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## Assignability of Commercial Contracts (TX)

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*A Practice Note examining Texas law relating to the transferability of **commercial contracts**, including a party's legal ability to assign its rights and delegate its performance obligations under a **contract** that is silent on transferability, and the construction and enforceability of contractual anti-**assignment** and anti-delegation clauses. It also includes applications to different types of **commercial contracts** and transactions, and discusses key drafting considerations for anti-**assignment** and anti-delegation provisions.*

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**Contracts** are a form of intangible property. Like other property owners, parties to **commercial contracts** often desire to transfer their property to a third party. With a **contract**, transfer involves the **assignment** of some or all of a party's rights or the delegation of some or all of a party's performance, or both, to a non-party to the agreement.

Situations in which a party may desire voluntarily to transfer contractual rights or performance, or both, include:

- The manufacturer that sells its accounts receivable to a third party (known as a factor).
- The borrower that grants a security interest in its assets to its lender.

Situations that may require a party to transfer contractual rights or performance, or both, include:

- The company that divests some or all of its business in an asset sale.
- The business conglomerate that undergoes an internal corporate restructuring.
- The contractor that subcontracts its work under certain projects (in this situation it is important to distinguish an **assignment** from an agency or subcontracting agreement).

In each of these cases, the non-transferring party may object to **assignment** or delegation for reasons that include:

- The desire to select the party with which it conducts its business.
- Concern that a different obligor or obligee may adversely affect the non-transferring party's ability to receive its benefit of the contractual bargain.

The transferring party (sometimes referred to as the transferor) must look to applicable law and the express language of the **contract** to determine whether it can validly complete the intended transfer without obtaining the non-transferring party's consent. If consent is required and is not obtained, the

transferring party risks:

- Breaching the **contract**, including an express covenant or default legal rule against **assignment**, which may result in either:
  - liability to the non-transferring party for money damages;
  - discharge of the non-transferring party's duties under the **contract**; or
  - both.

(See, for example, *Reuben H. Donnelley Corp. v. McKinnon*, 688 S.W.2d 612, 615 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).)

- Making an ineffective and invalid transfer, which may result in liability to either:
  - the transferee for money damages;
  - the non-transferring party for non-performance; or
  - both.

(See, for example, *Jetall Companies v. Four Seasons Food Distributors, Inc.*, 474 S.W.3d 780, 783 (Tex. App.—Houston [14th Dist.] 2014, no pet.).)

This Note examines the key issues to consider when analyzing **contract** transferability or drafting a contractual anti-**assignment** and anti-delegation provision under Texas law, including:

- Definitions of **assignment** and delegation.
- The general rules governing **assignment** and delegation, including key exceptions.
- Contractual anti-**assignment** and anti-delegation clauses.
- Applications to some major **commercial contract** types and business situations.

All references to the UCC refer to the Texas **Uniform Commercial Code** enacted under Texas law (Tex. Bus. & Com. Code Ann. § 1.101 et seq.) and not the model UCC.

This Note uses the terms:

- "Assign" and "**assignment**" to refer to the transfer of a party's contractual rights.
- "Delegate" and "delegation" to refer to the transfer of a party's contractual performance.
- "Transfer" to refer to a transfer that is an **assignment**, a delegation, or both, depending on the facts.

## **Assignment and Delegation Defined**

Each party to a **contract** is an:

- Obligee regarding its rights under the **contract**.
- Obligor regarding its performance obligations under the **contract**.

Contracting parties and practitioners often refer to "assignability" of **contracts**. While in some instances they are specifically addressing the **assignment** of a party's rights under the **contract**, in many cases they use the term "**assignment**" to refer to both:

- The **assignment** of rights to receive performance.

- The delegation of duties to perform.

However, **assignment** and delegation are two distinct legal concepts that must be separately addressed because they may have different consequences (see [General Rules Governing Assignment and Delegation](#)).

When parties refer to "assigning a **contract**" or permitting "**assignment** of the **contract**," most courts hold that they are both assigning rights and delegating performance unless the language or the circumstances indicate to the contrary ([Tex. Bus. & Com. Code Ann. § 2.210\(e\)](#) and [Restatement \(Second\) of Contracts § 328\(1\)](#)).

Conversely, when parties are restricting **assignment**, language generally prohibiting "**assignment** of the **contract**" only restricts the delegation of performance and not the **assignment** of rights ([Tex. Bus. & Com. Code Ann. § 2.210\(d\)](#) and [Restatement \(Second\) of Contracts § 322\(1\)](#)). For more information on anti-**assignment** and anti-delegation clauses, see [Contractual Anti-Assignment and Anti-Delegation Clauses](#).

### Assignment Definition

**Assignment** is the transfer by an obligee (assignor) of some or all of its rights to receive performance under the **contract** typically, but not always, to a non-party (assignee) (see [Pain Control Institute, Inc. v. GEICO General Insurance Company](#), 447 S.W.3d 893, 898 (Tex.App. – Dallas 2014, no pet.); [Brown v. Mesa Distributors, Inc.](#), 414 S.W.3d 279, 285 (Tex.App. – Houston [1st Dist.] 2013, no pet.); and [Pagosa Oil and Gas, L.L.C. v. Marrs and Smith Partnership](#), 323 S.W.3d 203, 210-11 (Tex.App. – El Paso 2010, pet. denied); see also [Restatement \(Second\) of Contracts § 317\(1\)](#)). For clarity purposes, this Note assumes the assignee to be a non-party but the rights and obligations of the parties discussed apply equally to an assignee who is also a party to the agreement.

When these rights are assigned, the assignor is no longer entitled to receive any benefits of the assigned rights, all of which are transferred to the assignee. However, even though the assignor is divested of its **contract** rights, **assignment** does not reduce or eliminate the assignor's obligations of performance to the non-assigning party (see [Delegation Definition](#)). Therefore, while the non-assigning party to the **contract** is relieved of its obligations to perform for the assignor (although not for the assignee), the non-assigning party retains:

- The right to receive performance from the assignor.
- Its remedies against the assignor for any failure to perform.

For an **assignment** to be effective, it must include a clear, present intent to transfer the assigned rights without requiring any further action by the assignee. This means that a promise to assign in the future is ineffective as an actual transfer (see [Commercial Structures and Interiors, Inc. v. Liberty Educ. Ministries, Inc.](#), 192 S.W.3d 827, 833-34 (Tex.App.—Fort Worth 2006, no pet.)). In Texas, an existing right is a precondition for a valid **assignment** ([Pain Control Institute](#), 447 S.W.3d at 899). Otherwise, no specific language is required to draft an effective **assignment**, including no requirement to use the word "assign." More commonly, a party encounters an agreement that purports to transfer "all rights and interests" to a third party.

For a sample **assignment** provision, see [Standard Document, Assignment and Assumption Agreement and Optional Novation \(TX\): Section 1.1](#).

### Delegation Definition

Delegation is the transfer by an obligor (delegating party) of some or all of its performance obligations (or conditions requiring performance) under the **contract** typically, but not always, to a non-party (delegatee) (Tex. Bus. & Com. Code Ann. § 2.210(a); see also [Restatement \(Second\) of Contracts § 318\(1\)](#)). For clarity purposes, this Note assumes the delegatee to be a non-party but the rights and obligations of the parties discussed apply equally to a delegatee who is also a party to the agreement.

The delegating party must consider whether:

- The express language of the **contract** or applicable law limits or conditions the delegation.
- The delegating party is liable to the delegatee for an invalid delegation.
- The delegating party would remain liable to the non-delegating party if the delegatee fails to perform.

