wisdom, desirability or propriety of statutes enacted by the Legislature. (*Griswold y. Connecticut*, 381 U.S. 479, 482 [14 L. Ed. 2d 510, 513, 85 S. Ct. 1678, 1680]; *People v. Hurd*, 5 Cal. App. 3d 865, 877 [85 Cal. Rptr. 718].) Having determined that the statutory scheme serves a legitimate state purpose and that the classification made has a rational relationship to that purpose, the court's function is at an end." (*Estate of Horman* (1971) 5 Cal. 3d 62, 77.) Thus "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." (*Williamson v. Lee Optical Co*. (1955) 348 U.S. 483, 487–488; accord, *Ferguson v. Skrupa* (1963) 372 U.S. 726, 730; *Liggett Co. v. Baldridge* (1928) 278 U.S. 105, 111–112; *In re Okahara,* 191 Cal. 353, 363; *Magan Medical Clinic v. Cal. State Bd. of Medical Examiners* (1967) 249 Cal. App. 2d 124, 131–132.) Further, while the question of whether particular legislation is meet in the premises is a factor in determining whether it can withstand constitutional attack, "in reviewing economic and social regulation . . . [where the government is not attempting to modify its own obligations,] courts properly defer to legislative judgment as to [its] necessity and reasonableness . . . *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945)." (*United States Trust Co. v. New Jersey*, *supra*, 431 U.S.at pp. 22–23; accord *El Paso v. Simm*ons (1965) 379 U.S. 497, 508–509; *cf. Sonoma County Organization of Public Employees v. County of Sonoma*, *supra*, 23 Cal. 3d 296, 310.)

Retroactive legislation that has impaired private contractual obligations or vested property rights has been particularly upheld where the law in question was addressed to an inimical situation involving a profession already subject to government regulation, or another relationship already "infused with a substantial public interest." (In re *Marriage of Walton* (1972) 28 Cal. App. 3d 108, 112; *Magan Medical Clinic v. Cal. State Bd. of Medical Examiners* (1967) 249 Cal. App. 2d 124, 131; *Castleman v. Scudder* (1947) 81 Cal. App. 2d 737, 740.) As was said in *Marriage of Walton*:

> "When persons enter into a contract or transaction creating a relationship infused with a substantial public interest, subject to plenary control by the state, such contract or transaction is deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy, and such legislative amendments or enactments do not constitute an unconititutional impairment of contractual obligations. (*Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 434–438 [78 L. Ed. 413, 426–429, 54 S. Ct. 231, 88 A.L.R. 1481]; *Castleman v. Scudder*, 81 Cal. App. 2d 737, 740[12] [185 P.2d 35]*; Phelps v. Prussia*, 60 Cal. App. 2d 732, 741

[12] [P]etitioners having qualified as licensees in a business already regulated under the police

> [141 P.2d 440]; *State etc. Bur. v. Pomona etc. Assn*., 37 Cal. App. 2d Supp. 765, 768–770 [98 P. 2d 829].) [¶]. . . . [Further, a vested) interest, however it be classified, [is] subject to the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy. (*Phelps v. Prussia*, *supra*, 60 Cal. App. 2d at p. 742; *cf. Home Building & Loan Assn. v. Blaisdell*, *supra*, 290 U.S. at pp. 434–438 [78 L. Ed. at pp. 426–429]; *Castleman v. Scudder*, *supra*, 81 Cal. App. 2d at p. 740; *State etc. Bur. v. Pomona etc. Assn.*, *supra*, 37 Cal. App. 2d Supp. at pp. 768–770.)" (28 Cal. App. 3d at pp. 112–113.)

The State of California has an undeniable substantial interest in, and the right to regulate the conduct of, the professions of optometry and optical manufacture within its borders. (*Williamson v. Lee Optical Co*., *supra*, 348 U.S. 483,488; *Rich v. State Board of Optometry*, *supra*, 235 Cal. App. 2d 591, 604–611 (number of offices); *Pennington v. Bonnelli* (1936) 15 Cal. App. 2d 316, 319; *cf. McNaughton v. Johnson* 242 U.S. 344, 347 (ophthalmology); *Magan Medical Clinic v. Cal. State Bd. of Medical Examiners*, *supra*, 249 Cal. App. 2d at p. 131.) In so doing it exercises that "residuum of state power" found in the "police power" that is inherent in its sovereignty to safeguard the welfare of its citizens. (*Home Bldg. & L. Assn. v. Blaisdell*, *supra*, 290 U.S. at p. 434–43 5; *Allied Structural Steel Co. v. Spannaus*, *supra*, 438 U.S. at p. 244; *Manigualt v. Springs* (1905) 199 U.S. 473, 480.) And, as the court said in *Magan Medical Clinic v. Cal. State Bd. of Medical Examiners*, *supra*:

> "The police power is the broadest in scope of any field of government authority and is the power to prevent, an anticipation of danger to come . . . and restrain individual tendency. [Citations.] There must, of necessity, be a very great discretion vested in the Legislature to the end that changing needs and conditions can be met." (249 Cal. App. 2d at p. 131.)

