

## Chapter 4

# SUCCESSORS AND ASSIGNS

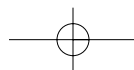
*Tina L. Stark*

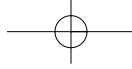
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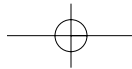
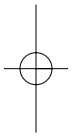
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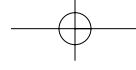




**NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE**

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## § 4.01 Introduction

The successors and assigns provision is a staple of commercial contracts.<sup>2</sup> Although inserted almost ritualistically, its function and effect are rarely understood.<sup>3</sup> Generally speaking, its purpose is to memorialize the relationship between the nonassigning party and the assignee. In addition, the cases have suggested other secondary purposes.

This Chapter examines the common law in the absence of a successors and assigns provision, analyzes each of the purported purposes of a successors and assigns provision, and then addresses the drafting and negotiating issues relating to the provision.

## § 4.02 The Common Law in the Absence of a Successors and Assigns Provision

### [1]—Definition of Terms

An assignment occurs when one party transfers to a third party its right to receive the other party's performance.<sup>4</sup> In this Chapter, the transferring party is referred to as the "assignor;" the party to whom the right is transferred is referred to as the "assignee;" and the party who must perform in favor of the assignee is referred to as the "nonassigning party."

### [2]—Ramifications of an Assignment for an Assignee

Under the common law, an assignment confers only the benefits of the contract being assigned, not the performance obligations.<sup>5</sup> The assignee is only an assignee, not an assignee and a delegate. Moreover, an assignee's mere acceptance of an assignment does not imply that there

<sup>2</sup> An analysis of the successors and assigns provision in the context of labor relations contracts and collective bargaining agreements is outside the scope of this Chapter.

<sup>3</sup> Corbin, observing this lack of understanding as to provisions purporting to bind the other party and its assigns, stated that successors and assigns provisions are often inserted without any "definite idea of their meaning or operation, the parties having some vague idea that they are making themselves more secure." 9 Corbin, *Corbin on Contracts* § 871 at 423 (Interim ed. 2002).

<sup>4</sup> See *Midland Mutual Life Insurance Co. v. Mercy Clinics, Inc.*, 579 N.W.2d 823, 833 (Iowa 1998).

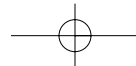
<sup>5</sup> See:

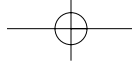
*California*: *Citizens Suburban Co. v. Rosemont Development Co.*, 244 Cal. App.2d 666, 675, 53 Cal. Rptr. 551, 557 (1966).

*Maryland*: *Petals Factory Outlet of Delaware, Inc. v. EWH & Associates*, 90 Md. App. 312, 318, 600 A.2d 1170, 1174 (1992).

*Minnesota*: *Suburban National Bank v. Morlock*, No. CO-88-2154, 1989 WL 32488 at \*1 (Minn. App. Apr. 11, 1989) (unpublished opinion).

*South Carolina*: *Rosemond v. Campbell*, 228 S.C. 516, 523, 343 S.E.2d 641, 645 (1986).





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has been a delegation and an assumption of performance.<sup>6</sup> Thus, as a corollary to an assignment, performance obligations arise only if there is a novation<sup>7</sup> or a contemporaneous delegation and an assumption.<sup>8</sup>

An assumption is an assignee's agreement with the assignor that the assignee will perform in the place of the assignor.<sup>9</sup> The nonassigning party is a third party beneficiary of the assignee's promise to the assignor.<sup>10</sup> Unfortunately, no consensus exists as to whether an assumption must be express or whether an implied assumption is also permissible. In addition, the cases differ as to whether the requirement of an express assumption is the majority or minority view.<sup>11</sup>

The "modern" approach is set forth in the *Restatement (Second) of Contracts* and the U.C.C. Both provide that broad, general words of assignment constitute not only an assignment, but also a delegation, unless there is evidence to the contrary.<sup>12</sup> A classic case in which there would be evidence to the contrary is an assignment for security.<sup>13</sup> In addition, both the *Restatement* and the U.C.C. provide that the acceptance of an assignment operates as a promise to perform the assignor's obligations, unless there is evidence to the contrary.<sup>14</sup> Stated differently, the *Restatement* and the U.C.C. both provide that an assignee may impliedly assume an assignor's performance obligations.<sup>15</sup>

<sup>6</sup> See, e.g., *Lumsden v. Roth*, 138 Cal. App.2d 172, 175, 291 P.2d 88, 89 (1955).

<sup>7</sup> A novation presupposes that there is a delegation in addition to an assignment. To create the novation, the nondelegating party accepts the delegation and agrees to the delegating party's release from all liability. By doing so, the delegate replaces the delegating party as a party to the contract. See *First American Commerce Co. v. Washington Mutual Savings Bank*, 743 P.2d 1193, 1195 (Utah 1987) (stating that the "essential element of a novation is the discharge of one of the parties to a contract and the acceptance of a new performer by the other party as a substitute for the first original party.").

<sup>8</sup> See generally, Calamari and Perillo, *The Law of Contracts* § 18.26 at 699 (4th ed. 1998).

