The Construction Lawyer

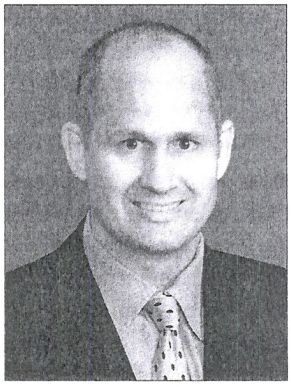
Journal of the ABA Forum on Construction Law Volume 36, Number 1, Winter 2016

Expert Testimony

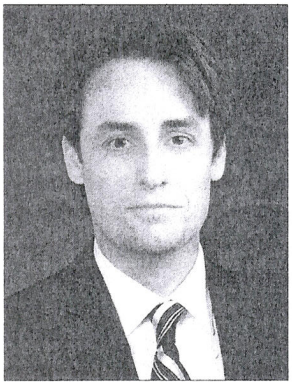
Illustration: Chad Crowe

Assignment Issues in Construction Contracts

By Ben Wheatley and Caleb Trotter



Ben Wheatley



Caleb Trotter

Many construction contracts, including most standard-form contracts such as those created by the American Institute of Architects (AIA), contain an anti-assignment clause like the following clause from the AIA Document B101-1997:

> Neither Owner nor Architect shall assign this Agreement as a whole without the written consent of the other, except that Owner may assign this Agreement to an institutional lender providing financing for the Project. . . .[1]

In most instances, this seemingly innocuous clause will remain just that, innocuous. However, the reality of the design and construction industry is that many properties will be sold early in their lives. Some properties may be transferred during the actual project design or construction, and many will be sold shortly after the completion of construction—perhaps before any potential issues with the design or construction manifest. For successors in interest and design and construction team members, this clause may be fiercely litigated in the event of problems with a project.

If your client is the successor in interest, you may be faced with major hurdles in order to demonstrate that your client has standing to bring a claim against the design or construction team members. If your client is an original design or construction team member, you may be inclined to argue that your client's potential liability regarding the project was essentially eliminated due to the sale of the property. Which party is correct? What if a cause of action on the part of the seller, against a design or construction team member, has already accrued at the time of the assignment? And where do arbitration clauses fit in the conversation?

This article will provide insight into these questions by addressing a number of issues. First, the article will examine typical language of assignment that often appears in transactional documents. Using this language as a base, the article will examine basic legal concepts regarding assignments, which may seem remedial to some but often provide the basis for assignment issues in the case law. Next, the article will connect the concepts of executory and nonexecutory contracts to the language of the AIA anti-assignment clause, discuss remedies for breach of the anti-assignment clause, and discuss what language can actually be enforced to prevent assignments. Issues concerning standing to challenge assignments and the question of arbitrability will also be addressed. Last, the article will examine unique circumstances where inartful language, or artful depending on your perspective, regarding assigns or assignment may have far-reaching and unintended consequences.

What Is an Assignment in a Purchase and Sale Agreement?

A legal assignment is a transfer or setting over of property, or of some right or interest therein, from one person to another, and unless in some way qualified, it is properly the transfer of one whole interest in an estate, chattel, or other thing.[2] The general rule is that a right may be subject to effective assignment unless (a) the assignment would result in a material increase in the risk of the obligor,[3] (b) the assignment is prohibited by contract, or (c) the assignment is prohibited by operation of law or where the contract involves a matter of personal trust or confidence.[4]

The following is a sample assignment clause from a purchase and sale agreement (PSA):

> Seller does hereby sell, assign, transfer, set-over and deliver unto Purchaser, its successors and assigns, subject to the limitations contained in the [PSA], all right, title and interest of Seller in and to:
>
> > All personal property (including equipment), if any, owned by Seller and located on or used exclusively in connection with the Property as of the date hereof, all inventory located on or used exclusively in connection with the Property on the date hereof, and all fixtures (if any) owned by

Ben Wheatley is a shareholder in the Austin, Texas, office, and Caleb D. Trotter an associate in the Dallas, Texas, office of Munsch Hardt Kopf & Harr, P.C.

The authors also want to thank their colleague Tracy McCreight for her assistance in editing this paper.

Seller and located on or used exclusively in connection with the Property as of the date hereof, including, without limitation, those items listed on the attached [exhibit] (collectively, the "Personal Property");

Because the only explicit exception to the consent prerequisite in the AIA Documents is for lenders, courts have questioned whether the AIA anti-assignment clause applies to causes of action.

That assignment will typically also contain a provision specifically assigning "intangible" assets relating to the Property, such as contracts, licenses, permits, and warranties.

> *Assignment*. Seller hereby assigns, sets over and transfers to Purchaser all of Seller's right, title and interest in, to and under the following, if and only to the extent the same may be assigned or quitclaimed by Seller without expense to Seller (collectively, the "*Intangible Property*"):
>
> (a) all service, supply, maintenance, utility and commission agreements, all equipment leases, and all other contracts, subcontracts and agreements relating to the Real Property and the Personal Property (including all contracts, subcontracts and agreements relating to the construction of any unfinished tenant improvements) that are described in *Exhibit A* attached hereto and incorporated herein by this reference (herein collectively called the "*Contracts*"); and
>
> (b) to the extent that the same are in effect as of the date hereof, any licenses, permits and other written authorizations necessary for the use, operation or ownership of the Real Property (herein collectively called the "*Licenses and Permits*");
>
> (c) any guaranties and warranties in effect with respect to any portion of the Real Property or the Personal Property as of the date hereof; and
>
> (d) all other intangible assets relating to the Property.

