Your Contract's Anti-Assignment Clause – Can You Pass the Buck?

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Many construction contracts, including AIA standard form contracts, contain anti-assignment provisions that prohibit the parties from assigning their contract rights and performance without the consent of the other party to the contract. An issue that often arises is whether such provisions bar the parties from assigning their rights of action for breach of the contract. This matter may occur in a variety of contexts and can affect architects, contractors, subcontractors, owners, engineers, and sureties.

For example, a performance bond surety may finance its principal to enable the principal to complete a project. The principal agrees to assign all its rights of action concerning the project to the surety. Will the contract's anti-assignment clause prevent the surety from asserting breach of contract claims against the owner-obligee? In another case, a contractor asserts claims against both the architect and the owner. During settlement negotiations, the architect offers to assign its claims against the owner to the contractor. However, the architect's contract with the owner contains an anti-assignment provision. Is the architect's offer of settlement nothing more than a transfer of unenforceable rights? The resolution of these problems varies from state to state. As discussed below, the courts in some states have decided that anti-assignment clauses prohibit only the assignment of contract performance, but not causes of action. Other state courts have interpreted anti-assignment provisions much more broadly.

Typical anti-assignment language

Obviously, there are as many anti-assignment provisions as there are contracts, and the language of the anti-assignment provision is critical to interpreting its meaning. By way of example, however, the AIA Standard Form of Agreement Between Owner and Architect (B141-1997) contains the following anti-assignment provision:

> The Owner and Architect, respectively, bind themselves, their partners, successors, assigns and legal representatives to the other party to this Agreement and to the partners, successors, assigns and legal representatives of such other party with respect to all covenants of this Agreement. Neither the Owner nor the Architect shall assign this Agreement without the written consent of the other…

B141-1997 AIA Standard Form of Agreement between Owner and Architect, ¶ 1.3.7.9.

Some states permit assignment of contractual claims despite the existence of an anti-assignment provision

A number of state courts have held that contractual anti-assignment provisions do not bar assignment of legal claims. For example, in *Ford v. Robertson*, 739 S.W.2d 3 (Tenn. Ct. App. 1987), an owner contracted with an architect for the design of apartment units. The contract was a standard AIA form agreement and contained an anti-assignment provision that prohibited assignment of "any interest" in the contract without the agreement of the other party. After the

construction of the apartments was completed, the owner sold the apartments and assigned to the purchasers all the owner's interest in leases, contracts, and warranties associated with the property. The purchasers became dissatisfied with the units and filed suit against, among others, the architect. The architect argued that the anti-assignment clause in its contract with the original owner precluded the purchasers' claim, and the trial court agreed, stating that the owner's assignment was invalid.

The Tennessee Court of Appeals reversed. The Court said that there was a distinction between the right to assign *performance* under a contract and the right to obtain *damages* for the breach of a contract. The purchasers contended that the lawsuit concerned only the breach of the architect's fully executed contract, and was not an action to compel performance of the contract. The Court agreed, stating that the purchasers had acquired a right to receive damages for breach of the original owner's contract with the architect and that their breach of contract claim was not precluded by the anti-assignment clause in the contract.

The Supreme Court of Washington reached a similar conclusion in *Berschauer/Phillips Constr. Co. v. Seattle School District No. 1*, 124 Wash.2d 816, 881 P.2d 986 (Wash. 1994). In that case, a school district contracted for renovations and additions to an elementary school in Seattle. The general contractor completed construction at the school and later filed an action against the school district for breach of contract. The general contractor alleged that the school district breached express and implied contractual obligations to the general contractor by providing defective design plans and failing to properly manage the project inspections. The general contractor and the school district entered into a settlement agreement in which the school district assigned to the general contractor its claims against, among others, the architect. The general contractor then filed suit against the architect, but the trial court held that the architect's contract with the school district prohibited the school district from assigning its claims to the general contractor.

However, the Supreme Court of Washington disagreed. The Court reasoned that a clause prohibiting assignment of a contract is intended to prevent assignment of the contract's performance, thereby protecting a party's right to select the persons or entities with which it contracts. In some states, absent specific language to the contrary, a provision proscribing assignment of a contract and/or contractual interests would not prevent one of the parties from assigning a claim for breach of the contract after the contract was performed.

The Supreme Court of Nebraska adopted the same rule in *Folgers Architects, Ltd. v. Kerns*, 262 Neb. 530, 633 N.W.2d 114 (Neb. 2001). *Folgers* arose out of the development of several apartment communities. The architect and the developer entered into an AIA standard form agreement for design services, but none of the communities were completed due to funding difficulties. The architect assigned the accounts receivable for the apartment project to another company, which later sold the accounts receivable to a separate entity.

The purchaser of the accounts brought suit against the developer, alleging breach of contract. The developer contended that the purchaser's claims were barred by the anti-assignment provision in its contract with the architect, but the Supreme Court of Nebraska disagreed. Citing to *Ford* and *Berschauer/Phillips*, the Court held that a provision prohibiting assignment of "any interest" in a contract did not affect a party's ability to assign a cause of action for breach of the agreement.

Courts in Florida (*Cordis Corp. v. Soncis International, Inc.*, 427 So.2d 782 (Fla. App. 1983)), Utah (*Fuller v. Favorite Theaters Co.*, 119 Utah 570, 230 P.2d 335 (Utah 1951)), and California (*Trubowitch v. Riverbank Canning Co.*, 30 Cal.2d 335, 182 P.2d 182 (1947)) have also stated, although not necessarily in construction cases, that a contractual anti-assignment provision does not prohibit a party from assigning a claim for breach of the contract.

