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Depersonalization of Personal Service Contracts: The Search For a Modern Approach To Assignability

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DEPERSONALIZATION OF PERSONAL SERVICE CONTRACTS: THE SEARCH FOR A MODERN APPROACH TO ASSIGNABILITY

by

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I. INTRODUCTION

> "It was once believed that a right could not be assigned. A 'right' was conceived of as a sort of nebulous, ethereal, *personal* relation."[1]

The ever-evolving nature of modern commercial transactions dictates the need to review the common law area of personal service contracts. Namely, that when a court labels a contract as one for "personal service," in contrast to the general rule of assignability, it is *per se* nonassignable.[2] A review of this exception to assignability is suggested when one views the dramatic change in the nature of personal service contracts as well as their increasing popularity.

Today, an ever-growing part of the American gross national product is in the service industry.[3] Thus, a critical review of the 20th century case law dealing with personal services might suggest fundamental changes in the law. In general, there has been a narrowing of the exception from the English common law days when the exception was the rule.[4] A review of the cases from the late 19th century to today will be undertaken to see if this narrowing has provided a sound decisional matrix[5] and to see whether the exception can still be defended.

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[1] Arthur L. Corbin, *Assignment of Contract Rights*, 74 U. PA. L. REV. 207, 213 (1926).

[2] The *per se* nonassignable exception can be defined as follows: "When performance of personal services is delegated, the trier merely determines that it is a personal services contract. If so, the duty is *per se* nondelegable. There is no inquiry into whether the delegate is as skilled or worthy of trust and confidence as the original obligor. . . ." Sally Beauty Co. v. Nexxus Prod. Co., Inc., 801 F.2d 1001, 1008 (7th Cir. 1986). One may argue that just such an inquiry into the qualities of the assignee should be undertaken by the courts.

[3] Approximately 40% of the Gross National Product in 1970 was made up of sales of services. STATISTICAL ABSTRACT OF THE U.S., U.S. TREASURY DEPT. 430, at table 676 (1992). In 1991 the percentage of the sales of services of the GNP had increased to 53%. *Id.*

[4] *See* Grover C. Grismore, *Effect of A Restriction in Assignments in a Contract*, 31 MICH. L. REV. 299, 299 (1933).

> The early common law took a strictly logical view in regard to the assignability of contract rights and duties. Since a contract is essentially a personal relationship voluntarily entered into by the parties to it, it follows as a logical deduction that one of the parties should not be allowed to destroy that relationship by introducing a third person into it in his place without the consent of the other party. This was the view of the early common law.

Id.

[5] *See* Boston Ice Company v. Potter, 123 Mass. 30 (1877). *See also* Drewes v. FM Da-Sota Elevator Co. (*In re* Da-Sota Elevator Co.), 939 F.2d 654 (8th Cir. 1991); Northwestern Cooperage & Lumber Co. v. Byers, 95 N.W. 529 (Mich. 1903).

However, the past 125 years has seen a sporadic pattern of expansions and contractions of the exception in different types of transactions.[6] This may be due to the change in the size and nature of personal service transactions.[7] The monetary stakes involved in contemporary transactions are far removed from the old common law days where most contracts formalized purely one to one relationships. In fact, it is often hard to find the "personal" in personal service contracts when often time services have taken on the standardized and interchangeable nature that characterizes transactions in goods. Thus, this article will argue for the elimination of the *per se* rule against assignability.[8] The *per se* rule can no longer be defended in an age of increased fungibility in commercial transactions, and the increased sophistication of the parties on the opposite sides of today's bargaining tables.[9]

The courts' attempts to apply 19th century rationale to the increasing sophistication of 20th century commercial transactions[10] have resulted in inconsistent decisions. A comparison of the fact patterns among the cases has shown no consistent underlying jurisprudence that a practicing lawyer can look to in preparing his arguments on assignability. One can find many examples of conflicting decisions in cases involving almost identical fact patterns, justified by the same personal service rationales. A franchise may be assignable[11]; but a distribution contract involving a seemingly identical fact pattern is held to be nonassignable.[12] A contract to sell and buy hemp from a specific

[6] "The commercial spirit gradually made inroads into this doctrine. . . ." *See* Grismore, *supra* note 4 at 299.

