

## Assignability of Commercial Contracts (FL)

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A Practice Note examining Florida 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.

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. Transfer can also involve the assignment of a cause of action that accrued under the contract.

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. For example, language prohibiting assignment or delegation is typically held to trigger a breach but not to make the transfer invalid (see *In re Freeman*, 232 B.R. 497, 501 (Bankr. M.D. Fla. 1999)).
- Making an ineffective and invalid transfer (see, for example, *Lexington Ins. Co. v. Simkins Indus., Inc.*, 704 So. 2d 1384, 1386 (Fla. 1998) (pertaining specifically to insurance policies)).

This Note examines the key issues to consider when analyzing contract transferability or drafting a contractual anti-assignment and anti-delegation provision under Florida 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 Florida Uniform Commercial Code enacted under Florida law 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 (§ 672.210(5), Fla. Stat. 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 (§ 672.210(4), Fla. Stat. 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 *Price v. RLI Ins. Co.*, 914 So. 2d 1010, 1013 (Fla. 5th DCA 2005) and *Lauren Kyle Holdings, Inc. v. Heath-Peterson Const. Corp.*, 864 So. 2d 55, 58 (Fla. 5th DCA 2003); see also Restatement (Second) of Contracts § 317(1)).

For clarity, 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.

(See *Shaw v. State Farm Fire & Cas. Co.*, 37 So. 3d 329, 332 (Fla. 5th DCA 2010), disapproved on other grounds by *Nunez v. Geico Gen. Ins. Co.*, 117 So. 3d 388 (Fla. 2013).)

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, which means that a promise to assign in the future is ineffective as an actual transfer (see *Trak Microwave Corp. v. Medaris Mgmt., Inc.*, 236 So. 2d 189, 193-94 (Fla. 4th DCA 1970)). Otherwise, there is no specific language that is required to draft an effective assignment, including no requirement to use the word “assign” (see *Giles v. Sun Bank, N.A.*, 450 So. 2d 258, 260 (Fla. 5th DCA 1984) (discussing an equitable assignment)).

For a sample assignment provision, see [Standard Document, Assignment and Assumption Agreement and Optional Novation \(FL\): 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) (see *Pope v. Winter Park Healthcare Grp., Ltd.*, 939 So. 2d 185, 191 (Fla. 5th DCA 2006), citing Restatement (Second) of Contracts § 318). For clarity, 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.

For a delegation to be effective, the delegatee must agree to assume the delegated performance. 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*) (*In re Sunshine Jr. Stores, Inc.*, 456 F.3d 1291, 1309 (11th Cir. 2006); see also *Sans Souci v. Div. of Florida Land Sales & Condominiums, Dept. of Bus. Regulation*, 421 So. 2d 623, 630 (Fla. 1st DCA 1982)).

This differs from an assignment of rights where, on assignment, the assignor relinquishes its contractual entitlements (see *Cont'l Cas. Co. v. Ryan Inc. E.*, 974 So. 2d 368, 376 (Fla. 2008) (the court stating that once an assignment has been made, “the assignor no longer has a right to enforce the interest because the assignee has obtained all rights to the thing assigned”); see also *One Call Prop. Services Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749, 752 (Fla. 4th DCA 2015)).

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 Florida. 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

(see *Pope*, 939 So. 2d at 188-89; see also *Atl. Coast Dev. Corp. v. Napoleon Steel Contractors*, 385 So. 2d 676, 679 (Fla. 3d DCA 1980)). 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 \(FL\): 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.

In Florida, there are four essential elements to form a novation:

- The existence of a previously valid contract.
- The agreement of the parties to cancel and extinguish the first contract.
- The agreement of the parties that the second contract takes the place of the first.
- The validity of the second contract.

(See *Thompson v. Jared Kane Co., Inc.*, 872 So. 2d 356, 361 (Fla. 2d DCA 2004) and *Jakobi v. Kings Creek Village Townhouse Ass’s*, 665 So. 2d 325, 327 (Fla. 3rd DCA 1995).)

Whether a novation takes place is dependent on the intention of the parties (*Pinnacle Holding, Inc. v. Biologics, Inc.*, 643 So. 2d 642, 644 (Fla. 2d DCA 1994)). The parties’ agreement or consent to substitute the second contract for the first contract may be implied from the circumstances (*Sans Souci*, 448 So. 2d at 1121).

For sample novation provisions, see [Standard Documents, Novation Agreement \(Short Form\) \(FL\)](#) and [Assignment and Assumption Agreement and Optional Novation \(FL\): 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 Florida'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 Florida, 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).

