

Chapter 3

ASSIGNMENT AND DELEGATION

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§ 3.01 Introduction²

An agreement's assignment and delegation provision is a compromise between competing business interests. Each party wants to be able to freely assign its rights and delegate its performance. But each party also wants to control with whom it does business—that is, to make considered business judgments about its business partners secure in the knowledge that its partners, and the law, will respect those judgments. Both these interests are potent business concerns, either of which might take precedence depending upon the circumstances.

The legal resolution of these business interests is the assignment and delegation provision. It is a malleable provision, one that can be modified to reflect the desired balance between the competing business interests. At its broadest scope, the provision forbids both the assignment of rights and the delegation of performance. In this incarnation, the parties' desire to control with whom they do business is paramount. This is to be contrasted with a provision that permits the assignment of rights and the delegation of performance. Between the two is perhaps the most common provision: a provision that prohibits delegation of performance, but permits assignments, if there is consent.

This Chapter briefly sketches the history of assignment and then, through the study of multiple provisions, explores the drafting and negotiating nuances that allow the parties to use the assignment and delegation provision to address their competing business interests.

Practitioners should be forewarned. The drafting of assignment and delegation provisions is riddled with minefields. The issues are complex and sometimes subtle. Moreover, the law in one state may differ from that in the next, and the cases, which should explicate the law, often add only confusion. Accordingly, practitioners should craft these provisions carefully to assure that the legal result reflects the business intent.

§ 3.02 Definition of Terms

Before turning to the substance of this Chapter, it is helpful to define the key terms to be used.

² Beyond the scope of this Chapter are anti-assignment clauses as they relate to negotiable instruments and conveyances of land, each of which is governed by a different set of principles from common law contract principles. See *Restatement (Second) of Contracts* § 316, Comment b (1981). For a brief review of the differences between property law principles and contract law principles, see Kelley, "Any Reports of the Death of the Property Law Paradigm for Leases Have Been Greatly Exaggerated," 41 *Wayne L. Rev.* 1563, 1565-1568 (1995). In addition, this Chapter does not cover gratuitous assignments or assignments for security.

[1]—Assignment and Delegation

Many practitioners speak only of assignments, thereby improperly collapsing the concepts of assignment and delegation into one concept. Each is a separate legal principle, although they are often joined at the hip.

[a]—Assignment

An assignment is a transfer of a right to performance to a third party.³ The transfer extinguishes the transferor's right to receive performance in whole or in part and gives that right to receive performance to the third-party transferee.⁴

[b]—Delegation

In contrast to assignment, delegation is the appointment by one person of another to perform either a duty or a condition to the other party's performance.⁵ Typically, practitioners think only of the delegation of the performance of a duty.⁶ But performance of a condition to a duty may also be delegated.⁷ For example, assume that Street Cleaner Inc. contracts with Metropolis to clean the streets of that city for five years. In return, Metropolis agrees to pay Street Cleaner Inc. \$1,000 monthly. Further assume that Street Cleaner Inc. delegates its performance to Clean Sweep Company and that Clean Sweep Company substantially performs. Clean Sweep Company's performance satisfies the condition to Metropolis's duty to pay.⁸ As performance of both a duty and a condition can be delegated, this Chapter uses the shorthand "delegation of performance" to refer to these two kinds of delegation.

Delegation of a duty does not discharge the delegating party's performance obligation.⁹ Rather, the delegating party remains "on the hook." Were it otherwise, the delegating party could effectively eliminate its performance obligation by delegating it to a person that had no ability to

³ *Iowa*: Midland Mutual Life Insurance Co. v. Mercy Clinics, Inc., 579 N.W.2d 823, 833 (Iowa 1998).

Massachusetts: Commonwealth v. Power, 420 Mass. 410, 421 n.8, 650 N.E.2d 87, 93 (1995), cert. denied 516 U.S. 1042 (1996) (quoting *Black's Law Dictionary* 118 (6th ed. 1990)).

See *Restatement (Second) of Contracts* § 317(1) (1981).

⁴ *Restatement (Second) of Contracts* § 317(1) (1981). See *Bank of Cave Spring v. Gold Kist, Inc.*, 173 Ga. App. 679, 680, 327 S.E.2d 800, 802 (1985).

⁵ *Proriver, Inc. v. Red River Grill, LLC*, 83 F. Supp.2d 42, 50 n.14 (D.D.C. 1999). See:

Iowa: Midland Mutual Life Insurance Co. v. Mercy Clinics, Inc., 579 N.W.2d 823, 833 (Iowa 1998).

Maryland: *Petals Factory Outlet of Delaware, Inc. v. EWH & Associates*, 90 Md. App. 312, 319, 600 A.2d 1170, 1174 (1992), limited on other grounds by *Holmes v. Coverall North America, Inc.*, 98 Md. App. 519, 633 A.2d 932 (1993), cert. granted 334 Md. 263, 638 A.2d 778, aff'd 336 Md. 534, 649 A.2d 365 (1994).

⁶ "An obligor can properly delegate the performance of his duty to another unless the delegation is contrary to public policy or the terms of his promise." *Restatement (Second) of Contracts* § 318(1) (1981). (Emphasis added.)

⁷ "Where a performance by a person is made a condition of a duty, performance by a person delegated by him satisfies that requirement unless the delegation is contrary to public policy or the terms of the agreement." *Id.* at § 319(1). (Emphasis added.)

⁸ This example paraphrases Illustration 1 to *Restatement (Second) of Contracts* § 319 (1981).

⁹ *First American Commerce Co. v. Washington Mutual Savings Bank*, 743 P.2d 1193, 1194 (Utah 1987); *Restatement (Second) of Contracts* § 318(3) (1981).

perform, whether because of insolvency, lack of skill or otherwise.¹⁰ While mere delegation does not relieve the delegating party of its performance obligation, the delegating party is discharged if there is a novation.¹¹

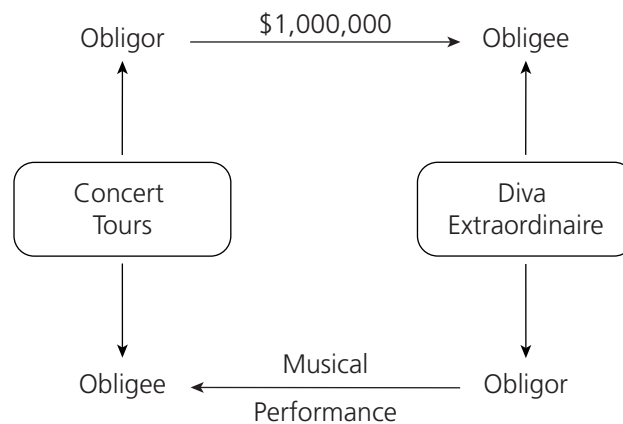
[2]—Obligor, Obligee, Assignor, and Assignee

To help define the terms obligor, obligee, assignor, and assignee, consider the following hypotheticals that put the terms in context, first with respect to assignments and then with respect to delegations.

[a]—Assignment

Imagine that Concert Tours has engaged Diva Extraordinaire to perform New Year’s Eve and has agreed to pay her \$1 million. If the hypothetical stops here, each of the parties is an obligor and an obligee because the contract is bilateral and executory. Specifically, each party is an obligor because it has a duty to perform, and each party is an obligee because it is entitled to receive performance.

DIAGRAM #1



Now assume, however, that Concert Tours decides to assign its rights to Diva’s performance under the contract to Perfect Performances for \$100,000.¹² That assignment, if consummated,

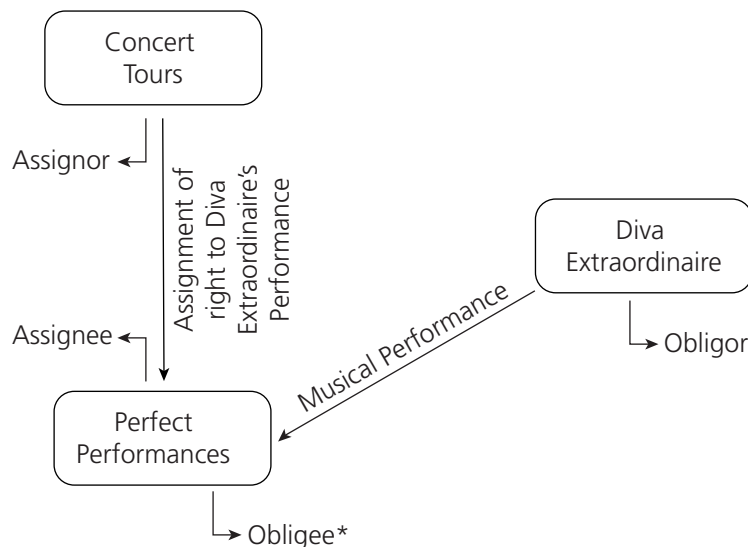
¹⁰ First American Commerce Co. v. Washington Mutual Savings Bank, 743 P.2d 1193, 1195 (Utah 1987) (noting that “[t]he usual rule requiring that a delegating party remain liable is designed to protect the expectations of the party receiving the performance. The delegating party should not be able to foist upon the other party to the contract a performer whose skills, goods, reliability, or solvency might differ from those of the delegator.”).

¹¹ See § 3.04[2][a] *infra*.

¹² This hypothetical assumes that the right to Diva’s performance is an assignable right—that is, that the assignment does not increase Diva’s obligations or change her performance in any way. See § 3.04[1] *infra*.

creates a second contractual relationship: one between Concert Tours and Perfect Performances. To conform to the lexicon used in discussing assignment fact patterns, Concert Tours is the assignor and Perfect Performances is the assignee. Diva Extraordinaire continues on as an obligor, owing her performance now to Perfect Performances. (In the context of assignments, this Chapter generally refers to the obligor as the “nonassigning party.”) In addition, Diva Extraordinaire is an obligee in that she continues to be owed the \$1 million for her performance. Who pays that fee depends on whether the duty to pay that sum is delegated contemporaneously with the assignment of the right to receive her performance.

DIAGRAM #2



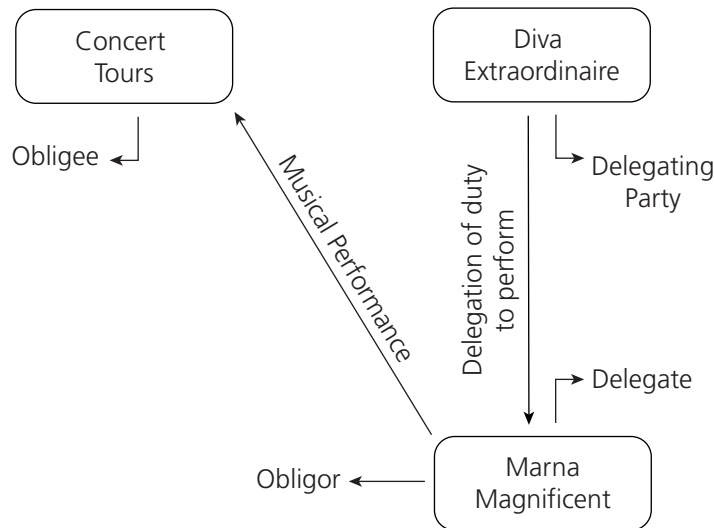
 *By virtue of the assignment, Perfect Performances is now Diva Extraordinaire's obligee as Diva owes her musical performance to Perfect Performances.

[b]—Delegation

Imagine the same scenario discussed in Diagram #1 in the immediately preceding subsection [a]. Again, each party is an obligor and an obligee. Further imagine that Diva Extraordinaire has the flu and delegates her duty to perform to her arch rival, Marna Magnificent, a delegation perfectly acceptable to Concert Tours. (Marna, of course, pays Diva \$25,000 as consideration.) The nomenclature with respect to this act of delegation is straightforward. Diva Extraordinaire, the party who is delegating her performance, is the delegating party, and Marna Magnificent, the third party who becomes obligated to perform the duty, is the delegate and the new obligor. She is the person who now owes a performance to Concert Tours. Concert Tours, the

party to whom the delegated duty is owed, is the obligee. In the context of delegations, this Chapter generally refers to the obligee as the “nondelegating party.”

DIAGRAM #3



§ 3.03 Historical Development of Anti-Assignment Clauses: Early Common Law

Today, contract rights are freely assignable, with certain limited exceptions. This general rule completely reverses earlier common law doctrines¹³ and reflects, in large part, the role that contract rights play in a modern credit-based economy.

Early common law courts considered contract rights and the right to tort damages to be personal, intangible rights.¹⁴ Because the rights were personal, courts held them to be nonassignable,¹⁵ denying all persons other than the original contract parties, or the wronged

¹³ Among the seminal articles discussing the history of the assignability of contract rights are the following: Corbin, “Assignment of Contract Rights,” 74 U. Pa. L. Rev. 207 (1926); Holdsworth, “The History of the Treatment of *Choses in Action* by the Common Law,” XXXIII Harv. L. Rev. 997 (1920); Ames, “The Disseisin of Chattels, Part III,” III Harv. L. Rev. 337, 340 (1890).

¹⁴ Holdsworth, “The History of the Treatment of *Choses in Action* by the Common Law,” XXXIII Harv. L. Rev. 997, 1003 (1920); Ames, “The Disseisin of Chattels, Part III,” III Harv. L. Rev. 337, 337, 338 n.1 (1890). See also, Corbin, “Assignment of Contract Rights,” 74 U. Pa. L. Rev. 207, 213 n.10 (1926).

¹⁵ Ames, “The Disseisin of Chattels, Part III,” III Harv. L. Rev. 337, 339 (1890). See also, Holdsworth, “The History of the Treatment of *Choses in Action* by the Common Law,” XXXIII Harv. L. Rev. 997, 1003 (1920).

plaintiff, the opportunity to enforce the rights. Although it has been commonplace to suggest that fear of litigation was the primary reason that contract rights were not assignable, commentators have largely debunked this view, and its status as a secondary rationale has been accepted.¹⁶

By upholding the principle that contract rights were nonassignable, the early common law courts created a problem. The principle unduly hampered commerce¹⁷ because parties could not turn contract rights into cash.¹⁸ Recognizing the impediment to commerce, courts turned to the artifice of a power of attorney as a way to circumvent the principle of the nonassignability of rights.¹⁹ In this “subterfuge,” an assignor with a debt owed to it (a contract right) would appoint the assignee as its attorney to collect that debt. As an incident to the power of attorney, the assignor would agree that the assignee would keep the proceeds from the collection of the debt. Thus, while hewing to the words of doctrine, courts slowly eroded the basic tenet that rights were not assignable.

At common law, however, nothing was ever simple. First, the power of attorney had its failings. The assignor could revoke the power of attorney, which in any event did not survive the assignor’s death or bankruptcy.²⁰ Moreover, until the latter part of the seventeenth century, courts blessed this subterfuge only if the assignor’s assignment of the debt to the assignee satisfied a prior debt of the assignor to the assignee.²¹ The stated concern was that a special relationship needed to exist between the assignor and the assignee to refute any objection based on maintenance.²²

Nonetheless, by the beginning of the eighteenth century, courts of equity recognized the validity of an assignment of a contract right without the need for a preexisting relationship between the assignor and the assignee.²³ From that point, it was only a matter of time before the principle that contract rights are assignable became universally accepted. The needs of the commercial world had trumped legal formalisms.

¹⁶ Ames, “The Disseisin of Chattels, Part III,” III Harv. L. Rev. 337, 338-339 (1890). “The traditional opinion that [nonassignability of contract rights] had its origin in the aversion of the ‘sages and founders of our law’ to the ‘multiplying of contentions and suits’ shows the power of a great name for the perpetuation of error. The inadequacy of this explanation by Lord Coke was first pointed out by Mr. Spence. The rule is not only older than the doctrine of maintenance in English law, but is believed to be a principle of universal law.”

Along similar lines, Professor Murray called the fear of maintenance a “dubious” explanation of why contract rights could not be assigned. Murray, *Murray on Contracts* 913 (2001). See also, Holdsworth, “The History of the Treatment of *Choses in Action* by the Common Law,” XXXIII Harv. L. Rev. 997, 1003 n.23 (1920) (“though [fear of maintenance] was a contributory cause [of contracts being] non-assignab[le], . . . it cannot be regarded as being the sole or the earliest cause.”).

Maintenance is the “[a]ssistance in prosecuting or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case” *Black’s Law Dictionary* (7th ed. 1999) (as available on Westlaw on Aug. 8, 2002).

¹⁷ See Farnsworth, *Contracts* 704-706 (3d ed. 1999).

¹⁸ For example, assume that Rancher Jones sold Stockyard Sue ten cattle for \$500, but agreed that Stockyard Sue could pay at a later date. Assume further that before the payment date, Rancher Jones needed cash. In today’s commercial world, Rancher Jones would assign his \$500 account receivable to Credit Bank, receiving in exchange a discounted amount, say \$450. Unfortunately, under the common law, the assignment of the \$500 account receivable would have been prohibited because the account receivable was a personal right that could not be assigned.

¹⁹ 3 Jaeger, *Williston on Contracts* § 408 (3d ed. 1960). See Ames, “The Disseisin of Chattels, Part III,” III Harv. L. Rev. 337, 340 (1890).

²⁰ Calamari and Perillo, *The Law of Contracts* 671 (4th ed. 1998), citing *Potter v. Turner*, Winch 7, 124 Eng. Rep. 7 (K.B. 1622).

²¹ Thus, in the hypothetical in N.18 *supra*, Rancher Jones could appoint Credit Bank as his attorney to collect his account receivable from Stockyard Sue, and Credit Bank could keep the proceeds of the collection, but only if Rancher Jones had borrowed from Credit Bank and the proceeds were used to satisfy the debt. See: Farnsworth, *Contracts* 706 (3d ed. 1999), citing *Harvey v. Bateman*, 74 Eng. Rep. 1020 (1600); Holdsworth, “The History of the Treatment of *Choses in Action* by the Common Law,” XXXIII Harv. L. Rev. 997, 1019-1020 (1920).

²² Holdsworth, “The History of the Treatment of *Choses in Action* by the Common Law,” XXXIII Harv. L. Rev. 997, 1020-1021 (1920).

²³ *Id.*

§ 3.04 Modern Common Law

[1]—Assignability of Rights

The general rule today is that all rights are assignable,²⁴ with limited exceptions. The first exception is that courts will not recognize assignments that violate public policy or law.²⁵ For example, public policy²⁶ and statutory proscriptions²⁷ forbid the assignment of tort claims. The rationale is two-fold. First, the facts giving rise to the tort claim are too personal to assign.²⁸ Second, the assignment of tort claims promotes champerty²⁹—a snippet of the old common law peeking through to the twenty-first century.

²⁴ *District of Columbia*: Peterson v. District of Columbia Lottery and Charitable Games Control Board, 673 A.2d 664, 667 (D.C. 1996) (quoting Flack v. Laster, 417 A.2d 393, 399 (D.C. 1980)) (“The right to assign is presumed, based upon principles of unhampered transferability of property rights and of business convenience.”).

New York: Sacks v. Neptune Meter Co., 144 Misc. 70, 72, 258 N.Y.S. 254, 257 (1932) (quoting Rosenthal Paper Co. v. National Folding Box & Paper Co., 226 N.Y. 313, 325, 123 N.E. 766, 770 (1919)), *aff’d* 238 A.D. 82, 263 N.Y.S. 462 (1933).

See *Restatement (Second) of Contracts* § 317(2) (1981).

²⁵ *Restatement (Second) of Contracts* § 317(2)(b) (1981). See *In re Freeman*, 232 B.R. 497, 501 (Bankr. M.D. Fla. 1999), and the cases cited therein.

²⁶ Among the tort claims that may not be assigned for public policy reasons are claims for personal injury, *Lingel v. Olbin*, 98 Ariz. 249, 253, 8 P.3d 1163, 1167 (2000), and claims for defamation and malicious prosecution, *Horton v. New South Insurance Co.*, 122 N.C. App. 265, 268, 468 S.E.2d 856, 858, *review and cert. denied* 343 N.C. 511, 472 S.E.2d 8 (1996). See also, *Truck Insurance Exchange v. Bennett*, 53 Cal. App.4th 75, 85 n.4, 61 Cal. Rptr.2d 497, 503 n.4 (1997) (noting that a slander or disparagement of title cause of action is assignable as it arises from a property right, while a cause of action for defamation is personal and is not assignable). But see, *Berschauer/Phillips Construction Co. v. Seattle School District No. 1*, 124 Wash.2d 816, 832-833, 881 P.2d 986, 995-996 (1994) (holding unpersuasive public policy claim that assignment was prohibited).

See Nadel, “Assignability of Proceeds of Claim for Personal Injury or Death,” 33 A.L.R.4th 82 (1984).

Although the majority of jurisdictions hold that malpractice claims may not be assigned, a few take the contrary position, but in limited circumstances. See Dougherty, “Assignability of Claim for Legal Malpractice,” 40 A.L.R.4th 684 (1985).