For a delegation to be effective, the delegatee must agree to assume the delegated performance (*Lone Star Gas Co., a Div. of Enserch Corp. v. Mexia Oil & Gas, Inc.*, 833 S.W.2d 199, 201 (Tex. App.—Dallas 1992, no writ.)). However, the delegating party remains liable for the delegated performance, whether or not it has also assigned its **contract** rights, unless the non-delegating party has agreed to a **novation** (see [Novation](#)) ([Restatement \(Second\) of Contracts § 318\(3\)](#) (1981); see also *Honeycutt v. Billingsley*, 992 S.W.2d 570, 579 (Tex.App.—Houston [1st Dist.] 1999, pet. denied)).

This differs from an **assignment** of rights where, on **assignment**, the assignor relinquishes its contractual entitlements (Tex. Bus. & Com. Code Ann. § 2.210(b); see also *University of Texas Medical Branch at Galveston v. Allan*, 777 S.W.2d 450, 452-53 (Tex.App.—Houston [14th] 1989, no writ.)). Even if the delegating party can effectively delegate its actual performance to the delegatee (so that the delegatee's actual performance discharges the delegating party's duty), the delegating party cannot be relieved of its obligation to perform and its liability for non-performance unless the non-delegating party has agreed to a novation.

Like the **assignment** of rights, there is no required language to create an effective delegation in Texas. When performance is effectively delegated, the delegatee assumes liability for the delegating party's performance obligations (under an assumption agreement) even though, absent a novation, the delegating party retains its liability to the non-delegating party for failure by the delegatee to adequately perform the delegated obligations.

Unless the parties expressly agree otherwise, courts commonly hold that the delegatee's liability is primary and the delegating party remains secondarily liable. The delegating party may itself have recourse against the delegatee under the assumption agreement, often addressed through a contractual **indemnification** right (see [Standard Document, Assignment and Assumption Agreement and Optional Novation \(TX\): Section 6](#)).

## Novation

If the delegating party desires to fully extricate itself from liability for non-performance, it must obtain the consent of the non-delegating party to the **contract** (novation). In most novations, the delegating party, the delegatee, and the non-delegating party agree that:

- The delegatee is substituted for the delegating party as a party to the **contract**.
- The delegating party is no longer liable for performance under the **contract**.
- The delegatee is directly and solely liable for the delegating party's performance under the **contract**.

(*Honeycutt*, 992 S.W.2d at 576.)

Specifically, four essential elements are necessary to form a novation in Texas:

- A previously valid obligation.
- Agreement of all parties to a new **contract**.
- Extinguishment of the old **contract**.
- A valid new **contract**.

(*New York Party Shuttle, LLC v. Bilello*, 414 S.W.3d 206, 214 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).)

Individually in a novation:

- The assigning party is released from all of its obligations and duties to perform under the assigned **contract**.
- The assuming party is deemed substituted for the assigning party as a party to the assigned **contract**.

(See *Honeycutt*, 992 S.W.2d at 576-77.)

Without a novation, the assigning party remains liable to the remaining party if the assuming party does not perform the delegated obligations (see *Seagull Energy E & P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 346-47 (Tex. 2006)).

For a sample novation provision, see Standard Documents, [Novation Agreement \(Short Form\) \(TX\)](#) and [Assignment and Assumption Agreement and Optional Novation \(TX\): Section 2](#). For information on the differences between a novation and an **assignment**, see [Practice Note, Novation, Accord and Satisfaction, and Substituted Contracts: Novation Versus Assignment](#).

## Voluntary and Involuntary Transfers

It is often clear that a contracting party has voluntarily transferred some or all of its contractual rights, obligations, or both to an assignee or delegatee. For example:

- In connection with a business transfer structured as an asset sale or a discrete transaction relating solely to a particular **contract**, a transferring party enters into a written **assignment** and assumption agreement with an assignee and delegatee.
- A non-party to the agreement renders certain performance or exercises certain rights, even though the **contract** has not been formally transferred to that non-party.

However, a **contract** is not always directly and voluntarily transferred to an assignee or delegatee by one of the parties. Instead, it may be indirectly transferred, often in conjunction with a corporate reorganization or a business sale structured as a merger or as the result of a court order. With these types of transfers, which are often characterized as occurring by operation of law, it may be more difficult to determine whether:

- A contractual anti-**assignment** and anti-delegation clause applies to a specific type of transfer.
- The transfer is permissible, with or without a contractual anti-**assignment** and anti-delegation provision.

The parties must look to Texas's general **contract** law or business entity law, or both, to determine

whether the transfer is permissible. The result may differ depending on whether the transferred **contract** has an anti-**assignment** and anti-delegation provision and the precise language of that provision (see [Drafting Anti-Assignment and Anti-Delegation Clauses](#)). For more information on transfers by operation of law in Texas, see [Box, Transfers by Operation of Law](#).

Certain **commercial** transactions and matters, such as business sales, corporate reorganizations, and bankruptcies, often require special considerations when determining **contract** transferability (see [Assignment Issues in Certain Commercial Contexts](#)).

## Change of Control

A [change of control](#) (or change in control) refers to a significant change in the equity ownership or management of a business entity (often defined as a sale of more than 50% of a party's stock or a change in a majority of the board members of a party, or both) (see, for example, *Fairfield Indus., Inc. v. EP Energy E&P Co., L.P.*, 531 S.W.3d 234, 242-44 (Tex. App.—Houston [14th Dist.] 2017, pet. filed)).

While a change of control does not involve the actual transfer of assets held by the affected business entity, contracting parties sometimes assume that a change of ownership or management triggers an impermissible transfer of contractual rights or obligations that are non-assignable or non-delegable under the **contract** or by applicable law (see [General Rules Governing Assignment and Delegation](#)). However, the general rule acknowledges the technical distinction, and courts commonly hold that a change of control does not implicate any legal or contractual restrictions on the transferability of a particular **contract** unless the **contract** either:

- Contains anti-**assignment** and anti-delegation language that expressly restricts a change of control.
- States that a change in the management or equity ownership of the contracting party is deemed to be an **assignment** (which is subject to restrictions in the **contract's** anti-**assignment** and anti-delegation clause).

**Commercial** real estate leases often include these types of provisions (see [Commercial Real Estate Leases](#)). In other situations (for example, in supply agreements), restrictions on a change of control are more commonly addressed in a different clause, often by including a contractual termination right in favor of one or both parties if the other party undergoes a change of control (see, for example, [Standard Document, Manufacturing Supply Agreement \(Pro-Seller\): Section 6.3\(f\)](#)).

## General Rules Governing **Assignment** and Delegation

The modern rule generally favors free transferability of all types of property, including **contracts**. It broadly permits:

- Most **assignments** of contractual rights.
- Many delegations of contractual performance.

In general, a contracting party can assign its contractual rights to:

- Receive money.
- Receive non-monetary performance.
- Pursue **contract** remedies.

In many cases, a party may delegate its contractual obligations to:

- Pay money.
- Deliver goods.
- Perform services that are not personal in nature (often requiring specialized skill or discretion).

The major exceptions to free transferability include:

- **Contracts** with anti-**assignment** or anti-delegation clauses (see [Contractual Anti-Assignment and Anti-Delegation Clauses](#)).
- **Assignments** and delegations that violate public policy or law (see [Ability to Assign Rights](#)).
- **Assignments** of rights or delegations of performance that are personal in nature (see [Ability to Assign Rights](#) and [Ability to Delegate Performance](#)).

The general rules of **contract** transferability are codified in the UCC, which applies to **contracts** for the sale of goods ([Tex. Bus. & Com. Code Ann. § 2.210](#)), and the Restatement (Second) of **Contracts**, which applies generally to all types of **contracts** ([Restatement \(Second\) of Contracts §§ 317-323](#)). For a discussion about the transferability of some major types of **contracts**, including intellectual property licenses and distribution and franchise agreements, see [Applications to Some Major Types of Contracts](#).