Basic Legal Principles Regarding Anti-Assignment Clauses

While the assignment language above addresses contracts, it does not address causes of action relating to contracts. This distinction has a significant relationship with the anti-assignment issue, especially regarding the concept of executory and nonexecutory contracts. The "intangible" assignment language holds the key. An intangible asset is a nonphysical asset that can be converted to cash or a right to something.[5] Courts generally define "intangibles" to include choses in action.[6] Additionally, the definition of chose in action includes the right to bring an action to recover a debt, money, or thing.[7] Phrased differently, a chose in action is a cause of action.[8] Originally, choses in action were not assignable at all but eventually equity, and then law, recognized the right to assign contracts and related causes of action.[9] Because anti-assignment clauses are a restriction on alienation, courts will strictly construe such clauses against the party urging the restriction.[10]

Because the only explicit exception to the consent prerequisite in the AIA Documents is for lenders, courts have questioned whether the AIA anti-assignment clause applies to causes of action. In addressing this question, courts around the country have consistently interpreted this standard, widely used AIA provision to prohibit the assignment of *performance*, but not the assignment of a post-performance cause of action.[11] In *Berschauer/Phillips Construction Co. v. Seattle School District No. 1*, the Washington Supreme Court held, where the contract in question contained substantively similar language to the sample clause provided above (neither party shall assign any interest without the written consent of the other), that "[t]he primary purpose of clauses prohibiting the assignment of contract rights without a contracting party's permission is to protect him [or her] in selecting the persons with whom he [or she] deals."[12] The court then held that where a contract is completed prior to the assignment of a breach of contract claim arising therefrom, assignment of the claim does not require consent, noting:

> A general anti-assignment clause, one aimed at prohibiting the assignment of a contractual performance, does not, absent specific language to the contrary, prohibit the assignment of a breach of contract cause of action.[13]

Additionally, the *Berschauer* court noted the distinction between an assignment for purposes of performance versus an assignment for purposes of damages, and that courts routinely "emasculated" anti-assignment clauses when specific prohibitions were not included in the clause.[14] Other courts have made similar findings with regard to the AIA anti-assignment clause and its predecessors.

In *Ford v. Robertson*, a Tennessee court of appeals noted the legal distinction between the "right to assign performance under a contract and the right to receive damages for its breach."[15] That court went on to interpret an anti-assignment clause that prohibited the assignment

or transfer of any "interest in this agreement" as meaning any interest in the performance of the *executory* contract.[16] When, at the time of assignment, all work has been performed and payment made under a contract, and the only right remaining under the contract is the right to sue for breach, an assignment of the causes of action is not barred by an anti-assignment clause.[17]

The *Ford* court cites two specific reasons as the basis for its ruling. The first is the general rule that causes of action are freely assignable.[18] The second reason references not only the distinction between executory and nonexecutory contracts, but between contracts pre- and post-breach, noting that

> [e]ven though an executory contract may be non-assignable because of its personal nature, because of a provision therein for non-assignment, or for other reasons, after an event which gives rise to a liability on a contract, the reason for the rule disappears and the cause of action arising under the contract is assignable. Thus, as indicated elsewhere, claims for money due under a contract which is non-assignable because of its personal nature may be assigned to a third person and enforced by the assignee. . . .[19]

Courts have traditionally made this distinction between an assignment of a right or thing before a loss or breach has occurred and an assignment of a right or thing after a loss or breach has occurred.[20] This is because pre-breach assignments involve the potential creation of new contractual relationships that could materially increase the risk of the nonconsenting party, whereas the post-breach assignment is supported by the law concerning the free alienability of causes in action and would not materially increase the risk of the nonconsenting party because in theory that risk has been fixed by the breach or loss.[21] Last, where the anti-assignment clause prohibits assignment "as a whole," assignment of the right to sue only constitutes a partial assignment and is not prohibited.[22]

In *Pagosa Oil & Gas LLC v. Marrs & Smith Partners*, the Texas Court of Appeals examined a mineral lease contract that allowed the lessor to expressly reserve "the right of approval of any and all assigning in whole or in part. . . ."[23] After recognizing the distinction between the assignment of obligations and performance under a contract versus the assignment of causes of action arising therefrom, the *Pagosa* court strictly construed the language of an anti-assignment clause and ruled that the language of the anti-assignment clause "did not indicate an intent to limit the parties' rights to assign a cause of action arising from an alleged breach of the lease."[24] For this reason, the *Pagosa* court recognized the assignee's right to assert a claim related to the lease even though the lease had been assigned without the lessor's approval.[25]

The Restatement (Second) of Contracts supports this interpretation of anti-assignment clauses:

> (1) Unless the circumstances indicate the contrary, a contract term prohibiting assignment of "the contract" bars only the delegation to an assignee of the performance by the assignor of a duty or condition.
>
> (2) A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested, (a) does not forbid assignment of a right to damages for breach of the whole contract or a right arising out of assignor's due performance of his entire obligation; (b) gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective; (c) is for the benefit of the obligor, and does not prevent the assignee from acquiring rights against the assignor or the obligor from discharging his duty as if there were no such prohibition.[26]

This provision of the Restatement is in support of arguments where contract rights are separated out from contract performance because, while every contract right can serve as a predicate for a cause of action when such rights are violated, the two concepts should not be treated interchangeably.[27] For example, in *Traicoff v. Digital Media, Inc.*, the U.S. District Court for the Southern District of Indiana examined a licensing agreement that contained a contractual provision preventing the assignment of "the contract" but did not specify whether the prohibition extended to the assignment of rights, duties, or both.[28] The federal court in Indiana determined that the general rule is that a prohibition on assignment of a contract refers only to delegation of duties under the contract, not assignment of rights.[29] Thus, courts generally rule that anti-assignment clauses do not render a subsequent assignment ineffective or void; rather, the assignor may simply be liable for any duties assigned.[30] Similarly, while an assignment in the face of an anti-assignment clause may create a right to damages for breach of the anti-assignment clause, the assignment itself is still not void.[31]

For example, imagine if an owner assigned not only its post-performance cause of action to a purchaser, but also its contractual performance obligations, such as timely payment to an architect. In the event the purchaser failed to fulfill the owner's payment obligations, the *owner* is still directly liable to the architect, thus effectively voiding that portion of the assignment.[32] The owner is also liable to the architect for any damages the architect sustains *as a result* of the assignment. Thus, in theory, the owner's continued liability, however, does not have the effect of voiding the post-performance, "intangible" portion of the assignment, meaning that the purchaser will still own the causes-in-action assigned to it by the owner.