²⁷ *New York*: N.Y. Gen. Oblig. Law § 13-101: “Any claim or demand can be transferred, except . . . [w]here it is to recover damages for a personal injury. . . .” N.Y. Jud. L. § 489: “No person . . . shall . . . buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon. . . .” See discussion of the N.Y. Jud. L. § 489 in *Elliott Associates, L.P. v. Republic of Peru*, 948 F. Supp. 1203, 1208-1210 (S.D.N.Y. 1996).

Virginia: Va. Code Ann. § 8.01-26.

See also, N.C. Gen. Stat. § 1-57 and a discussion of that statute in *Horton v. New South Insurance Co.*, 122 N.C. App. 265, 268, 468 S.E.2d 856, 858 (1996), *review and cert. denied* 343 N.C. 511, 472 S.E.2d 8 (1996).

But see, Revised U.C.C. § 9-109(d)(12) which provides that Revised Article 9 applies to commercial tort claims. A “commercial tort” is defined as “a claim arising in tort . . . [that] arose in the course of the claimant’s business or profession; and does not include damages arising out of personal injury to or the death of an individual.” Revised U.C.C. § 9-102(a)(13).

²⁸ *RTC Commercial Loan Trust 1995-NP1A v. Winthrop Management*, 923 F. Supp. 83, 88 (E.D. Va. 1996). But see:

Illinois: *Kleinwort Benson North America, Inc. v. Quantum Financial Services, Inc.*, 181 Ill.2d 214, 227, 692 N.E.2d 269, 275, 229 Ill. Dec. 496, 502 (1998) (allowing former shareholders to be assigned right to fraud action after sale of brokerage firm).

Wisconsin: *Chimekas v. Marvin*, 25 Wis.2d 630, 633, 131 N.W.2d 297, 299 (1964) (finding that claim of fraud to induce transfer of realty is assignable).

²⁹ *Horton v. New South Insurance Co.*, 122 N.C. App. 265, 268, 468 S.E.2d 856, 858, *review and cert. denied* 343 N.C. 511, 472 S.E.2d 8 (1996). Courts continue to cite fear of champerty and maintenance as a reason to prohibit the assignment of certain rights, even though the validity of these concerns has been undermined. See § 3.03 *supra*. (“Champerty” is an “agreement between a stranger to a lawsuit and a litigant by which the stranger pursues the litigant’s claim as consideration for receiving part of any judgment proceeds.” *Black’s Law Dictionary* (7th ed. 1999) (as available on Westlaw on Aug. 2, 2002). See: *In re Duty*, 78 B.R. 111, 114 (Bankr. E.D. Va. 1987)

Other statutes that prohibit the assignment of rights are the federal Anti-Assignment Act,³⁰ municipal laws,³¹ and state assignment of wage laws.³²

In addition to the public policy and statutory exceptions to the principle of free assignability of rights, the *Restatement (Second) of Contracts* lists four other exceptions:³³

- Assignments that would materially change the performance due from the nonassigning party.
- Assignments that would materially decrease the likelihood that the nonassigning party would receive the intended return performance from the assignee.

(holding that patient may assign *proceeds* of personal injury claims (but not the claims themselves) to a hospital or other health care provider); *In re Musser, II*, 24 B.R. 913, 922 (Bankr. W.D. Va. 1982) (same).

³⁰ 41 U.S.C. § 15. The rationale behind the enactment of this provision is two-fold: “[F]irst, to prevent persons of influence from buying up claims against the United States, . . . which might then be improperly urged upon officers of the Government; and second, to enable the United States to deal exclusively with the original claimant instead of several parties.” *Johnson Controls World Services, Inc. v. United States*, 44 Fed. Cl. 334, 343 (1999). (Citations omitted.)

³¹ *Schiavone Construction Co. v. City of New York*, No. 94 Civ. 1153, 1995 WL 714339 at *5-7 (S.D.N.Y. Dec. 5, 1995), *aff’d* 99 F.3d 546 (2d Cir. 1996) (holding assignment without consent in violation of New York General Municipal Law invalid).

³² Many states prohibit the assignment of wages as a means of protecting the individual from herself. The rationale is that if a person cannot assign her wages, she cannot mortgage herself in perpetuity. For a compendium of state statutes prohibiting the assignment of wages, see *Consumer Credit Guide* (as regularly updated by CCH).

³³ *Restatement (Second) of Contracts* § 317(2)(a) (1981). See:

Second Circuit: *In re Schick*, 235 B.R. 318, 323 (Bankr. S.D.N.Y. 1999).

Third Circuit: *Canister Co. v. National Can Corp.*, 71 F. Supp. 45, 48 (D. Del. 1947), *appeal dismissed* 163 F.2d 683 (3d Cir. 1947).

Fourth Circuit: *Liberty Life Assurance Co. of Boston v. Stone Street Capital, Inc.*, 93 F. Supp.2d 630, 634-637 (D. Md. 2000).

State Courts:

Maine: *Goldberg Realty Group v. Weinstein*, 669 A.2d 187, 191 (Me. 1996).

To similar effect, see also, U.C.C. § 2-210(2). See, e.g., *Beachler v. Amoco Oil Co.*, 112 F.3d 902, 907-909 (7th Cir. 1997).

See generally: *Calamari and Perillo, The Law of Contracts* 680-682 (4th ed. 1998); *Farnsworth, Contracts* 714-717 (3d ed. 1999).

There is a string of cases discussing whether a payee under a structured settlement agreement may assign the stream of annuity payments to which the payee is entitled in exchange for a discounted lump-sum payment. The controversy arises because the settlement agreements establishing the annuity have an anti-assignment clause.

At least two cases have held payees’ assignments permissible. See:

Sixth Circuit: *Wonsey v. Life Insurance Co. of North America*, 32 F. Supp.2d 939, 942-944 (E.D. Mich. 1998) (relying on the general weight of modern opinions that rights are assignable).

State Courts:

Connecticut: *Rumbin v. Utica Mutual Insurance Co.*, 254 Conn. 259, 277, 757 A.2d 526, 535 (2000) (holding the assignment enforceable as the anti-assignment clause took away only the right to assign, not the power to do so).

However, the preponderance of structured settlement cases enforce anti-assignment clauses and deny the payee the right to assign. Typically, the cases reason that enforcement is appropriate because the assignments increase the risk of the loss of the nonassigning parties’ tax benefits — increased risk being one of the four reasons that an assignment should be deemed ineffective.

Second Circuit: *Grieve v. General American Life Insurance Co.*, 58 F. Supp.2d 319, 323 (D. Vt. 1999).

Fourth Circuit: *Liberty Life Assurance Co. of Boston v. Stone Street Capital, Inc.*, 93 F. Supp.2d 630, 634-637 (D. Md. 2000).

State Courts:

Illinois: *In re Nitz*, 317 Ill. App.3d 119, 127, 739 N.E.2d 93, 101, 250 Ill. Dec. 632, 640 (2000); *Piasecki v. Liberty Life Assurance Co. of Boston*, 312 Ill. App.3d 872, 875, 728 N.E.2d 71, 73, 245 Ill. Dec. 340, 342 (2000); *Henderson v. Roadway Express*, 308 Ill. App.3d 546, 551-552, 720 N.E.2d 1108, 1112-1113, 242 Ill. Dec. 153, 156-158 (1999), *appeal denied* 188 Ill.2d 564, 729 N.E.2d 496 (2000).

See also, *Victims of Terrorism Relief Act of 2001*, Pub. L. No. 107-134 (H.R. 2884), § 115, *Treatment of Certain Structured Settlement Payments*.

For a further discussion of the issues relating to structured settlements, see Andrada, “Structured Settlements: The Assignability Problem,” 9 S. Cal. Interdisciplinary L.J. 465 (2000).

- Assignments that would materially reduce the value of the return performance to the nonassigning party.
- Assignments that would materially increase the risk of the nonassigning party.

[2]—Delegation of Duties

Delegation of a duty is the act by which one party who owes a duty to another confers that duty to perform upon a third person.³⁴ It is an ordinary incident of any contract, as is the assignment of rights.³⁵ It is also the stuff of lawyers' nightmares. If a client had specific reasons for choosing one party over another, the imposition of a new party to the contract will not sit well with the client.

[a]—A Delegate's Obligation to Perform a Delegated Duty

As noted earlier, when a right is assigned the assigning party relinquishes all rights with respect to the contract right assigned.³⁶ In contrast, a delegating party remains liable for the duty delegated.³⁷ If this were not the case, the delegating party could delegate the duty to a party who did not have the means (financial or otherwise) to perform the duty. The nondelegating party would then be faced with a delegate who could not perform.³⁸

Once a duty is delegated, the question arises as to whether the delegate is obliged to perform. The answer is: It depends. First, the mere fact that A has delegated a duty to B does not impose the duty on B.³⁹ Imagine being told that Intel has delegated to your client, an ice cream franchisee, Intel's duty to manufacture microprocessors. Assuming that your client did not agree to the delegation, it would be a bizarre result if the mere fact of the delegation could impose the duty to manufacture.

³⁴ See § 3.02[1][b] *supra*.

³⁵ *Restatement (Second) of Contracts* § 317, Comment d (1981).

³⁶ See § 3.02[1][a] *supra*.

³⁷ *Second Circuit*: *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 924 (2d Cir. 1977) ("The act of delegation . . . does not relieve the delegant of the ultimate responsibility to see that the obligation is performed. If the delegate fails to perform, the delegant remains liable."). (Citations omitted.)

Tenth Circuit: *Oral Roberts University v. Anderson*, 11 F. Supp.2d 1336, 1339 (N.D. Okla. 1997).

State Courts:

Alaska: *Seville v. Holland America Line Westours, Inc.*, 977 P.2d 103, 111 (Alaska 1999).

New York: *Smith v. Morin Brothers, Inc.*, 233 A.D. 562, 564, 253 N.Y.S. 368, 371 (1931).

See *Restatement (Second) of Contracts* § 318(3) (1981).

³⁸ *First American Commerce Co. v. Washington Mutual Savings Bank*, 743 P.2d 1193, 1195 (Utah 1987) ("The delegating party should not be able to foist upon the other party to the contract a performer whose skills, goods, reliability, or solvency might differ from those of the delegator."); Farnsworth, *Contracts* 742-743 (3d ed. 1999); Calamari and Perillo, *The Law of Contracts* 698 (4th ed. 1998).

³⁹ *Tenth Circuit*: *Oral Roberts University v. Anderson*, 11 F. Supp.2d 1336, 1339 (N.D. Okla. 1997).

State Courts:

Illinois: *Pelz v. Streator National Bank*, 145 Ill. App.3d 946, 952, 496 N.E.2d 315, 319-320, 99 Ill. Dec. 740, 745 (1986).

Indiana: *Boswell v. Lyon*, 401 N.E.2d 735, 741 (Ind. App. 1980).

Utah: *First American Commerce Co. v. Washington Mutual Savings Bank*, 743 P.2d 1193, 1195 (Utah 1987).

A duty to perform arises if a delegate assumes an obligation.⁴⁰ An assumption is simply an agreement to take on a delegated duty.⁴¹ If a delegate assumes a duty, it is primarily liable for performance. The delegating party continues to be liable, however, but secondarily as a surety,⁴² unless there is a novation. In a novation, the nondelegating party accepts the delegation and agrees to the delegating party's release from all liability.⁴³ By doing so, the delegate replaces the delegating party as a party to the contract.

[b]—Delegability of Duties

Not all duties may be delegated. A duty is nondelegable if its delegation is against public policy,⁴⁴ if the parties' contract provides that the duty is nondelegable,⁴⁵ or if the duty is personal in nature, requiring the skill, wisdom, taste or character of the person originally agreeing to tender performance.⁴⁶

Courts take into account several factors in deciding whether a duty is personal in nature, and therefore nondelegable. They consider whether the duty is so personal in nature that performance by a delegate would significantly change the performance for which the nondelegating party had bargained.⁴⁷ Further, courts examine whether the nondelegating party's decision in entering into the

⁴⁰ *Noblett v. General Electric Credit Corp.*, 400 F.2d 442, 446-447 (10th Cir.), *cert. denied* 393 U.S. 935 (1968).

⁴¹ *California*: *Lumsden v. Roth*, 138 Cal. App.2d 172, 175, 291 P.2d 88, 89-90 (1955).

Georgia: *High Point Sprinkler Co. of Atlanta v. The George Hyman Construction Co.*, 164 Ga. App. 706, 708, 297 S.E.2d 757, 759 (1982).

New York: *Smith v. Morin Brothers, Inc.*, 233 A.D. 562, 564, 253 N.Y.S. 368, 370 (1931).

⁴² *Eighth Circuit*: *Imperial Refining Co. v. Kanotex Refining Co.*, 29 F.2d 193, 201 (8th Cir. 1928).

Tenth Circuit: *Pan American Petroleum Corp. v. Gibbons*, 168 F. Supp. 867, 873 (D. Utah), *aff'd* 262 F.2d 852 (10th Cir. 1958).

State Courts:

California: *Cutting Packing Co. v. Packers' Exchange of California*, 86 Cal. 574, 577, 25 P. 52, 53 (1890).

Washington: *Lonsdale v. Chesterfield*, 99 Wash.2d 353, 359, 662 P.2d 385, 388 (1983).

⁴³ *Texas*: *Honeycutt v. Billingsley*, 992 S.W.2d 570, 576 (Tex. App. 1999) (stating that "[t]he elements of novation are: (1) a previous, valid obligation; (2) an agreement of the parties to a new contract; (3) the extinguishment of the old contract; and (4) the validity of the new contract.").

Utah: *First American Commerce Co. v. Washington Mutual Savings Bank*, 743 P.2d 1193, 1195 (Utah 1987) (stating that the "essential element of a novation is the discharge of one of the parties to a contract and the acceptance of a new performer by the other party as a substitute for the first original party.").

⁴⁴ *Restatement (Second) of Contracts* § 318(1) (1981).

⁴⁵ *Id.*

⁴⁶ *Second Circuit*: *In re Schick*, 235 B.R. 318, 323 (Bankr. S.D.N.Y. 1999).

Third Circuit: *Canister Co. v. National Can Corp.* 71 F. Supp. 45, 47-48 (D. Del. 1947).

Fourth Circuit: *Berliner Foods Corp. v. Pillsbury Co.*, 633 F. Supp. 557, 559 (D. Md. 1986).

Eighth Circuit: *Imperial Refining Co. v. Kanotex Refining Co.*, 29 F.2d 193, 199 (8th Cir. 1928).

State Courts:

Michigan: *UAW-GM Human Resource Center v. KSL Recreation Corp.*, 228 Mich. App. 486, 509-510, 579 N.W.2d 411, 422 (1998).

Missouri: *Kenneth D. Corwin, Ltd. v. Missouri Medical Service*, 684 S.W.2d 598, 600 (Mo. App. 1985).

See: *Restatement (Second) of Contracts* § 318(2) (1981); U.C.C. § 2-210(1). See also, Dimatteo, "Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability," 27 Akron L. Rev. 407 (1994) for a discussion of the inconsistent decisions with respect to personal service contracts.

⁴⁷ See, e.g., *Masterson v. Sine*, 68 Cal.2d 222, 230, 436 P.2d 561, 566, 65 Cal. Rptr. 545, 550 (1968). See also, Calamari and Perillo, *The Law of Contracts* 701 (4th ed. 1998), and the cases cited therein.

contract depended upon the specific identity or character of the delegating party.⁴⁸ Classic examples of these personal service contracts are contracts for artistic performances⁴⁹ and those that involve a close relationship like doctor-patient or attorney-client.⁵⁰ Also often included on this list are contracts calling for the “good faith” or “best efforts” of an obligor.⁵¹

Obligations that are generally found to be delegable are those arising under contracts for the construction of buildings and structures⁵² and obligations involving mechanical skills that can be tested by objective means.⁵³ Note that the duty to pay money may be delegated regardless of a delegate’s creditworthiness as the delegating party is still liable.⁵⁴ What is not delegable, however, is the duty to execute a promissory note or other instrument of credit, unless the delegate is willing and able to pay cash.⁵⁵

Contractual obligations of corporations are usually delegable because there is no personal relationship, confidence between the parties, or exercise of personal skill or science.⁵⁶ A corporation’s duties are not delegable, however, if the contract is based upon the personal performance of particular individuals within the corporation.⁵⁷ A factor that increases the likelihood that a delegation will be enforced is the delegating party’s continued supervision or control of the delegate’s performance.⁵⁸

⁴⁸ *Fourth Circuit*: *Berliner Foods Corp. v. Pillsbury Co.*, 633 F. Supp. 557, 559 (D. Md. 1986).

District of Columbia Circuit: *Clayman v. Goodman Properties, Inc.*, 518 F.2d 1026, 1035 (D.C. Cir. 1973).

State Courts:

Illinois: *Rural Electric Convenience Coop. Co. v. Soyland Power Coop., Inc.*, 239 Ill. App.3d 969, 979, 606 N.E.2d 1269, 1275 (1992).

⁴⁹ See, e.g.:

Eleventh Circuit: *Mitchell-Huntley Cotton Co., Inc. v. Waldrep*, 377 F. Supp. 1215, 1222 (N.D. Ala. 1974).

State Courts:

Connecticut: *Rossetti v. City of New Britain*, 163 Conn. 283, 291, 303 A.2d 714, 719 (1972).

⁵⁰ *Clayman v. Goodman Properties, Inc.*, 518 F.2d 1026, 1035 (D.C. Cir. 1973).

⁵¹ Farnsworth, *Contracts* 745 (3d ed.1999). See:

First Circuit: *Wetherell Brothers Co. v. United States Steel Co.*, 200 F.2d 761, 764 (1st Cir. 1952).

Second Circuit: *In re Schick*, 235 B.R. 318, 323 (Bankr. S.D.N.Y. 1999).

Seventh Circuit: *Sally Beauty Co. v. Nexus Products Co.*, 801 F.2d 1001, 1007-1008 (7th Cir. 1986).

⁵² *Third Circuit*: *Canister Co. v. National Can Corp.*, 71 F. Supp. 45, 48 n.3 (D. Del. 1947).

State Courts:

California: *Madison v. Moon*, 148 Cal. App.2d 135, 144-145, 306 P.2d 15, 21 (1957).

⁵³ *Meyer v. Washington Times Co.*, 76 F.2d 988, 990 (D.C. Cir. 1935), *cert. denied* 295 U.S. 734 (1935).

⁵⁴ *Third Circuit*: *Canister Co. v. National Can Corp.*, 71 F. Supp. 45, 49 n.5 (D. Del. 1947).

State Courts:

Minnesota: *S O Designs USA, Inc. v. Rollerblade, Inc.*, 620 N.W.2d 48, 54 (Minn. App. 2000).

⁵⁵ See *Cochran v. Taylor*, 273 N.Y. 172, 182, 7 N.E.2d 89, 92 (1937). See Calamari and Perillo, *The Law of Contracts* 702 (4th ed. 1998).

⁵⁶ *Fourth Circuit*: *Canister Co. v. National Can Corp.*, 71 F. Supp. 45, 48 (D. Del. 1947).

State Courts:

New York: *New England Iron Co. v. Gilbert Elevated Railroad Co.*, 91 N.Y. 153 (1883).

⁵⁷ *First Circuit*: *Wetherell Brothers Co. v. United States Steel Co.*, 105 F. Supp. 81 (D. Mass. 1952), *aff’d* 200 F.2d 761 (1st Cir. 1952).

State Courts:

Utah: *Prudential Federal Savings & Loan Ass’n v. Hartford Accident & Indemnity Co.*, 7 Utah 2d 366, 374, 325 P.2d 899, 904 (1958) (stating that “[P]arties have the right to select and insist upon the personalities with which they will sustain such personal relationships.”).

⁵⁸ Farnsworth, *Contracts* 746 (3d ed. 1999).

Note also that the parties may agree by contract that a duty is delegable even though ordinarily, by its nature, it would not be.⁵⁹ For example, if Luciano Pavarotti had an engagement to sing at Lincoln Center, he could not, under the common law, delegate his duty to perform because of his unique skill and artistry. Nonetheless, he could negotiate for the contract right to delegate his duty to Placido Domingo.

[3]—Delegability of Conditions

As with duties, not all conditions can be delegated.⁶⁰ The standards used to determine whether a condition is delegable are, in general, the same standards that are used to determine whether duties are delegable.⁶¹

§ 3.05 Enforceability of Anti-Assignment Clauses

Virtually all courts recognize the enforceability of anti-assignment clauses.⁶² This recognition, however, is more in form than in substance. While cases give lip service to the principle of enforceability, the bottom line holding of many cases is that, for whatever reason, the anti-assignment clause does not prohibit the particular assignment.⁶³ In order to achieve the desired result, courts rely on a variety of methods (ploys being, perhaps, too pejorative a term).

⁵⁹ *Florida*: Schweiger v. Hoch, 223 So.2d 557, 558 (Fla. Dist. App. 1969).

Maryland: Wolbert v. Rief, 194 Md. 642, 650, 71 A.2d 761, 764-765 (1950).

New York: Paige v. Faure, 229 N.Y. 114, 118, 127 N.E. 898, 899 (1920).

Pennsylvania: Saxe v. Feinstein, 366 Pa. 473, 476, 77 A.2d 419, 421 (1951).