[7] A court has held that a football player may negotiate and promote his future services while still under a personal service contract with a football team. World Football League v. Dallas Cowboys Football Club Inc. 513 S.W.2d 102 (Tex. Civ. App. 1974). "Bargaining for future services is a *matter of economics*. The Club can assure itself of the . . . services and loyalty of its players by offering them long-term contracts. . . ." *Id.* at 105 (emphasis added). In fact, the complexity of today's transactions have evolved well beyond the notion of the "personal" label used to rationalize the nonassignability of personal services contracts. *See infra* notes 260-265 and accompanying text. One commentator has stated this evolution quite dramatically: "The complexity of most agreements insures that such agreements will rarely be fully completed." T. Egan, *Equitable Doctrines Operating Against the Express Provisions of a Written Contract (or When Black and Gray Equals Gray)*, 5 DEPAUL BUS. L.J. 261, 312 (1993).

[8] The difficulty will be to fashion more precise tests to allow assignment of certain personal service contracts. *See infra* Section IV.

[9] For example, today's personal service contracts involving entertainment and sports stars are negotiated through a maze of specialized professionals: lawyers, agents, accountants, etc. The parties have no excuses for not protecting themselves by negotiating express and detailed assignability clauses in their contracts.

[10] *See supra* note 9.

[11] Schupack v. McDonald's System, Inc., 264 N.W.2d 827 (Neb. 1978) (holding the right of first refusal of McDonald franchises not assignable without consent). *Contra In re* Sunrise Restaurants, Inc., 135 B.R. 149 (Bankr. M.D. Fla. 1991) (holding Burger King franchise is assignable); *In re* Wills Motors, Inc., 133 B.R. 303 (Bankr. S.D. N.Y. 1991) (holding automobile franchise assignable by Chapter 11 debtor); Varisco v. Oroweat Food Co. (*In re* Varisco), 16 B.R. 634 (Bankr. M.D. Fla. 1981) (holding franchise for distribution and marketing of baked goods is assignable).

[12] Computer Communications, Inc. v. Codex Corp. (*In re* Computer Communications, Inc.), 824 F.2d 725 (9th Cir. 1987) (marketing and development agreement); Sally Beauty Co. v. Nexxus Prods. Co., Inc., 801 F.2d 1001 (7th Cir. 1986) (successor in hair care distribution contract cannot take assignment without consent of distributor); O'Brien v. Union Oil Co. of California, 699 F. Supp. 1562 (N.D.Ga. 1988); Berliner Foods Corp. v. Pillsbury Co., 633 F. Supp. 557 (D. Md. 1986) (food distribution contract); New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co., 73 N.W. 48 (N.Y. 1905) (distribution of printing presses not assignable).

field is held to be "personal" and nonassignable;[13] while a contract to sell and buy grapes from a specific field is held to be assignable.[14] Furthermore, cases have wavered as to whether a change in the legal form of the obligor works an invalid assignment.[15]

For example, a simple change in the legal form[16] of the obligor has resulted in some courts finding that the change worked an illegal assignment.[17] This result was preordained once the court affixed the personal service label upon the contract. One questions whether the law would better be served in such cases by the court undertaking a careful analysis as to whether the change in form will be detrimental to the adverse party. The detrimentality should be based on the expectations of the adverse party as to the totality of the bargain at the time of contracting.

A review of the use of the "personal service" label in the case law will be performed to see if certain factors can be enumerated to better quantify its meaning. The review will look to see if the application of the subjective determination of personal services is infected with problems that plague the application of most subjective standards.[18] For example, is the difficulty of determining the subjective intent of the parties replaced with the courts use of their own subjective leanings as to what is "personal"? If so, can it be argued that a better approach would be the use of a "totality of bargain" approach instead of the subjective intent of the parties approach now in use? Are the expectations of the parties sufficiently crystallized to be part of the bargain? If so, it will be argued that

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[13] Shultz & Co. v. Johnson, 44 Ky. (5 B. Mon.) 497 (1845).

