Welcome to this podcast on Assignment and Delegation brought to you by CALI. I am Professor Scott J. Burnham.

Contracts sometimes involve parties other than the parties that signed it. We call those other parties “third parties.” The topic of this podcast is when rights under a contract may be assigned to third parties and when duties may be delegated to third parties.

The vocabulary in this area of contract law is very important, so we are going to start by taking a contract apart and putting some labels on the parts. First, let’s identify the rights and duties of each party. In a bilateral contract, each party has at least one right and at least one duty. For example, B Company agrees to buy 100 widgets from S Company for $1000. B has the right to get the widgets from S, and S has the right to get $1000 from B. Also, S has the duty to tender the 100 widgets to B and B has the duty to tender the $1000 to S. We also use the term *obligor* to refer to the person who is under a duty and *obligee* to refer to the person who is to receive that duty. In our hypothetical, S is the obligor of the widgets and B is the obligor of the $1000.

Think of those rights and duties as property that can be bought and sold. With assignment, we are talking about the rights being transferred to a third party. For example, since B has the right to receive the widgets, B can assign that right to C. If that is an effective assignment, after getting proper notice, then S has to deliver the widgets to C instead of to B. C then “stands in the shoes” of B, who drops out of the picture.

How do we know if it is an effective assignment? The general rule is that the law strongly encourages free assignability, so unless an exception applies, we can assume the assignment is valid. One exception would be if the assignment materially increases the burden on the obligor. So if S was originally obligated to deliver the widgets to B in Boston, and B assigned the right to C with a delivery in Los Angeles, that could materially increase S’s burden and that might not be a valid assignment. But if S’s duty was to get the widgets to a carrier, then it would be no big deal to change the shipping address so that would be a valid assignment.

Another exception where the assignment would not be effective is if the right were personal. For example, assume a famous artist had an obligation to paint the President's portrait. Since the President had the right to receive the painting services, he might say to the artist, “I've assigned that right to Burnham, paint his portrait instead of mine.” The obligor, the artist, might say, “No – I have a personal interest in performing for you, not for someone else because it would enhance my reputation if I was to paint your portrait.” So that would probably not be an effective assignment.

Assignment of the right to receive money comes up frequently. For example, you take out a student loan with Bank A and after a short while you get a letter from Bank A that says from now on pay Bank B rather than us. Bank A has assigned the right to receive your payments to Bank B, and once you have notice of that assignment then you have to perform by paying the assignee. If you should have a memory lapse and pay Bank A, the assignor, you would of course have a claim in restitution to get the money back from Bank A, but that payment would not satisfy your duty to Bank B, the assignee.

The law has a very strong policy that the right to receive money should be freely assignable. The reason is that accounts receivable financing is frequently used in business. It allows the party who has the right to receive money to assign that right to a third party, often as collateral for a loan in which they are the debtor. We want that third party, the creditor, to be able to go after the parties, called account debtors, who promised to pay money to the debtor. So even if there is a non-assignment clause in the contract between the debtor and the account debtor, UCC Article 9 says that the non-assignment clause will not be effective when it pertains to the payment of money.

Now let’s turn to delegation of duties. Delegation involves a party transferring its contractual obligations to a third party. In our earlier hypothetical, if S had the duty to tender 100 widgets to B, S could agree with D that D would tender the widgets instead of S. Most importantly, unlike with an assignment, the delegating party does not drop out of the picture and remains liable for performance. In theory, the delegation should not bother B, because S remains liable. If D does not perform or performs badly, B can make a claim against either S or D.

Similarly, if there is a delegation of the duty to pay money, you might think at first that it isn't right to delegate the duty to pay to a third party. But it is permitted because the obligor, the one who delegated, remains liable after the delegation. So if B delegates to C its duty to pay for the widgets, S can go after either B or C if C does not pay. For this reason, delegation is strongly supported by the law.

Again we have the exception that if there is a choice of person involved in the obligation, then that obligation cannot be delegated. You have to watch out, however, because what may at first appear to be personal, may not necessarily be personal. For example, assume the President picked a particular artist to paint his portrait and that artist said, “I've delegated that duty to someone else who is equally talented to paint the portrait.” That would be not a lawful delegation because obviously the President picked that particular artist because of the artist's talents.

On the other hand, if you were to hire ABC Construction to build a garage and XYZ Construction shows up to build the garage and says that ABC has subcontracted most of the work to them, that's a lawful delegation. Subcontracting is simply a form of delegation – ABC has delegated the duty to XYZ. What about the fact that you chose ABC because it had a good reputation? The law would say that you did not really choose a particular person because you merely chose a corporate entity to do the work and there is no particular person involved. Furthermore, you are protected because ABC remains liable for performance and for breach if XYZ does not do a good job.

Now we have some freedom of contract here, so if you don’t like these rules encouraging assignment and delegation, then what do you do? You put in the contract a prohibition of assignment of rights or delegation of duties. But as we saw, if you put in a prohibition of assignment of right to receive money it will probably not be enforced in the case of creditors who receive an assignment of the rights. A prohibition of delegation of duties will probably be enforced, but the question is what does it mean to enforce it? If ABC Construction has agreed with you that it will not delegate its duties and they then delegate a duty to XYZ, there is clearly a breach of contract, but what is the consequence of that breach? In most jurisdictions it is a breach of contract entitling you to damages, but it is still an effective delegation. So if you want to put some teeth in the prohibition, you should add that any attempted delegation is void and ineffective. Then if XYZ showed up to do the work, you could tell them, sorry, I will not accept performance from you.

Also under U.C.C. § 2-210(6), our old friend demand for assurances that was the subject of another podcast, may apply here. If a delegation of duties causes the obligee to feel insecure about whether they are going to get the performance that they bargained for, they can demand assurances from the delegate and suspend their own performance until they get proper assurances.

By the way, lawyers are not always as careful with their vocabulary as you and me and they draft something like, “This contract may not be assigned.” But what do they mean when they say that, since *rights* are assigned and not contracts? This happens so often that U.C.C. § 2-210(5) has a rule that answers this question. The U.C.C. says that the parties were probably more concerned about delegation of duties, so saying “this contract may not be assigned” will be interpreted to mean the rights may be assigned but duties may not be delegated.

So if you want to avoid any ambiguity, you should specifically say in the contract “Under this contract, rights may not be assigned and duties may not be delegated” and then you will get it both ways, and you should also add that “any attempted assignment or delegation is void and of no effect” in order to make clear that this is the remedy you want.

This concludes the podcast. At this point, you should be able to explain when contract rights may be assigned and when contract duties may be delegated. You should also be able to recognize an effective prohibition of rights or duties.

I hope you’ve enjoyed this podcast on Assignment and Delegation.

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