It is important to note that not all assignments of causes-in-action are valid and a state-specific search should be performed in each instance where claims assignment is at issue. For example, the Texas Supreme Court has identified at least five instances where assignments of

claims have been held invalid for public policy reasons. These instances include (1) legal malpractice claims, (2) "Mary Carter" agreements,[33] (3) interests in an estate, (4) claims against a tortfeasor assigned as part of a settlement with the plaintiff where the tortfeasor then prosecutes a claim against a joint tortfeasor, and (5) claims against an insurer under certain circumstances.[34] The assignments of the above claims were held invalid because they tended to "increase and distort litigation."[35] The assignment of causes of action under an AIA contract from an owner to a purchaser does not qualify under any of these exceptions. Arguably, the assignment from an owner to a purchaser merely enables the party who has suffered damages to pursue the responsible parties and does not assign actual performance under the contract in contravention of an architect's or contractor's rights.

An example of when public policy will override the general rule in favor of assignability is found in *Kent General Hospital, Inc. v. Blue Cross Blue Shield of Delaware*.[36] In *Kent*, Blue Cross attempted to enforce an anti-assignment clause found in its subscriber agreements. The *Kent* court found that provisions in the subscriber agreements that rendered the medical benefits personal and nonassignable were vital to Blue Cross's function as a mutual, nonprofit hospital service corporation in performing its statutory duties. Therefore, public policy required the enforcement of the anti-assignment agreement, even in the face of the overwhelming public policy in favor of free alienation of causes in action.[37]

Thus, courts interpreting specific anti-assignment provisions generally agree that such clauses do not prohibit post-performance assignment of a cause of action based on contract, even when the performance of the contract was personal in nature. The rationale for this rule is that while parties have the absolute right to control the identities of the parties with which they have personal relationships, that reasoning is only valid so long as the contract is executory.[38] Once the contract has been performed and the only thing remains is payment for services rendered, the contract is no longer one for personal services and the reason for nonassignability no longer exists.[39]

Armed with knowledge of the legal principles at work, courts are still faced with a wide variety of fact patterns requiring application of these principles. What follows is a discussion of a few general fact patterns on the issue, and then a discussion of several fact patterns that, while certainly more unusual, present real issues that could be present in any anti-assignment clause dispute.

General Case Law Discussion of Anti-Assignment Clauses

In *Folgers Architects Ltd., Assignee of Folgers Architects & Facility Design, Inc. v. Kerns*, the assignee of an architect brought a cause of action against the architect's client for failure to pay the architect's fees.[40] An architecture firm named AAI contracted with Kerns for the design of various apartment developments. AAI was later merged into Folgers Architects & Facility Design, Inc. (FAFD), but AAI's original work and accounts receivable were kept separate. Following the implosion of the entire development and Kerns' failure to pay for fees, FAFD filed suit against Kerns. Shortly thereafter, AAI assigned its accounts receivable to FAFD. Subsequently, FAFD itself discontinued its operations and assigned its accounts receivable to JLK, an "assignment entity." Thereafter, Ken Folgers, former principal of FAFD, formed Folgers Architects Ltd., the plaintiff (FAL), and purchased the accounts receivable back from JLK. The trial court then allowed FAFD to amend its pleadings to identify FAL as FAFD's assignee. The original AIA contract between AAI and Kerns contained the following anti-assignment language: "Neither the Owner nor the Architect shall assign, sublet or transfer any interest in this Agreement without the written consent of the other."[41]

The trial court allowed FAL to recover on the AAI accounts despite the anti-assignment provision, and the Nebraska Court of Appeals (and, on review, the Nebraska Supreme Court) upheld the trial court's ruling. In *Folgers*, the court of appeals applied the general rule that, absent express language to the contrary, a general anti-assignment provision such as the one in the contract at issue did not preclude the assignment of the cause of action for breach of that contract, particularly in light of the fact that the assignment took place after the breach and the right for money damages had accrued.[42] The *Folgers* court, citing *Ford*, various other cases from multiple jurisdictions, and the Restatement of Contracts, held that "a contractual provision prohibiting assignment of rights under a contract, unless a different intention is manifested, does not forbid assignment of a right to money damages for a breach of the contract."[43]

In *TRST Atlanta, Inc. v. 1815 The Exchange, Inc.*, a builder challenged an assignment by an owner to a financier in conjunction with the development and construction of a 40-story apartment building.[44] TRST was the project financier for the project when it declared the project owner in default on the financing. Rather than foreclose on the project, TRST agreed to allow the original owner to convey the project to it. This was done through a general warranty deed from the original owner to TRST, whereby the original owner conveyed to TRST its ownership interest in the project. In addition to the general warranty deed, the original owner assigned "all personal property, tangible and intangible, of every kind and nature whatsoever, owned by [Club Tower L.P.] and located and/or used in connection with the Property" to TRST.[45]

After completion of the project, TRST brought an action against the builder for defective construction. At trial, the builder objected to TRST's standing to bring a claim. In support of the argument, the builder pointed to an anti-assignment provision that read as follows:

> Neither Owner nor Architect shall assign this Agreement as a whole without the written consent

> of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the contract.[46]

In rendering its decision, the Georgia Court of Appeals decided that neither the assignment of the "personalty" nor the conveyance by general warranty deed amounted to "assignment of the contract as a whole" sufficient to trigger the anti-assignment clause. While this is interesting, what the court said next is the most interesting:

> Rather, the contractual clause at issue anticipates assignments and provides that an unconsented-to assignment does not release the assignor.[47]

Thus, because the clause anticipated assignment (which many do) and was "self-contained" in terms of remedy for failure to obtain consent, the court approached the problem from the perspective of whether the clause specifically released the nonconsenting party, and because it did not, the assignment was valid.[48]

Insurance and Subrogation Rights

In *28 East 4th Street Housing Corp. v. Yen*, Yen, a tenant in a Manhattan cooperative apartment, obtained permission from the owner (28 East 4th Street) to do renovations to her top-floor apartment.[49] Yen hired a company called LGB to act as the general contractor. During the course of the work, one of LGB's subcontractors improperly performed structural modifications, leading to damage to Yen's property, the overall building facade, and the property of the apartment occupant directly below her.