### Ability to Assign Rights

Most **contract** rights are assignable. Aside from where the parties have agreed contractually to restrict **assignment** of rights, the legal bases for limiting **assignment** protect the non-assigning party against any significant adverse consequences of a particular transfer. When ruling on assignability, courts focus on the particular facts and circumstances of the **assignment** at issue.

Most states, like Texas, rely on the [Restatement \(Second\) of Contracts § 317\(2\)](#), which, along with case law, provides that a contractual right is assignable unless:

- Transferring the right to the assignee would materially:
  - change the duty of the non-assigning obligor;
  - increase the burden or risk imposed on the non-assigning obligor;
  - impair the non-assigning obligor's chances of obtaining return performance; or
  - reduce the value to the non-assigning obligor of return performance.

(See, for example, *Sw. Bell Tel. Co. v. Mktg on Hold Inc.*, 308 S.W.3d 909, 916 (Tex. 2010).)

- The **assignment** is prohibited by statute or on public policy grounds (see [Statutory and Public Policy Exceptions](#)).
- The right is personal in nature (see, for example, *In re FH Partners, L.L.C.*, 335 S.W.3d 752, 762-63 (Tex.App.—Austin 2011, no pet.)).
- The parties have validly restricted **assignment** by **contract** (see, for example, *Reuben H. Donnelley*, 688 S.W.2d at 615; see also *Texas Dev. Co. v. Exxon Mobil Corp.*, 119 S.W.3d 875, 881 (Tex.App.—Eastland 2003, no pet.)).

The UCC follows a similar principle and includes similar exceptions ([Tex. Bus. & Com. Code Ann. § 2.210\(b\)](#)); see also [Contracts for the Sale of Goods](#)).



Even if parties have agreed to restrict the **assignment** of their **contract** rights, either party may assign its right to receive damages for non-performance (*Restatement (Second) of Contracts* § 322(2)(a) and *Tex. Bus. & Com. Code Ann.* § 2.210(b)).

In addition, contractual anti-**assignment** provisions are ineffective to prohibit a party from granting a security interest to a secured party (*Tex. Bus. & Com. Code Ann.* § 9.406(d); see also *Secured Transactions*).

### Statutory and Public Policy Exceptions

Examples of statutory restrictions on the free assignability of contractual rights include:

- The Federal **Assignment** of Claims Act and its implementing regulations generally limit the **assignment** of rights under government **contracts** (31 U.S.C. § 3727 and 41 U.S.C. § 6305; 48 C.F.R. § 32.800 - 32.806).
- The UCC prohibits the **assignment** of the right to draw funds under a letter of credit in certain cases (*Tex. Bus. & Com. Code Ann.* § 5.112).
- The Texas Insurance Code prohibits the **assignment** of a **contract** between an insurer and its manager (*Tex. Ins. Code. Ann.* § 4152.206).

Examples of **assignments** that are commonly held to be inoperative because of public policy reasons include those made for consideration that is illegal, as well as **assignments** of:

- Standing to assert a due-process claim (*American Homeowner Preservation Fund, LP v. Pirkle*, 475 S.W.3d 507, 517-19 (Tex.App.—Fort Worth 2015, pet. denied)).
- A cause of action for a legal malpractice claim (see, for example, *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 315-17 (Tex.App.—San Antonio 1994, writ, ref'd); see also *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 389 (Tex.App.—Houston [14th Dist.] 1997, writ dism'd by agr.)).
- Claims for personal injuries and other tort claims as part of a settlement agreement (*International Proteins Corp. v. Ralston-Purina Co.*, 744 S.W.2d 932, 934 (Tex. 1988)).
- Rights that are considered inherently personal, such as those granted under a non-compete provision or a covenant not to sue.

(*Restatement (Second) of Contracts* § 317(2)(b); see also *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 129 & n. 11 (Tex. 2004) (stating that parties have the right to **contract** as they see fit provided their agreement does not violate the law or public policy) and *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 707-19 (Tex. 1996) (listing cases invalidating **assignments**).)

### Ability to Delegate Performance

The general rule is that a party may delegate its performance obligations. However, in practice, the delegation of performance is more often restricted than the **assignment** of rights. To delegate a duty, the delegatee must assume the duty, typically by using express promissory words (see, for example, *Lone Star Gas Co.*, 833 S.W.2d at 201). Conceptually, the exceptions to delegation are similar to those applicable to the **assignment** of rights. While worded differently, both sets of exceptions focus on the likely effect of the transfer on the non-transferring party. With delegation, this effect is often more significant.

The *Restatement (Second) of Contracts* § 318 permits delegation of performance to a third party



unless:

- Delegation is against public policy.
- The parties have agreed contractually to restrict delegation.
- The non-delegating obligee has a substantial interest in having the delegating party perform or control performance of the delegated acts (which includes duties that are personal in nature because the original obligor has special skill, talent, or ability to perform) (see, for example, *Kelley v. Marlin*, 714 S.W.2d 303, 308 (Tex. 1986); *In re Martin*, 117 B.R. 243, 249 (Bankr. N.D. Tex. 1990); and *McKinnie v. Milford*, 597 S.W.2d 953, 957 (Tex.Civ.App.—Tyler 1980, writ ref'd n.r.e.)).

The UCC similarly includes the exceptions listed in the second and third bullet points (Tex. Bus. & Com. Code Ann. § 2.210(a)).

When a **contract** is silent on the obligor's right to delegate performance, enforceability concerns commonly relate to the ability of the delegatee to adequately meet the expectations of the obligee when performing the delegated obligations (see, for example, *Honeycutt*, 992 S.W.2d at 579).

### When Performance is Personal

Some contractual obligations can be performed consistently by many different obligors (for example, the obligation to make payment, construct a building, or deliver fungible goods). Not only is the product of performance objectively measurable, the delegating party remains secondarily liable for performing the delegated obligations (see *McKinnie*, 597 S.W.2d at 957). However, other types of performance are more subjective, either:

- Involving a special relationship of trust or confidence between the parties.
- Requiring:
  - special types or levels of talent, skill, training, or knowledge;
  - taste or discretion;
  - character; or
  - reputation.

(See, for example, *McKinnie*, 597 S.W.2d at 957 and *Bolin Oil Co. v. Staples*, 496 S.W.2d 167, 176-77 (Tex.Civ.App.—Fort Worth 1973, writ ref'd n.r.e.).)

In these situations, both rendering and measuring performance is less objective and more personal. If performance from a substitute obligor would materially alter the benefit bargained for by the non-delegating obligee, courts often hold that:

- Performance is personal.
- The duties are non-delegable.

(*In re FH Partners, L.L.C.*, 335 S.W.3d at 762-63.)

The courts consider the facts and circumstances to make this determination. There is no specific legal test. Obligations under personal services **contracts** often fall into this category of non-delegable duties (see **Personal Services Contracts**), but obligations of a business entity under some types of professional services agreements (notably those that rely on the services of particular employees or contractors, for example, a film production agreement or an architectural design **contract**) may be treated similarly.

## Contractual Anti-Assignment and Anti-Delegation Clauses

Instead of relying on a somewhat ambiguous legal structure, most parties to **commercial contracts** choose to address issues of transferability in the written agreement. Therefore, most **commercial contracts** contain a negative **covenant** (an anti-**assignment** and anti-delegation clause or an **assignment** and delegation clause) that limits either party's or both parties' rights of **assignment** and delegation.

These clauses often also contain express exceptions permitting one or more of the parties to assign and delegate rights and obligations, usually to specified non-parties such as affiliates and successors-in-interest to the transferring party's business.