<sup>9</sup> *Lumsden v. Roth*, 138 Cal. App.2d 172, 175, 291 P.2d 88, 89-90 (1955).

<sup>10</sup> See, e.g.:

*North Carolina*: *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 663, 194 S.E.2d 521, 534-535 (1973).

*Oregon*: *Kunzman v. Thorsen*, 303 Ore. 600, 603, 740 P.2d 754, 755 (1987).

<sup>11</sup> See:

*Alabama*: *Meighan v. Watts Construction Co.*, 475 So.2d 829, 833 (Ala. 1985) (stating that the law "in most states" requires an express assumption) (citing *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 194 S.E.2d 521 (1973)).

*Minnesota*: *Suburban National Bank v. Morlock*, No. CO-88-2154, 1989 WL 32488 at \*1 (Minn. App. Apr. 11, 1989) (unpublished opinion) ("The law in Minnesota, as in most jurisdictions . . . requires a specific assumption of such liabilities.").

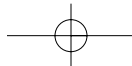
But see, *Nofziger Communications, Inc. v. Birks*, 757 F. Supp. 80, 82 and 85 (D.D.C. 1991) ("[A]lthough some jurisdictions seem to have accepted the express assumption rule as one of general applicability, [it is not the general rule]. . . [A] review of the law in other jurisdictions reveals that many jurisdictions have applied the express assumption rule only in a few narrow situations [the sale of land and assumption of liability for past breaches]").

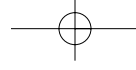
<sup>12</sup> See: *Restatement (Second) of Contracts* § 328(1) (1981); U.C.C. § 2-210(4). For example, an assignment of the "contract" and "all my rights under the contract" is an assignment of rights and a delegation of duties, unless there is evidence to the contrary.

<sup>13</sup> See *Bluebonnet Warehouse Cooperative v. Bankers Trust Co.*, 89 F.3d 292, 297 (6th Cir. 1996). See also: *Restatement (Second) of Contracts* § 328(1) (1981); U.C.C. § 2-210(4).

<sup>14</sup> *Restatement (Second) of Contracts* § 328(2) (1981); U.C.C. § 2-210(4).

<sup>15</sup> *Accord*, *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 661, 194 S.E.2d 521, 534 (1973) ("We therefore adopt the Restatement rule and expressly hold that the assignee under a general assignment of an executory bilateral contract, in the absence of circumstances showing a contrary intention, becomes the delegate of his assignor's duties and impliedly promises his assignor that he will perform such duties."). See also, *Meighan v. Watts Construction Co.*, 475 So.2d 829, 833-835 (Ala. 1985).






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In deciding whether there is evidence of an implied assumption, some courts find that a promise to assume may be inferred from the circumstances surrounding the transaction.<sup>16</sup> In these cases, courts may examine whether an assignee has accepted or claimed the full benefit of a contract.<sup>17</sup> If so, they hold that the assignee has impliedly undertaken to perform the assignor's obligations.

The less "modern" cases hold that assumptions must be express.<sup>18</sup> Many of these cases relate to assignees of a purchaser of land.<sup>19</sup> Indeed, the *Restatement* includes a caveat that it

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<sup>16</sup> See *Cedar Point Apartments, Ltd. v. Cedar Point Investment Corp.*, 693 F.2d 748, n.2 and 755 (8th Cir. 1982) (noting that while mere acceptance of an assignment is insufficient in a land contract to deem that an assignee has assumed the assignor's performance obligations, "assignees may show intent to bind themselves by their actions, such as by suing for specific performance").

See also: *Meighan v. Watts Construction Co.*, 475 So.2d 829, 833-835 (Ala. 1985); *Loegler v. C.V. Hill & Co.*, 193 So. 120, 121 (Ala. 1940).

<sup>17</sup> See:

*Fourth Circuit*: *United States Elevator Corp. v. 1616 Reminc Limited Partnership* (In re 1616 Reminc Limited Partnership), 9 B.R. 679, 687-688 (Bankr. E.D. Va. 1981) ("There is no showing of an intent not to perform the responsibilities of the assignor by [the assignee], and equity requires . . . that the assignee must accept the liabilities along with the benefits.").

**State Courts:**

*California*: *Walker v. Phillips*, 205 Cal. App.2d 26, 32, 22 Cal. Rptr. 727, 731 (1962) ("Whether an assignee has assumed the obligations of the contract is to be determined by the intent of the parties and may be implied from acceptance of benefits under the contract.") (citing Cal. Civ. Code § 1589, which provides that "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."); *Shutes v. Cheney*, 123 Cal. App.2d 256, 262-263, 266 P.2d 902, 907 (1954).

*Oregon*: *Kunzman v. Thorsen*, 303 Ore. 600, 610, 740 P.2d 754, 759 (1987) ("Where a party accepts a broadly worded assignment of a land sale contract . . . and asserts the interest the contract conveys, the presumption arises that the assignee intended also to assume the duties the contract imposes.").