The contract between Yen and LGB contained the standard anti-assignment clause referenced above, prohibiting assignment of the contract "as a whole" and also contained a waiver of subrogation for damages caused to the property that is covered by property insurance. Yen's insurance carrier settled the claims against her by 28 East 4th Street and the occupant of the apartment directly below her, and in so doing the carrier acquired a subrogated interest in Yen's claims against LGB.

Predictably, LGB objected to the insurance carrier's subrogation claim, based on the presence of a waiver of subrogation claim clause in the contract. This argument was not effective, however, because the court determined that while such a waiver would have been effective as to any subrogation claim arising from damages to Yen's property, the clause did not apply to claims arising from Yen's liability to 28 East 4th Street, or the apartment dweller directly below her, because those claims implicated Yen's liability insurance, not property insurance.[50] Next, LGB argued that the anti-assignment clause in the contract with Yen precluded Yen's assignment of the subrogated interest. The court rejected this argument, noting that assignment of a subrogated interest in a claim does not equate to "assignment of the contract as a whole."[51]

Effective Anti-Assignment Language

In *Oliver/Hatcher Construction & Development, Inc. v. Shain Park Associates*, the Court of Appeals of Michigan considered issues relating to a nonassignment clause in a standard construction contract.[52] Oliver/Hatcher was hired by 250 Martin to be the general contractor of a condominium project, and the parties executed a contract that incorporated AIA Document A201, which contains the following standard nonassignment language:

> [N]either party shall assign the contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nonetheless remain legally responsible for all obligations under the contract.

250 Martin defaulted on both the construction contract and its loan agreement with its lender, and Oliver/Hatcher filed a lien against the project. The lender foreclosed on the project and Shain Park, a third-party buyer, purchased it at the foreclosure sale. The lender's deed to Shain Park included a general assignment of all assignable contracts. In connection with the sale, 250 Martin also assigned all of its rights under the construction contracts to Shain Park through a bill of sale. Shain Park then drafted a demand letter to Oliver/Hatcher, alleging certain latent construction defects in the project. Oliver/Hatcher filed a declaratory judgment action seeking declarations from the court that, among other things, (1) the assignments were invalid and (2) Shain Park did not have contractual privity with Oliver/Hatcher and was precluded from bringing a construction defect claim. Shain Park filed a motion for summary judgment to dismiss Oliver/Hatcher's declaratory action.

The Michigan Court of Appeals ruled that the anti-assignment language in the AIA contract does not act to invalidate an assignment; rather, it simply gives rise to a cause of action for breach in the event of an assignment without consent.

On appeal brought by Shain Park, the court in *Oliver/Hatcher* reversed the trial court's ruling that the assignments from 250 Martin and the lender were invalid. The Michigan Court of Appeals ruled that the anti-assignment language in the AIA contract does not act to invalidate an assignment; rather, it simply gives rise to a cause of action for breach in the event of an assignment without consent. The court differentiated between language in the AIA contract and other contractual language

that explicitly states than an assignment without consent is "void" or "shall be deemed null and void and of no effect."[53] In reaching its decision, the *Oliver* court cited *Sweet on Construction Industry Contracts: Major AIA Documents*, as follows:

> The AIA made the classic mistake . . . of not precluding assignability, but simply stating that neither party "shall assign." This language is a promise not to assign. Breach of the promise would expose the assignor to a claim for breach, even though damages are almost impossible to show, but any assignment would still be valid.[54]

Thus, the assignments were not void and Shain Park did have contractual privity with Oliver/Hatcher. The court of appeals did not address whether the AIA contract was assigned "as a whole" or, as Shain Park argued, only the cause of action was assigned because all performance obligations under the contract were complete.

The anti-assignment clause prohibited either party from assigning "its interest" in the agreement without consent.

In contrast, the New York Court of Appeals, in *Allhusen v. Caristo Construction Corp.*, was asked to enforce an anti-assignment clause that stated that "[t]he assignment by the second party . . . of this contract or any interest therein, or of any money due or to become due by reason of the terms hereof without the written consent of the first party . . . shall be void."[55] The court noted that the issue of free alienation of property was not involved because the claimed rights arose out of a contract containing the provision the claimant sought to bar, and the right to money was just an adjunct of the rights under the contract.[56]

At first glance, this ruling seems to be at odds with the general principle found in the Restatement (Second) of Contracts § 322, but the *Allhusen* court found that it was not.[57] This is because the general rule that any property right that is not personal in nature is freely assignable and can be overcome by the contracting parties.[58] The court ruled this way because the language rendering the assignment void was written in "[c]lear language" using the "plainest words."[59]

Settlement Agreement Assignments

In *SME Industries, Inc. v. Thompson, Ventulett, Stainback & Associates, Inc.*, the Supreme Court of Utah overturned the dismissal of a subcontractor's breach of contract claim against architects Thompson, Ventulett, Stainback & Associates, Inc. (TVSA).[60] SME was a steel subcontractor on a project led by Hughes-Hunt, a general contractor hired by Salt Lake County (County) for the renovation of the Salt Lake City Convention Center. SME encountered numerous problems with the structural steel portions of the plans and specifications for the project, prepared by defendant TVSA. The TVSA–County contract contained the following anti-assignment language: "Neither [TVSA] nor the County shall assign, sublet or transfer its interest in this Agreement without the written consent of the other."[61]

As a result of cost escalation and delay, SME sought recovery from Hughes-Hunt, who in turn sought recovery from the County. Although the County originally rejected the claims, it eventually settled with Hughes-Hunt, who in turn settled with SME. Both settlements included cash consideration and the assignment of all rights, causes of action, and claims that the County had against TVSA, and in turn all rights, causes of action, and claims that Hughes-Hunt had against TVSA through the County. SME brought suit directly against TVSA for, among other things, breach of the TVSA–County contract.