[14] Larue v. Groezinger, 24 P. 42 (Cal. 1890) (holding contract to sell grapes to defendant from a specific field to be assignable). In reference to the much cited case of Boston Ice Co. v. Potter, 123 Mass. 28 (1877), the court commented: "If it cannot be so distinguished, we should be inclined to question the soundness of the decision." Larue v. Groezinger, 24 P. at 43. *See also* Farmland Irrigation Co. v. Dopplmaier, 308 P.2d 732 (Cal. 1957) (license to sell irrigation equipment is assignable); Cox v. Martin, 21 S. 611 (Miss. 1897) (cropping contract must be performed by representative of deceased).

[15] Equifax Servs, Inc. v. Hitz, 905 F.2d 1355 (10th Cir. 1990) (corporate merger); Hardy Implement Co. v. South Bend Iron Works, 31 S.W. 599 (Mo. 1895) (withdrawal of a partner); Alexander & Alexander, Inc. v. Koelz, 722 S.W.2d 311 (Mo. Ct. App. 1986) (change in partnerships); Nassau Hotel Co. v. Barnett & Barse Corp., 106 N.W. 1036 (N.Y. 1914) (individuals attempting to assign contract to their newly formed corporation); *New York Bank Note Co.*, 73 N.E. 48 (N.Y. 1905) (successor corporation).

[16] Examples of changes in legal forms: incorporation, merger, sale of corporation, changes in partners, etc. *See* cases cited *supra* note 15.

[17] The word "assignment" for purposes of this article shall be defined to include both the assignment of rights and delegation of duties. *See* RESTATEMENT (SECOND) OF CONTRACTS § 328 (1979); *see also* U.C.C. § 2-210(4)(1977). However, parties may "assign" only their "rights" and not their duties under a contract if specifically stated so in the assignment. The courts normally allow the "assignment" of a right to collect money even in personal service contracts when the corresponding duty has been fully performed or will be performed by the original party. Of course, the key issue in the area of personal service contracts is the "assignment" of personal duties. *See* JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS 722 (3d ed. 1987) (noting that the words "assignment" and "delegate" are words of art and lawyers seem prone to use the word "assignment" in art fully).

[18] In contrast to the rationale behind the general rule of contract law, i.e., the objective standard of the "reasonable person."

assignability should be allowed if those expectations can be satisfied without the use of the "personal service" mind-set currently used by the courts. A simple test of assignability would be whether the performance of the assignee meets the expectations of the obligee. Alternatively, is the performance of the assignee equivalent to the performance which would have been rendered by the assignor.[19]

Labelling and definitions aside, this article will examine the application of the *per se* rule of nonassignability[20] by determining what public policy concerns are being utilized by the courts to support their continued objection to assignability. Many courts have avoided articulating specific rationales for prohibiting an assignment.[21] Given its vague definition,[22] courts have simply labelled a transaction as "personal" and once labelled as such, rigidly apply the *per se* rule of nonassignability. It would seem that whatever definition of personal services that is used, if any, the labelling of a transaction as "personal" should only be the first step in the inquiry regarding assignability. The courts should carve out factors, express or implied, that can be used as reasons for not allowing an assignment.[23]

It will be determined whether the public policy matrix used under the general principle of "freedom of contract"[24] can be used to support the corollary principle of free

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[19] The law of personal service contracts have always revolved around the rights of the adverse (obligee) party. This should remain the primary focus. However, it would be remiss not to note that the rights of the obligor (the right to assign) and the rights of an innocent thire party (assignee) are also involved and should be weighed in the decision regarding assignability.