Because Texas courts favor the rights of parties to freely **contract**, they commonly enforce anti-**assignment** and anti-delegation clauses, unless they infringe an applicable statute (see *Johnson v. Structured Asset Services, LLC*, 148 S.W.3d 711, 721 (Tex.App.—Dallas 2004, no pet.); see also *Texas Dev. Co.*, 119 S.W.3d at 881). However, Texas law also favors the free alienability of property (see *Randolph v. Terrell*, 768 S.W.2d 736 (Tex.App.—Tyler 1987, writ denied); see also *Proctor v. Foxmeyer Drug Co.*, 884 S.W.2d 853, 861 (Tex.App.—Dallas 1994, no writ)). Therefore, courts generally construe these provisions narrowly (see *Rumbin v. Utica Mut. Ins. Co.*, 254 Conn. 259, 268-77 (2000)).

Parties should draft anti-**assignment** and anti-delegations carefully to support their intended result (see [Drafting Anti-Assignment and Anti-Delegation Clauses](#)).

## Drafting Anti-Assignment and Anti-Delegation Clauses

When drafting or negotiating an anti-**assignment** and anti-delegation clause, there are several key points that the parties should consider, including:

- Directly addressing **assignment** of rights and delegation of performance (see [Directly Addressing Assignment and Delegation](#)).
- Clarifying the universe of restricted transfers (see [Clarifying the Universe of Restricted Transfers](#)).
- Designating the non-transferring party's consent rights (see [Designating the Non-Transferring Party's Consent Rights](#)).
- Specifying exceptions to non-transferability (see [Specifying Exceptions to Non-Transferability](#)).
- Requiring notification of a permitted transfer (see [Requiring Notification of a Permitted Transfer](#)).
- Including a declaration that impermissible transfers are void (see [Including a Declaration That Impermissible Transfers Are Void](#)).
- Adding a novation to the anti-**assignment** and anti-delegation provision (see [Adding a Novation to the Anti-Assignment and Anti-Delegation Provision](#)).

For more information on drafting and negotiating anti-**assignment** and anti-delegation clauses, see [Standard Clause, General Contract Clauses: Assignment and Delegation \(TX\)](#). For more information on subcontracting, see [Standard Clauses, General Contract Clauses: Subcontracting](#).

## Directly Addressing Assignment and Delegation

Contractual language prohibiting "**assignment** of the **contract**" (instead of specifically addressing **assignment** of rights, delegation of obligations, or both) is commonly considered by courts to prohibit only the delegation of performance and not the **assignment** of rights ([Tex. Bus. & Com. Code Ann. § 2.210\(d\)](#) and [Restatement \(Second\) of Contracts § 322](#)).

However, contractual language expressly permitting "**assignment** of the **contract**" is commonly construed to permit the **assignment** of rights and the delegation of performance ([Tex. Bus. & Com. Code Ann. § 2.210\(e\)](#) and [Restatement \(Second\) of Contracts § 328\(1\)](#)). For clarity, the non-**assignment** and non-delegation clause should not address **assignment** of the **contract** generally. Instead, it should specifically reference **assignment** of rights and delegation of performance.

## Clarifying the Universe of Restricted Transfers

Some anti-**assignment** and anti-delegation clauses do not include general restrictions against transferability, and instead state the types of transfers that are permissible. However, this formulation is ambiguous for any non-specified transfers that are not generally restricted by law. To avoid ambiguity, parties should include a comprehensive restriction, followed by any exceptions to the general prohibition (see [Specifying Exceptions to Non-Transferability](#)).

In addition, the language of the general prohibition should:

- Specify whether it is limited to voluntary transfers or includes involuntary transfers.
- Identify the particular types of transactions (for example, mergers and dissolutions) that qualify as involuntary transfers.

Parties should avoid generally referencing involuntary transfers as "transfers by operation of law" because courts construe this term inconsistently (see [Transfers by Operation of Law](#)).

If a change of control is intended to be treated as an **assignment** for purposes of this provision, the parties should precisely define "change of control," including whether it is limited to a direct change in that party's ownership or management or also applies indirectly if there is a change in the ownership or management of a direct or indirect controlling parent company (see, for example, [Tenneco Inc. v. Enterprise Products Co.](#), 925 S.W.2d 640, 646 (Tex. 1996)).

## Designating the Non-Transferring Party's Consent Rights

If the non-assigning or non-delegating party's consent is required for some or all transfers, the clause should specify if:

- The consenting party has complete discretion or must not unreasonably withhold its consent.
- Consent must be in writing.
- Consent must be obtained before making the transfer.
- Obtaining consent is a contractual obligation or a condition precedent to the right to make the transfer.

For a sample form of request for consent to the **assignment** of a **commercial contract**, see [Standard Document, Request for Consent to Assignment of Contract \(TX\)](#).

## Specifying Exceptions to Non-Transferability

The clause should also clearly address whether exceptions for permitted transfers are either:

- Broadly applicable, allowing the designated party to assign or delegate freely to any non-party.
- Limited to specified categories of non-parties (such as affiliates and acquirors of all or a significant portion of the transferor's assets). The parties should also consider whether any temporal modifiers are necessary. For example, without temporal modifiers, past or future affiliates could be unintentionally excluded as permitted transferees (see *WesternGeco, L.L.C. v. Input/Output, Inc.*, 246 S.W.3d 776, 786 (Tex. App.—Houston [14th Dist.] 2008) ("future affiliate" did not include company that was not in existence at the time the **contract** was entered into); see also *Ellington v. EMI Music, Inc.*, 24 N.Y.3d 239, 246 (2014) (holding the use of the term "affiliates" in a **contract** includes only those affiliates in existence at the time **contract** was executed, absent clear and unambiguous language indicating that the parties intended to bind future affiliated parties to the underlying contractual obligations)).

The parties should specify each type of transfer that is excluded from the general prohibition.

### Requiring Notification of a Permitted Transfer

Consider whether circumstances support adding a requirement for the transferring party to notify the non-transferring party of any permitted transfer that is made. If included, the provision should specify whether the required notice is a contractual obligation or a condition subsequent to the right to make the transfer.

Even if the **contract** does not impose a notification requirement, the assignee is usually concerned about ensuring that notice of an **assignment** is promptly given to the non-transferring party. While the law does not formally require written notice of an **assignment**, an assignee takes the **assignment** subject to all defenses of the non-transferring obligor as against the assignor that arise before effective notice of the **assignment** (*Robert Parker's Truck & Trailer Repair, Inc. v. Speer*, 722 S.W.2d 45, 48 (Tex.App.-Houston [1st Dist.] 1986, no writ)).

If the non-transferring party delivers payment to the assignor instead of the assignee, it is not liable to the assignee if it did not have reason to know of the **assignment**. Upon receipt of notice, the non-transferring party is required to direct payment to the assignee (see *Buffalo Pipeline Co. v. Bell*, 694 S.W.2d 592, 596 (Tex. App. 1985) (any payment by the debtor to the original creditor (assignor) is effective against an assignee if the debtor makes the payment in good faith, without notice of the **assignment**)).

Therefore, it is in the assignee's best interest to notify the non-transferring party of any permitted **assignment** as quickly as possible. The assignee may separately obligate the assignor to deliver this notice or instead notify the non-transferring party itself. For a sample notice of **assignment**, see [Standard Document, Notice of Assignment \(TX\)](#).

### Including a Declaration That Impermissible Transfers Are Void

Because anti-**assignment** and anti-delegation clauses are typically construed narrowly, many Texas courts have held that language prohibiting **assignment** or delegation triggers a breach but does not to make the transfer invalid. This means that the non-transferring party may claim that the transferring party has breached the **contract** by making the transfer but cannot attack the validity of the transfer itself (see *Reuben H. Donnelley*, 688 S.W.2d at 615 (citing *Restatement (Second) of Contracts* § 322(2)(b) (1981); see also *Gips v. Red Robin Corp.*, 366 S.W.2d 853, 857 (Tex.App.—Houston 1963, writ ref'd n.r.e.)).