But see, *Lone Star Gas Co. v. Mexia Oil & Gas, Inc.*, 833 S.W.2d 199, 203 (Tex. App.1992) (declining to hold "that, if an assignee receives any benefit, no matter how tangential, from the contract, then the assignee impliedly assumes all of the contract's burdens, no matter how tangential.").

<sup>18</sup> See, e.g.:

*California*: *Citizens Suburban Co. v. Rosemont Development Co.*, 244 Cal. App.2d 666, 675, 53 Cal. Rptr. 551, 557 (1966).

*Maryland*: *Petals Factory Outlet of Delaware, Inc. v. EWH & Associates*, 90 Md. App. 312, 318, 600 A.2d 1170, 1174 (1992).

*New York*: *Langel v. Betz*, 250 N.Y. 159, 161-162, 164 N.E. 890, 891 (1928).

<sup>19</sup> See, e.g.:

*Eighth Circuit*: *Cedar Point Apartments, Ltd. v. Cedar Point Investment Corp.*, 693 F.2d 748, 755 n.3 (8th Cir. 1982).

**State Courts:**

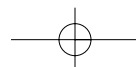
*Maryland*: *Pumphrey v. Kehoe*, 261 Md. 496, 506, 276 A.2d 194, 200 (1971) (citing Williston, *A Treatise on the Law of Contracts* § 418A at 109 (3d ed. 1960), for the proposition that "at least in regard to contracts for the sale of land the great majority of decisions strongly take the position that the assignee of the purchaser does not become bound . . . in the absence of an express assumption . . .").

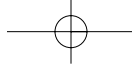
*Compare*, *Quest v. Robertson*, 71 Ill. App.3d 678, 681, 388 N.E.2d 1335, 1338, 27 Ill. Dec. 286, 289 (1979) (stating that "it is the rule in this State, at least in regard to contracts for the purchase of realty that '[a]n assignee does not become liable on an executory contract of the assignor unless by his contract he assumes such liability . . .'" (quoting *Lunt v. Lorscheider*, 285 Ill. 589, 593, 121 N.E. 237, 239 (1918)), with *Pelz v. Streator National Bank*, 145 Ill. App.3d 946, 954, 496 N.E.2d 315, 321, 99 Ill. Dec. 740, 746 (1986) (stating that Illinois is aligned "with the modern trend to infer an assumption by the assignee to a land contract of his assignor's contractual duties upon clear and convincing evidence that such assumption was intended by the parties to the assignment contract."). *Accord*, *Kneberg v. H.L. Green Co., Inc.*, 89 F.2d 100, 103 (7th Cir. 1937) (stating that the assignee of a contract for the sale of land may impliedly assume the burdens of the contract).

Note that some of the cases do not involve purchases of land, but nonetheless involve land in some way. See:

*California*: *Citizens Suburban Co. v. Rosemont Development Co.*, 244 Cal. App.2d 666, 53 Cal. Rptr. 551 (1966) (water utility company suit demanding specific performance by subdivision developers).

*Maryland*: *Petals Factory Outlet of Delaware, Inc. v. EWH & Associates*, 90 Md. App. 312, 600 A.2d 1170 (1992) (lease).





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expresses no opinion as to whether its general rule (that assumptions may be implied) applies to assignments in connection with the sale of land.<sup>20</sup>

Although many of the express assumption cases relate to land sales, other cases have applied the rule to matters outside this context.<sup>21</sup> That application, however, has not been without controversy. One case suggests that the rule requiring express assumptions should apply only to land sales and a few other specific exceptions.<sup>22</sup>

### [3]—Ramifications of an Assignment for a Nonassigning Party

If an assignment is enforceable, the nonassigning party is bound to perform in favor of the assignee as if it were the original party.<sup>23</sup> The nonassigning party is not obligated to assent to the assignment in order for it to become enforceable.<sup>24</sup> Instead, in most instances, the nonassigning party must perform even if it would not have chosen the assignee to be the original party to the contract.

## § 4.03 Purposes of a Successors and Assigns Provision

### [1]—To Bind an Assignee to Perform

Courts differ in their conclusions as to whether the successors and assigns provision binds the assignee to perform the assignor's obligations. Some courts have held that the provision eliminates the necessity for an express assumption and implies an assumption.<sup>25</sup> Others have held

<sup>20</sup> *Restatement (Second) of Contracts* § 328, Caveat and Comment c (1981).

<sup>21</sup> See:

*Minnesota*: *Suburban National Bank v. Morlock*, No. CO-88-2154, 1989 WL 32488 at \*1 (Minn. App. Apr. 11, 1989) (unpublished opinion) (purchase of an Arabian horse).

*New York*: *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 402, 165 N.Y.S.2d 498, 503 (1957) (no assumption of obligation to pay a percentage of profits).

<sup>22</sup> See *Nofziger Communications, Inc. v. Birks*, 757 F. Supp. 80, 82 and 85 (D.D.C. 1991).