Washington: Deaton v. Lawson, 40 Wash. 486, 490, 82 P.2d 879, 880 (1905).

⁶⁰ *Restatement (Second) of Contracts* § 319(1) (1981).

⁶¹ *Restatement (Second) of Contracts* § 319, Comment b (1981). See, e.g., *E.M. Loews, Inc. v. Deutschmann*, 344 Mass. 765, 184 N.E.2d 55 (1962).

⁶² See, e.g., *Immel v. Travelers Insurance Co.*, 373 Ill. 256, 260, 26 N.E.2d 114, 116 (1940). See Allen, "Validity of Anti-Assignment Clause in Contract," 37 A.L.R.2d 1251 (1954), for a list of states holding anti-assignment clauses enforceable.

See Barbre, "Validity, Construction, and Effect of Clause in Franchise Contract Prohibiting Transfer of Franchise or Contract," 59 A.L.R.3d 244 (1974). See also, Locke, "Agency: Anti-Assignment Clause in Contract as Precluding Enforcement by Undisclosed Principal," 75 A.L.R.3d 1184 (1977).

⁶³ Calamari and Perillo, *The Law of Contracts* 684 (4th ed. 1998) (stating that the cases "have tended to find that the particular provision before the court was not drafted with sufficient clarity to accomplish its purpose of prohibiting assignment. They have often emasculated the provision by holding it to be merely a promise not to assign.").

See also, U.C.C. § 9-318, Official Uniform Comment 4 (stating that "The cases are legion in which courts have construed the heart out of prohibitory or restrictive terms and held the assignment good. The cases are not lacking where courts have flatly held assignments valid without bothering to construe away the prohibition. See 4 *Corbin on Contracts* (1951) §§ 872, 873.").

Courts start with the proposition that anti-assignment clauses are subject to strict construction and are to be narrowly construed against the nonassigning party,⁶⁴ the party urging that the anti-assignment clause be enforced. With this head start, the courts then use a variety of techniques to obtain the result they desire. The first technique is to turn an anti-assignment clause into an anti-delegation clause. A second technique creates two classes of anti-assignment clauses: clauses that take away the right to assign and clauses that take away the power to assign. The first two subsections of this Section examine these techniques. The remaining subsection looks at the assignability of a claim for money damages arising from a breach of the whole contract and the assignability of rights arising from the assignor's full performance of its contract obligations.

[1]—Prohibiting the Assignment of the Contract vs. Prohibiting the Assignment of Rights Under the Contract

The following anti-assignment clause is short, but not sweet. It has engendered considerable litigation.

No party may assign this Agreement.

Courts have variously construed this clause to forbid solely an assignment of rights, solely a delegation of duties, or both an assignment of rights and a delegation of duties.⁶⁵ As can be seen, clauses forbidding the "assignment of contract" are imprecise and, therefore, should not be used.⁶⁶

To bring order to this issue, both the U.C.C. and the *Restatement (Second) of Contracts* include interpretive provisions.⁶⁷ They provide that a promise not to "assign a contract" generally prohibits only the delegation of duties and not the assignment of rights.⁶⁸ Courts have generally

⁶⁴ Many of the cases discussing strict construction involve anti-assignment clauses in leases. These cases reflect the traditional view that interests in real property should be freely transferable and that restraints against alienation strictly limited. However, to the extent that contract rights are now generally considered assignable, these cases become better precedent. See:

Connecticut: Rumbin v. Utica Mutual Insurance Co., 254 Conn. 259, 268, 757 A.2d 526, 531 (2000); Aiello v. Austrian, 2 Conn. App. 465, 467, 479 A.2d 1234, 1236 (1984).

Kansas: First Bank & Trust v. Novak, 12 Kan. App.2d. 407, 413, 747 P.2d 850, 855 (1987).

Montana: Kosena v. Eck, 195 Mont. 12, 18, 635 P.2d 1287, 1291 (1981).

New Jersey: Segal v. Greater Valley Terminal Corp., 83 N.J. Super. 120, 124, 199 A.2d 48, 50 (1964).

⁶⁵ See:

Eighth Circuit: Cedar Point Apartments, Ltd. v. Cedar Point Investment Corp., 693 F.2d 748, 753 (8th Cir. 1982), cert. denied 461 U.S. 914 (1983) (interpreting prohibition of assignment of contract to prohibit delegation of duties, not assignment of rights).

State Courts:

Missouri: Korte Construction Co. v. Deaconess Manor Ass'n, 927 S.W.2d 395, 401-403 (Mo. App. 1996) (assumes without discussion that a prohibition on the assignment of the contract forbids an assignment of rights).

Nebraska: City of Omaha v. Standard Oil Co., 55 Neb. 337, 75 N.W. 859, 860 (1898) (finding that a prohibition against the assignment of the contract prohibited the delegation of duties and the assignment of rights).

See also, Calamari and Perillo, *The Law of Contracts* 700 (4th ed. 1998).

⁶⁶ See Cedar Point Apartments, Ltd. v. Cedar Point Investment Corp., 693 F.2d 748, 753 (8th Cir. 1982), cert. denied 461 U.S. 914 (1983). See also, Midland Mutual Life Insurance Co. v. Mercy Clinics, Inc., 579 N.W.2d 823, 833 (Iowa 1998).

⁶⁷ *Restatement (Second) of Contracts* § 322(1) (1981); U.C.C. § 2-210(3).

⁶⁸ *Id.*

followed the lead of the *Restatement (Second) of Contracts* and the U.C.C.⁶⁹ By doing so, they have taken what appears to be a straightforward anti-assignment clause and turned it on its head to create an anti-delegation clause.

According to the courts, to prohibit the assignment of rights, the clause would need to be drafted along the following lines:⁷⁰

No party may assign *any of its rights* under this Agreement.

[2]—The Power vs. The Right to Assign

Case law distinguishes between anti-assignment clauses that eliminate the right to assign and those that eliminate the power to assign. To illustrate the distinction, consider the following two clauses:⁷¹

EXAMPLE 1

No party may assign any of its rights under this Agreement.

EXAMPLE 2

No party may assign any of its rights under this Agreement. Any purported assignment is void.

Pursuant to case law, Example 1 restricts the *right* of a party to assign its rights under the contract. The restriction is a “personal covenant,” a party’s promise that it will not assign.⁷² A violation

⁶⁹ *Fifth Circuit*: Charles L. Bowman & Co. v. Erwin, 468 F.2d 1293, 1297-1298 (5th Cir. 1972).

Eighth Circuit: Cedar Point Apartments, Ltd. v. Cedar Point Investment Corp., 693 F.2d 748, 753 (8th Cir. 1982), cert. denied 461 U.S. 914 (1983).

But see, Union Bond & Trust Co. v. M & M Wood Working Co., 256 Ore. 384, 412-414, 474 P.2d 339, 352-353 (1970) (interpreting a contract provision that prohibited assignments to prohibit both assignments and delegations) (interpreting California law).

⁷⁰ See:

Eighth Circuit: Cedar Point Apartments, Ltd. v. Cedar Point Investment Corp., 693 F.2d 748, 753 (8th Cir. 1982), cert. denied 461 U.S. 914 (1983).

State Courts:

Florida: Aldana v. Colonial Palms Plaza, Ltd., 591 So.2d 953, 955 (Fla. Dist. App. 1991), and the cases cited therein.

⁷¹ For purposes of this discussion, any issues with respect to delegation are put aside.

⁷² *Second Circuit*: Pro Cardiaco Pronto Socorro Cardiologica S.A. v. Trussell, 863 F. Supp. 135, 137 (S.D.N.Y. 1994).

Third Circuit: Bel-Ray Co., Inc. v. Chemrite (Pty) Ltd., 181 F.3d 435, 442 (3d Cir. 1999); Paccom Leasing Corp. v. E.I. du Pont de Nemours & Co., Civ. A. Nos. 89-255-CMW, 90-311-CMW, 1991 WL 226775 at *7 (D. Del. Oct. 30, 1991).

Eleventh Circuit: International Telecommunications Exchange Corp. v. MCI Telecommunications Corp., 892 F. Supp. 1520, 1533 (N.D. Ga. 1995).

State Courts:

New York: Belge v. Aetna Casualty and Surety Co., 39 A.D.2d 295, 297, 334 N.Y.S.2d 185, 187 (1972); Empire Discount Corp. v. William E. Bouley Co., 5 Misc.2d 228, 230, 160 N.Y.S.2d 395, 397 (1957) (“[T]he language employed constitutes merely a personal covenant on the part of the subcontractor that it would not assign without written consent.”).

of this covenant does not render the assignment ineffective.⁷³ Indeed, the case law consistently notes that the assignment is effective as between the assignor and the assignee.⁷⁴ As between the assignor and the nonassigning party, the assignment constitutes a breach by the assignor and gives the nonassigning party a claim for damages.⁷⁵ Unfortunately for the nonassigning party, these damages may be illusory because it may have difficulty proving that it sustained damages from the breach. The net result is that, often, an assignor may assign with relative impunity.

In contrast, Example 2 does more than restrict a party's *right* to assign. It takes away the *power* to assign by voiding any purported assignment.⁷⁶ Because taking away the power to assign results in a restraint on alienation, courts insist on explicit, unequivocal statements that an assignment is ineffective.⁷⁷ Generally, they look for magic words such as "ineffective," "null" or "void."⁷⁸ Also effective are phrases such as "the assignee will acquire no rights from the purported assignment," and "the obligor need not recognize the purported assignment."⁷⁹

⁷³ *Eleventh Circuit*: In re Freeman, 232 B.R. 497, 502 (Bankr. M.D. Fla. 1999); International Telecommunications Exchange Corp. v. MCI Telecommunications Corp., 892 F. Supp. 1520, 1533 (N.D. Ga. 1995) (holding that "a non-assignability clause . . . does not invalidate an otherwise proper transfer, unless the clause states specifically that any assignment shall be void. . . .").

State Courts:

New Jersey: Garden State Buildings, L.P. v. First Fidelity Bank, N.A., 305 N.J. Super. 510, 523, 702 A.2d 1315, 1322 (1997), *cert. denied* 153 N.J. 50, 707 A.2d 153 (1998).

⁷⁴ *Delaware*: Paul v. Chromalytics Corp., 343 A.2d 622, 625-626 (Del. Super. 1975).

New Jersey: Garden State Buildings, L.P. v. First Fidelity Bank, N.A., 305 N.J. Super. 510, 521-522, 702 A.2d 1315, 1321 (1997), *cert. denied* 153 N.J. 50, 707 A.2d 153 (1998).

Tennessee: United Pacific Life Insurance Co., v. Garrison, No. 02A01-9208-CV-002281, 1993 WL 330995 at *4-5 (Tenn. App. Sept. 1, 1993).

⁷⁵ *Third Circuit*: Paccom Leasing Corp. v. E.I. du Pont de Nemours & Co., Civ. A. Nos. 89-255-CMW, 90-311-CMW, 1991 WL 226775 at *7 (D. Del. Oct. 30, 1991).

State Courts:

New Jersey: Garden State Buildings, L.P. v. First Fidelity Bank, N.A., 305 N.J. Super. 510, 521-522, 702 A.2d 1315, 1321 (1997), *cert. denied* 153 N.J. 50, 707 A.2d 153 (1998).

New York: Sullivan v. International Fidelity Insurance Co., 96 A.D.2d 555, 556, 465 N.Y.S.2d 235, 237-238 (1983); Empire Discount Corp. v. William E. Bouley Co., 5 Misc.2d 228, 230, 160 N.Y.S.2d 395, 397 (1957).

See *Restatement (Second) of Contracts* § 322(2)(b) (1981).

⁷⁶ *Third Circuit*: Bel-Ray Co., Inc. v. Chemrite (Pty) Ltd., 181 F.3d 435, 442 (3d Cir. 1999); Paccom Leasing Corp. v. E.I. du Pont de Nemours & Co., Civ. A. Nos. 89-255-CMW, 90-311-CMW, 1991 WL 226775 at *7 (D. Del. Oct. 30 1991).

Eleventh Circuit: In re Freeman, 232 B.R. 497, 502-503 (Bankr. M.D. Fla. 1999).

State Courts:

New Jersey: Garden State Buildings, L.P. v. First Fidelity Bank, N.A., 305 N.J. Super. 510, 522, 702 A.2d 1315, 1321-1322 (1997), *cert. denied* 153 N.J. 50, 707 A.2d 153 (1998).

⁷⁷ *Bewley v. Miller*, 341 A.2d 428, 430 (D.C. 1975) (holding that "Clauses purporting to restrict the power to assign an otherwise assignable contract are ineffective unless the restriction is phrased in express, precise language."). See:

Eighth Circuit: Cedar Point Apartments, Ltd. v. Cedar Point Investment Corp., 693 F.2d 748, 754 & n.4 (8th Cir. 1982), *cert. denied* 461 U.S. 914 (1983).

State Courts:

Michigan: Detroit Greyhound Employees Federal Credit Union v. Aetna Life Insurance Co., 381 Mich. 683, 689-690, 167 N.W.2d 274, 277-278 (1969).

New York: Allhusen v. Caristo Construction Corp., 303 N.Y. 446, 450, 103 N.E.2d 891, 892 (1952); Empire Discount Corp. v. William E. Bouley Co., Inc., 5 Misc.2d 228, 229, 160 N.Y.S.2d 395, 397 (1957) (quoting *State Bank v. Central Mercantile Bank*, 248 N.Y. 428, 435, 162 N.E. 475, 477 (1928): "[To declare an assignment null,] [t]he plainest words should have been chosen, so that he who runs could read.").

⁷⁸ *Second Circuit*: Pravin Bankers Associates, Ltd. v. Banco Popular del Peru, 109 F.3d 850, 856 (2d Cir. 1997).

Third Circuit: Bel-Ray Co., Inc. v. Chemrite (Pty) Ltd., 181 F.3d 435, 442 (3d Cir. 1999).

In discussing anti-assignment clauses that take away the right or the power to assign, courts often note that these clauses are for the benefit of the nonassigning party.⁸⁰ By this statement, they generally mean one of two things: first, that the clause's purpose is to protect the nonassigning party from the intrusion of third parties;⁸¹ or second, that the only party that may complain about the assignment is the nonassigning party.⁸²

[3]—The Assignability of a Claim for Money Damages Arising from Breach of the Whole Contract and the Assignability of a Right Arising Out of the Assignor's Full Performance

Two issues that repeatedly arise are the following:

- The assignability of a right to money damages arising from the breach of the whole contract.
- The assignability of a right arising out of the assignor's full performance of its obligations.

Under the common law, these rights may be assigned because the contracts are no longer executory and all that is being assigned is the right to money.⁸³ With respect to the right to assign

State Courts:

New York: Allhusen v. Caristo Construction Corp. 303 N.Y. 446, 452, 103 N.E.2d 891, 893 (1952).

⁷⁹ *Bel-Ray Co., Inc. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 442 (3d Cir. 1999).

⁸⁰ *California*: Benton v. Hofmann Plastering Co., 207 Cal. App.2d 61, 68, 24 Cal. Rptr. 268, 273 (1962).

Delaware: Paul v. Chromalytics Corp., 343 A.2d 622, 625-626 (Del. Super. 1975).

New Jersey: Garden State Buildings, L.P. v. First Fidelity Bank, N.A., 305 N.J. Super. 510, 523, 702 A.2d 1315, 1322 (1997), *cert. denied* 153 N.J. 50, 707 A.2d 153 (1998).

Tennessee: United Pacific Life Insurance Co. v. Garrison, No. 02A01-9208-CV-00228, 1993 WL 330995 at *4-5 (Tenn. App. Sept. 1, 1993).

Wyoming: Wyoming Timber Products Co. v. Crow, 500 P.2d 683, 687 (Wyo. 1972) (“[A] provision forbidding one party to make an assignment of his right is solely for the advantage of the other party who is under the correlative duty.”).

See *Restatement (Second) of Contracts* § 322(2)(c) (1981).

⁸¹ *California*: Burns v. McGraw, 75 Cal. App. 481, 488, 171 P.2d 148, 152 (1946).

Pennsylvania: Nolan v. J. & M. Doyle Co., 338 Pa. 398, 405, 13 A.2d 59, 63 (1940).

⁸² *Eighth Circuit*: Midwest Sheet Metal Works v. Frank Sullivan Co., 215 F. Supp. 607, 609-610 (D. Minn. 1963) (holding that an anti-assignment clause that required consent of the obligor (which was not obtained) could not be relied upon by the assignor to rescind the assignment), *aff'd* 335 F.2d 33 (8th Cir. 1964).

State Courts:

New York: In re Campbell's Estate, 164 Misc. 632, 636-637, 299 N.Y.S. 442, 447 (N.Y. Sur. 1937) (holding that the creditor of the assignor could not object to the assignment as the creditor was not in privity with the obligor).

Oklahoma: In re Kaufman, 37 P.3d 845, 855 (Okla. 2001) (holding that “[A]n assignor of a contract containing a valid anti-assignment provision may not invoke the clause as against its assignee.”).

See *Restatement (Second) of Contracts* § 322, Comment d (1981).

⁸³ *Tenth Circuit*: U.S. Industries, Inc. v. Touche Ross & Co., 854 F.2d 1223, 1234 (10th Cir. 1988) (implied overruling on other grounds recognized by Anixter v. Home-Stake Production Co., 77 F.3d 1215, 1231 (10th Cir. 1996)).

State Courts:

California: Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, 339, 182 P.2d 182, 185 (1947).

Florida: Cordis Corp. v. Sonics International Inc., 427 So.2d 782, 783 (Fla. Dist. App. 1983).

Utah: Fuller v. Favorite Theaters Co. of Salt Lake, 119 Utah 570, 571-572, 230 P.2d 335, 336 (1951).

a claim for money damages, once the obligor has breached the whole contract, the assignor has (and therefore can assign) only a claim for money damages.⁸⁴ Similarly, with respect to the assignability of a right arising out of the assignor's performance of its duties, once the assignor's duties are fully executed, the assignor has (and therefore can assign) only a right to money. In both instances, the assignment cannot damage the nonassigning party as its obligation to pay is unaffected by a change in payee. Given the general inclination of courts to rule that most rights are assignable, it follows that they are exacting about what language forbids the right to assign when a contract is no longer executory.⁸⁵

§ 3.06 Enforceability of Anti-Delegation Clauses

Parties' agreements to prohibit delegation are generally enforceable. In fact under certain circumstances, what appears to be an anti-assignment clause is interpreted as an anti-delegation clause.⁸⁶

The *Restatement (Second) of Contracts* and the U.C.C. treat anti-delegation clauses tersely. The *Restatement (Second) of Contracts* § 318(1) provides that a party may delegate its performance

Washington: Berschauer/Phillips Construction Co. v. Seattle School District No. 1, 124 Wash.2d 816, 830, 881 P.2d 986, 994 (1994).
Accord: *Restatement (Second) of Contracts* § 322(2)(a) (1981); U.C.C. § 2-210(2).

⁸⁴ Upon a breach of the whole contract, the assignor has no rights other than a right to be paid damages. As a general rule, the nonassigning party should not object to the assignor's assignment of damages as the change in payee does not affect the nonassigning party's performance. Thus, courts permit the assignment of a right to money damages if there has been a breach of the whole contract—despite an anti-assignment clause prohibiting the assignment of rights. However, if the nonassigning party has only partially breached the contract, the contract is still executory, and the assignor retains a right to partial performance from the nonassigning party. (See, e.g., *Prudential Federal Savings & Loan Ass'n v. Hartford Accident & Indemnity Co.*, 7 Utah 2d 366, 373, 325 P.2d 899, 903 (1958).) The danger from the nonassigning party's perspective is that the assignor's assignment of its right to partial performance could damage the nonassigning party. For example, the change in obligee could affect the nonassigning party by imposing a greater burden upon it. See § 3.04[1] *supra*. Accordingly, an anti-assignment clause may be enforceable if the assignor has rights other than the right to the payment of money damages. See generally, the cases cited in N.83 *supra*.

⁸⁵ See, e.g.:

Seventh Circuit: *Lomas Mortgage U.S.A., Inc. v. W.E. O'Neil Construction Co.*, 812 F. Supp. 841, 843-844 (N.D. Ill. 1993) (holding that a promise not to assign any "interests" in agreement "does not clearly and unambiguously prohibit the assignment of the right to pursue a claim for breach of the contract. The term 'interests' does not manifest an intent to include the right to sue. If it were intended, the parties would have been specific in their reference to the right to pursue a damage claim.").

Tenth Circuit: *U.S. Industries, Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1234-1235 (10th Cir. 1988) (analyzing the phrase "under and in connection with") (implied overruling on other grounds recognized by *Anixter v. Home-Stake Production Co.*, 77 F.3d 1215, 1231 (10th Cir. 1996)).

State Courts:

Florida: *Cordis Corp. v. Sonics International Inc.*, 427 So.2d 782, 783 (Fla. Dist. App. 1983) (despite a clause that any assignment is void, the court found that a clause that prohibits the assignment of a party's rights under a contract "simply does not preclude the assignment of an accrued claim for damages arising from [the contract] breach.").