However, other courts in Texas have held that if a **contract** includes an anti-**assignment** clause, any non-conforming **assignment** made will be void or invalid (see *Texas Dev. Co.*, 119 S.W.3d at 881).

Notwithstanding the differing opinions of the Texas courts, the non-assigning or non-delegating party often prefers to limit the other party's power to transfer, not merely its right to transfer. Therefore, parties should consider including both:

- A negative covenant restricting transfer.
- A declaration that a prohibited transfer is invalid.

This formulation:

- Provides the non-assigning or non-delegating party with a claim for breach if a restriction is violated.
- Renders the prohibited **assignment** or delegation ineffective.

### **Adding a Novation to the Anti-Assignment and Anti-Delegation Provision**

When a non-**assignment** and non-delegation clause includes exceptions for permitted transfers, a party with sufficient negotiating leverage should consider trying to include novation language in the anti-**assignment** and anti-delegation provision. This language, which is not commonly included in most anti-**assignment** and anti-delegation clauses, provides that when a permitted transfer is made:

- The transferee is deemed substituted for the transferor as a party to the agreement.
- The transferor is released from all of its obligations and duties to perform under the agreement.

Without a novation, the transferor remains liable to the remaining party if the transferee does not perform the delegated obligations.

For more information on novation, see [Novation](#) and [Standard Document, Novation Agreement \(Short Form\) \(TX\)](#).

## **Applications to Some Major Types of Contracts**

Many types of **commercial contracts** routinely include a contractual anti-**assignment** and anti-delegation clause. If not, transferability depends on the subject matter of the **contract** and the nature of the rights and obligations that are to be transferred. This Note discusses applications to the following major types of **contracts**:

- **Contracts** for the sale of goods (see [Contracts for the Sale of Goods](#)).
- Distribution and franchise agreements (see [Distribution and Franchise Agreements](#)).
- Personal services **contracts** (see [Personal Services Contracts](#)).
- Intellectual property licenses (see [Intellectual Property Licenses](#)).
- **Commercial** real estate leases (see [Commercial Real Estate Leases](#)).
- **Commercial** real estate sale agreements (see [Commercial Real Estate Sale Agreements](#)).
- Merger and acquisition agreements (see [Merger and Acquisition Agreements](#)).
- Construction **contracts** (see [Construction Contracts](#)).

- Loan agreements (see [Loan Agreements](#)).
- Insurance **contracts** (see [Insurance Contracts](#)).

## **Contracts for the Sale of Goods**

Rights and obligations under **contracts** for the sale of goods generally are assignable and delegable. Exceptions may include, for example, an exclusive requirements or output **contract**, or a **contract** for a particularly unique product. Otherwise, most supply **contracts** do not involve the type of performance that courts view as non-transferable (see [Ability to Assign Rights](#) and [Ability to Delegate Performance](#) for the approach taken under the UCC).

The UCC provides that if performance is delegated, the non-delegating obligee may treat delegation as reasonable grounds for insecurity and demand adequate assurances of performance from the delegatee. Failure to give that assurance acts as a repudiation of the **contract** by the delegating party. (Tex. Bus. & Com. Code Ann. §§ 2.609 and 2.210(f) and see [Practice Note, Anticipatory Repudiation and Adequate Assurances of Future Performance](#).)

Many supply agreements contain express anti-**assignment** and anti-delegation clauses, often with exceptions for transfers to affiliates and successors-in-interest to all or a significant portion of the party's business. However, even if a supply agreement includes a restrictive anti-**assignment** and anti-delegation provision, parties should note that the UCC:

- Permits a party to assign its right to sue for breach of the **contract** despite the restriction (Tex. Bus. & Com. Code Ann. § 2.210(b)).
- Invalidates a contractual provision that prohibits **assignment** of an **account**, which includes the right to receive payment under the **contract** (Tex. Bus. & Com. Code Ann. § 9.406). This means, for example, that an anti-**assignment** provision cannot prevent a seller from:
  - using its receivables as collateral when it borrows money from an asset-based lender; or
  - factoring its receivables.

## **Distribution and Franchise Agreements**

Distribution and franchise agreements are often considered more personal than sale of goods **contracts**. Selection of a distributor or franchisee is based on many individual factors and, in both situations, the counterparty is marketing and selling:

- The manufacturer's or franchisor's products.
- Products or services under the franchisor's or manufacturer's trademarks.

In many cases, **assignment** or delegation by the distributor or franchisee can be harmful to the supplier's or franchisor's business if the transferee is not as capable and financially secure as the transferor, which is a particular concern for the franchisor. In addition, the non-transferring party is often concerned that the distributor or franchisee may transfer the **contract** to a competitor of the non-transferring party.

Therefore, franchisors and parties supplying goods to distributors typically insist on unilaterally limiting the franchisee's or distributor's transferability rights in a contractual anti-**assignment** and anti-delegation clause (see, for example, *Walner v. Baskin-Robbins Ice Cream Co.*, 514 F. Supp. 1028, 1030 (N.D. Tex. 1981)). These clauses often:

- Restrict the identity or categories of permitted transferees.
- Specify the terms that must be included in any **assignment** and delegation agreement.
- Reserve the non-transferring party's right to review and approve the proposed transferee and related deal terms.
- In a franchise agreement, require the transferring franchisee to make a transfer payment to the franchisor.

For more information on transferability of franchise agreements, see [Drafting and Negotiating a Franchise Agreement Checklist](#).

## Personal Services Contracts

Personal services **contracts**, including employment agreements, are often considered sufficiently personal in nature that they are held to be non-transferable without obtaining the consent of the non-transferring party. While the classic case typically concerns the delegation of obligations by the service provider, many courts similarly restrict **assignment** of the service recipient's rights in certain circumstances.

Service providers are often unconcerned about the identity of the party that is responsible for paying for the services rendered (noting that the original obligor remains secondarily liable for performance). However, in some situations, the nature of the services is sufficiently personal that public policy interests protect the service provider against being obligated to perform for a substitute obligee, especially where performance is guided by the discretion of the service recipient (see, for example, *American Biomedical Corp. v. Anderson*, 546 S.W.2d 112, 116 (Tex.Civ.App.-Amarillo 1977, no writ) and *Spengler v. Pitluk*, 261 S.W.2d 470 (Tex.Civ.App.—San Antonio 1953, writ dismissed) (both cases holding that an executory **contract** for personal services cannot be assigned by the employer without the consent of the employee)).

Therefore, in Texas the general rule is that most personal services **contracts** are not transferable without the non-transferring party's consent (see *American Biomedical Corp.*, 546 S.W.2d at 116; see also *Spengler*, 261 S.W.2d 470).

Many personal services **contracts** contain an express anti-**assignment** and anti-delegation clause that addresses each party's transferability rights and restrictions. These provisions often permit the services recipient (but usually not the service provider) to both assign rights and delegate duties, commonly limited to that party's affiliates and to successors-in-interest to all or a material portion of the transferring party's business.

## Intellectual Property Licenses

Transferability of [intellectual property](#) (IP) licenses often depends on:

- Whether the transferor is the licensor or the licensee.
- The type of IP covered by the license.
- Whether the license is exclusive or non-exclusive.

Note that federal law may apply to the transferability of intellectual property licenses.



## Licensors

Unless an IP license contains an anti-**assignment** or anti-delegation provision, licensors can generally assign rights and delegate performance (while remaining secondarily liable) under the license agreement (see *IP Innovation L.L.C. v. Google, Inc.*, 661 F. Supp. 2d 659, 664 (E.D. Tex. 2009)).