The trial court dismissed SME's breach of contract claim against TVSA by granting TVSA's motion for summary judgment on the basis that the contract's anti-assignment clause precluded such a direct action by SME.[62] The anti-assignment clause prohibited either party from assigning "its interest" in the agreement without consent.[63] In rejecting the trial court's argument and overturning the dismissal of SME's claim, the Supreme Court of Utah ruled that the anti-assignment language was ambiguous—SME's argument that the language only prohibits the assignment of the contract, as opposed to causes of action arising from a breach, and TVSA's argument that the language "its interest" includes causes of action were both tenable.[64] The court first acknowledged the general rule that a prohibition on the assignment of a contract does not prohibit the assignment of a cause of action stemming from a breach of that contract, citing case law from a number of jurisdictions, as well as the Restatement of Contracts.

However, the court also made a distinction between those anti-assignment clauses that prohibit the assignment of the "contract itself" and those that "expressly state[] that the right to sue for breach of contract is nonassignable."[65] The court concluded that the clause in the TVSA–County contract was ambiguous and could reasonably be interpreted as prohibiting assignment of the contract or of any interest arising thereunder including the right to sue for breach. Accordingly, the court reversed and remanded the case for a determination regarding the intent of the parties. In its ruling, the Supreme Court of Utah stated, in dicta, that if the trial court ruled that the parties only intended to bar the assignment of the contract, as opposed to claims, SME's damages would

be limited to those damages that the County could have recovered from TVSA under the TVSA–County contract.[66]

Does a Court or Arbitrator Decide the Efficacy of an Anti-Assignment Clause?

In *Village of Westville v. Loitz Bros. Construction Co.*, the Appellate Court of Illinois considered the enforceability of an assignment from a contractor to one of its subcontractors against the Village of Westville.[67] The Village of Westville, Illinois (Village), contracted with O'Neil Brothers Construction Company (O'Neil) for the construction of a sanitary sewer system. Loitz was a subcontractor of O'Neil and was approved by the Village as such. The Village defaulted under the contract, which contained a "broad form" arbitration agreement, and Loitz proceeded to initiate arbitration proceedings against the Village. O'Neil was also a party to the proceeding. The Village moved at the circuit (trial) court level to stay the proceedings on the basis of the unenforceability of the assignment of the right to arbitrate, based on an anti-assignment clause in the contract. The circuit court denied the motion, and the Village appealed the denial.[68]

The appellate court in *Loitz* ruled that the anti-assignment provision did not preclude Loitz's right to bring its claim and enforce the arbitration provision in the assignment. The court relied almost exclusively on Second Circuit case law stating that the "right to receive moneys due or to become due under an existing contract may be assigned though the contract itself may be unassignable," drawing a general distinction between the right to sue for money damages and the right to assume a contract. So, in effect, the arbitration provision itself was the "chose in action" that was subject to the court review because it was a right arising out of or relating to the contract in question, and that all of the issues in the case were subject to arbitration.[69]

Standing to Challenge an Assignment

In *Elzinga & Volkers, Inc. v. LSSC Corp.*, the Seventh Circuit Court of Appeals was called to address a question concerning arbitrability and standing to challenge the effectiveness of an assignment.[70] At the district court level, the party opposing the assignment argued for an injunction of an arbitration proceeding and that the assignment was not effective between the assignor and the assignee because the assignment language did not clearly spell out the language of the assignment.[71] Moreover, after the district court enjoined the arbitration, the assignor and assignee executed a supplemental document expressly assigning the rights in question.[72] The district court refused to consider the clarification because it was "newly created as opposed to newly discovered evidence."[73]

First, dealing with the "newly discovered evidence," the Seventh Circuit rejected the trial court's ruling and considered the clarification, noting that were the matter before the trial court as an action for damages instead of one for an injunction, the trial court ruling might have been appropriate, but in the context of a motion to enjoin an arbitration, the court must deal with the facts as it finds them at the time of the motion.[74] Next, the appellate court rejected an argument on the part of the party opposing the assignment that the clarification was void for want of consideration, noting that the complainant, as a stranger to the bargain, had no standing to find fault with it.[75] The Seventh Circuit rejected the challenge to the efficacy of the assignment, stating:

> Whether [assignor] has transferred its entitlements to [assignee] is something that neither arbitrator nor judge should decide. The resolution of this controversy depends on the [assignor-assignee] contract, not the construction contract, and therefore is outside the arbitrator's purview. As for the court: when parties to a contract agree on its meaning—as [assignor and assignee] agree . . . there is no dispute requiring resolution.[76]

Conclusion

A careful analysis of the applicable case law, statutes, and legal commentary reveals a cogent legal doctrine for validating the assignment of causes-in-action (or other choses-in-action) in the face of an otherwise enforceable anti-assignment clause. Courts around the country have ruled that the type of anti-assignment clauses discussed in this article typically only bar the assignment of performance obligations, as opposed to post-performance causes of action. Any party seeking to resist assignment should commence the effort at the contract drafting stage. By inclusion of specific language addressing specific contract rights at that stage, a party may advance its position regarding assignment. Thus, depending on your position, a careful drafting or editing is called for, as it is in all instances where a practitioner is dealing with a concept, like assignment and anti-assignment, where there is more depth than meets the eye.