[20] *Per se* rule: "Certain kinds of contracts, often called 'personal service contracts,' are deemed by the common law to be non-delegable.... Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements and the Creditors' Bargain*, 91 YALE L. J. 857, 896 (1992). The *per se* rule of nonassignability holds that once a contract is labelled as "personal" then the contract rights and duties are *per se* nonassignable. However, over time the contract rights even in a "personal" contract have been held to be assignable. Nonetheless, most courts have not allowed the assignment (delegation) of duties once the "personal" label has been affixed to a contract. "Contract law generally distinguishes the delegation of 'fungible' duties from the delegation of 'non-fungible' duties . . . In essence, holders of these contracts are protected by a property rule: they do not have to deal with any assignees...." *Id.* *See also* DONALD A. WIESNER & NICOLAS A. GLASKOWSKY, SCHAUM'S OUTLINE OF THEORY & PROBLEMS OF BUSINESS LAW (1985). "[The rule against assignment of personal service contracts is generally upheld] provided they are indeed based upon a personal relationship between the parties." *Id.* at 104.

[21] This labelling of a contract as personal and not assignable was taken to an extreme in Johnson v. Vickers, 120 N.W. 837 (Wis. 1909). The court applied nonassignability retroactively to an executed contract. *Id.* at 839.

[22] Definition of "personal service" contracts: Contracts based upon the personal skills or other unique qualities of a contracting party, such as, talent, trust, confidence, credit, knowledge and experience. It is "a contract . . . which so far involves the element of personal knowledge or skill or personal confidence that it can be performed only by the person with whom made." BLACK'S LAW DICTIONARY 324 (6th ed. 1990).

[23] The *Boston Ice* case is an example of the dangers of a court implying terms of trust and confidence into a contract. Boston Ice Co. v. Potter, 123 Mass. 28 (1877). In that case the defendant took delivery and used conforming ice and was allowed to avoid payment because of an earlier assignment of the contract. *Id.*

[24] "[I]t is said that the paramount public policy is that freedom to contract is not to be interfered with lightly, and it is the ocurt's duty to sustain the legality of a contract in whole or in part whenever it can do so." 17A AM. JUR. 2d *Contracts* § 264 (1991).

assignability.[25] Current models already exist to protect or minimize the adverse party from harm in the case of an assignment. This article will review a number of such models. First, landlord-tenant laws' "consent may not be unreasonably withheld" principle.[26] Second, the Bankruptcy Code's use of "assurance" to allow for the assignability of shopping center leases.[27] Third, the assumption of secured indebtedness. For example, the sale of real estate where there is an assumption by the buyer of the existing mortgage.[28] Fourth, the U.C.C. model of giving "assurance."[29]

After a review of the case law,[30] this article will explore a number of different approaches which may be utilized as an alternative to the *per se* nonassignability of personal service contracts.[31] The approaches to be discussed as to this issue will illustrate the type of factors[32] a court may weigh in making a determination on assignability.[33]

II. HISTORICAL ANALYSIS AND PHILOSOPHICAL BASIS FOR RULE OF NONASSIGNABILITY OF PERSONAL SERVICE CONTRACTS

The fundamental basis of American contract law is that parties should have absolute "freedom of contract" unless some overriding public policy concern restricts that freedom.[34] However, any such restriction on that freedom is not to be taken lightly and should be strictly construed.[35] Furthermore, rights under a contract are viewed as "property

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[25] Free assignability or alienability is subsumed within the principle of "freedom of contract." For example: "The law [today] generally favors free alienation . . . and . . . the right to assign. . . ." Fernandez v. Vazquez, 397 So.2d 1171, 1172 (Fla. Dist. Ct. App. 1981) (involves assignment of a leasehold).

[26] *Id.* at 1172 n.2. Requirement that a "commercially reasonable" reason must be given: credit, tenant mix, diminishment in value. "An increasing number of jurisdictions hold that when a lease requires . . . consent prior to assignment . . . such consent may not be arbitrarily or unreasonably refused." *Id.* at 1173.

[27] 11 U.S.C. § 365 (b)(3)(1988); *See also In re* Federated Dept. Stores, Inc., 126 B.R. 516 (Bankr. S.D. Ohio 1990) (upheld liberal assignability of shopping center leases under the Code).

[28] This assumes that there is no "due-on-sale" provisions within the existing note and mortgage. Such mortgages have become increasingly rare. However, there is one important exception, FHA (Federal Housing Administration) and VA (Veterans Administration) guaranteed loans. Prior to 1989, these were freely assumable. Currently, they are assumable subject to a favorable credit check of the assuming party.