<sup>23</sup> See *Pacific Eastern Corp. v. Gulf Life Holding Co.*, 902 S.W.2d 946, 958-959 (Tenn. App. 1995) (citing: 3 Williston, *A Treatise on the Law of Contracts* § 433 (3d ed. 1960) and *Restatement (Second) of Contracts* §§ 280 Comment e, 323 Comment a (1979)).

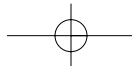
<sup>24</sup> *Id.* See also, *Peterson v. District of Columbia Lottery and Charitable Game Control Board*, 673 A.2d 664, 667 (D.C. App. 1996) (“The effectiveness of an assignment does not normally depend upon the consent of the [nonassigning party] unless the rights to be assigned involve the performance of unique personal services.”). (Citation omitted.)

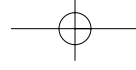
<sup>25</sup> See:

*Fourth Circuit*: *Mehul's Investment Corp. v. ABC Advisors, Inc.*, 130 F. Supp.2d 700, 706 (D. Md. 2001) (stating that because the contract included a successors and assigns provision, the parties contemplated that they might assign their rights “and that their assigns and successors would be bound by the contract.”).

**State Courts:**

*California*: *Citizens Suburban Co. v. Rosemont Development Co.*, 244 Cal. App.2d 666, 675, 53 Cal. Rptr. 551, 557 (1966); *Brady v. Fowler*, 45 Cal. App. 592, 595, 188 P. 320, 321-322 (1920).





that the presence of a successors and assigns provision “is strong evidence of intent of assumption.”<sup>26</sup> Still others have held that the provision alone does not mean that the assignee is bound. Instead, the provision gives the assignee the option to be bound.<sup>27</sup> Finally, courts have held that an assignment does not bind an assignee simply because the successors and assigns provision says that it does.<sup>28</sup>

### [2]—To Bind a Nonassigning Party

The second purpose of the successors and assigns provision is to restate the common law that after an assignment, the nonassigning party is obligated to perform in favor of the assignee and to thereby give the assignee the benefits of the contract.<sup>29</sup>

### [3]—To Determine Whether Rights Are Assignable

Courts use the successors and assigns provision sporadically and inconsistently as a way of determining whether contract rights are assignable. Two basic positions have been staked out:

- First, that the successors and assigns provision should not be a factor in deciding whether the rights under a contract are assignable.<sup>30</sup>
- Second, that the presence of a successors and assigns provision demonstrates that the parties intended contract rights to be assignable.<sup>31</sup>

<sup>26</sup> Cedar Point Apartments, Ltd. v. Cedar Point Investment Corp., 693 F.2d 748, 755 n.8 (8th Cir. 1982) (citing 4 *Corbin on Contracts* § 871 at 481 (1951)). See Conn Aire, Inc. v. J.C. Leasing, No. 90-5143, 1990 WL 209580 at \*5 (6th Cir. Dec. 19, 1990) (unpublished opinion).

<sup>27</sup> See Kneberg v. H.L. Green Co., Inc., 89 F.2d 100, 103-104 (7th Cir. 1937), and the cases cited therein.

<sup>28</sup> See:

*California*: Shutes v. Cheney, 123 Cal. App.2d 256, 262-263, 266 P.2d 902, 907 (1954).

*Illinois*: Quest v. Robertson, 71 Ill. App.3d 678, 682, 388 N.E.2d 1335, 1338-1339, 27 Ill. Dec. 286, 289-290 (1979).

*Mississippi*: Mitchell v. Atlas Roofing Manufacturing Co., 246 Miss. 280, 293-295, 149 So.2d 298, 303-304 (1963) (holding that although the contract included a successors and assigns provision, “[an] assign of one of the contracting parties does not become bound by the contract unless he ratifies or adopts the contract.”), and the cases cited therein.

<sup>29</sup> See:

*District of Columbia Circuit*: Safer v. Perper, 569 F.2d 87, 94-95 (D.C. Cir. 1977).

**State Courts:**

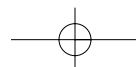
*Minnesota*: Suburban National Bank v. Morlock, No. CO-88-2154, 1989 WL 32488 at \*1 (Minn. App. Apr. 11, 1989) (unpublished opinion).

<sup>30</sup> See Estate of Showers v. Hy Cite Corp., 462 N.W.2d 552, 1990 WL 174739 at \*2 (Wis. App. Sept. 13, 1990) (unpublished opinion) (stating that the existence of both a successors and assigns provision and an anti-assignment provision did not make the latter ambiguous, but that the “terms of the [successors and assigns provision] simply bind[s] an assignee or successor [who has been] approved [by the nonassigning party].”).

See also, Calamari and Perillo, *The Law of Contracts* § 18.16 at 685 (4th ed. 1998) (“[V]ery often a clause appears in a contract to the effect that the contract shall inure to the benefit of the heirs and assigns of the parties. Such a clause normally is not directed at the issue of assignability and unless there is some other manifestation of intent of assignability, it will not be taken into account on this issue.”).

<sup>31</sup> See:

*Colorado*: Baum v. Rock, 106 Col. 567, 575, 108 P.2d 230, 234 (1940) (“The courts generally have held that a contract which otherwise might not be assignable, is made so by the insertion therein of a provision binding the assigns of the parties. We follow this rule.”).