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).

(See *Sears Termite & Pest Control, Inc. v. Arnold*, 745 So. 2d 485, 486 (Fla. 1st DCA 1999) (stating that a change in ownership of corporate stock does not affect a corporation's existence, contract rights, or liabilities).)

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 (see *Bioscience W., Inc. v. Gulfstream Prop. & Cas. Ins. Co.*, 185 So. 3d 638, 640 (Fla. 2d DCA 2016)). It broadly permits:

- Most assignments of contractual rights and choses in action.
- 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.

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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 (§ 672.210, Fla. Stat.), and the Restatement (Second) of Contracts, which applies generally to all types of contracts (Restatement (Second) of Contracts §§ 317-323).

### 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.

In Florida, a contractual right is assignable unless:

- The assignment is prohibited by statute or on public policy grounds (see, for example, *Law Office of David J. Stern, P.A. v. Sec. Nat. Servicing Corp.*, 969 So. 2d 962, 970 (Fla. 2007) (prohibiting assignments of most legal malpractice claims); see also Statutory and Public Policy Exceptions).
- The contract involves obligations that are personal in nature (see, for example, *Cibran Enterprises, Inc. v. BP Products N. Am., Inc.*, 365 F. Supp. 2d 1241, 1251 (S.D. Fla. 2005)).
- The parties have validly restricted assignment by contract (see, for example, *Bioscience*, 185 So. 3d at 640-41 (assignment prohibited without consent)).

(See *One Call Prop. Services*, 165 So. 3d at 752; see also *Abraham K. Kohl, D.C. v. Blue Cross & Blue Shield of Florida, Inc.*, 955 So. 2d 1140, 1143 (Fla. 4th DCA 2007).)

Note that most states rely on the Restatement (Second) of Contracts § 317(2), which 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.
- The assignment is prohibited by statute or public policy grounds (see Statutory and Public Policy Exceptions).
- The parties have validly restricted assignment by contract.

In contracts for the sale of goods under the UCC, all rights of either the seller or buyer can be assigned unless the parties agree otherwise or assignment would materially do any of the following:

- Change the duty of the other party.
- Increase the burden or risk imposed on the other party.
- Impair the other party's chance of obtaining return performance.

(§ 672.210(2), Fla. Stat.; 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 (§ 672.210(2), Fla. Stat. and Restatement (Second) of Contracts § 322(2)(a); see also *Sousa v. Zuni Transp., Inc.*, 286 So.3d 820, 822 (Fla. 3d DCA 2019) and *Cordis Corp. v. Sonics Int'l, Inc.*, 427 So. 2d 782, 783 (Fla. 3d DCA 1983) (permitting assignment even though anti-assignment provision stated that prohibited transfers were ineffective)).

In addition, contractual anti-assignment provisions are generally ineffective to prohibit a party from granting a security interest to a secured party (§§ 679.4061, 679.4071, and 679.4081, Fla. Stat.; 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

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(31 U.S.C. § 3727 and 41 U.S.C. § 6305; 48 C.F.R. §§ 32.800 to 32.806).

- The UCC prohibits the assignment of the right to draw funds under a letter of credit in certain cases, but not of the proceeds (§§ 675.112 and 675.114, Fla. Stat.).
- The Florida Consumer Finance Act prohibits the assignment of wages to secure a loan (§ 516.17, Fla. Stat.).

Examples of assignments that are commonly held to be inoperative because of public policy reasons include assignments:

- Made for consideration that is illegal.
- Of claims for personal injuries and other types of tort claims, including medical malpractice and intentional infliction of emotional distress (see *Wachovia Ins. Services, Inc. v. Toomey*, 994 So. 2d 980, 988 (Fla. 2008)).
- Of certain legal malpractice claims (see *Law Office of David J. Stern*, 969 So. 2d at 970).
- Of rights that are considered inherently personal, such as:
  - those granted under a non-compete provision. However, in Florida, non-compete agreements can be enforced by an assignee if the agreement so provides (see, for example, *DePuy Orthopaedics, Inc. v. Waxman*, 95 So. 3d 928, 934-36 (Fla. 1st DCA 2012) and *Marx v. Clear Channel Broad., Inc.*, 887 So. 2d 405, 408 (Fla. 4th DCA 2004));
  - a covenant not to sue; or
  - where one party relied on the personal credit of another party (see, for example, *U.S. Properties, Inc. v. Marwin Corp.*, 123 So. 2d 371, 375 (Fla. 3d DCA 1960)).