Utah: *SME Industries, Inc. v. Thompson, Ventulett, Stainback and Associates, Inc.*, 28 P.3d 669, 675, 676 (Utah 2001) (holding that a clause prohibiting the assignment of a party's "interest" was ambiguous and therefore did not necessarily prohibit the assignment of money damages).

⁸⁶ See § 3.05[1] *supra*.

“unless the delegation is contrary to . . . the terms of his promise.” Similarly, the U.C.C. provides that a party can delegate “unless otherwise agreed.”⁸⁷

§ 3.07 Scope of the Anti-Assignment Clause

[1]—Assignments by Operation of Law and by Merger

One recurrent issue that threads its way through the cases is the enforceability of anti-assignment clauses that prohibit the transfer of rights by merger, operation of law, or sale of stock.⁸⁸ The cases on this topic are frustrating to the woeful soul who seeks to harmonize them. Although various strands of legal reasoning can be untangled, the strands themselves are inconsistent when viewed in light of each other. Exacerbating the analytical conundrum is the relative dearth of cases.⁸⁹ Moreover, many of the cases concern real estate leases and insurance matters, leaving open the question whether the same analysis would pertain in a different context.⁹⁰

The content of the anti-assignment clauses that prohibit, or purportedly prohibit, the transfer of rights by merger, sale of stock, and by operation of law varies. The easy cases are those that explicitly prohibit specific types of transfers. There, the plain language of the clause prevails. The harder cases require the courts to interpret the intent of the parties and to parse each clause’s language.

[a]—Operation of Law

Transfers by operation of law are generally considered involuntary transfers. They include court-ordered property transfers,⁹¹ bankruptcy-related transfers,⁹² and transfers to or from an

⁸⁷ U.C.C. § 2-210(1).

⁸⁸ See Zitter, “Merger or Consolidation of Corporate Lessee as Breach of Clause in Lease Prohibiting, Conditioning, or Restricting Assignment or Sublease,” 39 A.L.R.4th 879 (1985). See also: Ballew, “The Assignment of Rights, Franchises, and Obligations of the Disappearing Corporation in a Merger,” 38 Bus. Law. 45 (1982); Note, “Effect of Corporate Reorganization on Nonassignable Contracts,” 74 Harv. L. Rev. 393 (1960).

⁸⁹ Pacific First Bank v. New Morgan Park Corp., 319 Ore. 342, 349, 876 P.2d 761, 765 (1994) (noting the paucity of relevant cases). See also, Nicholas M. Salgo Associates v. Continental Illinois Properties, 532 F. Supp. 279, 282 (D.D.C. 1981) (noting “dearth of relevant case law”).

⁹⁰ At least one court has suggested that lease cases are irrelevant to the analysis of anti-assignment clauses because “the results in those cases can be attributed, in large part, to distinctions between real and personal property and to the strong public policy against restraining the alienability of land.” Nicholas M. Salgo Associates v. Continental Illinois Properties, 532 F. Supp. 279, 282 n.5 (D.D.C. 1981). To aid the reader, the cases cited in this Section indicate whether the fact pattern is based on a lease or a different kind of agreement.

But see, *Restatement (Second) of Contracts* § 322, Comment a (1981) (“But as assignment has become a common practice, the policy which limits the validity of restraints on alienation has been applied to the construction of contractual terms open to two or more possible constructions.”).

⁹¹ See, e.g.:

executor or an administrator.⁹³ Whether mergers and consolidations are transfers by operation of law is an open question. The cases reach inconsistent results.⁹⁴

As previously noted, courts narrowly construe anti-assignment restrictions against the nonassigning party.⁹⁵ This also holds true when courts decide whether a particular provision prohibits an involuntary transfer by operation of law.⁹⁶ Accordingly, courts are predisposed to interpret an anti-assignment clause as one that prohibits only voluntary assignments, not involuntary assignments. The result, of course, is that the transfers are permitted,⁹⁷ for the most part.⁹⁸ Courts

Florida: Pol v. Pol, 705 So.2d 51, 53 (Fla. Dist. App. 1997) (holding that terms “sale” and “transfer” encompassed involuntary transfers by operation of law, including forced sale in condemnation proceeding).

Illinois: In re Marriage of Devick, 315 Ill. App.3d 908, 920, 735 N.E.2d 153, 162, 248 Ill. Dec. 833, 842 (2000) (finding that share transfer restrictions applied only to voluntary transfers and that court-ordered transfer in a divorce proceeding was an involuntary transfer by operation of law).

Utah: Riche v. North Ogden Professional Corp., 763 P.2d 1210, 1213-1214 (Utah App. 1988) (court-ordered transfer of shares as part of a bankruptcy proceeding is an involuntary transfer), *cert. granted sub nom.* Riche v. Profess, 773 P.2d 45 (Utah), *aff'd sub nom.* Riche v. North Ogden Professional Corp., 784 P.2d 1128 (Utah 1989).

⁹² Standard Operations, Inc. v. Montague, 758 S.W.2d 442, 444 (Mo. 1988).

⁹³ See, e.g.:

California: California Packing Corp. v. Lopez, 207 Cal. 600, 603, 279 P. 664, 665 (1929) (anti-assignment clause forbids only voluntary assignments, not involuntary assignments by operation of law, such as assignment of a contract to a person's executors or administrators).

New York: Salter v. Columbia Concerts, Inc., 191 Misc. 479, 480-481, 77 N.Y.S.2d 703, 705 (1948) (holding that transfer to executor by will takes place by operation of law).

⁹⁴ See discussion in § 3.07[1][b] *infra*.

⁹⁵ See § 3.05 *supra*.

⁹⁶ See Kerr v. Porvenir Corp., 119 N.M. 262, 264, 889 P.2d 870, 872 (1994), *cert. denied* 119 N.M. 168, 889 P.2d 203 (1995).

⁹⁷ The cases in this footnote are organized by type of case. Some cases may belong in more than one category but are listed only once.

Anti-Assignment Clauses Restricting the Transfer of Shares:

Illinois: In re Marriage of Devick, 315 Ill. App.3d 908, 735 N.E.2d 153, 248 Ill. Dec. 833 (2000).

Massachusetts: Durkee v. Durkee-Mower, Inc., 384 Mass. 628, 631, 634, 428 N.E.2d 139, 141, 143 (1981) (holding that court-ordered transfer of shares in a divorce proceeding is a transfer by operation of law and that anti-assignment clause did not prohibit transfer as it was not specific enough; court did not hold that the wife could transfer the shares free of the restriction set forth in the anti-assignment clause).

Minnesota: Castonguay v. Castonguay, 306 N.W.2d 143, 145-146 (Minn. 1981) (holding that in the absence of an express prohibition of involuntary transfers, restrictions on transfer did not prohibit court-ordered transfer of shares in a marriage dissolution proceeding; court distinguished this case from similar ones on the basis that Minnesota was not a community property state).

New Mexico: Kerr v. Porvenir Corp., 119 N.M. 262, 266, 889 P.2d 870, 874 (1994) (stock restriction did not prohibit testamentary transfer of shares; words of the restriction “point[ed] to voluntary transfers by the stockholder, not to involuntary transfers by law.”), *cert. denied* 119 N.M. 168, 889 P.2d 203 (1995).

Utah: Riche v. North Ogden Professional Corp., 763 P.2d 1210, 1213-1214 (Utah App. 1988) (held that bankruptcy trustee's sale of corporate stock to a nonmedical professional was an involuntary transfer and not prohibited by corporate stock restrictions that forbade transfers to nonprofessionals), *cert. granted sub nom.* Riche v. Profess, 773 P.2d 45 (Utah), *aff'd sub nom.* Riche v. North Ogden Professional Corp., 784 P.2d 1128 (Utah 1989).

See Bockrath, Annotation, “Restrictions on Transfer of Corporate Stock as Applicable to Testamentary Dispositions Thereof,” 61 A.L.R.3d 1090 (1975, as supplemented).

Anti-Assignment Clauses in Other Contexts:

Eighth Circuit: Shakey's Inc. v. Caple, 855 F. Supp. 1035, 1042 (E.D. Ark. 1994) (lease provision that prohibited the assignment of rights did not forbid an assignment to a stockholder upon dissolution of the corporate lessee; dissolution was a transfer effected by operation of law).

State Courts:

California: Burns v. McGraw, 75 Cal. App.2d 481, 486, 171 P.2d 148, 151 (1946) (despite anti-assignment clause prohibiting assignments by operation of law, devolution of lease to the executrix did not breach the covenant against assignment; general anti-assignment clause should not be “construed to prevent the transmission of leasehold interest either to an administrator or to an executor or legatee.”). (Citation omitted.)

may or may not interpret clauses specifically prohibiting transfers “by operation of law” to prohibit testamentary or court-ordered transfers.⁹⁹

When courts override an anti-assignment clause, they often hold that it “is inoperative as to a particular transfer unless the restriction specifically applies to the transfer.”¹⁰⁰ If it’s not there in black and white, it’s not in the contract. Linguistic analysis and precision (if not gymnastics) are regular elements of these cases.¹⁰¹

[b]—Mergers

Most courts view mergers to be transfers by operation of law.¹⁰² Therefore, if the anti-assignment clause does not prohibit assignments by merger or transfers by operation of law, an assignment by merger is permitted.¹⁰³ Although the substance of the previous sentences is generally true, there are multiple inconsistent decisions.

New York: In re Estate of David, 275 A.D.2d 964, 965, 714 N.Y.S.2d 175, 176 (2000) (general anti-assignment clause did not bar transfer of leasehold to decedent’s administrator; transfer of leasehold by will was a transfer by operation of law, and anti-assignment clause barred only voluntary assignments).

But see, In re Estate of Showers v. Hy Cite Corp., 158 Wis.2d 354, 462 N.W.2d 552, 1990 WL 174739 at *2 (1990) (unpublished opinion) (contract prohibiting assignment by operation of law prohibited assignment to testator’s personal representative; contract stated that contract was personal to testator).

⁹⁸ See:

California: Miller v. San Francisco Newspaper Agency, 164 Cal. App.3d 315, 317-318, 210 Cal. Rptr. 159, 160-161 (1985) (held that agreement forbidding transfers “by operation of law” prohibited testamentary dispositions).

Illinois: Ames v. Saylor, 267 Ill. App.3d 672, 674, 642 N.E.2d 1340, 1342, 205 Ill. Dec. 223, 225 (1994) (stating that a personal services contract is not assignable and terminates on death, except if both parties consent).

Wisconsin: In re Estate of Showers v. Hy Cite Corp., 158 Wis.2d 354, 462 N.W.2d 552, 1990 WL 174739 at *2 (1990) (unpublished opinion) (assignment of testator’s bonus to personal representative prohibited; contract was personal to testator, and it prohibited assignment of the contract or any part of it, whether by contract, operation of law or otherwise).

⁹⁹ Miller v. San Francisco Newspaper Agency, 164 Cal. App.3d 315, 317-318, 210 Cal. Rptr. 159, 160-161 (1985) (holding that a clause prohibiting transfers “by operation of law” prohibited testamentary dispositions; court intimates that it would have found that the clause permitted testamentary dispositions if the contract had contained “more specific language purporting to bind executors, administrators and heirs to the terms of the agreement, thus creating a specific exception.”); Burns v. McGraw, 75 Cal. App.2d 481, 483-489, 171 P.2d 148, 149-152 (1946) (clause prohibiting transfers by “operation of law” was not specific enough to prohibit transfer to executrix of lessee; transfer enforced).

¹⁰⁰ See:

Massachusetts: Durkee v. Durkee-Mower, Inc., 384 Mass. 628, 631, 428 N.E.2d 139, 141 (1981).

New Mexico: Kerr v. Porvenir Corp., 119 N.M. 262, 266, 889 P.2d 870, 874 (1994), cert. denied 119 N.M. 168, 889 P.2d 203 (1995).

New York: In re Estate of David, 275 A.D.2d 964, 965, 714 N.Y.S.2d 175, 176 (2000).

¹⁰¹ See:

Massachusetts: Durkee v. Durkee-Mower, Inc., 384 Mass. 628, 631-632, 428 N.E.2d 139, 141-142 (1981).

New Mexico: Kerr v. Porvenir Corp., 119 N.M. 262, 266, 889 P.2d 870, 874 (1994) (discussing other cases’ analyses of the words “sell,” “transfer,” “assign,” “convey” and “otherwise dispose of” and their conclusion that these words describe voluntary *inter vivos* transfers) (Citations omitted.), cert. denied 119 N.M. 168, 889 P.2d 203 (1995).

¹⁰² See, e.g., Citizens Bank & Trust Co. of Maryland v. The Barlow Corp., 295 Md. 472, 478, 484-485, 456 A.2d 1283, 1285, 1289 (1983) (lease). See also, Pacific First Bank v. New Morgan Park Corp., 319 Ore. 342, 348-349, 876 P.2d 761, 765 (1994) (lease).

¹⁰³ *Eleventh Circuit*: Winchester Construction Co. v. Miller County Board of Education, 821 F. Supp. 697, 702 (M.D. Ga. 1993) (construction contract).

State Courts:

Missouri: Dodier Realty & Investment Co. v. St. Louis National Baseball Club, Inc., 361 Mo. 981, 991, 238 S.W.2d 321, 325 (1951) (holding that “[t]he merged corporation having succeeded to the rights of the original lessee by operation of law, it follows that there was no assignment within the prohibition of the covenant. . . .”) (lease). Note that, in dicta, this case also discusses consolidation of two or more entities. See N.121 *infra* for a discussion of how Standard Operations, Inc. v. Montague, 758 S.W.2d 442 (Mo. 1988), reinterprets *Dodier*.

New Jersey: Segal v. Greater Valley Terminal Corp., 83 N.J. Super. 120, 124, 199 A.2d 48, 50 (1964) (lease).

Underlying many of these decisions is judicial bias toward construing anti-assignment clauses narrowly against the nonassigning party, especially in the lease context.¹⁰⁴ However, the reasoning in specific cases varies, sometimes relying on one line of reasoning, other times, bundling multiple rationales.

Some courts take a forthright approach: if the parties had intended to prohibit assignments by merger, they should have said so, especially if they were sophisticated.¹⁰⁵ In these cases, courts concluded that in the absence of an express prohibition of assignment by merger, they were permitted.

In some jurisdictions, cases rely on the fact that mergers are creatures of statute and that any transfer as part of a merger is not by assignment, but by operation of law. Therefore, a “plain vanilla” anti-assignment clause does not prohibit assignments by merger.¹⁰⁶ In Texas, the merger statute provides that a disappearing company’s assets are vested in the surviving company “without any transfer or assignment having occurred.”¹⁰⁷ Therefore, as a merger requires no assignment, an “assignment” by merger does not violate an anti-assignment clause.¹⁰⁸

In other cases, courts take a definitional approach to interpreting the anti-assignment clause. One case, relying on statutory commentary, stated that a merger is not a conveyance or a transfer. Indeed, it went further and said that “the word ‘transfer’ . . . does not . . . have a plain or generally prevailing meaning.”¹⁰⁹ Accordingly, assignment by merger was permitted. Another court reasoned that the phrase “otherwise transfer”—despite its seemingly broad sweep—did not encompass assignments by merger or transfers by operation of law. The court’s rationale was that the terms were inappropriate descriptions of the effects of a merger.¹¹⁰ Again, assignment by merger was permitted. However, in yet another case, the court reached the opposite conclusion in analyzing the phrase “transfer in any manner.” Here, the court stated that because the phrase was “all-encompassing,” assignments by merger were prohibited.¹¹¹

¹⁰⁴ Segal v. Greater Valley Terminal Corp., 83 N.J. Super. 120, 124, 199 A.2d 48, 50 (1964) (“A covenant not to assign, being in restraint of alienation, is subject to the doctrine of strict construction which tends to limit its operation. Implied covenants against transfer by operation of law are disfavored, and courts are astute in finding ways to avoid even an express provision restricting transfer by operation of law.”) (lease).

¹⁰⁵ *Alabama*: International Paper Co. v. Broadhead, 662 So.2d 277, 279 (Ala. Civ. App. 1995), rehearing denied (Feb. 10, 1995), cert. denied (May 5, 1995) (agreement with Alabama Department of Revenue concerning a tax credit for a foreign corporation).

Delaware: Star Cellular Telephone Co., Inc. v. Baton Rouge CGSA, Inc., Civ. A. No. 12507, 1993 WL 294847 at *7 (Del. Ch. Aug. 2, 1993), aff’d 647 A.2d 382 (Del. 1994) (unpublished opinion) (partnership agreement).

Missouri: Standard Operations, Inc. v. Montague, 758 S.W.2d 442, 444 (Mo. 1988) (lease).

Pennsylvania: Seven Springs Farm, Inc. v. Croker, 748 A.2d 740, 750 (Pa. Super. 2000) (restrictive stock agreement).

¹⁰⁶ International Paper Co. v. Broadhead, 662 So.2d 277, 279 (Ala. Civ. App. 1995), rehearing denied (Feb. 10, 1995), cert. denied (May 5, 1995) (agreement with Alabama Department of Revenue concerning a tax credit for foreign corporations).

¹⁰⁷ Tex. Rev. Civ. Stat. Ann., Art. 1528n, 10.04. A. (2).

¹⁰⁸ See Macaulay, “The Effect of Mergers on Anti-Assignment Provisions in Contracts: A Case Note on *TXO Production Co. v. M.D. Mark*,” 53 Baylor L. Rev. 489, 496-497 (Spring 2001).

¹⁰⁹ Star Cellular Telephone Co., Inc. v. Baton Rouge CGSA, Inc., Civ. A. No. 12507, 1993 WL 294847 at *7 (Del. Ch. Aug. 2, 1993), aff’d 647 A.2d 382 (Del. 1994) (unpublished opinion) (partnership agreement).

¹¹⁰ International Paper Co. v. Broadhead, 662 So.2d 277, 279 (Ala. Civ. App. 1995), rehearing denied (Feb. 10, 1995), cert. denied (May 5, 1995) (“Applying statutory and case law to the facts of this case, we find that the merger did not constitute a ‘transfer’ or an ‘assignment.’ We find those terms to be inappropriate descriptions of the effect of a merger.”) (agreement with Alabama Department of Revenue concerning a tax credit for foreign corporations).

¹¹¹ Pacific First Bank v. New Morgan Park Corp., 319 Ore. 342, 348-349, 876 P.2d 761, 764-765 (1994) (Following the prohibition on “transfer[s]” “in any manner,” the anti-assignment provision added the following: “whether voluntary or involuntary or by operation of

One more variant on the theme is seen in a case involving a stockholders' agreement. There, the anti-assignment clause stated that a stockholder could not "transfer, assign, sell, pledge, hypothecate, mortgage, alienate or in any other way encumber or dispose of all or any part of his stock in the Corporation. . . ." ¹¹² The court ruled that assignments by merger could not have been contemplated by the parties because the anti-assignment clause, as drafted, contemplated a stockholder's act, not a fundamental corporate act. ¹¹³

Another common fact pattern is the merger of one entity into a related party, often a subsidiary into its parent. ¹¹⁴ In these cases, courts hold, after looking at the facts, that an assignment by merger does not violate the anti-assignment clause because there is no change in beneficial ownership and no effect on the nonassigning party. ¹¹⁵ Along similar lines are cases that hold that the determination as to whether an anti-assignment clause prohibits assignments by merger is a factual question that can only be decided on a case-by-case basis. ¹¹⁶

Still another jurisdiction uses a fact-based analysis to determine whether a merger is accompanied by a "demonstrated increase in risk or hazard." ¹¹⁷ If there is no increase in risk, then the assignment by merger is permitted. Conversely, if there is an increase in risk, it is prohibited. ¹¹⁸

law. . . ." 319 Ore. at 345, 876 P.2d at 763. In its decision, the court did note the explicit "operation of law" language, but it was in the context of explaining that a transfer by operation of law was one kind of transfer—all of which were prohibited. 319 Ore. at 348-349, 879 P.2d at 765.) (lease).

¹¹² *Seven Springs Farm, Inc. v. Croker*, 748 A.2d 740, 742 (Pa. Super. 2000) (restrictive stock agreement).

¹¹³ *Id.*, 748 A.2d at 745-746.

¹¹⁴ Although the fact patterns in these cases typically involve a subsidiary merging into a parent (an upstream merger), one case states that an anti-assignment clause effectively prohibits a downstream merger. See *Pacific First Bank v. New Morgan Park Corp.*, 319 Ore. 342, 348-349, 876 P.2d 761, 765 (1994) (finding that the anti-assignment clause "contemplates that the type of merger that occurred in this case [a downstream merger] was a 'transfer' within the meaning of that section.") (lease).

¹¹⁵ *California*: *Trubowitch v. Riverbank Canning Co.*, 30 Cal.2d 335, 344-345, 182 P.2d 182, 188 (1947) (holding that "if an assignment results merely from a change in the legal form of ownership of a business, its validity depends upon whether it affects the interests of the parties protected by the nonassignability of the contract.") (lease).