Since the ultimate purpose of professional licensing statutes is to protect the consumer-public (*Borror v. Department of Investment*, 15 Cal. App. 3d 531, 540 (1971); *Cornell v. Reilly*, 127 Cal. App. 2d 178, 184 (1954); 59 Ops. Cal. Atty. Gen. 537, 542 (1976)), in the exercise of this facet of its police power, the Legislature "may impose such proper restrictions [upon the practice of the professions] as it deems necessary for the protection of the public" (*Pennington v. Bonnelli*, *supra*, 15 Cal. App. 2d at p. 320). These may include restrictions which insure that a sufficient degree of professional integrity and quality will be maintained (see e.g., *Liggett Co. v. Baldridge*, *supra*, 278 U.S. at pp. 111–

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power of the state, they thereby accepted such licenses subject to the possibility of further regulatory legislation upon the same subject matter. (*Veix v. Sixth Ward Bldg. & L. Assn.* 310 U.S. 32 [60 S. Ct. 792, 84 L. Ed. 1061])"

112;[13] *Dent v. West Virginia* (1889) 129 U.S. 114, 122–123; *Hawker v. New York* (1898) 170 U.S. 189, 195; *Williamson v. Lee Optical Co*., *supra*, 348 U.S. at pp. 487–488; *Magan Medical Clinic v. Cal. State Bd. of Medical Examiners*, *supra*, 249 Cal. App. 2d at pp. 131–134) as well as those which will protect the citizenry from untoward business interrelationships between professionals. As was said in *Castleman v. Scudder*, *supra*:

> "[T]here can be no question of the power of the Legislature to 'restrict or prohibit trade practices which upon reasonable grounds it determines are predatory, vicious, unfair and anti-social' (*Wholesale Tobacco Dealers Bureau v. National Candy & T. Co.,* 11 Cal. 2d 634, 658 [82 P. 2d 3, 118 A.L.R. 4861) . . . . (81 Cal. App. 2d at p. 740.)

Regulation in the area we have is certainly "infused with, a substantial public interest," if not a public necessity, and may constitutionally have the effect of impairing contractual obligations. (See e.g., *United States Trust Co. v. New Jersey*, *supra*, 431 U.S. at p. 22 ("The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result."); *Home Bldg. & L. Assn. v. Blaisdell, supra*, 290 U.S. at p. 437 ("The interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."); see also *In re Marriage of Walton*, *supra*, 28 Cal. App. 3d at pp. 112–1 13 and cases cited.)

In *Magan Medical Clinic v. Cal. State Bd. of Medical Examiners*, *supra*, a case involving a situation very akin to that with which we are presented, the court upheld against constitutional attack the 1963 amendment to Business and Professions Code section 654 which provided that after June 1, 1967, no physician could have any "membership, proprietary interest or co-ownership in a pharmacy." (Stats. 1963, ch. 1303, p. 2829, § 1.) With a review of constitutional cases similar to that we have undertaken, the court said:

> "The question is, is it in the public welfare to prohibit a physician who prescribes medicines from having an interest in an establishment which fills

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[13] In Liggett the High Court declared a Pennsylvania statute prohibiting anyone other than a pharmacist from owning a pharmacy, to be unconstitutional (278 U.S. at pp. 108, 114) since it created an unreasonable and unnecessary restriction on private business (*id*., at p. 113) and invaded property rights guaranteed by the Constitution (*id*., at p. 111). In so holding, the court found as it had to that the law did not bear 'a real and substantial relation to the public health, safety, morals or . . . other phase of the general welfare" (*id*., at p. 112) because no/acts were presented to it (and apparently none were to the Legislature which enacted the statute) to justify a different conclusion. (*Id*., at p. 113.) Were that bearing demonstrated, the law would have been upheld. (*Id*., at pp. 111–112.)

> prescriptions? We think it was reasonable for the Legislature to declare, in effect, that such a statute would be for the public welfare. True it is that the statute may leave much to be desired. The question is a debatable one upon which reasonable men may differ, and under such circumstances, it is not the duty or the province of this court to substitute its judgment for that of the Legislature. The court can interfere only when the statute clearly interferes with the Constitution. The law need not be in every respect logically consistent with its aims to be constitutional." (249 Cal. App. 2d at p. 134.)