### 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. 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 *Pope*, 939 So. 2d at 191.)

The UCC similarly includes the exceptions listed in the second and third bullet points (§ 672.210(1), Fla. Stat.).

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.

### 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. 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, *Cibran Enterprises*, 365 F. Supp. 2d at 1251.)

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.

(See, for example, *Cibran Enterprises*, 365 F. Supp. 2d at 1251.)

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 courts favor the rights of parties to freely contract, they commonly enforce anti-assignment and anti-delegation clauses (see *Singer Asset Fin. Co., L.L.C. v. Tempkins*, 871 So. 2d 915, 917 (Fla. 3d DCA 2004) (citing *Cordis Corp.*, 427 So. 2d at 783)). However, the law also favors the free alienability of property (*Peavey v. Reynolds*, 946 So. 2d 1125, 1126 (Fla. 5th DCA 2006)). Therefore, courts generally construe these provisions narrowly (see *Rumbin v. Utica Mut. Ins. Co.*, 254 Conn. 259, 268-77 (2000) for a general discussion of how US courts narrowly construe anti-assignment clauses). 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 \(FL\)](#). For more information on subcontracting, see [Standard Clause, 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 to prohibit only the delegation of performance and not the assignment of rights (§ 672.210(4), Fla. Stat. and Restatement (Second) of Contracts § 322(1)).

However, contractual language expressly permitting "assignment of the contract" is commonly construed to permit the assignment of rights and the delegation of performance (§ 672.210(5), Fla. Stat. 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

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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 *Box, 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 *Collier HMA Physician Mgmt., LLC v. Menichello*, 223 So. 3d 334, 341 (Fla. 2d DCA 2017) (discussing the holding in *Corporate Express Office Products, Inc. v. Phillips*, 847 So. 2d 406 (Fla. 2003), which stated that if the other prerequisites to the validity of a non-compete agreement are met, a 100 percent stock purchase will not affect the enforceability of the agreement)).

### 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.

The non-assigning party’s consent is not needed unless an exception applies. For example, the contract is either:

- Personal in nature.
- Contains an enforceable anti-assignment clause.

(*Cibran Enterprises*, 365 F. Supp. 2d at 1251.)

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](#).

### 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).

If the assignor sees a situation where it might want to assign or delegate its contract rights to a future affiliate, it should consider including a temporal modifier. For example, some courts have held that use of the term “affiliates” in a contract includes only those affiliates in existence when the contract was executed, absent clear and unambiguous language indicating that the parties intended to extend the contract’s application or the underlying obligations to future affiliates (see *Cellco P’ship v. Kimbler*, 68 So. 3d 914, 917 (Fla. 2d DCA 2011); see also *Ellington v. EMI Music, Inc.*, 24 N.Y.3d 239, 246 (2014)).

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 (*State v. Family Bank of Hallandale*, 667 So. 2d 257, 259 (Fla. 1st DCA 1995)).

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](#).

### Including a Declaration That Impermissible Transfers Are Void

Because courts construe anti-assignment and anti-delegation clauses narrowly, language prohibiting assignment or delegation is typically held to trigger a breach but 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 *In re Freeman*, 232 B.R. at 501 and Restatement (Second) of Contracts § 322(2)(b)).

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 (see, for example, *Lexington Ins. Co.*, 704 So. 2d at 1386).

### 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.

(See *Orlando Orange Groves Co. v. Hale*, 161 So. 284, 291 (Fla. 1935) and *Jakobi*, 665 So. 2d at 327 (both cases discussing novation generally).)

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

## 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

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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. (§§ 672.609 and 672.210(6), Fla. Stat.; see also [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 (see, for example, [Standard Document, Sale of Goods Agreement \(Pro-Seller\): Section 18.12](#)). However, even if a supply agreement includes a restrictive anti-assignment and anti-delegation provision, parties should be aware that the UCC:

- Permits a party to assign its right to sue for breach of the contract despite the restriction (§ 672.210(2), Fla. Stat.).
- Invalidates a contractual provision that prohibits assignment of an account, which includes the right to receive payment under the contract (§ 679.4061, Fla. Stat.). 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, [Standard Document, Distribution Agreement \(Pro-Seller\): Section 21.12](#)). 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.