[29] *See infra* notes 235-36 and accompanying text.

[30] *See infra* Sections II and III.

[31] *See infra* Section IV.

[32] For example, the existence or lack of existence of an express nondelegation of duties clause would be one factor. The issue then becomes whether such an express prohibition works its "magic" to prevent a delegation (assignment). Are there sufficiently strong policy factors which override the prohibition? For example, (1) The principle of free assignability, (2) The marketability of the rights and duties.

[33] Strong public policy concerns for free assignability, such as the increased marketability and fungibility of personal rights and duties, may suggest the need to recognize a presumption in favor of assignability. *See infra* Section V.

[34] *See supra* notes 24-25.

[35] *See* 17A AM. JUR. 2d *Contracts* § 264 (1991). *See also* Bene v. New York Life Ins. Co. 87 S.W.2d 979 (Ark. 1935); Crimmins & Pierce Co. v. Kidder Peabody Acceptance Corp., 185 N.E. 383 (Mass. 1933); Tharp v. Allis-Chalmers Mfg. Co., 81 P.2d 703 (N.M. 1938).

rights" which one should be able to assign or sell. In fact, at one time, restraints on assignment were considered an illegal "restraint on alienation."[36] However such restrictions against assignment have been upheld under the notion of freedom of contract despite public policy concerns against restrictions on the free alienation of property rights.[37]

Nonetheless, in a contract which does not restrict assignment, the rule of free alienation applies. A major exception to this free assignability has been in the area of personal services. It was firmly held that such contracts were not assignable because they were *delectus personage*.[38] Common law held that the duties under such contracts were so personal that they could not be delegated. The obligee's expectations dictated that a specific person would have to perform the duty.[39] The court in the much cited *Boston Ice Company v. Potter*,[40] in 1877, explained that "[a] party has a right to select and determine with whom he will contract" and that "[i]t may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book."[41] The personal nature aspect of the nonassignability exception was more poetically stated in *Taylor v. Palmer*:[42] "All painters do not paint portraits like Sir Joshua Reynolds, nor landscapes like Claude Lorraine, nor do all writers write dramas like Shakespeare or fiction like Dickens. Rare genius and extraordinary skill are not transferable, and contracts for their employment are therefore personal, and cannot be assigned."[43]

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[36] ROBERT N. CORLEY & PETER J. SHEDD, FUNDAMENTALS OF BUSINESS LAW 277-78 (5th ed. 1990).

[37] 17A AM. JUR. 2d *Contracts* § 303 (1980) (citing Allhusen v. Caristo Constr. Corp., 103 N.E.2d 891 (N.Y. 1952)).

[38] Translates into "choice of the person." MARK E. ROSZKOWSKI, BUSINESS LAW PRINCIPLES, CASES, & POLICY (1987). Such a concept can be traced back to Roman times: "In the language of Roman law, personal actions were founded upon an *obligation*...." W.S. Holdsworth, *The History of the Treatment of Choses In Action by the Common Law*, 33 HARV. L. REV. 997, 1002 (1920).

[39] Jackson states the idea concisely as follows:

> Contract law generally distinguishes the delegation of "fungible" duties from the delegation of "non-fungible" duties. Certain kinds of contract, ofter called "personal service contracts," are deemed by the common law to be nondelegable because they are based on particular skills or other unique features of the contracting parties.... This protects the expectations of a party that has contracted with a particular entity in much the same say the specific performance rule does in other circumstances.

Jackson, *supra* note 20, at 896.

[40] 123 Mass. 28 (1877).

[41] *Id.* at 30.

[42] 31 Cal. 240 (1866).

[43] *Id.* at 247. *See also* Standard Chautaugua System v. Gift, 242 P. 145 (Kan. 1926) (contract to select and furnish lectures and entertainers was not assignable); Corson v. Lewis, 109 N.W. 735 (Neb. 1906) (contract for legal services held to be personal); Deaton v. Lawson, 82 P. 879 (Wash. 1905) (contract involving professional services of a physician nonassignable).