Endnotes

1. Am. Inst. of Architects, AIA Document A101-1997, § 9.5. The 2007 version of the A101 deleted the word "institutional" in reference to lenders and moved the clause from section 9.5 to section 10.3. The AIA Document A201-2007 General Conditions similarly contains an anti-assignment clause with an exception for assignment to the owner's lender: "Except as provided in Section 13.2.2 [exception for owner's lender], neither party to the Contract shall assign the Contract as a whole without written consent of the other."

2. Hunter-Wilson Distilling Co. v. Foust Distilling Co., 84 F. Supp. 996, 1000 (M.D. Pa. 1949), *rev'd in part on other grounds*, 181 F.2d 543 (3d Cir. 1950).

3. *In re* Cooper, 242 B.R. 767, 771 (Bankr. S.D. Ga. 1999); Gallagher v. S. Source Packaging, LLC, 564 F. Supp. 2d 503, 506–08 (E.D.N.C. 2008); Owen v. CNA Ins./Cont'l Cas. Co., 771 A.2d 1208, 1213–14, 1218 (N.J. Super. 2001).

4. Restatement (Second) of Contracts § 371 (1981); *Hunter-Wilson*, 84 F. Supp. at 1000 (citing Restatement of

(Continued on page 48)

53. S. H. Farghal & J. G. Everett, *Learning Curves: Accuracy in Predicting Future Performance*, 123 J. CONSTR. ENG'G & MGMT. 41 (Mar. 1997).

54. Zey Emir, *Learning Curve in Construction*, THE REVAY REPORT (Oct. 1999).

55. A. Singh, *Claim Evaluation for Combined Effect of Multiple Claim Factors*, 43 COST ENG'G, no. 12, 2001, at 13.

56. Frantzolas, *supra* note 46.

57. *Id.*

58. *Supra* note 42.

59. *Supra* note 48.

60. A. J. WALDRON, APPLIED PRINCIPLES OF PROJECT PLANNING AND CONTROL (2d ed. 1968).

61. L. V. O'Connor, *Overcoming the Problems of Scheduling on Large Central Station Boilers*, 31 AM. POWER CONFERENCE 518 (Apr. 1969).

62. M. H. Kappaz, *Effect of Scope Changes on Schedule: A Systems Approach*, 19 AACE BULL. 221, 237 (Nov./Dec. 1977).

63. Gates & Scarpa, *supra* note 44.

64. *See supra* note 15.

65. H. R. THOMAS & D.F. KRAMER, THE MANUAL OF CONSTRUCTION PRODUCTIVITY MEASURE AND PERFORMANCE EVALUATION (Constr. Indus. Inst. 1987).

66. *See* Smith, *supra* note 49.

67. NECA, EFFECT OF TEMPERATURE, *supra* note 26.

68. H. R. THOMAS & G. R. SMITH, LOSS OF CONSTRUCTION LABOR PRODUCTIVITY DUE TO INEFFICIENCIES AND DISRUPTORS: THE WEIGHT OF EXPERT OPINION, PTI REPORT 9019 (Pa. Transp. Inst. Dec. 1990).

69. Donald J. Cass, *Labor Productivity Impact of Varying Crew Levels*, AACE TRANSACTIONS, at C.2.1 et seq. (1992).

70. M. Gunduz, *A Quantitative Approach for Evaluation of Negative Impact of Overmanning on Electrical and Mechanical Projects*, 39 BLDG. & ENV'T 581 (2003).

71. A. S. Hanna, C. K. Chang, J. A. Lackney & K. T. Sullivan, *Overmanning Impact on Construction Labor Productivity*, ASCE CONSTR. RESEARCH CONGRESS (Apr. 2005).

72. THOMAS & SMITH, *supra* note 68.

73. Danac, Inc., ASBCA No. 33394, 97-2 B.C.A. (CCH) ¶ 29184, 1997 WL 484579 (July 31, 1997).

74. *See* Cass, *supra* note 69.

75. S. BILAL & H. R. THOMAS, A COMPARATIVE ANALYSIS OF LABOR PRODUCTIVITY OF MASONS IN SEVEN COUNTIES, PTI REPORT No. 9036 (Penn. St. Univ. 1990).

76. AACE INT'L, RP 25R-03, *supra* note 4.

77. The authors have a different perspective and believe the MCAA and NECA studies should be considered to be specialty-industry studies.

78. *Is There a Better Way?*, *supra* note 3, at 27, 31, 38.

79. *Id.* at 38.

80. Raytheon v. White, 305 F.3d 1354, 1365 (Fed. Cir. 2002); Youngdale & Sons Constr. Co. v. United States, 27 Fed. Cl. 516, 541 (1993); Tecom, Inc. v. United States, 86 Fed. Cl. 437, 455 (2009).

81. Servidone Constr. Corp. v. United States, 931 F.2d 860, 861 (Fed. Cir. 1991); *Youngdale*, 27 Fed. Cl. at 541; Cavalier Clothes, Inc. v. United States, 51 Fed. Cl. 399, 417 (2001).

82. The case relied upon by the "Is There a Better Way?" authors, *Parsons-UXB, JV*, ASBCA No. 56-481, 12-1 B.C.A. (CCH) ¶ 34919, 2012 WL 231563 (Jan. 12, 2012), is not a construction case and did not involve the acceptability of the use of industry studies to measure loss of productivity. Instead, it involved a cost-plus contract to remove unexploded military ordnance; the issue concerned whether cost overruns were foreseeable.

83. *See* Safeco Ins. Co. of Am. v. S&T Bank, 2010 WL 786257, at *10 (W.D. Pa. Mar. 3, 2010) (while generally treated unfavorably, these methods are admissible when circumstances allow).