Franchise or distribution agreements that do not expressly permit assignment may be unassignable without the express consent of the party granting the contract because the services provided thereunder are personal in nature (see, for example, *Clinton Foods, Inc. v. Frozen Foods, Inc. of Miami*, 130 F. Supp. 422, 425-26 (S.D. Fla. 1955); see also *Geary Distrib. Co., Inc. v. All Brand Importers, Inc.*, 931 F.2d 1431, 1435 (11th Cir. 1991)).

For more information on transferability of franchise agreements, see [Drafting and Negotiating a Franchise Agreement Checklist](#). For more information on distribution agreements in general, see [Practice Note, Distributors and Dealers \(FL\)](#).

### 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 likely 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.

Therefore, in Florida the general rule is that most personal services contracts are not transferable without

the non-transferring party's consent (*Johnston v. Dockside Fueling of N. Am., Inc.*, 658 So. 2d 618, 619 (Fla. 3d DCA 1995) and *Schweiger v. Hoch*, 223 So. 2d 557, 558 (Fla. 4th DCA 1969) (citing *Orlando Orange Groves*, 161 So. 284)).

Many personal services contracts contain an express anti-assignment and anti-delegation clause that addresses each party's transferability rights and restrictions (see, for example, [Standard Document, Independent Contractor/Consultant Agreement \(Pro-Client\) \(FL\): Section 13](#)).

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.

#### Licensor

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.

#### Licensee

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 of federal common law, non-exclusive IP licenses are not transferable by the licensee without the licensor's consent (see, for example, *Gilson v. Republic of Ireland*, 787 F.2d 655, 658 (D.C. Cir. 1986)). 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 *Applied Concepts Unleashed, Inc. v. Matthews*, 2012 WL 12831313, at \*10 (S.D. Fla. Oct. 1, 2012)).

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

Florida law generally supports the transferability of real estate leases unless a lease expressly provides otherwise (*Fernandez v. Vazquez*, 397 So. 2d 1171, 1172 (Fla. 3d DCA 1981); see also *Frissell v. Nichols*, 114 So. 431, 434 (Fla. 1927)). However, most leases contain provisions that restrict the tenant's right to assign its lease interest without the landlord's express consent. Depending on the language in the lease, a landlord's consent to an assignment may be required before the assignment can become effective. Many anti-assignment and anti-delegation 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. In Florida, the implied obligation of good faith performance has been applied in the context of lease provisions requiring a landlord's consent to a tenant's assignment of a lease (see *Speedway SuperAmerica, LLC v. Tropic Enterprises, Inc.*, 966 So. 2d 1, 4-5 (Fla. 2d DCA 2007)). The following factors are among those to be considered in applying the standards of good faith and commercial reasonableness:

- The financial responsibility of the proposed subtenant.
- The "identity" or "business character" of the subtenant.
- The need for alteration of the premises.
- The legality of the proposed use.
- The nature of the occupancy.

(*Fernandez*, 397 So. 2d at 1174.)

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.

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- Transfers the lease to a wholly owned subsidiary or affiliate of the original tenant.

The original tenant usually is not released from its obligations under the lease and remains liable for the transferee's performance (see *Kornblum v. Henry E. Mangels Co.*, 167 So. 2d 16, 17-18 (Fla. 3d DCA 1964) (noting that the original tenant's obligations may be extinguished in situations where the original lease is replaced by an agreement between the landlord and assignee)).

For more information on lease assignment, see Standard Documents:

- [Landlord Consent to Assignment of Lease](#).
- [Office Lease Agreement \(Multi-Tenant Gross Lease\) \(Pro-Landlord Short Form\) \(FL\): Section 13](#).
- [Assignment and Assumption of Leasehold Interest in Corporate Transactions \(Short Form\)](#).
- [Assignment and Assumption of Contracts, Warranties, Permits, and Licenses \(Commercial Real Estate Purchase and Sale\) \(FL\)](#).
- [Assignment and Assumption of Leases \(Commercial Real Estate Purchase and Sale\) \(FL\)](#).

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

- [State Q&A: Real Estate Leasing: Florida: Questions 13-17](#).
- [State Q&A: Managing Commercial Real Estate Leases: Florida: 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. For a sample agreement for transferring a purchase agreement to an SPE, see [Standard Document, Assignment and Assumption of Purchase and Sale Agreement \(Commercial Real Estate Purchase and Sale\)](#). 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 assignment of commercial real estate agreements, see [Standard Document, Purchase and Sale Agreement \(Commercial Real Estate\) \(Pro-Seller Short Form\) \(FL\): 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 (see, for example, *Paley v. Cocoa Masonry, Inc.*, 433 So. 2d 70 (Fla. 2d DCA 1983)). 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

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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. Under Florida law, an insurance policy is assignable or not assignable, depending on its terms (§ 627.422, Fla. Stat.; see also *One Call Prop. Services*, 165 So. 3d at 752). 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. Under Florida law, an anti-assignment provision in an insurance contract does not apply to assignment after loss (see *CMR Constr. & Roofing, LLC v. Empire Indem. Ins. Co.*, 2019 WL 2281678, at \*3 (M.D. Fla. May 29, 2019) and *Bioscience*, 185 So. 3d at 640). 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,

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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. 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.