Missouri: *Alexander & Alexander, Inc. v. Koelz*, 722 S.W.2d 311, 312-313 (Mo. App. 1986) (employment contract—noncompetition covenant).

New Jersey: *Segal v. Greater Valley Terminal Corp.*, 83 N.J. Super. 120, 123-124, 199 A.2d 48, 50 (1964) (lease).

New York: *Brentsun Realty Corp. v. D'Urso Supermarkets, Inc.*, 182 A.D.2d 604, 605, 582 N.Y.S.2d 216, 217-218 (1992) (lease).

Texas: *TXO Production Co. v. M.D. Mark, Inc.*, 999 S.W.2d 137, 141 (Tex. App. 1999) (confidentiality agreement).

Washington: *Berry v. Absher Construction Co.*, No. 23114-0-II, 1999 WL 982415 at *4 (Wash. App. Oct. 29, 1999) (unpublished opinion) (holding that "It is inequitable to hold that in a family-owned corporation or partnership, the transfer of interests between spouses constitutes an 'assignment' in violation of the contract provision.") (construction contract).

But see, *Rother-Gallagher v. Montana Power Co.*, 164 Mont. 360, 364, 522 P.2d 1226, 1228 (1974) (where stockholders dissolved two corporations that were party to a logging contract and then formed a partnership that continued the logging business, court held the anti-assignment clause enforceable, stating that Montana did not follow *Trubowitch v. Riverbank Canning Co.*, *supra*.)

Compare, *Rother-Gallagher* to *Shakey's Inc. v. Caple*, 855 F. Supp. 1035, 1041 n.5 (E.D. Ark. 1994) (lease provision that prohibited the assignment of rights did not prohibit an assignment of rights to a stockholder upon dissolution of the corporate lessee; dissolution is a transfer effected by operation of law; "the Court notes that the effect of dissolution on contracts is a question subject to much confusion and 'the cause of considerable conflict in the decisions.' In any event, 'the same confusion does not exist in cases of leases.'" (Citations omitted.)) (lease).

¹¹⁶ *Connecticut*: *Aiello v. Austrian*, 2 Conn. App. 465, 467, 479 A.2d 1234, 1235, *cert. denied* 194 Conn. 803, 482 A.2d 709 (1984) (holding "that whether a change in the form of a lessee's business from a partnership to a corporation violates a covenant against assignment is a factual question, to be resolved by reference to such factors as whether there was an essential change in personnel, whether the change was substantial or merely one of form, and whether the interests of the landlord are affected by the change.") (lease).

Delaware: *Star Cellular Telephone Co., Inc. v. Baton Rouge CGSA, Inc.*, Civ. A. No. 12507, 1993 WL 294847 at *8 (Del. Ch. Aug. 2, 1993), *aff'd* 647 A.2d 382 (Del. 1994) (unpublished opinion) (partnership agreement).

¹¹⁷ *Imperial Enterprises, Inc. v. Fireman's Fund Insurance Co.*, 535 F.2d 287, 290 (5th Cir. 1976) (insurance policy).

To add a wrinkle, the Supreme Court of Missouri has twice addressed the issue of the prohibition of assignments by merger and arrived at arguably inconsistent rulings.¹¹⁹ In the first case, the court held that in order to prohibit a merger, an involuntary transfer of assets, an anti-assignment clause needed to recite the magic words “prohibited by operation of law.”¹²⁰ In the second case, the court stated that its prior opinion had been misunderstood. The earlier case did not stand for the proposition that mergers are a subset of transfers by operation of law and that, therefore, assignments by merger are prohibited if transfers by operation of law are prohibited. Instead, relying on a somewhat questionable reading of the contract, it redefined the phrase “operation of law” to refer to involuntary transfers such as transfers in bankruptcy or by a compulsory court order. The court then concluded that as mergers are voluntary transactions, an anti-assignment clause that prohibits involuntary assignments by operation of law does not prohibit assignments by merger.¹²¹

In another case of note, an anti-assignment clause appeared in a patent license.¹²² It was a straightforward clause, prohibiting assignment without consent. This case is unusual in that it addressed not whether the anti-assignment clause prohibited assignments by merger, but whether

¹¹⁸ *Id.*, 535 F.2d at 292 n.9 (stating that “[W]e choose not to rest our decisions solely on the fact that this transfer occurred by operation of law. Rather, it is the complete lack of any alteration in the insured-against risks or hazards in this particular transfer that we find to be the most compelling reason for not applying the no-assignment clause in this case.”).

¹¹⁹ A study of these two cases underscores the lengths to which courts will go to find that an anti-assignment clause does not prohibit mergers.

¹²⁰ *Missouri: Dodier Realty & Investment Co. v. St. Louis National Baseball Club, Inc.*, 361 Mo. 981, 991, 238 S.W.2d 321, 325 (1951) (holding that corporate mergers are not assignments because the leasehold estates passed to the surviving corporation involuntarily by statute, and therefore, by operation of law; “Dodier’s claim of voluntariness is based on the fact that the directors and stockholders approved and brought about the merger. . . . [B]ut we do not regard this circumstance as determinative of the question of whether the transfer of the leasehold (as an asset of the merging corporation) was by operation of law. . . . ‘But in a broad sense, few if any transfers ever take place ‘wholly by operation of law’ for every transfer must necessarily be a part of chain of human events, rarely if ever other than voluntary in character. Thus . . . [w]e must look only to the immediate mechanism by which the transfer is made effective. If that mechanism is entirely statutory, effecting an automatic transfer [sic] without any voluntary action by the parties, then the transfer [is wholly by operation of law].”) 361 Mo. at 988-989, 238 S.W.2d at 323 (quoting *United States v. Seattle-First National Bank*, 321 U.S. 583, 64 S.Ct. 713, 716, 88 L.Ed. 944 (1944)) (Emphasis added.) (lease).

¹²¹ *Standard Operations, Inc. v. Montague*, 758 S.W.2d 442, 444 (Mo. 1988). Apparently taking the holding of the *Dodier* case to heart, the drafters of the anti-assignment clause in *Standard Operations* explicitly prohibited assignments by operation of law. To circumvent this drafting, the agile court deemed mergers to be voluntary transfers and, then for purposes of that agreement, limited “operation of law” to involuntary assignments related to financial distress: “The second sentence of 20(f) refers to ‘involuntary assignment,’ as though that term were synonymous with assignment by operation of law. The specific examples given, bankruptcy, attachment, and receivership, all describe situations in which the rights of an owner of property are involuntarily taken away or suspended because of financial exigencies. A merger is a voluntary transaction, depending on an affirmative vote of the shareholders of the constituent corporations. The analysis in this paragraph is essentially the application of the historic maxim *noscitur a sociis*, sometimes freely rendered as ‘birds of a feather’. . . . There is substantial indication that only involuntary assignments were intended to constitute acts of default. . . . So here, when all of the specifications are of involuntary transfers occasioned by financial problems, it is reasonable to assume that the general language does not include a voluntary transaction between solvent corporations.” 758 S.W.2d at 444. Thus, mergers, which are involuntary transfers in *Dodier*, are voluntary transfers in *Standard Operations*. The net result of these circumlocutions is, that in both cases, assignment by merger is permitted.

¹²² *PPG Industries, Inc. v. Guardian Industries Corp.*, 597 F.2d 1090 (6th Cir.), cert. denied 444 U.S. 930 (1979) (patent license agreement). See generally: Henry, “Assignability of Licensee’s Rights Under Patent Licensing Agreements,” 66 A.L.R.2d 606 (1959); Note, “Antiassignment Clauses, Mergers, and the Myth About Federal Preemption of Application of State Contract Law to Patent License Agreements,” 50 Drake L. Rev. 639 (2002).

it prohibited the transfer of the patent license as a result of a merger. The court held that transfer of the license was prohibited.¹²³

One final case with a twist requires a brief description.¹²⁴ In this case, the anti-assignment clause had no explicit language prohibiting assignments by merger or transfers by operation of law. Nonetheless, the court found that assignment by merger was forbidden.¹²⁵

[2]—Sales of Shares

Generally, an anti-assignment clause prohibits the transfer of shares only if it explicitly forbids a change in control.¹²⁶ To make this rule concrete, imagine the following hypothetical:

- Cyborg Parent Inc. (Parent) owns all of the issued and outstanding shares of stock in Fire Prevention Corp. (Sub).
- Parent wants to sell all of its shares in Sub to Buyer Co. because Sub no longer fits with Parent's long-term strategic objectives.
- Sub has previously entered into a contract with Fire Hydrants Inc. and that contract provides as follows:

Neither party may assign any of its rights or delegate any performance under this Agreement.

¹²³ In deciding that transfer of the patent license was prohibited, the court relied on the personal nature of a patent license and three other factors. First, the court stated that the parties could have explicitly provided that the patent license was assignable in a merger. (This is in stark contrast to the cases that require an explicit prohibition of mergers.) Next, the court rejected the argument that the patent license was not "transferred" because the merger vested it, automatically by operation of law, in the surviving corporation. Instead, the court reasoned that, in a merger, assets are transferred, albeit by operation of law, so, therefore, the anti-assignment clause prohibited the transfer of the patent license. Finally, the court stated that it was "noteworthy" that the disappearing company was the original party to the license agreement. This point is intriguing because it suggests the possibility that had there been no "transfer" of assets from the disappearing company to the surviving company, the court might have concluded that the anti-assignment clause had not been breached. 597 F.2d 1090, 1094-1096 (6th Cir.), cert. denied 444 U.S. 930 (1979) (patent license agreement).

¹²⁴ *Nicholas M. Salgo Associates v. Continental Illinois Properties*, 532 F. Supp. 279 (D.D.C. 1981) (partnership agreement).

¹²⁵ To reach this conclusion, the court first interpreted the contract. It bootstrapped the word "transfer" from another provision into the anti-assignment clause, and then found that a merger was a transfer for purposes of the agreement. Next, the court determined that the prohibited transfer had occurred after control of the "assignor" changed when virtually all of its stock was purchased, and the "assignor" then merged into its new parent. Based on existing case law, the court could have decided that neither one of these acts violated the anti-assignment clause. Specifically, the court could have discounted the change of control as the anti-assignment clause did not prohibit that. See § 3.07[2] *infra*. In addition, the court could have disregarded the upstream merger because of cases that hold that these mergers generally do not violate anti-assignment clauses. See § 3.07[1][b] Ns.114 and 115 *supra*, and the accompanying text. After concluding this analysis, the court stated that two other factors had also affected its decision. First, the District of Columbia Code required consent before mergers, and second, the parties "[were] extremely experienced business entities and should [have been] savvy to the importance of accurately drafting contracts." *Nicholas M. Salgo Associates v. Continental Illinois Properties*, 532 F. Supp. 279, 283 (D.D.C. 1981). The court added that, given this sophistication, the parties could have provided that mergers were permitted. *Id.*

¹²⁶ *Second Circuit*: *In re Ames Department Stores, Inc.* 127 B.R. 744, 748-749 (Bankr. S.D.N.Y. 1991).

Fourth Circuit: *Alabama Vermiculite Corp. v. Patterson*, 124 F. Supp. 441, 445 (W.D.S.C. 1954).

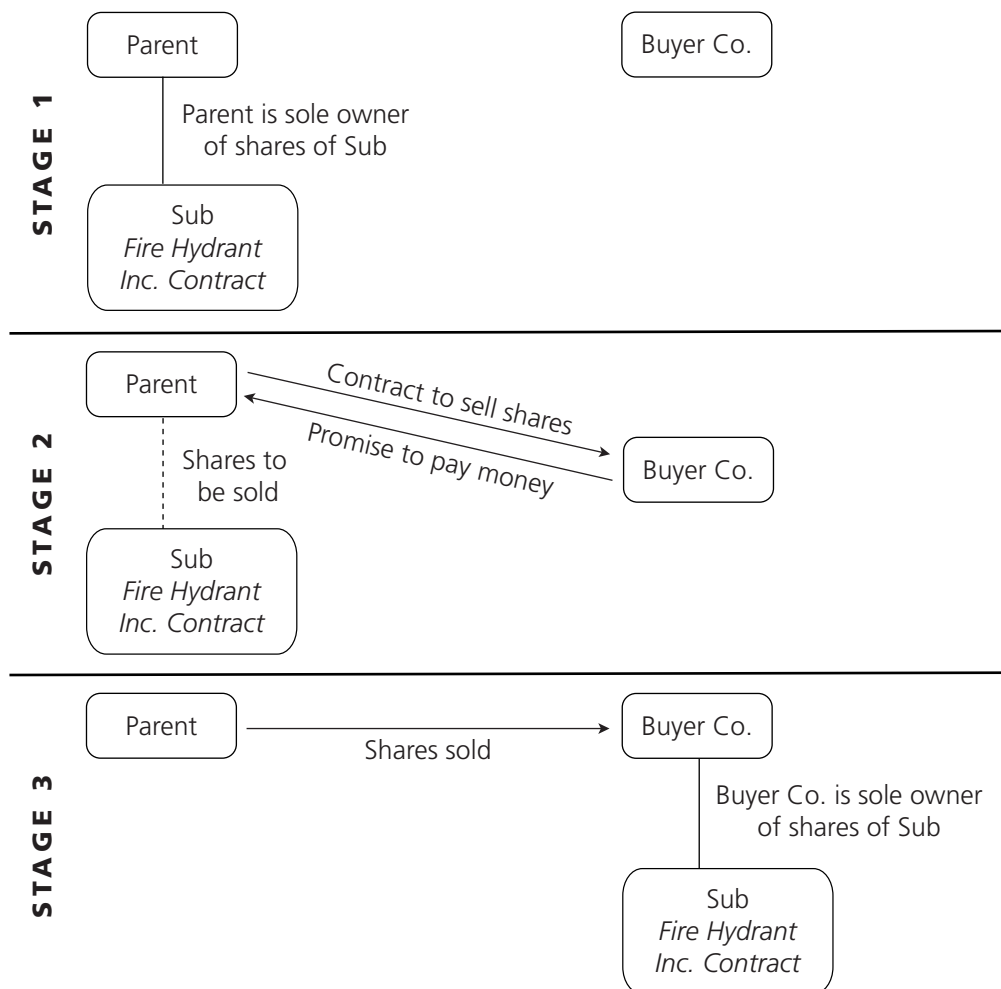
State Courts:

Delaware: *Baxter Pharmaceutical Products, Inc. v. ESI Lederle Inc.*, No. Civ. A. 16863, 1999 WL 160148 at *5 (Del. Ch. Mar. 11, 1999); *Branmar Theatre Co. v. Branmar, Inc.*, 264 A.2d 526, 528-529 (Del. Ch. 1970).

New Jersey: *Segal v. Greater Valley Terminal Corp.*, 83 N.J. Super. 120, 123, 199 A.2d 48, 50 (1964); *Posner v. Air Brakes & Equipment Corp.*, 2 N.J. Super. 187, 192, 62 A.2d 711, 714 (1948).

Parent asks whether it may sell all of the issued and outstanding shares of Sub to Buyer Co. without breaching the anti-assignment clause in the Fire Hydrants Inc. contract. The answer is that there will be no breach because Sub did not assign anything. Nothing changes at Sub's corporate level. All of Sub's assets and liabilities remain its own. No rights have been assigned; no performance obligations assumed. What has changed is the identity of the sole stockholder of Sub. Parent no longer owns Sub's shares; Buyer Co. owns them. Thus, Parent's sale of all the shares of stock of Sub to Buyer Co. results in a change of control of Sub. Parent no longer controls Sub through the exercise of its stock ownership. Instead, Sub is subject to Buyer Co.'s control.¹²⁷

DIAGRAM #4



¹²⁷ See generally, Kling and Nugent, *Negotiated Acquisitions of Companies, Subsidiaries and Divisions* §§ 1.02 and 1.03 (Law Journal Press 1992).

In reaching their decisions, courts note, among other things, the following:

- Had the parties to an agreement intended that a stockholder's sale of shares was to be deemed to be an assignment, they should have expressed that intent in clear and unequivocal language.¹²⁸
- Had the parties included a "change of control" term, which would have prohibited a party from being subject to a different party's control, the anti-assignment clause would have been breached.¹²⁹

§ 3.08 The Uniform Commercial Code

This Section briefly describes how the Uniform Commercial Code (U.C.C.) treats anti-assignment clauses.¹³⁰

[1]—U.C.C. § 2-210(2)

Article 2 of the U.C.C. deals with "transactions in goods."¹³¹ U.C.C. § 2-210(2) provides that except as otherwise agreed, and subject to Revised U.C.C. § 9-406,¹³² all rights may be assigned.¹³³ It contemplates an enforceable contract term that restricts a party's right to assign. It does not, however, specify the ramifications of an assignor's breach of that term. Nonetheless, several guideposts suggest an answer to the question of remedies, but nothing definitive.

First, Official Uniform Comment 7 to U.C.C. § 2-210 states that U.C.C. § 2-210 is not intended as a complete statement of the law of assignment and delegation. Instead, it is intended to clarify a few points doubtful under the case law.¹³⁴ Complementing Comment 7 is U.C.C. § 1-103. That Section provides that, "Unless displaced by the particular provisions of [the U.C.C.], the principles of law and equity . . . supplement [the U.C.C.'s] provisions."¹³⁵ Thus, the Section

¹²⁸ *Baxter Pharmaceutical Products, Inc. v. ESI Lederle Inc.*, No. Civ. A. 16863, 1999 WL 160148 at *5 (Del. Ch. Mar. 11, 1999).

¹²⁹ *In re Ames Department Stores, Inc.* 127 B.R. 744, 748-749 (Bankr. S.D.N.Y. 1991).

¹³⁰ A discussion of the U.C.C.'s treatment of anti-assignment clauses in leases is outside the scope of this Chapter. See U.C.C. Article 2A.

¹³¹ U.C.C. § 2-102.

¹³² In 1998, the National Conference of Commissioners on Uniform State Laws approved and recommended that the states enact Revised Article 9 of the U.C.C. The revisions were effective July 1, 2001. Revised U.C.C. § 9-701. See Smith, "New Article 9 Transition Rules," 74 *Chi-Kent L. Rev.* 1339, 1153-1155 (1999).

References to "Revised" U.C.C. sections are to Article 9 provisions in effect after July 1, 2001, while references to U.C.C. sections that are not preceded by "Revised" are to Article 9 provisions in effect before July 1, 2001.

¹³³ U.C.C. § 2-210(2).

¹³⁴ *Id.* at Official Uniform Comment 7.

¹³⁵ U.C.C. § 1-103.

provides maneuvering room outside the U.C.C. to fashion an appropriate remedy. Finally, U.C.C. § 1-106 deals directly with remedies. It provides that remedies should be liberally administered in order to put the aggrieved party in as good a position as if the other party had fully performed.¹³⁶

U.C.C. § 1-106's directive must be thought through carefully in the context of an anti-assignment clause and U.C.C. § 2-210(2). As stated before, U.C.C. § 2-210(2) grants the parties the right to agree contractually to forbid assignment. Arguably, to put the nonassigning party in as good a position as if the assignor had fully performed, the parties must return to the status they were in before the assignment. That is, full performance by the assignor would mean that it had complied with the anti-assignment clause and had never assigned any of its rights. To reach this result, the assignment would need to be deemed void. This outcome would mirror that under the common law if the contract clause took away the power to assign.¹³⁷

Alternatively, U.C.C. § 1-106's directive might be construed to permit an effective assignment, deem it a breach, and require the assignor to pay damages to the nonassigning party. Presumably the damages would compensate the nonassigning party to such an extent that it would be in as good a position as it would have been in had the assignment not taken place. This result would be the outcome under the common law if the anti-assignment clause had taken away only the right to assign and not the power.¹³⁸

The third alternative is that it is not an "either/or" proposition between the first and second options. Perhaps, the remedy depends upon how the anti-assignment clause is drafted. Does it take away the right to assign or the power?

Unfortunately, it appears that the case law does not resolve the issue. The authors of one treatise¹³⁹ have looked to the *Restatement (Second) of Contracts* § 322(2)¹⁴⁰ for guidance. Their view is that the *Restatement* suggests the second approach is correct: an anti-assignment clause is breached; the assignment is effective; and the obligor has a cause of action against the assignor for damages.

A final note with respect to U.C.C. § 2-210(2): it also provides that, unless there is a specific clause to the contrary, a party may assign its right to damages for breach of the whole contract or its right arising out of the assignor's full performance of its obligations.¹⁴¹

[2]—Revised Article 9 of the U.C.C.

Before its revision, U.C.C. § 9-318(4) made "ineffective"¹⁴² any contract term that prohibited an assignment of an account.¹⁴³ Its purpose was to remove anti-assignment clauses as an obstacle

¹³⁶ U.C.C. § 1-106.

¹³⁷ See § 3.05[2] *supra*.

¹³⁸ *Id.*

¹³⁹ 1 White and Summers, *Uniform Commercial Code* § 3-13 (4th ed. 1995).

¹⁴⁰ *Restatement (Second) of Contracts* § 322(2) (1981).

¹⁴¹ See § 3.05[3] *supra*.