84. GSBCA No. 14744 et al., 01-1 B.C.A. (CCH) ¶ 31249 (Jan. 11, 2001).

85. *Id.*

86. 597 F. Supp. 1014 (S.D.N.Y. 1984).

87. 70 Fed. Cl. 253 (2006).

88. *Id.* at 282–83.

89. GSBCA No. 11029, 96-1 B.C.A. (CCH) ¶ 28265, 1996 WL 154494 (Mar. 29, 1996).

90. VABCA No. 5674 et seq., 00-1 B.C.A. (CCH) ¶ 30870, 2000 WL 375542 (Apr. 5, 2000), *reconsideration denied*, 00-2 B.C.A. (CCH) ¶ 30997, 2000 WL 9650044 (July 12, 2000).

91. *Id.* [see note in case].

92. Norment Sec. Grp., Inc. v. Ohio Dep't of Rehab. & Corr., 2003 WL 22890088 (Ct. Cl. Ohio 2003); Sauer, Inc., ASBCA No. 39605, 01-2 B.C.A. (CCH) ¶ 31525, 2001 WL 865382 (July 20, 2001); States Roofing Co., ASBCA No. 54860, 10-1 B.C.A. (CCH) ¶ 34356, 2010 WL 292732 (Jan. 12, 2010); Clark Constr. Grp., Inc., GAOCAB No. 2003-1, 2004 WL 5462234 (Nov. 23, 2004).

93. Luria Bros. & Co. v. United States, 369 F.2d 701, 713 (Cl. Ct. 1966).

94. *Sauer, Inc.*, 2001 WL 865382; Aei Pac., Inc., ASBCA No. 53806, 08-1 B.C.A. (CCH) ¶ 33792, 2008 WL 436928 (Feb. 8, 2008); *Clark Constr. Grp.*, 2004 WL 5462234.

95. *Aei Pac., Inc.*, 2008 WL 436928.

96. *Id.*

97. *Id.*

98. Herman B. Taylor Constr. Co., GSBCA No. 15421, 03-2 B.C.A. (CCH) ¶ 32320, 2003 WL 21711359 (July 21, 2003).

99. *See, e.g.*, *Sauer, Inc.*, 2001 WL 865382.

100. MCAA Manual, *supra* note 9, at 81.

101. Adapted from C. William Ibbs & P. Stynchcomb, *The Reality Behind the Theory of Loss of Labor Productivity*, ABA FORUM ON CONSTR. L., MIDWINTER MEETING (Feb. 2013).

ASSIGNMENT ISSUES IN CONSTRUCTION CONTRACTS

(Continued from page 33)

CONTRACTS § 151). *See also* Parrish Chiropractic Ctrs., P.C. v. Progressive Cas. Ins. Co., 874 P.2d 1049, 1053 (Colo. 1994).

5. BLACK'S LAW DICTIONARY (10th ed. 2014).

6. Nuveen Mun. Trust v. Withumsmith Brown, P.C., 752 F.3d 600, 604 (3d Cir. 2014); Johnston Memorial Hosp. v. Hess, 44 B.R. 598, 60 (W.D. Va. 1984).

7. BLACK'S, *supra* note 5.

8. *Nuveen*, 752 F.3d at 604.

9. Kent Gen. Hosp., Inc. v. Blue Cross & Blue Shield of Del., Inc., 442 A.2d 1368, 1370 (Del. 1982) (citing 4 CORBIN ON CONTRACTS § 856 (1951)).

10. Gallagher v. S. Source Packaging, LLC, 564 F. Supp. 2d 503, 514 (E.D.N.C. 2008) (citing Elzinga & Volkers, Inc. v. LSSC Corp., 852 F. Supp. 681 (N.D. Ind. 1994), *rev'd on other grounds*, 47 F.3d 879 (7th Cir. 1995)).

11. *See, e.g.*, Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 881 P.2d 986 (Wash. 1994); Korte Constr. Co. v. Deaconess Manor Ass'n, 927 S.W.2d 395, 403 (Mo. Ct. App. 1996); SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., Inc., 28 P.3d 669 (Utah 2001), *holding modified by* Sunridge Dev. Corp. v. RB & G Eng'g, Inc., 230 P.3d 1000 (Utah 2010).

12. *Berschauer*, 881 P.2d at 994 (citing Portland Elec. & Plumbing Co. v. Vancouver, 627 P.2d 1350 (Wash. Ct. App. 1981)).