## Licensees

However, even if the IP license does not restrict transferability by the licensee, the policy interest in permitting the licensor to control the use of its IP often supports non-transferability by the licensee. Therefore, as a general rule, non-exclusive IP licenses are not transferable by the licensee without the licensor's consent (see *SuperSpeed, L.L.C. v. Google, Inc.*, 2 F. Supp. 3d 952, 963 (S.D. Tex. 2014)). The rule regarding exclusive licenses varies, depending on the type of IP that is being transferred.

While courts often hold that exclusive **patent** and **trademark** licenses are non-transferable by the licensee, exclusive **copyright** licenses, which are treated under the federal **Copyright Act** as exclusive transfers of ownership, are usually transferable by the licensee (see *Guzman v. Hacienda Records, L.P.*, 2015 WL 789113, at \*1 (S.D. Tex. Feb. 24, 2015) (stating the requirements for a transfer of copyright ownership)).

Most courts will enforce contractual provisions that expressly permit or restrict transferability.

For more information on contractual restrictions, see [Practice Note, IP Licenses: Restrictions on Assignment and Change of Control](#). For information on when a licensor's consent may be required in connection with an M&A transaction, see [IP Licenses: Restrictions on Assignment and Change of Control Flowchart](#).

## Commercial Real Estate Leases

In Texas, absent a provision in a **commercial** real estate lease stating otherwise, tenants cannot sublet or assign without the landlord's prior consent (*Tex. Prop. Code Ann. § 91.005*; see also *718 Associates, Ltd. v. Sunwest N.O.P., Inc.*, 1 S.W.3d 355, 362 (Tex. App.—Waco 1999, pet. denied)). Case law interprets § 91.005 to apply to both **assignments** and subleases (*718 Assocs., Ltd.*, 1 S.W.3d at 362). Additionally, Texas courts have held that there is no implied covenant by the landlord to act reasonably in withholding its consent (*Reynolds v. McCullough*, 739 S.W. 2d 424, 429 (Tex. App.—San Antonio 1987, writ denied)).

In Texas, an **assignment** of lease does not release the tenant or assignor from future liability under the lease, absent a provision stating otherwise (*Twelve Oaks Tower I, Ltd. v. Premier Allergy, Inc.*, 938 S.W.2d 102, 114 (Tex. App.—Houston [14th Dist. 1996, no writ])). An original lessee that assigns its interest in a lease, unless expressly released by the original lessor, becomes a surety or guarantor of the rental payments and remains liable therefor to the original lessor (*Dameron Oil Co., Inc. v. Majeed*, 2004 WL 1211620, at \*2 (Tex. App.—Waco June 2, 2004, pet. denied)). A lessee is not released from his obligation to pay rent by the fact that it has assigned the lease with the lessor's consent (*Martinez v. Ball*, 721 S.W.2d 580, 581 (Tex. App. – Corpus Christi 1986, no writ)).

The tenant's right to assign or sublease is typically a key issue when negotiating a **commercial** real estate lease. Parties often negotiate whether **assignment** provisions in leases also expressly define an **assignment** to include a change of control (whether direct or indirect). Another commonly negotiated aspect of the **assignment** clause is whether the landlord can withhold its consent in its sole discretion or whether the landlord must not unreasonably withhold, condition, or delay consent.

Tenants often try to negotiate for certain exemptions to the landlord's consent requirement for an **assignment**. For example, a landlord's consent may not be required when the tenant:

- Sells all or substantially all of its business assets.
- Undergoes a merger or consolidation.
- Transfers the lease to a wholly owned subsidiary or affiliate of the original tenant.

In a **commercial** lease, these actions by the tenant are often referred to as "permitted transfers" and they reduce the landlord's ability to get involved with the tenant's merging or consolidating businesses.

For more information on lease **assignment**, see Standard Documents:

- [Landlord Consent to \*\*Assignment\*\* of Lease](#).
- [Standard Document, \*\*Assignment\*\* and Assumption of Leases \(\*\*Commercial\*\* Real Estate Purchase and Sale\) \(TX\)](#).
- [Assignment and Assumption of Leasehold Interest in Corporate Transactions \(Short Form\)](#).

To analyze the interpretation of **assignment** clauses across Texas and multiple states, see:

- [State Q&A: Real Estate Leasing: Texas: Questions 13-17](#).
- [State Q&A: Managing \*\*Commercial\*\* Real Estate Leases: Texas: Question 16](#).
- [Real Estate Leasing: State Q&A Tool: Questions 13, 14, 15, 16, and 17](#).
- [Managing \*\*Commercial\*\* Real Leases: State Q&A Tool: Question 16](#).

For further information, see [Practice Note, \*\*Assignment\*\* and Subleasing: Leasing Fundamentals](#).

## **Commercial Real Estate Sale Agreements**

A **contract** for the sale of real property is generally transferable unless the purchase agreement expressly restricts transferability. However, many purchase agreements include anti-**assignment** and anti-delegation clauses prohibiting the purchaser from transferring the **contract**, often subject to standard exceptions for affiliates and successors-in-interest to the purchaser's assets.

Many **commercial** lenders providing acquisition funding for a real property purchase require the purchaser to create a [special purpose entity](#) (SPE) to own the purchased property. If the SPE has not been formed before the purchase agreement is executed, the purchaser must ensure that the agreement does not prohibit transfer of the sales **contract** to the newly formed entity. A commonly negotiated aspect of a purchase agreement is whether the purchaser may assign the agreement to the SPE without the seller's consent. Alternatively, the purchaser may want to negotiate that the seller may not unreasonably withhold, condition, or delay consent.

For more information on **commercial** real estate agreements, see [Purchase and Sale Agreement \(\*\*Commercial\*\* Real Estate\) \(Pro-Seller Short Form\) \(TX\): Section 14.08](#).

## **Merger and Acquisition Agreements**

Merger and acquisition agreements typically include an anti-**assignment** and anti-delegation provision restricting each party from assigning its rights or delegating its obligations under the **contract** to a non-party without obtaining the non-transferring party's prior written consent. Buyers commonly try to

negotiate an exception to this restriction that would permit transfer of the agreement to a subsidiary when they intend to have a different entity purchase the stock or assets from the seller (or, with a merger, to use a different entity in the merger transaction).

For sample anti-**assignment** provisions used in merger and acquisition agreements, see [Standard Documents, Stock Purchase Agreement \(Pro-Buyer Long Form\): Section 10.07](#) and [Merger Agreement \(All-Cash, Pro-Buyer\): Section 8.11](#).

For information on **contract** transferability issues that may arise in the context of M&A transactions, see [Sale of a Business](#).

## Construction Contracts

Construction **contracts** are generally transferable unless the parties agree otherwise. Similar to the sale of goods, these agreements are considered less personal than other types of service **contracts**.

However, parties often enter into a construction **contract** intending to work with a specific owner or contractor and each party desires to preserve the identity of the original contracting party. Therefore, in practice, most construction **contracts** contain anti-**assignment** and anti-delegation clauses that restrict transfer of the agreement without obtaining the other party's consent. These provisions often include standard exceptions that permit transfer by:

- Either party to its affiliates and successors-in-interest to its assets.
- The owner to a purchaser of the owner's interest in the construction project before completion.

Construction **contracts** also commonly address:

- The contractor's rights and restrictions regarding subcontracting, and whether the owner's consent is required.
- Requirements regarding the terms of any permitted subcontracting agreements.