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](#)).

In Florida, if the sale of the assets includes a personal service contract that contains a non-compete agreement, the purchaser can enforce its terms only with the employee's consent to an assignment (see *Corporate Exp.*, 847 So. 2d at 412-13).

In a forward merger and forward triangular merger, the assets (including contracts) that began as property of the target company become the property of the surviving merger entity (the buyer and the buyer's merger subsidiary, respectively). This transfer occurs resulting from the application of the applicable state merger statute.

Merger statutes, like those for corporations in Florida and Delaware, typically provide that all of the assets of the constituent merger entities, including contract rights, become vested in the surviving merger entity following the merger (see, for example, § 607.1106(1)(c), Fla. Stat. and 8 Del. C. § 259(a); see also *Rawls v. Wells Fargo Bank, N.A.*, 2019 WL 293325, at \*4 (M.D. Fla. Jan. 23, 2019) (citing *Corporate Exp.*, 847 So. 2d at 415 n.6, "Under the law of Delaware as well as Florida, the rights of the merged corporation become those of the surviving corporation"). Therefore, some courts, including the Florida Supreme Court, have determined that in a forward

merger, the target's contracts are transferred or assigned to the surviving corporation "by operation of law" (see, for example, *Corporate Exp.*, 847 So. 2d at 414; see also *Box, Transfers by Operation of Law*).

Transactions structured either as a stock sale or a reverse triangular merger typically do not involve a technical transfer of the contracting party's assets. Because the target company continues to own its assets (including contracts) after the closing, Florida courts take the view that a stock acquisition generally does not trigger an anti-assignment and anti-delegation provision (see *Corporate Exp.*, 847 So. 2d at 412). This approach is consistent with the approach taken by many other jurisdictions, including Delaware (see *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62, 88 (Del. Ch. 2013) (specifically discussing a reverse triangular merger) and [Legal Update, Delaware Court of Chancery Holds that Reverse Triangular Mergers Do Not Trigger "Assignment by Operation of Law" Provisions](#)).

While Florida courts have not ruled specifically regarding reverse triangular mergers, they may look to decisions from other jurisdictions that have considered the issue, particularly Delaware, as persuasive authority. In most jurisdictions, a reverse triangular merger is unlikely to trigger a simple anti-assignment and anti-delegation clause (see *Meso Scale Diagnostics*, 62 A.3d at 88).

However, 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 courts 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.*, 1991 WL 626458, at \*3 (N.D. Cal. Dec. 18, 1991)). 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 *Floreys Inst. of Neuroscience and Mental Health v. Kleiner Perkins Caufield & Byers*, 2013 WL 5402093, at \*4-5 (N.D. Cal. Sept. 26, 2013)).

### 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 Florida, 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 Florida, 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) (§§ 605.1041 to 605.1046, Fla. Stat. and §§ 607.11930 to 607.11935, Fla. Stat., for example). 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.
- No assignment of the converting entity's assets occurs.

(§§ 605.1046 and 607.11935, Fla. Stat., for example.)

Some statutes, including those in Florida, 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, §§ 605.1046(1)(a)(2) and 607.11935(1)(h)(2), Fla. Stat.).

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 [Florida Entity Conversion Checklist](#) and [Practice Note, Internal Corporate Group Restructurings Involving LLC's or Partnerships: Tax Considerations](#).

### 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 (§§ 679.4061(6)(a) and 679.4081(1), Fla. Stat.).

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 to 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 § 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.
- 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 Florida law, see [Sale of a Business](#). For example, in *Corporate Express*, 847 So. 2d at 413-14, the court held that the surviving corporation in a merger can enforce a non-compete agreement that was previously entered into between one of the merged corporations and one of its employees.

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:



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- **The intent of the parties.** Many courts look to the intent of the parties when determining whether a general transferability restriction (which does not expressly prohibit transfers by operation of law) 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 is broadly worded and 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 Florida 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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