¹⁴² U.C.C. § 9-318(4).

to financings.¹⁴⁴ The Revised Article has gone even farther in eliminating anti-assignment clauses as a roadblock to commerce. The relevant changes are embodied in Revised U.C.C. §§ 9-406 through 9-409. Revised U.C.C. § 9-406(d) and Revised U.C.C. § 9-408 supersede former U.C.C. § 9-318(4), which was limited to accounts and general intangibles for the payment of money due or to become due. Revised U.C.C. § 9-406(d) basically follows former U.C.C. § 9-318(4), but is more expansive.¹⁴⁵ It explicitly overrides both restrictions and prohibitions of assignment not only in accounts,¹⁴⁶ but also in chattel paper, payment intangibles, and promissory notes.

Revised U.C.C. § 9-408 picks up where Revised U.C.C. § 9-406(d) leaves off. It applies to general intangibles, promissory notes, and health-care-insurance receivables (collectively, Section 9-408 Assets). Specifically, Revised U.C.C. § 9-408(a) renders ineffective any provision that purports to prohibit or restrict the creation, attachment or perfection of a security interest in Section 9-408 Assets. In addition, it renders ineffective any provision that purports to make a default of any assignment or the creation, attachment or perfection of any security interest in Section 9-408 Assets.

Official Comment 5 to Revised U.C.C. § 9-406 highlights an important point: the Section does not override terms that might “impair” an assignment. For example,¹⁴⁷ assume that a buyer agrees to purchase made-to-order equipment directly from a seller. Further assume that the contract requires the seller to set aside the buyer’s payments and to use them only to manufacture the equipment. Finally, assume that the contract prohibits the seller from assigning its rights under the contract, but that the seller grants a security interest in the accounts to a lender. Under Revised U.C.C. § 9-406(d), the prohibition of the assignment to the lender is ineffective, but the covenant to set aside funds is enforceable even though it impairs the assignment to the lender. It is not a restriction or prohibition of assignment, and it has a “plausible business purpose.”¹⁴⁸

Both Revised U.C.C. § 9-406(d) and Revised U.C.C. § 9-408 use the word “ineffective” to state the consequences of applying their respective provisions to an anti-assignment clause. Although Article 9 did not define “ineffective,” Revised Article 9 explains its intended meaning. Official Comment 5 to Revised U.C.C. § 9-406 states that the anti-assignment clause has “no effect whatsoever; the clause does not prevent the assignment from taking effect between the parties and the prohibited assignment does not constitute a default under the agreement between the account debtor and assignor.” In essence, the clause is deleted from the contract.

¹⁴³ In essence, under Article 9, an account was a right to money arising out of the sale or lease of goods or the provision of services. U.C.C. § 9-106.

¹⁴⁴ Annotation 4 of the New York Annotations to U.C.C. § 9-318(4) states that “[p]resent New York law . . . gives effect to a provision prohibiting an assignment of an account or contract right. *Allhusen v. Caristo Construction Corp.*, 303 N.Y. 446, 103 N.E.2d 891 (1951). The Code rejects that rule and thus favors accounts receivable financing.”

¹⁴⁵ Revised U.C.C. § 9-406, Official Comment 5.

¹⁴⁶ Note that Revised U.C.C. § 9-406 implements an expanded definition of “account.” *Compare*, Revised U.C.C. § 9-102(2), *with* U.C.C. § 9-106.

¹⁴⁷ This example is based on the example in Revised U.C.C. § 9-406, Official Comment 5.

¹⁴⁸ Revised U.C.C. § 9-406, Official Comment 5.

§ 3.09 Deciding Whether to Include an Assignment and Delegation Provision

Including an assignment and delegation provision almost always makes sense. First, it forces the practitioner to confront the issues in the context of the agreement being drafted. Second, although cases and statutes have vitiated much of the force of anti-assignment clauses, the clause may be enforceable, although narrowly construed. Third, even if the anti-assignment clause is not technically enforceable, including it may nonetheless exercise some moral sway on the parties' conduct. Finally, not including an assignment and delegation provision leaves the parties' intent open to interpretation—a surefire invitation to litigation.

§ 3.10 Problems with the Typical Assignment and Delegation Provision

The following is a classic example of an assignment and delegation provision:

This Agreement shall not be assigned by either party without the consent of the other party.

This provision is rife with business and legal questions left unanswered:

- What does “assign” mean? Does the provision even prohibit the assignment of rights? Is it intended to comprehend assignments by merger and transfers by operation of law? Should a change of control be prohibited in order to achieve the parties' business objectives?
- Should some assignments be permitted? Should the parties state specifically to whom an assignment may be made, or should there be generic standards for permitted assignees? Alternatively, should the parties agree that consent is required but that it will not be unreasonably withheld?
- Should only one party be barred from assigning its rights, or should the prohibition be bilateral?
- Have the parties considered the ramifications of taking away only the right to assign, but not the power?

- The provision is silent as to the right to delegate performance. Does it prohibit delegation? Should some duties be delegable? If so, which ones? Should there be a novation releasing the delegating party?

The following three Sections of this Chapter address these and other issues.

§ 3.11 Negotiating and Drafting the Assignment and Delegation Provision: The Anti-Assignment Clause

[1]—A Typical, But Flawed, Anti-Assignment Clause

What follows is a typical clause intended to prohibit the assignment of rights under a contract:

This Agreement shall not be assigned^[A] by either party^[B] without the consent of the other party.



Drafting Notes

- [A] As previously noted,¹⁴⁹ a clause that prohibits solely the assignment of the contract, without any reference to rights under the contract, presumptively prohibits only the delegation of duties.
- [B] This clause uses the passive voice, while the active is generally preferred.¹⁵⁰

[2]—A Well-Drafted Anti-Assignment Clause¹⁵¹

The following clause¹⁵² addresses many of the issues that practitioners should consider when drafting an anti-assignment clause:

¹⁴⁹ See § 3.05[1] *supra*.

¹⁵⁰ See § 2.03[2] *supra*.

¹⁵¹ Contract provisions that prohibit the creation of security interests in real or personal property, such as goods, are beyond the scope of this Chapter. In addition, this Chapter does not examine the negotiating and drafting issues relating to the “successors and assigns” provision. However, Chapter 4 *infra* does consider those issues.

¹⁵² This clause is silent as to a party’s right to assign with the consent of the other party. For a discussion of the issues relating to consent, see § 3.12 *infra*.

Assignments.

- (a) *No Assignments.* No party^[A] may^[B] assign^[C] any of its rights^[D] under this Agreement,^[E] voluntarily or involuntarily, whether by merger, consolidation, dissolution, operation of law, or any other manner.^[F]
- [(b) *Ramifications of Purported Assignment.* Any purported^[G] assignment of rights in violation of subsection (a) is void.]^[H] [I]

**Drafting Notes**

- [A] As drafted, the anti-assignment clause applies to all parties to the contract. Practitioners should not, however, take that as a given.¹⁵³ Sometimes, significant business issues weigh in favor of applying the clause to only one party.

For example, a credit agreement generally prohibits the borrower from assigning its right to borrow funds. In negotiating for this prohibition (if it even needs to be discussed), the bank will contend that it should not be obligated to lend to a person it has not approved; its risks would be different, possibly materially greater.¹⁵⁴ The same agreement, however, probably explicitly permits the bank to assign or sell participations to other banks.¹⁵⁵

- [B] There are two different ways to draft a negative statement within the context of an assignment and delegation provision. The first is to use a positive subject and “shall not” in conjunction with the verb “assign.”¹⁵⁶ This works well when only one party is prohibited from assigning its rights.

Chocolate Inc. *shall not assign* any of its rights under this Agreement.

The alternative is to use a negative subject, such as “no party,” in conjunction with “may” and “assign.”¹⁵⁷

¹⁵³ U.S. Industries, Inc. v. Touche Ross & Co., 854 F.2d 1223, 1234 n.13 (10th Cir. 1988) (anti-assignment clause prohibited all parties, other than one, from assigning rights) (implied overruling on other grounds recognized by Anixter v. Home-Stake Production Co., 77 F.3d 1215, 1231 (10th Cir. 1996)).

¹⁵⁴ See § 3.04[1] *supra*.

¹⁵⁵ For a comprehensive analysis of participation agreements, see Stern, *Structuring Commercial Loan Agreements* Ch. 11 (2d ed. 1990).

¹⁵⁶ See Dickerson, *The Fundamentals of Legal Drafting* 213-217 (2d ed. 1986).

¹⁵⁷ *Id.*

No party may assign any of its rights under this Agreement.

This format works well when the prohibition against assignment applies to all parties.

- [C] Many practitioners automatically use the verb “assign” in an anti-assignment clause. Others use “transfer” or “assign or transfer.” The author of this Chapter has concluded that “assign” alone is the best choice, but the path to this conclusion was bumpy and full of blind spots and detours.

The clause proposed above is based on several considerations. First, it relies on the *Restatement (Second) of Contracts*’ definition of “assign.” As noted earlier,¹⁵⁸ the *Restatement* states that “assign” refers to an act, by an owner of a right, which manifests the owner’s intent to transfer its right to performance to an assignee.¹⁵⁹ Cases paraphrase this definition and state that an assignment is a complete transfer of rights to an assignee.¹⁶⁰ This is the classic sense in which “assign” is used.

According to *Black’s Law Dictionary*, “transfer” encompasses every manner by which title to property is conveyed from one person to another, including an assignment.¹⁶¹ Thus, every assignment is a transfer, but not every transfer is an assignment.¹⁶²

Upon learning the scope of the meaning of “transfer,” some practitioners might be inclined to omit “assign” altogether and instead choose to use “transfer.” The problem, however, is that there are reams of cases that analyze “assign,” but not “transfer.” If “transfer” were used alone, the precedential value of the existing cases might be compromised. Moreover, cases already question the meaning of “transfer.”¹⁶³

¹⁵⁸ See § 3.02[1][a] *supra*.

¹⁵⁹ “In this Chapter ‘assign’ . . . refer[s] to an act which has the effect stated in Subsection (1).” *Restatement (Second) of Contracts* § 317, Comment a (1981).

Restatement (Second) of Contracts § 317(1) (1981) states that: “An assignment of a right is a manifestation of the assignor’s intention to transfer it by virtue of which the assignor’s right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance.”

¹⁶⁰ *Seventh Circuit*: *Smoker v. Hill & Associates, Inc.*, 204 B.R. 966, 972 (Bankr. N.D. Ind. 1997) (“In Indiana, ‘[a]n assignment is a transfer which confers a complete and present right in a subject matter to the assignee.’”). (Citation omitted.)

State Courts:

Georgia: *Allianz Life Insurance Co. of North America v. Riedl*, 264 Ga. 395, 397, 444 S.E.2d 736, 738 (1994) (“An assignment is an ‘absolute, unconditional, and completed transfer of all right, title, and interest in the property that is the subject of the assignment . . . with the concomitant total relinquishment of any control over the property.’”). (Citation omitted.)

Illinois: *Newcombe v. Sandara*, 274 Ill. App.3d 590, 597, 654 N.E.2d 530, 534, 211 Ill. Dec. 68, 72 (1995) (“[An] assignment operates to transfer to the assignee all of the rights, title or interest of the assignor.”).

¹⁶¹ *Pacific First Bank v. New Morgan Park Corp.*, 319 Ore. 342, 348, 876 P.2d 761, 765 (1994) (quoting *Black’s Law Dictionary* 1497 (6th ed. 1990)). See also, the Bankruptcy Code’s definition of “transfer.” “[T]ransfer’ means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor’s equity of redemption.” 11 U.S.C. § 101(54).

¹⁶² *Kelly Health Care, Inc. v. Prudential Insurance Co. of America, Inc.*, 226 Va. 376, 379, 309 S.E.2d 305, 307 (1983).

¹⁶³ *Star Cellular Telephone Co., Inc. v. Baton Rouge CGSA, Inc.*, Civ. A. No. 12507, 1993 WL 294847 at *5 (Del. Ch. Aug. 2, 1993) (stating that “transfer” has no generally prevailing meaning), *aff’d* 647 A.2d 382 (Del. 1994) (unpublished opinion).

In deciding whether to couple “assign” with “transfer,” practitioners should be aware of how Revised Article 9 of the U.C.C. uses these terms.¹⁶⁴ Although Article 9 does not define either “assign” or “transfer,” Official Comment 26 to Revised U.C.C. § 9-102 addresses their meanings.¹⁶⁵ It states that Revised Article 9 generally follows common usage by using the terms “assignment” and “assign” to refer to transfers of rights to payment, claims, and liens and other security interests. The Comment further states that Revised Article 9 uses the term “transfer” to refer to other transfers of property. The Comment concludes with the statement that no significance should be placed on the use of one term or the other¹⁶⁶ and that Revised Article 9 uses the words interchangeably.

After reading the Comment, a practitioner could easily conclude that one word suffices and the couplet is unnecessary. However, the proverbial fly in the ointment is that Revised Article 9 occasionally uses the terms as a couplet, suggesting the possibility that the two terms together are broader than either term alone.¹⁶⁷ Practitioners can easily conjure the litigation in which one side contends that only one of the terms is necessary (relying on the Commentary), while the other side insists that both terms are necessary (relying on the provisions of Revised Article 9).

With this background, a drafting decision was made. The proposed provision uses “assign” alone. The rationale is four-fold: It is the *Restatement’s* term of choice; it is the custom and practice of most practitioners; Official Comment 26 to Revised U.C.C. § 9-102 supports the use of “assign” alone; and the tenets of plain English espouse omitting superfluous terms.¹⁶⁸

- [D] As with choosing the proper verb to use in an anti-assignment clause, practitioners must also choose the proper word to describe the “thing” that may not be assigned. After a quick romp through the precedents files, many practitioners might be convinced that the proper choice is the phrase “right, title, and interest.” While all three terms may have been used historically in a quitclaim deed for real property,¹⁶⁹ they are redundant in a modern, commercial anti-assignment clause.¹⁷⁰ Prohibiting the assignment of “rights under the contract” is sufficient.

¹⁶⁴ Although Revised Article 9 of the U.C.C. voids anti-assignment clauses with respect to property subject to the U.C.C., an analysis of its approach is useful as it is a likely basis for an argument by analogy.

¹⁶⁵ Revised U.C.C. § 9-102, Official Comment 26, states that “In numerous provisions, this Article refers to the ‘assignment’ or the ‘transfer’ of property interests. These terms and their derivatives are not defined. This Article generally follows common usage by using the terms ‘assignment’ and ‘assign’ to refer to transfers of rights to payment, claims, and liens and other security interests. It generally uses the term ‘transfer’ to refer to other transfers of interests in property. Except when used in connection with a letter-of-credit transaction . . . no significance should be placed on the use of one term or the other. Depending on the context, each term may refer to the assignment or transfer of an outright ownership interest or to the assignment or transfer of a limited interest, such as a security interest.”

¹⁶⁶ Official Comment 26 notes that there is an exception with respect to letters of credit. See Revised U.C.C. § 9-107 and Official Comment 4 to that Section.

¹⁶⁷ Compare: U.C.C. § 9-401(b) (using “transfer” alone) and U.C.C. § 9-405 (using “assign” and its derivatives alone), with: U.C.C. § 9-406(d)(1) and (2) and U.C.C. § 9-407(a)(1) and (2) (each using both “transfer” and “assignment” as a couplet).

¹⁶⁸ Felsenfeld and Siegel, *Writing Contracts in Plain English* 124-126 (1981).

¹⁶⁹ Mellinkoff, *Mellinkoff’s Dictionary of American Legal Usage* 129-132, 534-535 (1992).

¹⁷⁰ Mellinkoff, *The Language of the Law* 120-122 (1963). Practitioners may take further comfort in that the *Restatement (Second) of Contracts* speaks only of assigning “rights.” See *Restatement (Second) of Contracts* § 316, Comment a (1981).

Three other points on this issue: First, sometimes practitioners craft an anti-assignment clause so that it prohibits the assignment of “any interest in the contract” or “the contract or any part of the contract.” At least one case has recognized that this and similar language prohibits the assignment of rights under the contract.¹⁷¹

Second, prohibiting “assignment of the contract” probably does not prohibit the assignment of rights. Both the *Restatement (Second) of Contracts* and the U.C.C. interpret this prohibition to forbid only the delegation of performance.¹⁷²

Third, if the parties want to prohibit the assignment of either a claim for money damages arising out of a breach of the whole contract or a claim arising from the assignor’s full performance of the contract, the anti-assignment clause must forbid those assignments explicitly.¹⁷³ Keep in mind, however, that with respect to transactions in goods, U.C.C. § 2-210(2) provides that these rights can be assigned despite an agreement otherwise.

Assignments.

- (a) *No Assignments.* No party may assign any of its rights under this Agreement, voluntarily or involuntarily, whether by merger, consolidation, dissolution, operation of law, or any other manner.
- (b) *Specific Assignments Prohibited.* Assignments prohibited under subsection (a) include, without limitation, assignment of
 - (i) any claim for damages arising out of the nonassigning party’s breach of the whole contract; and
 - (ii) any rights arising out of the assignor’s full performance of this Agreement.

While language prohibiting the assignment of “rights” is sufficiently broad to proscribe assignments of rights under a contract or a tort claim (to the extent that the tort claim can be assigned), practitioners should be cautious when drafting an assignment. Several courts have held that a mere assignment of “rights” is insufficient to transfer a tort claim arising out of a contract. See Drafting Note [E] below for a further discussion of the assignment of tort claims. See, e.g., *Banque Arabe et Internationale C’Investissement v. Maryland National Bank*, 57 F.3d 146, 152 (2d Cir. 1995) (while holding that no specific boilerplate words were necessary to assign a tort claim, the court held that an assignment of “all of [a party’s] right, title and interest” in an agreement was insufficient to transfer tort claims arising out of the contract; nonetheless, the court found that the tort cause of action had been assigned, relying instead on language assigning all of a party’s rights and interest in a “transaction.”) (called into doubt on other grounds by *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 103 (2d Cir. 2001)).

See also, *Royal Mortgage Corp. v. FDIC*, 20 F. Supp.2d 664, 666-668 (S.D.N.Y. 1998) (discussing scope of the assignment), *aff’d* 194 F.3d 389 (2d Cir. 1999). But see, *ACLI International Commodity Services, Inc. v. Banque Populaire Suisse*, 609 F. Supp. 434, 442-443 (S.D.N.Y. 1984).

¹⁷¹ See *Ford v. Robertson*, 739 S.W.2d 3, 5 (Tenn. App. 1987) (holding that the prohibition on assignment of “any interest in this Agreement” prohibited the assignment of any interest *in the performance of the executory contract* but did not prohibit the assignment of a claim for damages for breach as it was based on an executed contract). See also, *Mingledorff’s, Inc. v. Hicks*, 133 Ga. App. 27, 28, 209 S.E.2d 661, 662 (1974) (anti-assignment clause that forbade the assignment of the contract “or any part thereof” prohibited the assignment of money due).

¹⁷² See § 3.05[1] *supra*.

¹⁷³ See § 3.05[3] *supra*.

The provision that follows is the same provision as that in the beginning of this subsection. It is included again to facilitate the reading of the Drafting Notes that follow it.

Assignments.

- (a) *No Assignments.* No party^[A] may^[B] assign^[C] any of its rights^[D] under this Agreement,^[E] voluntarily or involuntarily, whether by merger, consolidation, dissolution, operation of law, or any other manner.^[F]
- [(b) *Ramifications of Purported Assignment.* Any purported^[G] assignment of rights in violation of subsection (a) is void.]^[H] [I]

[E] One question rarely addressed in connection with anti-assignment clauses is whether the prepositional phrase “under this Agreement” is the appropriate standard. The alternative is a phrase that is more expansive in scope. This question is not rhetorical or academic. For example, cases analyzing choice of law provisions hold that to bring tort claims within the scope of that provision, the phrase “arising under or related to this Agreement” must be used.¹⁷⁴

The question then is whether the expanded prepositional phrase may be of use in restricting the assignment of tort claims. As most tort claims are not assignable,¹⁷⁵ it may be that the typical anti-assignment clause suffices to preclude assignment of tort claims. As previously noted, however, some tort claims are assignable, so the question remains.¹⁷⁶ If assignment of tort claims is a concern, the anti-assignment clause should either specifically forbid the assignment of a kind of tort claim (e.g., malpractice claims) or the assignment of all tort claims.

[F] As noted earlier, a simple prohibition of assignments does not forbid assignments by merger or transfers by operation of law.¹⁷⁷ Accordingly, practitioners must tweak the clause and add the following phrase: “voluntarily or involuntarily, whether by merger, consolidation, dissolution, operation of law, or any other manner.” This detail addresses the courts’ requirement that each proscribed transfer be specifically set forth. “Any other manner” is included as a catch-all to bring other transfers within the scope of the anti-assignment clause. However, conflicting case law makes relying on it questionable.¹⁷⁸ If there is a specific

¹⁷⁴ For example, assume a choice of law provision reads as follows:

The laws of the State of New York govern all matters [arising under or relating to this Agreement]. As drafted, torts such as fraudulent inducement are within the scope of the provision.