## Loan Agreements

**Commercial** loan agreements typically include complex anti-**assignment** and anti-delegation provisions that:

- Restrict the borrower from transferring any of its rights or obligations under the loan agreement without obtaining the consent of each lender.
- Address the terms and conditions under which lenders may:
  - transfer all or part of the loan to another lender (commonly referred to as an **assignment** even though it includes a full transfer of rights and obligations, and a novation where one lender is substituted for another and the loan agreement is amended to include the assignee as a party); or
  - sell an interest in the loan (known as a participation) to another lender that does not become a party to the loan agreement, and who **contracts** and interacts solely with the lead lender.

Participations typically do not require the borrower's consent. However, because loan **assignments** involve a novation, the borrower's consent is usually required, except under certain circumstances (such as the existence of a default or for **assignments** to other lenders or their affiliates). Some [syndicated loan](#) agreements include language providing that the borrower is deemed to have consented to the

**assignment** if it does not object to it within a stated period of time.

For more information on loan transfers, see [Practice Note, Assignments and Participations of Loans](#) and [Standard Clauses, Loan Agreement: Assignment and Participation Clauses](#).

## Insurance Contracts

Insurance **contracts** are generally transferable unless they contain express transferability restrictions. Most insurers want to restrict the insured from transferring the **contract** because a different insured may present a different risk profile and increase the insurer's liability exposure. Therefore, insurance policies typically contain anti-**assignment** and anti-delegation restrictions that prohibit transfer by the insured without the insurer's consent.

Many courts distinguish between transfer of the policy and transfer of claims under the policy. They often limit application of contractual anti-**assignment** and anti-delegation provisions to prohibit transfer of the **contract** itself, but not of claims for covered losses insured under the **contract**. Once a loss occurs, the only **contract** right involved is the right to receive proceeds for covered losses, which does not impact the insurer's liability exposure.

## Assignment Issues in Certain Commercial Contexts

Certain types of **commercial** transactions and matters present unique considerations relating to **contract** transferability. These include:

- Assignability of **contracts** in the sale of a business (see [Sale of a Business](#)).
- Internal corporate reorganizations that involve the merger, consolidation, or conversion of a contracting party (see [Corporate Reorganizations](#)).
- A borrower's grant of a security interest in its accounts and general intangibles (see [Secured Transactions](#)).
- Debtors' rights to assign **contracts** in bankruptcy (see [Bankruptcy](#)).

### Sale of a Business

In the sale of a business, the structure of the sales transaction determines whether any **contract** transferability issues are implicated. As a technical matter, some types of sales (for example, a stock sale) do not involve actual asset transfers (see [Change of Control](#)), while other types of sales (for example, asset sales) do involve an asset transfer.

In general, **contract assignment** and delegation issues arise if the transaction is structured as:

- An asset sale.
- A [forward merger](#) or [forward triangular merger](#).

If an asset transfer occurs, anti-**assignment** clauses in the target's business **contracts** may trigger a breach or prevent the **assignment** of the applicable **contracts**, or both, unless the non-assigning parties to the **contracts** consent to the transfer (for more information on acquisition structures, see [Practice Note, Private Acquisition Structures](#)).

To address this issue, sellers are typically required to obtain the necessary consents before closing.

Non-assignable **contracts** (where consents are not obtained) are excluded from the transaction (see, for example, [Standard Document, Asset Purchase Agreement \(Pro-Buyer Long Form\): Section 2.02](#)). For a sample form of request for consent to the **assignment** of a **commercial contract**, see [Standard Document, Request for Consent to Assignment of Contract \(TX\)](#).

The result usually differs for a transaction structured either as a stock sale or a [reverse triangular merger](#). Typically, neither of these structures involves a technical transfer of the contracting party's assets, and in many jurisdictions, including Delaware, generally they do not implicate anti-**assignment** or anti-delegation clauses (see *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62, 88 (Del. Ch. 2013) and [Legal Update, Delaware Court of Chancery Holds that Reverse Triangular Mergers Do Not Trigger "Assignment by Operation of Law" Provisions](#)).

Texas courts have not directly addressed whether a stock acquisition triggers an anti-**assignment** provision. The Texas Supreme Court, however, held that a stock acquisition was not a sale or **assignment** that would trigger a right of first refusal provision where the parties failed to include "change of control" language (see *Tenneco*, 925 S.W.2d at 646). In the context of an anti-**assignment** clause, this approach is consistent with Delaware law that a stock acquisition generally does not trigger an anti-**assignment** and anti-delegation provision (see *Baxter Pharm. Products, Inc. v ESI Lederle Inc.*, 1999 WL 160148, at \*5 (Del. Ch. 1999)).

Merger-based transactions may or may not implicate anti-**assignment** and anti-delegation restrictions, depending on the type of merger involved and applicable state law. Under Texas law, however, in a corporate merger of any type, generally:

- All rights, title, and interests of a merging party are vested in the surviving entity (or the new entity created by the merger).
- No transfer or **assignment** occurs.

([Tex. Bus. Orgs. Code Ann. § 10.008\(a\)\(2\)](#).)

Although Texas courts have not specifically ruled on the effect of an anti-**assignment** and anti-delegation provision on a reverse triangular merger, like most jurisdictions, they are unlikely to find that a reverse triangular merger triggers a simple anti-**assignment** and anti-delegation clause (see *TXO Prod. Co. v. M.D. Mark, Inc.*, 999 S.W.2d 137, 143 (Tex. App. - Houston [14th Dist.] 1999, pet. denied) (holding that a merger of a subsidiary into its parent did not violate an anti-**assignment** clause); see also [Tex. Bus. Orgs. Code Ann. § 10.008\(a\)\(2\)](#)).

Although an equity purchase or reverse triangular merger generally does not trigger anti-**assignment** provisions, counsel should carefully review applicable **contracts** for change of control provisions that may be triggered by the transaction.

In light of [§ 10.008\(a\)\(2\)](#), it is unlikely that a forward or forward triangular merger would trigger a simple anti-**assignment** provision. However, a forward or forward triangular merger might trigger a specifically worded anti-**assignment** and anti-delegation provision that expressly addresses this type of merger or that contains change of control language. Otherwise, a prohibited transfer is not implied by merger under Texas law unless the agreement specifically provides that merger violates an anti-**assignment** provision (see *M.D. Mark, Inc. v. Nuevo Energy Co.*, 988 S.W.2d 463, 465 (Tex. App.- Houston [1st Dist.] 1999, no pet.) and *TXO Prod. Co.*, 999 S.W.2d at 143).

Parties should be aware that certain anti-**assignment** and anti-delegation provisions may be drafted broadly to:

- Restrict all forms of mergers (including reverse triangular mergers).
- Deem a change of control to be an **assignment** for purposes of the anti-**assignment** provision.

Not all states follow the general rule that a reverse triangular merger does not result in an **assignment** of assets by operation of law. For example, one California federal district court found that an **assignment** or transfer of rights does occur through a change in the legal form of ownership of a business (see *SQL Solutions, Inc. v. Oracle Corp.* (N.D. Cal., Dec. 18, 1991) 1991 WL 626458, at \*3). However, another California federal court addressing the issue began from the presumption that a reverse triangular merger does not effect a transfer of rights (see *Florey Institute of Neuroscience and Mental Health v. Kleiner Perkins Caufield & Byers* (N.D. Cal., Sept. 26, 2013) 2013 WL 5402093, at \*4-5).

## Corporate Reorganizations

When a company reorganizes its corporate structure, it faces the same transferability issues applicable to the sale of a business if either or both:

- Assets are distributed.
- The contracting entity merges into or consolidates with a different entity.

In each of these cases, assets, including **contracts**, are transferred as a technical matter, and the law in some states may treat the underlying event as triggering a transfer (for a discussion of the treatment of asset transfers and mergers in Texas, see [Sale of a Business](#)). Therefore, depending on the details of the transaction, a **contract** transfer may be impermissible, especially if the transferred **contract** contains a broadly drafted anti-**assignment** and anti-delegation clause (see [Box, Transfers by Operation of Law](#)).

