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Contractual Assignment and Validity of Anti-Assignment Clauses in the Construction Context

Assignment is a transfer of property, a claim, or a right from an assignor to an assignee. *Bishop v. Village of Brookfield*, 99 Ill. App. 3d 483, 490 (1st Dist. 1981). When assignment occurs, the "assignee takes the assignor's interest subject to all legal and equitable defenses existing at the time of the assignment." *Kelley/LEHR & Associates, Inc. v. O'Brien*, 194 Ill. App. 3d. 380, 389 (2d Dist. 1990). A valid assignment also establishes privy of contract. *1400 Museum Park Condominium Ass'n. v. Kenny Construction Co.,* 2021 IL App (1st) 192167, ¶ 38.

Anti-assignment clauses prevent a party from transferring the rights or obligations to a third party without the consent of the obligor party. They help parties maintain their control over the contractual relationship by ensuring that any transfers are mutually agreed upon. Such benefits include allowing the contracting parties to rely on the reputation and performance standards of the other party they are contracting with. This can be valuable in the field of construction, as general contractors may rely on the esteem of specialty sub-contractors in getting the work completed. Additionally, anti-assignment clauses protect sensitive and confidential business information by ensuring that such information will not change hands to other people–such as competitors.

Narrow Construction of Anti-Assignment Clauses

Anti-assignment clauses are narrowly construed. *Henderson v. Roadway Exp*, 308 Ill. App. 3d 546, 550 (4th Dist. 1999). The Court of Appeals for the Seventh Circuit noted that:

> Illinois' approach implements the modern view. . . that an anti-assignment provision in a contract is unenforceable against an assignee unless a different intention is manifested. Magic words are not required. Where there is a promise not to assign but no provision that assignment is ineffective, the question whether breach of the promise discharges the obligor's duty depends on all the circumstances.

Bank of Am., N.A. v. Moglia, 330 F. 3d 942, 948 (7th Cir. 2003) (internal quotes omitted). Language prohibiting the assignment of the contract is construed narrowly to prohibit only the delegation of duties, but not the assignment of rights. *In re: Estate of Powless*, 315 Ill. App. 3d 859, 865 (5th Dist. 2000). The Court of Appeals for the Seventh Circuit has colorfully acknowledged this distinction between rights and duties in assignment.

> Illinois distinguishes between rights and duties under an agreement and rights to damages following breach. Thus, if a contract between Placido Domingo and the Lyric Opera contains an anti-assignment clause, and Domingo decides that he is too pooped to participate, he cannot send Neil Shicoff to his stead even if the opera

is Offenbach's Tales of Hoffmann. But if Domingo sings, and the opera does not pay, he can transfer to Shicoff (or anyone else) the right to collect.

Mut. Assignment and Indemnification Co., v. Lind-Waldock & Co., LLC, 364 F. 3d 858, 861 (7th Cir. 2004).

Evaluating Validity of Anti-Assignment Clauses

The validity of assignment depends on the nature of what is being assigned and both the extent and specific language of a anti-assignment clause. For example, and as a general rule, personal service contracts are not assignable. *Ames v. Sayler,* 267 Ill. App. 3d 672, 675 (4th Dist. 1994). That said, "[o]rdinary business contracts . . . are generally assignable." *Y.P.I 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC,* 403 Ill. App. 3d 1, 5 (1st Dist. 2010).

There are additional considerations included regarding the validity of the assignment when an anti-assignment provision is present, such as "[t]he degree of trust and confidence placed by a party entitled to performance under a contract in the party required to perform has also been considered important in determining whether the responsibilities of performance can be delegated." *Rural Electric Convenience Cooperative Co. v. Soyland Power Cooperative,* 239 Ill. App. 3d 969, 979 (4th Dist. 1992). Although considerations for trust and confidence between the parties is only noted in dicta, it would follow that a general contractor and a subcontractor who have been working together for a substantial period of time are more likely to have an anti-assignment clause upheld rather than first-time contracting parties because there would be less trust between first-time contracting parties.

With regard to the general rule as to the inability to assign personal service contracts, "[t]here is a dearth of Illinois caselaw discussing . . ." and defining personal service contracts. *Prazen v. Shoop*, 2013 IL 115035, ¶ 26. "That an agreement is between two corporations and does not identify any individual as being material to its performance are facts that weigh strongly against (if they are not indeed fatal) to construing the agreement as a personal service contract." *Id.*

In the context of construction, it follows that a prime contract would have a better chance of surviving assignment than a specialty subcontract. That is to say, a prime contract may not consider specific parties as being material to their performance in the execution of a large scope of work. On the other hand, a specialty subcontract would specifically delineate the specific tasks to be performed by such specialty subcontractor.

Remedies

With regard to remedies for violation of an anti-assignment clause, any remedy for a breach of contract is available. "Assignments are governed by contract law." *Northwest Diversified, Inc. v. Desai,* 353 Ill. App. 3d 378, 387 (1st Dist. 2004) (internal quotes omitted); *1400 Museum Park Condominium Ass'n,* 2021 IL App (1st) 192167, ¶ 46. Termination and recission are common remedies when violation of an anti-assignment clause occurs. To the point, violation of an anti-assignment clause makes the contract voidable for an obligor. *Ruva v. Mente,* 143 Ill. 2d 257, 270 (1991). Other remedies include damages—including compensatory, consequential economic loss, and liquidated damages—and injunctive relief.

Other Exceptions to Anti-Assignment Clause & Non-Payment

An anti-assignment clause has no weight or value when a party has performed and has expected payment or performance from the obligor. This is in line with the distinction noted regarding rights and duties, *infra*. According to the Restatement (2nd) of Contracts, "[a] contract term prohibiting assignment of rights under the contract, unless a different intention is manifested . . . does not forbid assignment of a right to damages for breach of the whole contract or a right arising out the assignor's due performance of his entire obligation." *Restatement (2nd) of Contracts* (1981) at §322(2). This principle, originally promulgated by the Illinois Supreme Court case several decades earlier, noting:

> After [a] contract [with an anti-assignment provision] has been fully executed and nothing remains to be done except to pay the money, a different rule applies. The element of the personal character, credit, and substance of the party with whom the contract is no longer material, because the contract has been completed and all that remains to be done is to pay the amount due. The claim becomes a chose in action, which is assignable and enforceable.

Ginsberg v. Bulldog Auto Fire Ins. Ass'n of Chicago, 328 Ill. 571, 573 (1928). This principle has been specifically applied in the construction context, when an anti-assignment clause was deemed invalid when the municipality failed to pay a contractor and the construction assignee filed suit and had a valid right to recover. *Westville v. Loitz Bros. Constr. Co.*, 165 Ill. App. 3d 338, 339-41 (4th Dist. 1988).

In sum, assignments are generally favored by Illinois courts, and anti-assignment provisions are narrowly construed. When determining enforceability, the specific language in addition to the relationship of the parties and the nature of what is being assigned will be considered by the courts.

About the Author

Kevin H. Young is an associate attorney in Chicago office of *Cassiday Schade LLP*. Mr. Young focuses his practice on a wide range of civil litigation defense and has extensive experience handling transportation and construction matters. Prior to joining Cassiday Schade, Mr. Young worked as an attorney where he honed his litigation skills in the areas of premises and products liability. Mr. Young earned his J.D. from Loyola University School of Law and is a member of the Illinois bar.

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