Thus, it has been held that such rights and duties should be excepted from the fundamental principle of free alienation.[44] In fact the courts have generally held that such contracts were *per se* nonassignable.[45] The following review of the development of this common law exception to assignability for personal service contracts will have two focuses. First, to examine any problems which this *per se* rule may pose in application.[46] Second, to analyze the decisional matrix to determine any inconsistencies resulting from the application of the *per se* rule to the subjective labelling of a contract as "personal."[47]

A. Lumley v. Wagner and Its Litany

The historical touchstone for the development of personal service nonassignability is often traced to *Lumley v. Wagner*.[48] "The *locus classicus* or paradigmatic example of personal service is the English precedent of *Lumley v. Wagner*. It involved a then prominent opera singer.... The parties and the public... contemplated and bargained for that particular artist, and no other would be expected to take his place....'[49] In the companion case of *Lumley v. Gye*[50] the court made clear that the law of personal services is not restricted to contracts involving such unique services as an opera singer.[51] The court fails to see any fundamental difference between the services of an opera singer and that of a shoemaker.[52] "The personal service being in one case to make shoes, and in the other to sing songs, it seems difficult to distinguish the cases upon principle: It is the... personal service that gives the right [and not the nature of the services]."[53] Thus, the nature of the services need not be unique or involve special knowledge or skills.[54] Furthermore, the transaction need not even be cloaked in the guise of "trust and confi-

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[44] Paige v. Faure, 127 N.E. 898 (N.Y. 1920). "The general rule is that rights arising of a contract cannot be transferred if they are coupled with liabilities or if they involve a relationship of personal credit and confidence." *Id.* at 899.

[45] *See* Swarts v. Narragansett Elec. Lighting Co., 59 A. 77 (R.I. 1904). "It is easy to see that personal service... might be a factor in electrical work, and upon such a possibility contracts have been held to be nonassignable." *Id.* at 78.

[46] *See infra* Section III.

[47] *See infra* Sections II.A.-B.

[48] 1 De G., M. & G. 604, 619, 622 (Ch. App. 1852).

[49] Drewes v. FM Da-Sota Elevator Co. (*In re* Da-Sota Elevator Co.), 939 F.2d 654, (8th Cir. 1991) (citation omitted).

[50] 2 E. & R. 216 (Q.B. 1853).

[51] *Id.*

[52] *Id.*

[53] *Id.* at 242. The court also used the following illustation: "The wrong and the injury are surely the same, whether the wrong-doer entices away the gardener, who has hired himself for a year, the night before he is to go to his work...." *Id.* at 255. Note, this actually involves a cause of action for tortious interference against a theater owner who contracted away the services of an opera singer. However, it does serve to illustrate the breadth of the personal service label to which the *per se* rule of nonassignability has been attached.

[54] *Id.*

dence.'"[55] In short, in "a right arising upon the contract of hire, the nature of the service contracted for is immaterial."[56]

As to the issue of assignability, the rule of *per se* nonassignability was firmly attached to the personal services label by Justice Holmes in *American Colortype Co. v. Continental Colortype Co.*[57] An assignment will not be allowed if a contract involves a personal service.[58] "Service is like marriage . . . [i]t may be repeated, but substitution is unknown."[59]

It has been argued that the courts have been unable to find a firm doctrinal basis for determining the parameters of the labelling of contracts as personal. The result has been diverging lines of cases involving other labelling devices within the personal service label. The old common law stemming from *Lumley v. Wagner* has been brought forward[60] to the 1990s. It is no surprise that this old subjective labelling has been challenged as being unresponsive to a "changed world."[61] Professor Ian Macneil invokes the changed world argument when he states: "[T]he similarity-of-outcome patterns which exist among such diverse relations as automobile dealer franchises, collective bargaining, and the internal operations of corporations, have at the present time, few, if any common doctrinal patterns."[62] Professor Macneil summarizes the problem as "the wisdom of attempting to [apply] the law of transactional contracts at a time when so

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[55] *Id.*

[56] *Id.* at 232. Stating it in the old garb or "master-servant" the Court in *Blake v. Lanyon* states that "a person who contracts with another to do certain work for him is the servant of the other till the work is finished, and no other person can employ such servant to the prejudice of the first master." 101 Eng. Rep. 521 (K.B. 1795).