An exception may apply, however, when a legal entity converts from one type of business entity into another type of business entity (for example, when a [limited liability company](#) (LLC) converts into a corporation).

An increasing number of states, including Texas, have enacted statutes that permit an existing business entity (typically, a corporation, LLC, or limited partnership) to convert into a different type of business entity (also typically a corporation, LLC, or limited partnership) ([Tex. Bus. Orgs. Code Ann. § 10.101](#)). While state conversion statutes often differ in their scope (including, for example, whether they apply equally to domestic and foreign corporations), many conversion statutes deem that:

- The original entity's existence continues. ([Tex. Bus. Orgs. Code Ann. § 10.106\(1\)](#)).
- No **assignment** of the converting entity's assets occurs. ([Tex. Bus. Orgs. Code Ann. § 10.106\(2\)\(C\)](#)).

Some statutes even include language that expressly states that a converted entity is for all purposes the same entity that it was before the conversion (see, for example, [Del. Code. Ann. tit. 8, § 265](#)).

If a party undertaking a corporate reorganization is concerned about running into **contract** transferability restrictions, it may be able to use a conversion to avoid triggering a restricted asset transfer during the reorganization process. However, broadly drafted anti-**assignment** and anti-delegation language in a loan agreement, for example, may be triggered even by a conversion and make it necessary to obtain consent before the conversion can occur (see [Loan Agreements](#)). Parties contemplating conversion should do careful diligence to confirm that their business **contracts** will not require prior consent.

For more information on entity conversions, see [Entity Conversion Checklist \(TX\)](#).

## Secured Transactions

The grant of a security interest to a secured party includes an **assignment** of the grantor's rights in the collateral (but not a delegation of obligations). Under UCC Article 9, many **commercial contracts** that give one party the right to receive payment of a monetary obligation are likely to be considered accounts or payment intangibles (a subcategory of **general intangibles**). Borrowers and other parties that grant security interests to lenders and other secured parties may be concerned that the lien granted to the secured party violates any anti-**assignment** clauses in its **contracts**.

UCC Article 9 eliminates this concern. Under the UCC, an anti-**assignment** clause is rendered ineffective if it attempts to restrict or prevent the grant of a security interest in an account or a general intangible (*Tex. Bus. & Comm. Code Ann. §§ 9.406(d) and 9.408(a)*).

Therefore, the UCC permits the lender to take a security interest in the asset despite the terms of the agreement between the grantor and non-assigning party to the **contract**. However, while this right to take a security interest may allow the secured party receive the proceeds of the asset, it may not allow the secured party to "step into the shoes" of the grantor without the consent of the non-assigning party.

For more information on secured transactions, see [Practice Note, UCC Creation, Perfection, and Priority of Security Interests](#).

## Bankruptcy

Under [Section 365 of the Bankruptcy Code](#), a debtor has the power to assume, assign (a term of art that covers both **assignment** and delegation), or reject **executory contracts** and unexpired leases. Technically, any transfer to a non-party violates a contractual anti-**assignment** and anti-delegation provision. However, the Bankruptcy Code invalidates contractual anti-**assignment** clauses in this context (*11 U.S.C. § 365(f)(1)*).

While assignability is the general rule, **contracts** that are non-transferable without consent under non-bankruptcy statutory or common law (for example, personal services agreements) are also non-assignable under bankruptcy law. In these cases, the general rules of assignability apply, even if the **contract** does not contain a specific anti-**assignment** and anti-delegation provision, unless the non-debtor party consents to the transfer.

For more information on assignability under bankruptcy law, see [Practice Note, Executory Contracts and Leases: Overview: Anti-Assignment Clauses](#).

## Transfers by Operation of Law

The law of **contract** transferability is often more permissive in its treatment of involuntary transfers, including those transfers categorized as occurring by operation of law. This distinction is particularly relevant when a **contract** has an anti-**assignment** and anti-delegation clause, which, for involuntary transfers, is more narrowly construed (see [If the Contract Has an Anti-Assignment and Anti-Delegation Clause](#)).

Examples of transfers that are generally considered to occur by operation of law include:

- Testamentary dispositions.
- Court-ordered asset **assignments** in bankruptcy proceedings (see, for example, *B & L Farms Co. v. United States*, 368 F.2d 571, 572 (5th Cir. 1966)).
- Court-ordered transfers in divorce proceedings.



- Assets transferred when a business entity is merged into another business entity.

However, courts do not universally construe this term or consistently rule on whether a particular transfer by operation of law is permissible. Therefore, to make this determination, the parties must look to:

- State corporate and business entity law.
- State **contract** law.
- The precise language of any contractual anti-**assignment** or anti-delegation provision.

### If the **Contract** is Silent on Transferability

If a transfer has occurred and the **contract** does not restrict transferability, the general rule permitting transferability usually applies (see [General Rules Governing Assignment and Delegation](#)). Similar to other types of transfers, courts typically consider the effect of the transfer on the non-transferring party. This is often a fact-intensive inquiry.

In the business merger context, courts often hold that the transfer is permissible if a merger or other consolidation or dissolution does not result in a change of beneficial ownership or a change in the management or affairs of the transferred business, and should therefore not adversely affect or prejudice the non-transferring party. For a discussion of the treatment of mergers under Texas law, see [Sale of a Business](#).

For resources addressing the transferability of IP assets in M&A transactions, see [Intellectual Property in M&A Transactions Toolkit](#).

### If the **Contract** Has an Anti-**Assignment** and Anti-Delegation Clause

The fact that a **contract** contains an anti-**assignment** and anti-delegation clause is not always determinative. Because courts construe anti-**assignment** and anti-delegation clauses narrowly, many courts permit involuntary transfer of **contracts** by operation of law, even if the **contract** includes a general transfer restriction. In some states, there is no general rule regarding permissibility of involuntary transfers and the courts take various fact-based approaches. The leading approaches focus on:

- **The intent of the parties.** Many courts look to the intent of the parties when determining whether a general transferability restriction covers a particular transfer. Some courts have held that a general transfer restriction does not indicate the intent to include transfers by operation of law and only applies to voluntary transfers.
- **The effect on the non-transferring party.** Some courts focus primarily on whether the non-transferring party was adversely affected by the transfer. If the non-transferring party is not adversely affected or prejudiced by the **assignment**, many courts permit the transfer despite the presence of the contractual restriction.

Even if a contractual restriction expressly prohibits transfers made by operation of law, the result may differ, depending on:

- The particular type of transaction.
- Whether the clause specifies the types of transactions that qualify as occurring by operation of law.

If the anti-**assignment** and anti-delegation clause expressly restricts a particular type of transfer, most courts enforce that restriction as the stated intent of the parties. However, when the clause is left unspecified, results vary for different types of transactions and within different states. In particular, judicial decisions are inconsistent about whether mergers and other types of consolidations are voluntary transfers or involuntary transfers by operation of law. While some courts have addressed this question directly, others apply the same general approach used to determine whether a general transferability restriction applies (often focusing on the intent of the parties or the effect on the non-transferring party). For a discussion of the treatment of mergers under Texas law, see [Sale of a Business](#).

Parties must review appropriate state law to determine the general rule applicable to their situation. To avoid uncertainty, when drafting and negotiating a contractual anti-**assignment** and anti-delegation clause, they should consider including comprehensive and explicit language to address this issue. If the clause specifically lists the types of prohibited transfers and permitted transfers (as exceptions to a general prohibition), courts are more likely to honor the parties' actual intent (see [Drafting Anti-Assignment and Anti-Delegation Clauses](#)).

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