However, if the bracketed language were replaced with the phrase “with respect to this Agreement,” those torts would no longer be covered. See § 6.02[3][a] *infra*, discussing choice of law and choice of forum.

¹⁷⁵ See § 3.04[1] *supra*.

¹⁷⁶ *Id.*

¹⁷⁷ See § 3.07[1][a] and [b] *supra*.

¹⁷⁸ Compare, *International Paper Co. v. Broadhead*, 662 So.2d 277 (Ala. Civ. App. 1995), *rehearing denied* (Feb. 10, 1995), *cert. denied* (May 5, 1995), with *Pacific First Bank v. New Morgan Park Corp.*, 319 Ore. 342, 876 P.2d 761 (1994). In both cases, drafters ended

assignment that the parties want to prohibit, the better approach is to add it to the litany of forbidden assignments. Remember, if the parties want to prohibit a particular transfer, specificity is key as the general tenor of the law is to permit assignments.

Practitioners should consider tacking on one additional sentence:

For purposes of this Section, “merger” refers to any merger in which [insert name of party] participates, regardless of whether it is the surviving or disappearing corporation.

The advantage of this add-on is that it explicitly forbids *any* merger in which a party participates. It addresses dictum that suggests that if a party is the surviving entity in a merger, no assets of the surviving party have been transferred, and, that, therefore, the merger does not violate an anti-assignment clause.¹⁷⁹

Some practitioners pair a relatively “plain vanilla” anti-assignment clause with a covenant that prohibits mergers. Typically, this combination of provisions appears in a credit agreement.

Assignments.

- (a) *No Assignments.* No party may assign any of its rights under this Agreement, voluntarily or involuntarily, whether by operation of law or any other manner.
- [(b) *Ramifications of Purported Assignment or Delegation.* Any purported assignment in violation of subsection (a) is void.]

the anti-assignment clauses with an omnibus, catch-all clause. The cases, however, were decided differently. The court in *International Paper* found that mergers were outside the scope of the phrase “otherwise transfer,” *International Paper Co. v. Broadhead*, *supra*, 662 So.2d at 279, while the court in *Pacific First* found that mergers were within the scope of the phrase “in any manner,” *Pacific First Bank v. New Morgan Park Corp.*, *supra*, 391 Ore. at 348-349, 876 P.2d at 764-765.

¹⁷⁹ *PPG Industries, Inc. v. Guardian Industries Corp.*, 597 F.2d 1090, 1095 (6th Cir. 1979), *cert. denied* 444 U.S. 930 (1979). See Macaulay, “The Effect of Mergers on Anti-Assignment Provisions in Contracts: A Case Note on *TXO Production Co. v. M.D. Mark*,” 53 *Baylor L. Rev.* 489, 496-497 (Spring 2001) (noting that the Texas merger statute provides that a disappearing company’s assets are vested in the surviving company “without any transfer or assignment having occurred,” thereby circumventing anti-assignment clauses that require consent before any assignment; noting also that reverse triangular mergers can circumvent clauses prohibiting assignments because the target’s assets are not transferred.) See *Tex. Rev. Civ. Stat. Ann.*, Art. 1528n, 10.04. A. (2).

Negative Covenant

[Insert name of party] shall not dissolve, merge with or into, and shall not consolidate with, any Person.¹⁸⁰ For purposes of this Section, “merge” refers to any merger in which [insert name of party] participates, regardless of whether it is the surviving or disappearing corporation.

As with assignments by merger and transfers by operation of law, anti-assignment clauses must explicitly prohibit changes in control. To do so, a practitioner has two choices. First, the practitioner could add the following sentence:

For purposes of this Section, a change in control is deemed an assignment.

Alternatively, if the contract has an Event of Default section, a change in control could be defined as an Event of Default. With both approaches, defining “control” will curtail disputes as to whether a change of control has occurred. For example:

“Control” of a Person means the power, directly or indirectly,

- (a) to vote more than [50%] of the securities that have ordinary voting power for the election of that Person’s directors; or
- (b) to direct or cause the direction of the management and policies of that Person whether by voting power, contract or otherwise.

For the purposes of this definition, if a Person obtains “Control” by acquiring more than 50% of the securities that have ordinary voting power for the election of that Person’s directors, that acquisition may be accomplished by one or multiple transfers.

¹⁸⁰ Many practitioners use a defined term “Person” to make the covenant as broad as possible. What follows is one possible definition: “‘Person’ means a natural person, corporation, limited partnership, general partnership, limited liability company, limited liability partnership, joint stock company, joint venture, association, company, trust, or other organization, whether or not a legal entity, and a government or agency or political subdivision of that entity.”

- [G] Inserting the adjective “purported” avoids any ambiguity as to whether a party’s actions actually constituted an assignment of rights.¹⁸¹
- [H] Through the end of its first sentence, the clause takes away only the right to assign, not the power.¹⁸² As previously noted, the restriction is a “personal covenant,” a party’s promise that it will not assign. Violating this covenant does not render the assignment ineffective. Instead, the assignment is effective as between the assignor and the assignee. However, the nonassigning party has a cause of action against the assignor. To eliminate a party’s power to assign, courts require magic words such as “void,” “null” or “ineffective.” Also effective are phrases such as “the assignee will acquire no rights from the purported assignment,” and “the obligor need not recognize the purported assignment.”¹⁸³ More than one of these terms is superfluous.¹⁸⁴

Although cases clarify how to void a purported assignment, practitioners should consider whether automatically nullifying the assignment serves their clients’ best interests. For example, might there be circumstances under which a client would want the power to assign (e.g., as a buyer in connection with an acquisition)? If so, the proposed provision could effectively preclude that opportunity.

Voiding the assignment is not the only possible consequence of breaching an anti-assignment clause. One option is to provide the nonassigning party *the right to void the assignment*:

The nonassigning party is entitled to void any purported assignment in violation of this Section and to declare the assignor in default of this Agreement.

This right permits the nonassigning party to evaluate whether the assignee is a suitable business counterpart. Practitioners should, however, advise their clients to promptly exercise their right to void the assignment and to declare the assignor in default. If a client fails to do so, a court might hold that it waived its right to void the assignment.¹⁸⁵

Another possibility is to grant the nonassigning party *the right to terminate the agreement*. For example:

¹⁸¹ *Restatement (Second) of Contracts* § 317, Comment a (1981).

¹⁸² For a discussion of the distinction between taking away the right to assign, but not the power, see § 3.05[2] *supra*.

¹⁸³ See *id.*

¹⁸⁴ Mellinkoff, *The Language of the Law* 358-360 (1963).

¹⁸⁵ Grayson, Fried & Golden, “Rights of Nonparties: Assignment, Delegation, and Third Party Beneficiaries,” § 13.11, in *Drafting Business Contracts: Principles, Techniques and Forms, Continuing Education of the Bar—California* (1998).

If a party assigns its rights under this Agreement without the nonassigning party's prior written consent, the nonassigning party is entitled to terminate this Agreement. If the nonassigning party terminates this Agreement, the termination is effective as of the assignment's occurrence.¹⁸⁶ Any termination is without prejudice to the nonassigning party's claim for damages.

The last sentence sets the stage for the nonassigning party's claim for damages. Without the last sentence, an argument could be made that the nonassigning party's only remedy is termination, with no right to damages.¹⁸⁷

Finally, the parties could agree that an attempted assignment *automatically terminates the agreement*. Practitioners and their clients should carefully consider whether this extreme result will actually benefit the client. For example: Is the contract long-term and at a favorable price? Can the client accomplish the contract's business purpose in another way? If the contract terminates, what kind of damages are appropriate?

A termination clause might be as follows:

If a party assigns its rights under this Agreement without the nonassigning party's prior written consent, this Agreement terminates, effective as of the assignment's occurrence. The termination is without prejudice to the nonassigning party's claims for damages.

- [1] As previously noted, Revised U.C.C. § 9-406 does not override clauses that might "impair" an assignment.¹⁸⁸ Practitioners should consider whether such a clause might be appropriate in a specific agreement.

¹⁸⁶ This clause is based on the clause at issue in *James v. Whirlpool Corp.*, 806 F. Supp. 835, 839 (E.D. Mo. 1992).

¹⁸⁷ If a practitioner provides for any remedy in the assignment and delegation provision, the cumulative remedies provision should be checked to see how the two provisions interact. See Chapter 9 *infra*.

¹⁸⁸ See § 3.08[2] *supra*.

§ 3.12 Consent of the Nonassigning Party

[1]—Introduction

When negotiating an anti-assignment clause, one party may request an exception to the clause's total prohibition on assignment. This request generally arises when the parties' business objectives conflict. Often, the assignor-to-be wants to maintain its business options and contends it needs the flexibility to assign its rights. The other party, who may be unlikely to assign its rights, wants to maintain control over with whom it does business. It claims it made a business judgment to contract with the assignor and does not want the assignor to usurp its prerogatives by assigning the assignor's rights to an unknown third party. The typical resolution is to grant the right to assign, but subject to the nonassigning party's prior written consent. For example:

Vanilla Inc. shall not assign any of its rights or delegate any performance under this Agreement *except*, in each instance, with Chocolate Inc.'s prior written consent.

For many practitioners, this clause is only a starting point. Among the issues to be tackled are the following:

- Is the consent requirement a condition precedent to an effective assignment, or is it merely the assignor's personal covenant to obtain consent?
- Does the nonassigning party have unfettered discretion in deciding whether to grant consent, or do the duty of good faith and fair dealing rein in that discretion?
- Will the nonassigning party agree in advance to the assignment of rights under the contract to a specific assignee, or perhaps a class of assignees? If so, what requirements must the assignee meet before the assignment is effective?

There is no one-size-fits-all answer. The nuances of each deal mold the answer.

[2]—Written Consent

Most clauses requiring the consent of the nonassigning party require *written* consent. That requirement, however, should give the nonassigning party only a modicum of comfort as it can be waived or modified orally or by a course of business dealings.¹⁸⁹ Nonetheless, the requirement of a

¹⁸⁹ *Fifth Circuit*: Charles L. Bowman & Co. v. Erwin, 468 F.2d 1293 (5th Cir. 1972).

Eleventh Circuit: International Telecommunications Exchange Corp. v. MCI Telecommunications Corp., 892 F. Supp. 1520, 1533-1534 (N.D. Ga. 1995).

State Courts:

New York: University Mews Associates v. Jeanmarie, 122 Misc.2d 434, 439-440, 471 N.Y.S.2d 457, 461 (1984).

writing should be included. At the very least, it should give a potential assignor pause before assigning without consent.

[3]—The Consent Requirement: Covenant or Condition Precedent?

[a]—Background

A condition precedent is an event that must occur or be waived before performance by one of the parties is due.¹⁹⁰ Whether the consent requirement is a condition precedent to the right to assignment or a personal covenant to obtain consent can significantly affect a dispute between the parties concerning the consent. Specifically, if the consent requirement is a personal covenant, the assignment is effective, although it causes a contract breach.¹⁹¹ However, if the consent requirement is a condition precedent to assignment, the assignment is ineffective if consent has not been obtained or waived.¹⁹²

If a court is entertaining the possibility that consent is a condition precedent, it often parses the provision looking for words that indicate a condition precedent—for example, “when,” “provided that,” “if,” and “upon.”¹⁹³ But even these magic words do not always meet the necessary standard.¹⁹⁴ Moreover, even if they do, they often do not end a court’s analysis. Instead, they only test the court’s creativity in finding a way, once again, to write the anti-assignment clause out of the contract.

¹⁹⁰ *Restatement (Second) of Contracts* § 224 (1981). See:

Second Circuit: Aniero Concrete Co., Inc. v. New York City Construction Authority, 1998 WL 148324 at *2 (S.D.N.Y. Mar. 30, 1998).

State Courts:

Georgia: First National Bank of DeKalb County v. National Bank of Georgia, 249 Ga. 216, 217, 290 S.E.2d 55, 57 (1982).

See Calamari and Perillo, *The Law of Contracts* 398 (4th ed. 1998).

¹⁹¹ *Second Circuit*: Fidata Trust Co. of New York v. F.D.I.C., 826 F. Supp. 105, 107 (S.D.N.Y. 1993), *aff’d* 52 F.3d 312 (2d Cir. 1995) (holding that any assignment of an FDIC indemnity would be ineffective in the face of “an unequivocal statement that an [indemnity] is ‘not . . . assignable.’” Ordinarily “an unequivocal prohibition of assignment” requires words to the effect that any assignment without consent is void. This case is unusual because the anti-assignment clause did not include that language, and the cases cited to support the decision were cases holding an anti-assignment clause to be a personal covenant. One possible explanation is that the decision was actually bottomed in a public policy concern: that the FDIC’s risks in giving an indemnity should not be extended by requiring the indemnity to cover downstream indemnitees.)

Eighth Circuit: Frank Sullivan Co. v. Midwest Sheet Metal Works, 335 F.2d 33, 39 (8th Cir. 1964).

Tenth Circuit: Midwest Grain Products, Inc. v. Envirofuels Marketing, Inc., 1996 WL 445070 at *8 (D. Kan. Jul. 12, 1996).

State Courts:

Minnesota: Mears Park Holding Corp. v. Morse/Diesel, Inc., 427 N.W.2d 281, 283-284 (Minn. App. 1988).

See generally, Murray, *Murray on Contracts* 620-621 (2001).

¹⁹² *Tenth Circuit*: Midwest Grain Products, Inc. v. Envirofuels Marketing, Inc., 1996 WL 445070 at *8 (D. Kan. Jul. 12, 1996).

State Courts:

Wisconsin: Price v. Ross, 45 Wis.2d 301, 312, 172 N.W.2d 633, 638 (1969).

See generally, Murray, *Murray on Contracts* 620-621 (2001).

¹⁹³ Ross v. Harding, 64 Wash.2d 231, 237, 391 P.2d 526, 531 (1964).

¹⁹⁴ Cedar Point Apartments, Ltd. v. Cedar Point Investment Corp., 693 F.2d 748 n.9 (8th Cir. 1982), *cert. denied* 461 U.S. 914 (1983).

When analyzing this issue, courts often start with a bias against conditions precedent, reasoning that the law dislikes forfeitures.¹⁹⁵ Accordingly, courts will often go out of their way to find the clause to be a covenant or to be an ineffective condition precedent.

To accomplish this goal, courts take different paths, but their destination is the same: an anti-assignment clause that is toothless.¹⁹⁶ Some cases hold that a condition precedent need not be satisfied because the justification for the consent has already been met.¹⁹⁷ For example, assume that the purpose of the consent was to be sure that an assignee had the financial resources to pay the nonassigning party. If the assignee has paid the nonassigning party, that party has no right to insist that its consent was required as a condition precedent to assignment. Other jurisdictions make the same point, but use different words. They hold that the anti-assignment clause is nugatory because it “is merely collateral to the main purpose of the contract, designed as a means of securing and enforcing performance.”¹⁹⁸ In these cases, if the assignee is ready, willing and able to perform, the assignment does not breach the anti-assignment clause as the nonassigning party’s security has not been threatened.¹⁹⁹ All these decisions are a variation on the theme of “no harm, no foul.”²⁰⁰

[b]—Drafting a Clause that Requires the Nonassigning Party’s Consent

There are two relatively simple drafting solutions to the condition precedent versus covenant controversy. First, the anti-assignment clause could include a statement that obtaining consent is a condition precedent to the effectiveness of any assignment.²⁰¹ Alternatively, the anti-assignment clause could state that any purported assignment in violation of the anti-assignment clause is void.²⁰² As noted earlier, courts generally give effect to these clauses.²⁰³

¹⁹⁵ *Id.*, citing both: *Miran Investment Co. v. Medical West Building Corp.*, 414 S.W.2d 297, 304 (Mo. 1967) and 3A Corbin, *Corbin on Contracts* § 635 (1960).

¹⁹⁶ Although the cases cited in subsequent footnotes discuss the effectiveness of an anti-assignment clause, their focus on securing performance suggests that the courts’ salient concern was really the ramifications of a concurrent delegation of performance.

¹⁹⁷ *Obermeier v. Bennett*, 230 Neb. 184, 189-191, 430 N.W. 524, 528-529 (1988).

¹⁹⁸ *Johnson v. Eklund*, 72 Minn. 195, 199, 75 N.W. 14, 15 (1898).

¹⁹⁹ *Eighth Circuit: Cedar Point Apartments, Ltd. v. Cedar Point Investment Corp.*, 693 F.2d 748, 755 (8th Cir. 1982), *cert. denied* 461 U.S. 914 (1983).

State Courts:

Oregon: Smith v. Martin, 94 Ore. 132, 138, 185 P. 236, 238 (1919).

South Dakota: Wandler v. Lewis, 1997 S.D. 98 at *37, 567 N.W.2d 377, 384-385 (1997).

²⁰⁰ Although these cases discuss the effectiveness of an anti-assignment provision, the focus on securing performance suggests that the salient concern was really the ramifications of a delegation of performance.

²⁰¹ See the proposed contract clause in § 3.13[2][b] *infra*, for an example of a clause that requires the delegating party and the delegate to meet multiple conditions before a delegation is effective.

²⁰² *Hy King Associates, Inc. v. Versatech Manufacturing Industries, Inc.*, 826 F. Supp. 231, 238-239 (E.D. Mich. 1993) (court relies on “null and void and of no effect” contract language in holding that the requirement of consent was a condition precedent).

²⁰³ See § 3.05[2] *supra*.

[4]—Good Faith and the Nonassigning Party’s Consent²⁰⁴

Many states have recognized that within each contract is an implied covenant of good faith and fair dealing.²⁰⁵ The question, therefore, arises as to how these principles apply to an anti-assignment clause that requires the nonassigning party’s consent.²⁰⁶ The answer depends upon the chosen law of the contract.

The first possibility, and the more modern approach, is that the implied covenant of good faith and fair dealing requires the nonassigning party to respond reasonably to requests for consent.²⁰⁷ The second possibility is that the state does not recognize the implied covenant of good faith and fair dealing.²⁰⁸ In this event, the nonassigning party may make its consent decision without regard to the reasonableness of its determination.²⁰⁹ A variation on this line of cases reaches the same conclusion. These cases hold that even if there is an implied covenant of good faith, it does not affect every term of the contract. The covenant is designed to fill gaps, and if the parties have unmistakably made clear their intent, the courts will enforce the bargained for terms.²¹⁰ Thus, again, the nonassigning party may make judgments without regard to their reasonableness. The final possibility is that the nonassigning party retains discretion by negotiating for that right and

²⁰⁴ For an excellent exposition of the history and case law concerning good faith, see Burton and Anderson, *Contractual Good Faith* (1995).

²⁰⁵ See, e.g.:

Fifth Circuit: Hubbard Chevrolet Co., v. General Motors Corp., 873 F.2d 873, 875-876 (5th Cir.), cert. denied 493 U.S. 978 (1989).

Seventh Circuit: Business Information Group, Inc. v. Bell Atlantic Systems Leasing International, Inc., 1992 WL 281367 at *4 (N.D. Ill. Oct. 8, 1992).

State Courts:

South Dakota: Garrett v. BankWest, Inc., 459 N.W.2d 833, 841 (S.D. 1990).

Both the U.C.C. and the *Restatement (Second) of Contracts* (1981) provide that within every contract there is an implied duty of good faith. See: U.C.C. §§ 1-201(19) and 1-203; *Restatement (Second) of Contracts* § 205 (1981).

²⁰⁶ Many of the cases discussing good faith and consent involve leases. They are cited and are applicable to the extent that leases are contracts in addition to being conveyances. *Boss Barbara, Inc. v. Newbill*, 97 N.M. 239, 241, 638 P.2d 1084, 1086 (1982).

See generally, Hall, Annotation, “Construction and Effect of Provision in Lease that Consent to Subletting or Assignment Will Not Be Arbitrarily or Unreasonably Withheld,” 54 A.L.R.3d 679 (1973).

²⁰⁷ *Seventh Circuit*: Business Information Group, Inc. v. Bell Atlantic Systems Leasing International, Inc., 1992 WL 281367 at *4 (N.D. Ill. Oct. 8, 1992) (holding that there is an implied standard of reasonableness on a party’s right to withhold consent to a request to move personal property).

State Courts:

Arizona: Campbell v. Westdahl, 148 Ariz. 432, 437, 715 P.2d 288, 293 (1985) (holding that the law will impose a standard of reasonableness upon a lessor’s consent to an assignment where the lease is silent as to how the consent is to be exercised).

California: Kendall v. Ernest Pestana, Inc., 40 Cal.3d 488, 506, 709 P.2d 837, 849, 220 Cal. Rptr. 818, 830 (1985).

New Mexico: *Boss Barbara, Inc. v. Newbill*, 97 N.M. 239, 241, 638 P.2d 1084, 1086 (1982).

²⁰⁸ See, e.g., *Enfield Equipment Co., Inc. v. John Deere Co.*, 64 F. Supp.2d 483, 486 (D. Md. 1999), *aff’d* 217 F.3d 838 (4th Cir. 2000) (holding that the implied duty of good faith and fair dealing in Maryland is of limited scope and that to imply a good faith limitation on an anti-assignment clause “would work an impermissible change in the contract as written”).