13. *Id.*
14. *Id.*
15. 739 S.W.2d 3, 5 (Tenn. Ct. App. 1987).
16. *Id.*
17. *Id. See also* Folgers Architects Ltd. v. Kerns, 612 N.W.2d 539, 548 (Neb. Ct. App. 2000) (holding that a contractual provision prohibiting assignment of rights under a contract does not forbid assignment of a right to money damages for breach of the contract).
18. *Ford*, 739 S.W.2d at 5.
19. *Id.* (citing 6 AM. JUR. 2D *Assignments* § 33 (1963).
20. Parrish Chiropractic Centers, P.C. v. Progressive Cas. Ins. Co., 874 P.2d 1049, 1053 (Colo. 1994).
21. *Id.* (citing Kent Gen. Hosp., Inc. v. Blue Cross & Blue Shield of Del., Inc., 442 A.2d 1368, 1370 (Del. 1982); Santiago v. Safeway Ins. Co., 396 S.E.2d 506, 508 (Ga. Ct. App. 1990)).
22. Elzinga & Volkers, Inc. v. LSSC Corp., 852 F. Supp. 681, 689 (N.D. Ind. 1994), *rev'd on other grounds*, 47 F.3d 879 (7th Cir. 1995).
23. 323 S.W.3d 203, 211 (Tex. App. 2010).
24. *Id.* at 212.
25. *Id.*
26. RESTATEMENT (SECOND) OF CONTRACTS § 322 (1981).
27. Korte Constr. Co. v. Deaconess Manor Ass'n, 927 S.W.2d 395, 402 (Mo. Ct. App. 1996).
28. 439 F. Supp. 2d 872, 879 (S.D. Ind. 2006).
29. *Id.* (citing Cedar Point Apartments, Ltd., v. Cedar Point Inv. Corp., 693 F.2d 748, 753 (8th Cir. 1982)).
30. Reuben H. Donnelley Corp. v. McKinnon, 688 S.W.2d 612, 614–15 (Tex. App. 1985) (ruling that the anti-assignment clause "only forbids the assignment; it does not render an assignment ineffective"); Quicksilver Res. Inc. v. Eagle Drilling L.L.C., CA No. H-08-868, 2008 WL 3165745, at *4 (S.D. Tex. Aug. 4, 2008).
31. *See McKinnon*, 688 S.W.2d at 615 (citing RESTATEMENT (SECOND) OF CONTRACTS § 322(2)(b)).
32. Tex. Dev. Co. v. Exxon Mobil Corp., 119 S.W.3d 875 (Tex. App. 2003) (enforcing anti-assignment clause when company assigned its right to receive payment, as opposed to chose-in-action, under the contract without consent).
33. A contract by which one or more, but not all, codefendants settle with the plaintiff and obtain a release, along with a provision granting them a portion of any recovery from the nonparticipating codefendants. In a Mary Carter agreement, the participating codefendants agree to remain parties to the lawsuit and, if no recovery is awarded against the nonparticipating codefendants, to pay the plaintiff a settled amount. Such an agreement is void as against public policy in some states but is valid in others if disclosed to the jury. BLACK'S, *supra* note 5 (citing Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. Dist. Ct. App. 1967)).
34. *See* State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696, 707–11, 714 (Tex. 1996).
35. *Id.* at 711.
36. 442 A.2d 1368, 1371 (Del. 1982).
37. *Id.* at 1370–71.
38. SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., Inc, 28 P.3d 669, 674 (Utah 2001).
39. *Id.*
40. 612 N.W.2d 539 (Neb. Ct. App. 2000), *aff'd in relevant part, rev'd in part sub nom.* Folgers Architects Ltd. v. Kerns, 633 N.W.2d 114 (Neb. 2001).
41. *Id.*
42. *Id.* at 548.
43. *Id.*
44. 469 S.E.2d 238 (Ga. Ct. App. 1996).
45. *Id.* at 240.
46. *Id.* at 240–41.
47. *Id.* at 241.
48. *Id.*
49. 2010 WL 441956 (N.Y. Sup. Ct. 2010).
50. *Id.*
51. *Id.*
52. No. 275500, 2008 WL 2151716 (Mich. Ct. App. May 22, 2008).
53. *Id.* at *3 (citing Hy King Assoc., Inc. v. Versatech Mfg. Indus., Inc., 826 F. Supp. 231 (E. Mich. 1993)).
54. *Id.* (citing JUSTIN SWEET & JONATHAN SWEET, SWEET ON CONSTRUCTION INDUSTRY CONTRACTS: MAJOR AIA DOCUMENTS § 23.19 (4th ed. 2000)).
55. 103 N.E.2d 891, 893 (N.Y. 1952).
56. *Id. See also* Cloughly v. NBC Bank-Seguin, N.A., 773 S.W.2d 652, 655 (Tex. App. 1989).
57. *Allhusen*, 103 N.E.2d at 893.
58. *Id.* at 893–94.
59. *Id.*
60. 28 P.3d 669, 672 (Utah 2001).
61. *Id.* at 675 n.6.
62. *Id.* at 673.
63. *Id.*
64. *Id* at 674–75.
65. *Id.* at 674.
66. *Id.*
67. 519 N.E.2d 37 (Ill. App. Ct. 1988).
68. *Id.* at 38.
69. *Id.* at 39.
70. 47 F.3d 879, 882 (7th Cir. 1995). In *Elzinga*, the Seventh Circuit decided that an arbitrator, and not a district court judge, should have decided what the language "assignment of the contract as a whole" meant because it is the sort of controversy or claim arising out of or related to a contract that the party urging review had agreed to arbitrate.
71. Elzinga & Volkers, Inc. v. LSSC Corp., 852 F. Supp. 681, 686 (N.D. Ind. 1994), *rev'd by Elzinga*, 47 F.3d 879.
72. *Elzinga*, 43 F.3d at 882.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*

CONSTRUCTION BILLS

(Continued from page 42)

38. *See generally* MONT. CODE ANN. § 17-8-403 (2015); R.I. GEN. LAWS § 9-1.1-4 (2015) Tenn. H.B. 184, Pub. Acts no. 99 tit. 71, ch. 5; TEX. HUM. RES. CODE ANN. §§ 36.001–36.132 (West 2015).
39. 2015 Wis. Act 55 (July 13, 2015); *Wisconsin Repeals State False Claims Act*, NAT'L L. REV. (July 15, 2015), *available at* http://www.natlawreview.com/article/wisconsin-repeals-state-false-claims-act.
40. *Id.*
41. Letter from Daniel R. Levinson, Inspector Gen., to Thomas Storm, Wis. Dir. of Medicaid Fraud Control (Mar. 21, 2015), *available at* http://oig.hhs.gov/fraud/docs/falseclaimsact/Wisconsin.pdf.
42. Miss. H.B. 58 and 196 (2014).
43. Miss. H.B. 491 (2015).
44. *See generally* W. VA. CODE ANN. § 9-7-1 (2011).
45. W. VA. H.B. 4001 (2014).
46. *Justice Department Recovers Nearly $6 Billion*, *supra* note 10.
47. *See* 31 U.S.C. § 3729(b):