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#### [4]—To Determine Whether Performance Is Delegable

The conclusions vary when courts rely on the successors and assigns provision to decide whether performance may be delegated. In some jurisdictions, the provision has been held to be “evidence of consent to the delegation of an otherwise nondelegable duty.”<sup>32</sup> In still other jurisdictions, however, courts have held that the provision does not make a nondelegable performance delegable.<sup>33</sup>

#### [5]—To Bind the Parties to the Contract

A literal reading of the successors and assigns provision is misleading. Its statement that the agreement “is binding upon the parties” is not intended to be the glue that makes a contract binding upon the parties.<sup>34</sup> Consideration, capacity, legality and other factors are required to do that.<sup>35</sup> Instead, the phrase “is binding upon the parties” is intended to convey that the nonassigning party must perform in favor of the assignee.

*Minnesota*: Suburban National Bank v. Morlock, No. CO-88-2154, 1989 WL 32488 at \*1 (Minn. App. Apr. 11, 1989) (unpublished opinion).

*Missouri*: Little Rock Surgical Co. v. Bowers, 42 S.W.2d 367, 369 (Mo. App. 1931).

<sup>32</sup> Cedar Point Apartments, Ltd. v. Cedar Point Investment Corp., 693 F.2d 748, 755 n.2 (8th Cir. 1982) (citing 4 *Corbin on Contracts* § 871 at 481 (1951)). See:

*Second Circuit*: Mathews v. United States, 226 F. Supp. 1003, 1006 (E.D.N.Y. 1964) (finding that the presence of a successors and assigns provision “help[s] in interpretation by indicating whether the parties intended contractual performances to continue beyond death even though, in some degree, they involved personal qualities . . .”).

*Tax Court*: DeGroff v. Commissioner, 54 T.C. 59, 74 (1970) (noting that although a contract was “personal to the parties,” it was nonetheless assignable), *aff’d* 444 F.2d 1385 (10th Cir. 1971).

**State Courts:**

*Illinois*: Henry v. Irwin (In re Frayser’s Estate), 401 Ill. 364, 372, 82 N.E.2d 633, 638 (1948).

*Oregon*: Mail-Well Envelope Co. v. C.P. Saley, 262 Ore. 143, 150, 497 P.2d 364, 368 (1972).

Courts do not always use correct terminology. Specifically, many ask whether a contract is “assignable” when the real issue is whether performance is “delegable.” See, e.g., Davis v. Basalt Rock Co., Inc., 107 Cal. App.2d 436, 444-446, 237 P.2d 338, 343-344 (1951). See, generally, Calamari and Perillo, *The Law of Contracts* § 18.1 at 670 (4th ed. 1998).

<sup>33</sup> See:

*California*: Davis v. Basalt Rock Co., 107 Cal. App.2d 436, 444, 237 P.2d 338, 343 (1952) (holding that performance could not be delegated despite a recital of “assignability” in the successors and assigns provision as that provision was not “absolutely determinative,” and noting that “the intention of the parties must be gathered from a consideration of the terms and entire tenor of the contract.”) (quoting Montgomery v. De Picot, 153 Cal. 509, 96 P. 305, 307 (1908)).

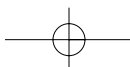
*Kansas*: Standard Chautauqua System v. Gift, 242 P. 145, 146 (Kan. 1926).

*New York*: Nassau Hotel Co. v. Barnett & Barse Corp., 162 A.D. 381, 383, 147 N.Y.S. 283, 285 (explaining that performance which required personal trust or confidence could not be delegated despite presence of successors and assigns provision), *aff’d* 212 N.Y. 568, 106 N.E. 1036 (1914); Paige v. Faure, 229 N.Y. 114, 118-119 (1920).

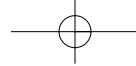
<sup>34</sup> See Plastone Plastic Co. v. Whitman-Webb Realty Co., 278 Ala. 95, 97, 176 So.2d 27, 28-29 (1965) (although the successors and assigns provision made no reference to binding the parties, the contract was found to be “binding upon the original parties”) (citing Texas Co. v. Birmingham Southern College, 239 Ala. 158, 194, 194 So. 192 (1940)).

But see, Normandy Place Associates v. Beyer, No. 10498, 1988 WL 35311 at \*1 (Ohio App. Mar. 16, 1988) (unpublished opinion) (referring to the successors and assigns provision as evidence that a preliminary agreement was a binding contract).

<sup>35</sup> See 17A Am. Jur.2d, *Contracts* § 16 (2002).







## § 4.04 Negotiating and Drafting a Successors and Assigns Provision

### [1]—A Typical Provision

Two versions of the successors and assigns provision follow. Example 2 uses a more contemporary style. Please note that while the Drafting Notes refer to Example 1, they apply equally to Example 2.

#### EXAMPLE 1

This Agreement is binding upon,<sup>[A]</sup> and inures to the benefit of, the parties and their respective [permitted]<sup>[B]</sup> successors and assigns.<sup>[C]</sup>

#### EXAMPLE 2

This Agreement binds and benefits the parties and their respective [permitted] successors and assigns.