Other states interpret contractual anti-assignment provisions as prohibiting the assignment of breach of contract claims

Some jurisdictions have interpreted contractual anti-assignment provisions much more broadly, however. For example, in *Mears Park Holding Corp. v. Morse/Diesel, Inc.*, 427 N.W.2d 281 (Minn. Ct. App. 1988), a developer entered into a contract with an architect for the design of a plaza in St. Paul. The contract contained an anti-assignment clause prohibiting either party from transferring its "interest in the agreement" without the written consent of the other party. Prior to completion of the project, the developer defaulted on its construction loan. To avoid foreclosure, the developer transferred title to the project to a subsidiary of the bank, and also attempted to assign to the subsidiary all of the developer's rights, actions, and causes of action which might arise out of the construction project. The subsidiary later asserted claims for negligence, contribution, and indemnity against the architect and the architect's subcontractor. The trial court found that the developer's attempted assignment was invalid and dismissed the subsidiary's claims against the architect.

The Minnesota Court of Appeals affirmed the trial court's decision. Citing *Ford v. Robertson*, discussed above, the Court stated that, in analyzing anti-assignment provisions, it was important to distinguish between the right to assign contractual performance, which could be prohibited, and the right to receive damages for breach of the contract, which may not be prohibited. However, the Court, construing the anti-assignment provision as prohibiting the assignment of any interest in the *performance* of an executory contract, stated that the contract was "still executory" and affirmed dismissal of the developer's claims against the architect.

A contractual anti-assignment provision also resulted in the dismissal of claims in *Tycon Tower I Inv., L.P. v. John Burgee Architects*, 234 A.D.2d 748, 651 N.Y.S.2d 637 (N.Y. App. Div. 3d Dep't 1996). In that case, an owner contracted with an architect to design a building. To finance the project, the owner provided deeds of trust to a bank. A series of conveyances of the deeds of trust followed. The owner defaulted on the deeds of trust and the property was put up for public sale. A union trust purchased the property and the plaintiff took title to the property as the union trust's nominee. The plaintiff later filed suit against the architect for breach of contract, negligence, fraud, and negligent misrepresentation, alleging that the property was defectively designed and constructed. The trial court concluded that the plaintiff lacked standing to bring suit against the architect, and Supreme Court of New York, Appellate Division affirmed.

Because the plaintiff was not a party to the contract with the architect, the Appellate Division stated the plaintiff could not sue the architect for breach of contract. Moreover, the Court noted that the contract between the original property owner and the architect contained an anti-assignment provision that prohibited either party from assigning "any interest" in the agreement without the written consent of the other party. The Court found that the lower court properly dismissed the plaintiff's breach of contract claim, because the architect had not consented to the assignment. Leave to appeal was denied by the New York Court of Appeals.

A recent Pennsylvania trial court decision, although not a construction case, also suggests that the courts of that state may interpret contractual anti-assignment clauses as prohibiting the assignment of claims arising in connection with an agreement containing an anti-assignment provision. *Amico v. Radius Communications*, 2001 WL 1807391 (Pa. Comm. Pl. Oct. 29, 2001), concerned an entertainment contract for a television program. The plaintiffs in the case were Wow Enterprises, Inc. and Paola Amico. The program was to feature Amico's mother, known as "Mamma Maria." The defendant entered into a programming contract with Mamma Maria. Amico executed the contract, "thereby accepting it on behalf of Mamma." Amico signed the contract as "Owner," presumably of Wow Enterprises, Inc. The defendant argued that the plaintiffs did not have any rights to sue under the contract, citing Pennsylvania Rule of Civil Procedure 2002, which requires that all actions be prosecuted by the real party in interest. In response, the plaintiffs contended, *inter alia*, that Mamma Maria's interest in the contract was assigned to the plaintiffs.

The Court disagreed, stating that the language of the contract prohibited the assignment of "any rights arising under the Contract" absent the written consent of the other party to the contract. The plaintiffs conceded that they had not obtained the defendant's consent for the assignment. The Court noted that contractual clauses barring assignment are generally valid and enforceable, and stated that permitting the plaintiffs to sue on Mamma Maria's behalf would allow persons to whom the defendant owed no obligations to bring claims against it.

Recommendations

Obviously, this article does not present the law of every jurisdiction regarding anti-assignment provisions; however, the cases discussed above demonstrate that states differ in their interpretation and enforcement of contractual anti-assignment clauses. Given the varied landscape of assignment jurisprudence, parties entering into construction contracts would do well to keep the following in mind:

- Be alert to the inclusion of anti-assignment language in your contract. Such provisions are often tucked into "catch-all" sections of an agreement, such as one labeled "Miscellaneous." As shown by the cases discussed above, a void assignment may result in the dismissal of legal claims, so anti-assignment provisions are important terms to consider.

- Read carefully the terms used in the anti-assignment provision. Does the clause state that any assignment made without written consent of the other party is "void" or "invalid"? Does the provision make clear that it only precludes assignment of contract performance, or is the language broad enough to cover the assignment of legal claims and moneys due under the contract?

- Negotiate changes to a contract including an anti-assignment clause before you sign the contract, rather than assume the risks of harshly worded clauses if problems arise later.

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