(See also *Rich v. State Board of Optometry*, *supra*, 235 Cal. App. 2d 591, 611 (the Legislature may regulate the number of optometrist's branch offices).)

Against that same constitutional background, amplified by subsequent cases, we reach our conclusion that neither the "contract clause" nor the "due process" clause of either the federal constitution or the state constitution prohibits the Legislature from having made the amended version of section 655 apply to all lease and sublease arrangements for business office space that may still exist between dispensing opticians and optometrists on January 1, 1983.

In *Allied Structural Steel Co. v. Spannaus*, *supra*, the High Court pointed to five factors which it had earlier found to be significant to its upholding Minnesota's mortgage moratorium law against a constitutional (contract clause) attack in *Home Bldg. & L. Assn. v. Blaisdell*, *supra*, 290 U.S. 398:

> "First, the state legislature had declared in the Act itself that an emergency need for the protection of homeowners existed. *Id*., at 444. Second, the state law was enacted to protect a basic societal interest, not a favored group. *id*., at 445. Third, the relief was appropriately tailored to the emergency, that it was designed to meet. *Ibid.* Fourth, the imposed conditions were reasonable. *Id*., at 445–447. And, finally, the legislation was limited to the duration of the emergency. *Id*., at 447." (438 U.S. at p. 242.)

It also noted that in *Veix v. Sixth Ward Building & Loan Assn*., 310 U.S. 32, 38, it had taken into account still another consideration in upholding a state law against a Contract Clause attack: the petitioner had "purchased into an enterprise already regulated in the particular to which he now objects." (438 U.S. at pp. 242–243, fn. 13.) "Similar factors have been applied in California decisions." (*Sonoma County Organization of Public Employees v. County of Sonoma*, *supra*, 23 Cal. 3d at pp. 306–307.)

The factors permitting retroactive legislation to scale the bulwark of the due process clause are similar:

"In determining whether a retroactive law contravenes the due process clause, we consider such factors as the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of action taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions. [Citations.] . . . [A]mended section 5118 can be applied retroactively if such a retroactive application is necessary to subserve a sufficiently important state interest. (See *Addison v. Addison*, *supra*, 62 Cal. 2d 558; see generally *Boyd v. Oser* (1944) 23 Cal. 2d 613, 623 [145 P.2d 312] (Traynor, J., concurring); *In re Marriage of Bouquet*, *supra*, 16 Cal. 3d at pp. 592–593.)

As in the *Allied Structural Steel Co.* in applying these principles to the situation before us,

> "the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship [for t]he severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation." (438 U.S. at pp. 244–245. See also, *Sonoma County Organization of Public Employees v. County of Sonoma* (1979), *supra*, 23 Cal. 3d at pp. 307–308.)

We have accepted the fact that any remaining contracts between dispensing opticians and optometrists that the amended version of section 655 prohibits, will be impaired when that section becomes operative on January 1, 1983. Here the problem of course is with those arrangements which were made *before* the section was amended in 1979; those entered into after the section was amended can find no succor in the contract clause (*Hudson County Water Co. v. McCarter* (1908) 209 U.S. 349, 357 ("One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them")), nor can they find protection in the "due process clause" since justifiable reliance would be lacking (*cf. In re Marriage of Bouquet*, *supra*, 16 Cal. 3d at pp. 592–593). Nevertheless, even the "careful examination of the nature and purpose of the state legislation" required by a "severe impairment" of contractual obligations leads us to conclude that the statute may be retroactively applied to those pre-1979 arrangements without constitutional interdiction. The legislation in question was addressed to a general problem of vital interest to society as a whole, involving as it did the public health and welfare, and was in an area already subject to pervasive regulation by the state, professional activity. While the conditions prompting its enactment may not have constituted an