²⁰⁹ *Id.*

²¹⁰ *Taylor Equipment, Inc. v. John Deere Co.*, 98 F.3d 1028, 1032 (8th Cir. 1996), cert. denied 520 U.S. 1197 (1997), citing with approval:

Seventh Circuit: Continental Bank, N.A. v. Everett, 964 F.2d 701, 705 (7th Cir.), cert. denied 506 U.S. 1035 (1992).

Eighth Circuit: *Cambee’s Furniture, Inc. v. Doughboy Recreational, Inc.*, 825 F.2d 167 n.13 (8th Cir. 1987).

memorializing it in the contract.²¹¹ The degree to which the discretion is unfettered depends upon state law.²¹²

To facilitate further analysis, it is useful to have in mind four different consent provisions:

EXAMPLE 1

No party may assign any of its rights or delegate any performance under this Agreement.

EXAMPLE 2

No party may assign any of its rights or delegate any performance under this Agreement except with the prior written consent of the other party.

EXAMPLE 3

No party may assign any of its rights or delegate any performance under this Agreement except with the prior written consent of the nonassigning party. That party shall not unreasonably withhold its consent.

EXAMPLE 4

No party may assign any of its rights or delegate any performance under this Agreement except with the prior written consent of the nonassigning party. That party may withhold consent for any or no reason in its sole and absolute discretion.

²¹¹ *Fourth Circuit*: Prudential Carolinas Realty v. Cambridge Development Corp., 872 F. Supp. 256, 260 (D.S.C. 1994) (enforcing clause that assignor could not assign “without the prior written consent of Seller, which approval shall be at the sole discretion of Seller”), *aff’d sub nom.* Prudential Carolinas Realty v. 111 Tradd, Inc., 42 F.3d 1386 (4th Cir. 1994) (unpublished opinion).

Eighth Circuit: James v. Whirlpool Corp., 806 F. Supp. 835, 843 (E.D. Mo. 1992) (stating that contract provision that rights could not be assigned without consent “does not limit . . . [the nonassigning party’s] discretion in approving or disapproving a transfer.”).

Tenth Circuit: Foley v. Aspen Ski Lodge Ltd. Partnership, 208 F.3d 225, 2000 WL 223549 at *3 (10th Cir. Feb. 28, 2000) (unpublished opinion) (finding that no good faith covenant was implied in a partnership agreement that provided that the General Partner could exercise its “sole discretion” in deciding whether a person could become a Limited Partner); Larese v. Creamland Dairies, Inc., 767 F.2d 716, 718 (10th Cir. 1985) (stating that a party “must bargain for a provision expressly granting the right to withhold consent unreasonably”).

State Courts:

New York: Mann Theaters Corp. of California v. Mid-Island Shopping Plaza Co., 94 A.D.2d 466, 470, 464 N.Y.S.2d 793, 797 (1983) (holding that where a lease contains an express provision restricting assignment without consent, the landlord may arbitrarily refuse consent for any or no reason), *aff’d* 62 N.Y.2d 930, 468 N.E.2d 51, 479 N.Y.S.2d 213 (1984).

Texas: Reynolds v. McCullough, 739 S.W.2d 424, 429 (Tex. App. 1987) (holding that there is no implied covenant to act reasonably when withholding consent, although a party may contract not to act unreasonably).

²¹² *Compare*, White Stone Partners, LP v. Piper Jaffray Companies, Inc., 978 F. Supp. 878, 882-883 (D. Minn. 1997) (quoting Tymshare, Inc. v. Covell, 727 F.2d 1145, 1154 (D.C. Cir. 1984) in holding that the phrase “sole discretion” did not mean “for any reason whatsoever no matter how arbitrary or unreasonable”), *with* Foley v. Aspen Ski Lodge Ltd. Partnership, 208 F.3d 225, 2000 WL 223549 at *3 (10th Cir. Feb. 28, 2000) (finding that no good faith covenant was implied in a partnership agreement that provided that the General Partner could exercise its “sole discretion” in deciding whether a person could become a Limited Partner).

Compare Example 1 to Example 2. Example 1 is a flat-out prohibition of assignment, while Example 2 contemplates the possibility of assignment, albeit subject to the nonassigning party's consent. Historically, case law has not distinguished between the two. Courts held that both clauses completely prohibited assignment and that an Example 2 clause garnered an assignor no additional rights.²¹³ Arguably, the only difference between the clauses was the name of the piece of paper that the assignor requested from the nonassigning party if it wanted to circumvent the clause. If the Example 1 clause were included in the contract, the assignor would request a waiver. However, if the Example 2 clause were included in the contract, the request would be for a consent. All that an assignor achieved was whatever visceral comfort it derived from having negotiated the right to ask for a consent rather than a waiver.

Despite this historical line of cases, there is modern authority to interpret an Example 2 clause differently. In some jurisdictions, courts construe the language "except with the prior written consent of the nonassigning party," to mean that the nonassigning party may not unreasonably withhold its consent.²¹⁴ In essence, courts turn the language in Example 2 into the language in Example 3. The courts' rationale is that the obligation of good faith and fair dealing requires that discretion must be exercised reasonably. Thus, while a nonassigning party thought that it had retained unfettered discretion over whether it granted or denied consent, in fact some courts have grafted on a public policy overlay of reasonableness.²¹⁵

Example 4 is a clause that expressly reserves to the nonassigning party the right to make decisions in its sole judgment. If the parties use this clause, it is enforceable in some states but not others. There is no assurance that the clause is enforceable in a state that reads in a public policy requirement of reasonableness.²¹⁶

The net effect of this analysis for the practitioner is that it is imperative that the practitioner know how a court will interpret a consent requirement. Unfortunately it is a state-by-state analysis, and depending upon the chosen law of the agreement, the result may vary. Complicating the analysis is the fact that the answer is not known in every state.

[5]—Pre-Consents of the Nonassigning Party

Occasionally, when negotiating a contract, a party knows that it wants to be able to assign its rights under the contract—perhaps to a subsidiary or an affiliate.²¹⁷ Alternatively, a party may

²¹³ See 1 Friedman, *Friedman on Leases* § 7.304a at 322-323 (4th ed. 1997), quoting *Granite Trust Building Corp. v. Great Atlantic & Pacific Tea Co.*, 36 F. Supp. 77, 78 (D. Mass. 1940) (stating that "[i]t would seem to be the better law that when a lease restricts a lessee's rights by requiring consent before these rights can be exercised, it must have been in the contemplation of the parties that the lessor be required to give some reason for withholding consent. Text books and digests state the law otherwise.").

²¹⁴ See N.207 *supra*.

²¹⁵ *Id.*

²¹⁶ *White Stone Partners, LP v. Piper Jaffray Companies, Inc.*, 978 F. Supp. 878, 882-883 (D. Minn. 1997) (quoting *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1154 (D.C. Cir. 1984), in holding that the phrase "sole discretion" did not mean "for any reason whatsoever no matter how arbitrary or unreasonable").

²¹⁷ *Eighth Circuit: Cedar Point Apartments, Ltd. v. Cedar Point Investment Corp.*, 693 F.2d 748, 752 (8th Cir. 1982), *cert. denied* 461 U.S. 914 (1983) (contract grants a party the right to assign "to any partnership of which [that party] is a general partner.").

want the right to assign rights not otherwise assignable. In such an instance, the prospective assignor invariably wants the pre-consent memorialized in the contract.²¹⁸

EXAMPLE 1

No party may assign any of its rights under this Agreement, voluntarily or involuntarily, whether by merger, consolidation, dissolution, operation of law, or any other manner. Despite the previous sentence, Chocolate Inc. may assign its rights to any subsidiary^[A] of Chocolate Inc.^[B]

EXAMPLE 2

No party may assign any of its rights or delegate any performance under this Agreement, except that Chocolate Inc. may assign its rights to the extent necessary to obtain financing.

**Drafting Notes**

[A] The prospective obligor should think through carefully what requirements a prospective assignee must meet.²¹⁹ For example, must the prospective assignee be a subsidiary? If so, should the subsidiary be named, or may it be any subsidiary if the parent owns more than a certain percentage of shares? Or more broadly, is there a class of potential assignees and how should it be defined?

The anti-assignment clauses set forth in Examples 1 and 2 above provide for a one-time right of assignment. That, however, is not always the case. The clause may grant each successive assignee the right to assign. For example:

Tenth Circuit: U.S. Industries, Inc. v. Touche Ross & Co., 854 F.2d 1223, 1233 n.13 (10th Cir. 1988) (noting that anti-assignment clause prohibited all parties, other than one, from assigning rights) (implied overruling on other grounds recognized by Anixter v. Home-Stake Production Co., 77 F.3d 1215, 1231 (10th Cir. 1996)).

²¹⁸ The *Restatement (Second) of Contracts* § 323(1) (1981) recognizes the effectiveness of pre-consents.

²¹⁹ For example, the clause at issue in *International Telecommunications Exchange Corp. v. MCI Telecommunications Corp.*, 892 F. Supp. 1520, 1533 (N.D. Ga. 1995) permitted transfer only to a “wholly-owned subsidiary upon notice to MCI provided the assignee’s financial strength is equal to or greater than that of Customer, and further provided that Customer shall remain responsible for full performance of this Agreement.”

No party may assign any of its rights under this Agreement, except that Chocolate Inc. may assign its rights to any confectionery manufacturer and, afterwards, that assignee, and any successive assignee, may assign its rights to any other confectionery manufacturer.

- [B] To avoid controversy, a pre-consent should address whether a concurrent delegation is contemplated and to be permitted. If delegation is permitted, the pre-consent should state whether the delegating party is to be released from its performance obligations. See § 3.13[2] *infra* for a detailed discussion of the issues relating to pre-consents and anti-delegation clauses.

Practitioners should beware of the dangers in drafting a permissive assignment clause that does not include an express prohibition. For example:

The Bank may assign all or any part of its rights in the Loan to any Qualified Bank Transferee.^[A]



Drafting Note

- [A] The court interpreting this language held it to be a mere grant of permission to assign. It refused to read into the clause a prohibition of other assignments.²²⁰ Accordingly, other assignments were permitted. To prevent this problem, practitioners should either include an express prohibition of other assignments or insert the word “only” in the appropriate place.

Another common example of a permissive clause is seen in indemnity agreements:

²²⁰ Pravin Banker Associates, Ltd. v. Banco Popular Del Peru, 109 F.3d 850, 856 (2d Cir. 1997). See also: *Second Circuit*: LNC Investments, Inc. v. The Republic of Nicaragua, 1999 WL 92603 at *5 (S.D.N.Y. Feb. 19, 1999).

State Courts:

Massachusetts: Chatham Pharmaceuticals, Inc. v. Angier Chemical Co., Inc., 347 Mass. 208, 210-211, 196 N.E.2d 852, 854-855 (1964).

The Buyer may assign its rights under this Indemnity Agreement to any lender providing financing to the Buyer to acquire the Purchased Assets.^[A]



Drafting Note

- [A] This clause presents the same problem as the immediately preceding one. Nothing in it prohibits other assignments; therefore, the Buyer may also assign its rights under the indemnity agreement to anyone else. The cure to the problem is the same as discussed with respect to the preceding clause.

§ 3.13 Negotiating and Drafting the Assignment and Delegation Provision: The Anti-Delegation Clause

[1]—A Typical, But Flawed, Anti-Delegation Clause

The typical anti-delegation clause is an anti-assignment clause that never mentions the word delegation. Such a clause may be drafted in one of two ways:

EXAMPLE 1

No party may assign this Agreement to any other Person.^[A]

EXAMPLE 2

No party may assign any of its rights under this Agreement.^[B]



Drafting Notes

- [A] As may be recalled from an earlier Section of this Chapter,²²¹ the courts, the *Restatement (Second) of Contracts* § 322(1), and U.C.C. § 2-210(3) interpret Example 1 as an anti-

²²¹ See § 3.05[1] *supra*.

delegation clause. Nonetheless, practitioners should avoid using this form of an anti-delegation clause because it invites litigation. Despite the case law, the interpretative provisions of the U.C.C., and the *Restatement*, there continue to be cases that litigate the meaning of this clause.²²²

- [B] Although many courts would interpret Example 2 not only as an anti-assignment clause, but also as an anti-delegation clause, practitioners should weigh the advantages of an assignment and delegation provision that expressly states that performance may not be delegated. First, it may avoid litigation that might otherwise be necessary to interpret the provision. Equally as important, by stating “may not delegate any performance,” the practitioner is reminded to think through the delegation issues that might otherwise have been glossed over.

[2]—A Well-Drafted Anti-Delegation Clause

[a]—Prohibiting Delegations

Crafting a well-drafted anti-delegation clause is straightforward. It may stand on its own, although it is usually coupled with an anti-assignment clause:

EXAMPLE 1

No party may delegate any performance^[A] under this Agreement.

EXAMPLE 2

- (a) *No Assignments.* No party may assign any of its rights under this Agreement, voluntarily or involuntarily, whether by merger, consolidation, dissolution, operation of law, or any other manner.
- (b) *No Delegations.* No party may delegate any performance under this Agreement.
- (c) *Ramifications of Purported Assignment or Delegation.* Any purported assignment of rights or delegation of performance in violation of this Section is void.^[B]

²²² See *Cedar Point Apartments, Ltd. v. Cedar Point Investment Corp.*, 693 F.2d 748, 753 (8th Cir. 1982), *cert. denied* 461 U.S. 914 (1983).



Drafting Notes

- [A] Note, “performance” is used rather than “duties.” As may be recalled, a party may delegate not only a duty, but also a condition.²²³ The noun “performance” takes into account both types of delegation.
- [B] This sentence precludes the enforcement of a delegation in violation of the anti-delegation clause. Inserting the adjective “purported” avoids any ambiguity as to whether a party’s actions actually constituted a delegation of performance.²²⁴

[b]—Permitting Delegations

If the parties agree that performance may be delegated, permission to delegate may be drafted as a blanket permission to delegate performance to any person or as permission to delegate performance to a specific delegate:

EXAMPLE 3

No party may assign any rights under this Agreement, but each party may delegate its performance to any Person.^[A]

EXAMPLE 4

No party may assign any rights or delegate any performance under this Agreement, except that Chocolate Inc. may delegate its performance to Vanilla Corp.^[B]



Drafting Notes

- [A] One reason to permit delegation explicitly is to memorialize the common law and to acknowledge that it applies to the deal being negotiated.
- [B] Permission to delegate is sometimes given to override the common law which would otherwise hold the delegation impermissible.²²⁵ For example, as noted earlier, if Luciano

²²³ See § 3.02[1][b] *supra*.

²²⁴ See *Restatement (Second) of Contracts* § 317, Comment a (1981).

²²⁵ See § 3.04[2][b] *supra*.

Pavarotti had an engagement to sing at Lincoln Center, under the common law he could not delegate his duty to perform because of his unique skill and artistry. He could, however, negotiate for the contract right to delegate his duty to Placido Domingo.

Sometimes, rather than granting permission to delegate to a named person, the parties might want to consider a set of requirements that a potential delegate must meet to be eligible for a nondelegating party's pre-consent. For example:

- Should the delegate be a named subsidiary, or may it be any subsidiary if the delegating party owns more than a certain percentage of its shares? Or more broadly, is there a class of potential delegates that should be defined?
- Should there be a test of creditworthiness?²²⁶
- Should the delegate be obligated to deliver an assumption, and, if so, do the parties want to attach the form of the assumption as an exhibit to the agreement?
- Should the prospective delegate's counsel be obligated to deliver an opinion as to due incorporation, execution and delivery, and enforceability? Along the same lines, should the delegate be obligated to deliver an incumbency certificate and certified copies of its certificate of incorporation and bylaws?

The rationale for each of these requirements is that the nondelegating party is entitled to be in essentially the same position as when it and the delegating party executed and delivered the agreement. A sample provision resolving some of these questions follows:

Delegation.

(a) *No Delegations.* Neither party may delegate any performance under this Agreement, *except* that Chocolate Inc. may delegate its performance to Raspberry Swirl Corp. (the "Delegate") before June 6, 20XX *if* the Delegate delivers to Vanilla Corp. [the nondelegating party] the following documents on or before the delegation:

- (i) An assumption, executed and delivered by the Delegate, substantially in the form of Exhibit A.²²⁷

²²⁶ See *International Telecommunications Exchange Corp. v. MCI Telecommunications Corp.*, 892 F. Supp. 1520, 1533 (N.D. Ga. 1995) (permitting transfer only to a "wholly-owned subsidiary upon notice to MCI provided the assignee's financial strength is equal to or greater than that of Customer, and further provided that Customer shall remain responsible for full performance of this Agreement.").

²²⁷ The rationale behind annexing the form of assumption is that it may forestall a later dispute as to whether the substance of the assumption is acceptable. Alternatively, if time is tight or the parties less pessimistic, subsection (a)(i) could be drafted as follows: "An assumption, executed and delivered by the Delegate, in form and substance [reasonably] satisfactory to Vanilla Corp."

- (ii) A certified copy of the certificate of incorporation and bylaws of the Delegate.
- (iii) An opinion of the Delegate's counsel that the assumption has been duly executed and delivered by the Delegate, and that the assumption is valid, binding, and enforceable.
- (iv) The Delegate's most recent audited fiscal year-end financial statements, without any qualifications, and showing the Delegate to have a net worth of at least \$20,000,000 as of its most recent fiscal year-end.

Delivery of each of these documents is a condition precedent to the effectiveness of Chocolate Inc.'s delegation.

- (b) *Ramification of Purported Delegation.* Any purported delegation of performance under this Agreement in violation of this Section is void.

The provision just set forth does not directly address whether the delegating party is to remain liable for its performance. Continued liability is, of course, the nondelegating party's preference as it then has two parties on the hook. If the parties intend the delegating party to remain liable, the contract need not state that explicitly as it is the result absent a contractual clause otherwise.²²⁸ Some practitioners, however, feel more comfortable reiterating the common law principle:

Despite any delegation, the delegating party remains liable for the performance it delegated.

The delegating party's perspective is different—not surprisingly—from that of the nondelegating party's. The delegating party will prefer to be released, causing a novation, thereby putting the nondelegating party in privity with the delegate.²²⁹ If the parties agree to release the delegating party, the practitioner could add the following sentence to the anti-delegation clause:

²²⁸ See: §§ 3.02[1][b] and 3.04[2][a] *supra*.

²²⁹ *Id.*

Contemporaneously with the delegation, the delegating party is released from all its performance obligations under this Agreement.

Note that the release is drafted in the present tense rather than stating that “the delegating party shall be released.” That language presents two problems. First, it suggests the possibility that the release will occur at some undesignated time in the future. Second, it suggests that some action by the nondelegating party may be needed to effect the release. Instead, as drafted, the clause is self-executing. It happens by virtue of the delegation.

Occasionally, a client may profess concern that it will have no piece of paper evidencing its release. To mollify this fear, the following clause may be added:

Upon the request of the delegating party, the nondelegating party shall promptly execute and deliver to the delegating party a document, substantially in the form of Exhibit A,²³⁰ evidencing the delegating party’s release from all its performance obligations under this Agreement. The parties acknowledge that this document is merely evidence of release and is unnecessary to accomplish the release of the delegating party.

§ 3.14 Putting It All Together

The assignment and delegation provision becomes ever more sophisticated the more the practitioner reads and learns. The following provision takes into account the salient concerns discussed in this Chapter and is a good provision from which to start drafting:

²³⁰ The rationale behind annexing the form of release acknowledgment is that it may forestall a later dispute as to whether the substance of the release acknowledgment is acceptable. Alternatively, the clause could be drafted as follows: “Upon the request of the delegating party, the nondelegating party shall promptly execute and deliver to the delegating party a document, in form and substance [reasonably] satisfactory to the delegating party, evidencing the delegating party’s release from all its performance obligations under this Agreement.”

Assignment and Delegation.

- (a) *No Assignments.* No party may assign any of its rights under this Agreement,^[A] except with the prior written consent of the other party. That party shall not unreasonably withhold its consent.^[B] All assignments of rights are prohibited under this subsection, whether they are voluntary or involuntary, by merger, consolidation, dissolution, operation of law, or any other manner.^[C] For purposes of this Section,
- (i) a “change of control” is deemed an assignment of rights;^[D] and
 - (ii) “merger” refers to any merger in which a party participates, regardless of whether it is the surviving or disappearing corporation.^[E]
- (b) *No Delegations.* No party may delegate any performance under this Agreement.^[F]
- (c) *Ramifications of Purported Assignment or Delegation.* Any purported assignment of rights or delegation of performance in violation of this Section is void.^[G]

**Drafting Notes**

- [A] See § 3.11[2] *supra*, Drafting Notes [A] through [E].
- [B] See § 3.12[4] *supra*.
- [C] See § 3.11[2] *supra*, Drafting Note [F].
- [D] See § 3.11[2] *supra*, Drafting Note [F].
- [E] See § 3.11[2] *supra*, Drafting Note [F].
- [F] See § 3.13[2] *supra*.
- [G] See § 3.11[2] *supra*, Drafting Notes [G] and [H].