#### Drafting Notes

- [A] Drafters often improperly draft this provision by using the false imperative.<sup>36</sup> Both Example 1 and Example 2 fix this error.
- As noted earlier,<sup>37</sup> a literal reading of the phrase “is binding upon” is deceptive. Those words do not create a binding agreement. Perhaps, for this reason, some successors and assigns provisions omit all references to the signatories and refer only to the parties’ successors and assigns.<sup>38</sup>
- [B] Parties sometimes litigate what role the successors and assigns provision has in determining whether rights under a contract are assignable and whether performance is delegable.<sup>39</sup> To foreclose this issue,<sup>40</sup> some drafters insert “permitted” before successors and assigns,

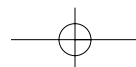
<sup>36</sup> For example, “This Agreement *shall* bind, and *shall* inure to the benefit of, the parties and their respective successors and assigns.”

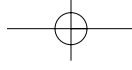
<sup>37</sup> See § 4.03[5] *supra*.

<sup>38</sup> See, e.g., *Markham v. Prutsman Mirror Co.*, 565 N.E.2d 385, 386 (Ind. App. 1991).

<sup>39</sup> See § 4.03[3] and [4] *supra*.

<sup>40</sup> See:





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thereby indicating that the agreement binds and benefits the parties and their respective successors and assigns *only if* the assignment and delegation provision permitted assignment and delegation. Alternatively, the following, more explicit clause could be added. It provides that the successors and assigns provision has no role in determining assignability or delegability and that, instead, the assignment and delegation provision is dispositive as to these matters.

This Section does not address, directly or indirectly, whether a party may assign its rights or delegate its performance under this Agreement. Section [insert cross-reference to the assignment and delegation provision] addresses these matters.

[C] When “successors” and “assigns” are used in tandem, “assigns” denotes a party to whom a voluntary transfer of rights has been made.<sup>41</sup> An example is the purchaser of substantially all of a company’s assets.

“Successor” does not usually mean “assignee.”<sup>42</sup> Instead, the classic definition of a “successor” is a corporation that by merger, consolidation, or other legal succession has been transferred rights and has assumed performance obligations of another corporation.<sup>43</sup> “Successor,” however, is not always used in this way. Its meaning is fluid and may depend on context.<sup>44</sup> Several courts have interpreted “successors” to refer to heirs and administrators.<sup>45</sup> Another court found the term to be an appropriate description for an entity

*Washington*: Lockerby v. Amon, 64 Wash. 2d, 26-27, 116 P. 463, 464 (1911).

*Wisconsin*: Estate of Showers v. Hy Cite Corp., 462 N.W.2d 552, 1990 WL 174739 at \*2 (Wis. App. Sept. 13, 1990) (unpublished opinion).

<sup>41</sup> See Southern Patrician Associates v. International Fidelity Insurance Co., 191 Ga. App. 107, 107-108, 381 S.E.2d 98, 99 (1989).

<sup>42</sup> See Enchanted Estates Community Ass’n, Inc. v. Timberlake Improvement District, 832 S.W.2d 800, 802 (Tex. App. 1992) (“As applied to corporations, ‘successor’ does not normally mean an assignee. . . .”) (citing International Ass’n of Machinists, Lodge No. 6 v. Falstaff Brewing Corp., 328 S.W.2d 778, 781 (Tex. Civ. App. 1959)).

<sup>43</sup> See:

*Georgia*: TRST Atlanta, Inc. v. 1815 The Exchange, Inc., 220 Ga. App. 184, 185, 469 S.E.2d 238, 240 (1996) (citing Southern Patrician Associates v. International Fidelity Insurance Co., 191 Ga. App. 107, 381 S.E.2d 98 (1989)).

*Texas*: Enchanted Estates Community Ass’n, Inc. v. Timberlake Improvement District, 832 S.W.2d 800, 802 (Tex. App. 1992) (citing International Ass’n of Machinists, Lodge No. 6 v. Falstaff Brewing Corp., 328 S.W.2d 778, 781 (Tex. Civ. App. 1959)).

<sup>44</sup> See:

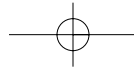
*District of Columbia Circuit*: Safer v. Perper, 569 F.2d 87, 95 (D.C. Cir. 1977) (“Initially, we note that [successor] is a word with many legal applications and that it is therefore difficult to define precisely. Recognizing this difficulty, Mr. Justice Marshall once remarked, ‘There is, and can be, no single definition of “successor” which is applicable in every legal context.’”) (Citation omitted.)

**State Courts:**

*Maine*: Sylvan Properties Co. v. State Planning Office, 711 A.2d 138, 140 (Me. 1998).

<sup>45</sup> See: Howell v. Murray Mortgage Co., 890 S.W.2d 78, 84 (Tex. Civ. App. 1994) (writ denied) (noting that when term successor is used as a legal term applying to natural persons, it means “one to whom property descends” or the “estate of decedent”); Procter v. Foxmeyer Drug Co., 884 S.W.2d 853, 861 (Tex. Civ. App. 1994).