"emergency" approaching the Great Depression,[14] they were such as to be a concern to a state exercising the residuum of its inherent sovereign power to protect the common wealth. (*Cf. Allied Structural Steel Co. v. Spannaus*, *supra*, 438 U.S. at p. 241; *Home Bldg. & L. Assn. v. Blaisdell*, *supra*, 290 U.S. at pp. 434–437; *Addison v. Addison* (1965) 62 Cal. 2d 558, 566.) And while the exercise of that power in "[l]egislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption. . . ." (*United States Trust Co. v. New Jersey*, *supra*, 431 U.S. at p. 22), in the case of the 1979 adoption of the amendments to section 655 we can surely say that an evil was at hand for correction and that the legislative measure as we have construed it was a rational way to correct it (*cf. Williamson v. Lee Optical Co*., *supra*, 348 U.S. at p. 488): The Legislature was presented with evidence that certain relationships between dispensing opticians and optometrists were still causing harmful effects on the health care the public was receiving, despite its having tried, for over a decade, the less drastic method of avoiding that result by prohibiting only those relationships when patient referrals were involved. The Legislature therefore decided to address the root of the problem and it determined that a total prohibition on those relationships was necessary to prevent the dangerous result to the public that was ensuing from the "individual tendency" they were breeding. Even if we were not compelled by a "severe impairment" to give complete deference to that legislative determination, its correctness would be enhanced by the historical fact that a lesser prohibition had not worked. (*United States Trust Co. v. New Jersey*, *supra*, 431 U.S. at pp. 29–31; *cf. Magan Medical Clinic v. Cal. State Bd. of Medical Examiners*, *supra*, 249 Cal. App. 2d at p. 128.) Clearly, the means now chosen were appropriate to the end, and were reasonably tailored to the situation that it was designed to meet.[15]

As alluded to above, the United States Supreme Court has "accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States" (*Allied Structural Steel Co. v. Spannaus*, *supra*, 438 U.S. at p. 241) and that "[t]he States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result." (*United*

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[14] We note, as did the United States and California Supreme Courts, that the existence of an emergency is but one factor in determining the constitutionality of retroactive legislation; it is not an absolute requirement to sustain its validity nor is it essential in every case. (*United Sates Trait Co. v. New Jersey*, *supra*, 431 U.S. at pp. 22–23, fn. 19, citing *Veix v. Sixth Ward Building & Loan Assn*. (1940) 310 U.S. 32. 39–40 for the proposition that an emergency need not be declared and the relief measure need not be temporary; *Sonoma County Organization of Public Employees v. County of Sonoma*, *supra*. 23 Cal. 3d at p. 310, fn. 13.)

[15] Since the question posed involves one of dispensing opticians and optometrists having a relationship in proximate offices (see also § 2556), we do not consider if a greater degree of separation involved would pose due process problems.

States Trust Co. v. New Jersey, supra, 431 U.S. at p. 22; *Manigualt v. Springs, supra*, 199 U.S. 473, 480.) We have also seen that there are of course limits "upon the power of the State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." (*Allied Structural Steel Co. v. Spannaus*, *supra*, 438 U.S. at p. 242.) In balancing the factors in the situation presented, we conclude that the California Legislature acted well within those constitutional limitations when it amended section 655 and made it applicable to all existing business leases and similar arrangements that it prohibits which may still exist between dispensing opticians and optometrists on January 1, 1983.

With similar result, a review of the factors to be considered in determining whether a retroactive law contravenes the due process clause leads us to the conclusion that the retroactive application of the law does not offend "due process": significant state interests are subserved by the law, and its retroactive application on January 1, 1983, is necessary to effect the, lest those relationships between dispensing opticians and optometrists that were found to spawn the evils to which the statute was directed be entrenched yet further. Reliance on the current "loophole" of the absence of mutual patient referrals is only well taken in the case of relationships that existed before the amendment was adopted in 1979, and even as to them that reliance is tempered by the four year notice the Legislature has provided those affected. In any event, those relying do so in an area infused with a substantial public interest, which was already subject to pervasive state regulation. Thus, when any such pre-1979 arrangements were made, the Legislature had already spoken to their parameters and inherent in any contemplated expectations at the time was the possibility of further regulatory legislation upon the same subject matter.

Just as the bulwarks of the due process and contract clauses would not shield a spouse from a retroactive application of a change in the law regarding the grounds for dissolution of marriage (*In re Marriage of Walton*, *supra*), or a change in the law allocating marital property (*In re Marriage of Bouquet*, *supra*, *Addison v. Addison*, *supra*), or a physician from a law requiring him to divest himself by a certain date of interests in a pharmacy (*Magan Medical Clinic v. Cal. State Bd. of Medical Examiners*, *supra*), so we find that they do not stand as constitutional impediments to the Legislature having had the amended version of section 655 apply to all relationships between dispensing opticians and optometrists which it prohibits that may still exist on January 1, 1983.

Summarizing then, when the amended version of section 655 becomes operative on January 1, 1983, it will apply to all the (business) relationships which it prohibits between dispensing opticians and optometrists that may still exist on that date. Specifically it will prohibit a dispensing optician from leasing two business office spaces from a landlord and thereafter unconditionally assigning the lease on one of them to an optometrist, as well. as the variation on that arrangement by which the dispensing optician

reserves a right of reentry in the premises so assigned/sublet in the event of their vacation or surrender by the optometrist

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