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that was not a party to a documentary chain of contract assignments but had nonetheless voluntarily accepted the contract's benefits.<sup>46</sup> Still another court has defined "successor" as "one who takes the place that another has left, and sustains the like part or character."<sup>47</sup>

If one or more of the contract parties is a natural person, it is appropriate to add to the successors and assigns provision terms describing those to whom rights devolve upon a person's death, such as "heirs, executors, administrators and legal representatives." Practitioners should be sure to check the contract's governing law to ascertain whether any "magic words" should be used. For example, should "devisee" be added to the litany?

If the contract parties are all natural persons, the successors and assigns provision may be drafted as follows:

**This Agreement binds and benefits the parties and their respective heirs, executors, administrators, legal representatives, [and permitted] [successors] and assigns.**

Some drafters omit "successors" reasoning that individuals do not have "successors" in the classic sense of the term. In other words, individuals do not merge. Other drafters, however, include "successors" to handle the possibility of multiple transfers, one of which might result in a "successor."<sup>48</sup> The latter approach is more conservative.

If the contract parties include both a natural person and a corporation, the successors and assigns provision may be drafted as follows:

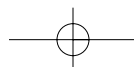
**This Agreement binds and benefits**

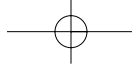
- (a) Roger North and his heirs, executors, administrators, legal representatives, and [permitted] [successors and] assigns; and**
- (b) Telecom Inc. and its [permitted] successors and assigns.**

<sup>46</sup> See *Citizens Suburban Co. v. Rosemont Development Co.*, 244 Cal. App.2d 666, 675-677, 677 n.3, 53 Cal. Rptr. 551, 557-558, 558 n.3 (1966).

<sup>47</sup> See *Enchanted Estates Community Ass'n, Inc. v. Timberlake Improvement District*, 832 S.W.2d 800, 802 (Tex. App. 1992) (quoting: *Safer v. Perper*, 569 F.2d 87, 95 (D.C. Cir. 1977) and *Wawak Co. v. Kaiser*, 90 F.2d 694, 697 (7th Cir. 1937)).

<sup>48</sup> For example, a sole proprietor could assign all of her rights to a corporation that she forms, and that corporation could then merge with another corporation.





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Disputes sometimes arise as to whether heirs are bound to perform, or conversely, whether they are entitled to receive a contract's benefits. These issues can arise with respect to almost any contract to which an individual is a party. One context in which they regularly occur is personal services agreements.<sup>49</sup> For example, assume that Victoria Pearson is an Executive Vice President of Telecom Inc. and that her four-year employment contract includes a \$1 million sign-on bonus, payable over the contract term. Further assume that Pearson dies in the middle of the second year of her contract and that the contract is silent with respect to the payment of the unpaid bonus. Was the bonus earned when she began working for Telecom (thereby passing on the right to the bonus to her heirs), or did full payment require Pearson to have worked for the full employment term (thereby terminating the heirs' rights to the bonus)?

Because court decisions involving contracts with individuals can be difficult to reconcile,<sup>50</sup> drafters should anticipate and directly address any issues that could arise upon a party's death or other life event.<sup>51</sup>

**[2]—Provisions that Bind Only One Party and Benefit Only the Other**

In Examples 1 and 2, both parties were bound to the contract and both were to benefit. In some contracts, however, the successors and assigns provision binds only one party and benefits only the other. This type of provision is sometimes seen in loan-related documents, such as security agreements.

**EXAMPLE 3**

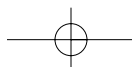
**This Agreement binds only the Borrower and its successors and assigns, and it benefits only the Bank and its successors and assigns.**

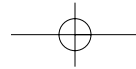
When reviewing a successors and assigns provision with this more limited scope, a practitioner should carefully analyze it to discern whether one of the parties really has no performance obligations. Sometimes, the "benefitting party" does have some obligations. For example, with respect to a security agreement, a bank is generally obligated (or should be) to care

<sup>49</sup> See generally, *Estate of Showers v. Hy Cite Corp.*, 462 N.W.2d 552, 1990 WL 174739 (Wis. App. Sept.13, 1990) (unpublished opinion).

<sup>50</sup> See Dimatteo, "Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability," 27 Akron L. Rev. 407 (1994), for a discussion of the inconsistent decisions with respect to personal service contracts.

<sup>51</sup> See, e.g., *Castonguay v. Castonguay*, 306 N.W.2d 143, 145-146 (Minn. 1981) (holding that in the absence of an express prohibition of involuntary transfers, restrictions on transfer did not prohibit court-ordered transfer of shares in a marriage dissolution proceeding).





for the collateral in a certain way.<sup>52</sup> In addition, the bank should be obligated to take whatever actions are required to release the collateral upon payment of the loan.<sup>53</sup>

### [3]—An Alternative Provision

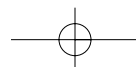
For a short provision, the classic successors and assigns provision has engendered its fair share of litigation. Unfortunately, the genesis of much of the litigation is its terseness; the provision is so truncated that its objectives are veiled. The following provision clarifies the provision's purpose and application.

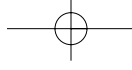
#### **Successors and Assigns.**

- (a) *The Nonassigning Party's Performance Obligations.* If there is an assignment of rights, the nonassigning party is deemed to have agreed to perform in favor of the assignee.<sup>[A]</sup>
- (b) *The Assignee's Performance Obligations.* If there is an assignment of rights,
  - (i) a contemporaneous delegation is deemed to have occurred, and
  - (ii) the assignee is deemed to have assumed the assignor's performance obligations in favor of the nonassigning party,<sup>[B]</sup>
 except if in either instance there is evidence to the contrary.<sup>[C]</sup>
- (c) *Assignability of Rights and Delegability of Performance.* This Section does not address, directly or indirectly, whether
  - (i) rights under this Agreement are assignable; or
  - (ii) performance under this Agreement is delegable.
 Section [insert cross-reference to the assignment and delegation provision] addresses these matters.<sup>[D]</sup>
- (d) *Definitions.* For purposes of this Section,
  - (i) "assignment" means any assignment, whether voluntary or involuntary, by merger, consolidation, dissolution, operation of law or any other manner;
  - (ii) "assignee" means any successor or assign of the assignor;<sup>[E]</sup>

<sup>52</sup> Revised U.C.C. § 9-207(a).

<sup>53</sup> For example, the bank must sign and file U.C.C.-3s.





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- (iii) a “change of control” is deemed an assignment of rights; and
- (iv) “merger” refers to any merger in which a party participates, regardless of whether it is the surviving or disappearing corporation.<sup>[F]</sup>

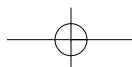
**Drafting Notes**

- [A] This clause addresses the nonassigning party’s obligations when its counterpart assigns its rights under the contract. It restates the common law and provides that the nonassigning party is required to perform the obligations it previously owed to the assignor in favor of the assignee.
- [B] This clause addresses whether
  - (1) a delegation occurs concurrently with an assignment and
  - (2) an assignee assumes the assignor’s obligations by accepting the assignment.
 In accord with the modern view, the clause provides that the delegation is deemed to have occurred concurrently and that the assignee is deemed to have agreed to perform the assignor’s obligations.<sup>54</sup> Neither this clause nor the first clause states whether the assignment benefits the nonassigning party or the assignee. Language to this effect is superfluous. By stating to whom performance is owed, the clause states who will benefit from the performance.
- [C] This clause is necessary to take into account that the assignor and the assignee may have intended that the assignment be made without a concurrent delegation and assumption; for example, as in an assignment for security.
- [D] As previously noted,<sup>55</sup> parties sometimes litigate what role the successors and assigns provision has in determining whether rights under a contract are assignable and whether performance is delegable. This subsection provides that the successors and assigns provision has no role and that the assignment and delegation provision is dispositive as to these issues.
- [E] This subsection defines “assignment,” “assignee,” “change of control” and “merger” to foreclose (one hopes) any issue as to their meaning.

<sup>54</sup> See: *Restatement (Second) of Contracts* § 328(1) and (2) (1981); U.C.C. § 2-210(4). See also, *Bank of New York, Albany v. Hirschfeld*, 37 N.Y.2d 501, 506, 374 N.Y.S.2d 100, 103 (1975) (holding enforceable a lease covenant that upon a sale of the building, “the purchaser . . . [is deemed to have] assumed and agreed to carry out any and all covenants and obligations of the Landlord”).

*Compare*, *Bank of New York to Longley-Jones Associates, Inc. v. Ircon Realty Co.*, 115 A.D.2d 272, 273-274, 496 N.Y.S.2d 155, 157 (1985) (holding that a traditional successors and assigns provision does not have the effect of causing an assumption by an assignee).

<sup>55</sup> See § 4.04[1] *supra*, Drafting Note [B].





“Assignment” is defined to mean not only a straightforward transfer of rights, but also any transfer that occurs by any other means. The definition is intended to be as all-encompassing as possible. It should be crafted with an eye to the assignment and delegation provision.<sup>56</sup> Both provisions should use “assignment” (or its variation, “assign”) consistently so that there is no divergence between the provisions. Therefore, for example, the assignment and delegation provision should use language along the following lines:

Neither party may assign any rights under this Agreement (whether voluntarily or involuntarily, by merger, consolidation, dissolution, operation of law or any other manner) . . .

The purpose of the definition “assignee” is to expand the typical meaning of assignee to include “successors.” If one of the parties is a natural person, the definition should be modified to take that fact into account. See § 4.04[1] *supra*, Drafting Note [C].

[F] “Change of control” and “merger” are defined to take into account case law. See § 3.11[2] *supra*, Drafting Note [F].

## § 4.05 Putting It All Together

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The successors and assigns provision addresses recurring questions relating to the relationship between the nonassigning party and the assignee. By directly tackling these issues in the contract, parties can effect their intent and avoid litigation.

<sup>56</sup> See Chapter 3 *supra*.