[57] 188 U.S. 104 (1913).

[58] *Id.* at 107.

[59] *Id.* Ironically, the plaintiff-assignee won the case. *Id.* at 108. The court maneuvered around the nonassignability rule by "finding" a novation. *Id.* It held that there was no assignment even though there was evidence of "consent" given by the obligee. *Id.* Instead, it found that the original contract was discharged and a new employment contract was formed. *Id.* Justice Holmes seemed to acknowledge the rue by stating, "indeed, long has smouldered as a dimly burning question of the law." *Id. See also* Arkansas Valley Smelting Co. v. Belden Mining Co., 127 U.S. 379 (1888).

[60] In Miller Constr. Co. v. First Indus. Technology Corp, 576 So.2d 748 (Fla. 1991), the court uses the personal service label in a contract involving architectural design services to avoid the application of the doctrine of part performance exception to the statute of frauds. The District of Columbia Circuit Court hardens back in the 1973 case of Clayman v. Goodman Properties, Inc., 518 F.2d 1026 (D.C. Cir. 1973). The court cites Humble v. Hunter, 115 Eng. Rep. 885, 887 (Ex. 1848), for a contracting party's "right to the benefit . . . from the . . . substance of the party with whom [he] contract[s]." The bell tolls loudly in this case for the rule of nonassignability: "The opinion neither of judge nor jury as to the capabilities of a replacement is acceptable as a substitute for the promisee's won judgement and tastes. . . ." *Id.* at 1035-36.

[61] *See infra* Section V.A.

[62] Ian R. Macneil, *Restatement (Second) of Contracts and Presentation*, 60 VA L. REV. 589, 609 (1974).

much contract law concerns *relations* which much of the transactional doctrine is so ill-fitted to serve."[63]

It is now time to turn to the litany of *Lumley v. Wagner* in order to examine the evolution of a rule which made such good sense in 1852. The following is *Lumley's* family tree which has beared a bit too many illegitimate fruits.

1. Intent, Whether Fact or Fiction, As the Paramour of Personal Service Nonassignability

Initially, the courts seemed to focus on the perceived intent of the parties in determining whether a contract was a nonassignable personal service. The nature of the contracted services was not considered important to this determination. Thus a contract for services of an opera singer was not viewed any differently than a contract for the services of a shoemaker.[64]

The court in *Paige v. Faure*[65] held that an agreement for an automobile tire franchise could not be assigned even when the assignee was one of the two original parties (franchisees) to the agreement.[66] This was despite the fact that a provision in the franchise agreement stated that it would "benefit the respective successors and assigns."[67] The court disregarded the express provision of the agreement, the fact that the assignment was not to a third party, and that the nature of the agreement was the sale of tires.[68] Instead, the court held that "[t]he intention of parties to a contract must be ascertained, not from one provision, but from the entire agreement."[69] The court implied the necessary intent by applying the traditional personal service rationale of "trust and confidence."[70] "[A]

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[63] *Id.* (emphasis added). The problems of applying the personal service fiction and its rule of *per se* nonassignability have become increasingly apparent because of the complex nature of many of today's relational contracts and because of the courts ignoring the many transactional elements in these contracts. Alternatively stated, many of today's so-called personal service contracts possess many of the characteristics found in the transactional "sale of goods." *See infra* Section V.A.1. Thus, the application of a *per se* nonassignability rule to personal service contracts is difficult to justify. Professort Macneil states:

> [A] frank legal recognition of the relational nature of much contractual behavior could relieve transactional contract doctrine of the *tremendous pressure of coping with situations for which it was never* designed.... The twisting of fact and doctrine and the fictions imposed in order *to reach sound results* within transactional rules can be and often are immense.

Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 815 (1974) (emphasis added).

[64] *See supra* notes 48-49 and accompanying text.

[65] 127 N.E. 898 (N.Y. 1920).

[66] *Id.*

[67] *Id.* at 899.

[68] *Id.*

[69] *Id.*

[70] *Id.*

contract cannot be transferred if [rights] are coupled with liabilities or if [rights] involve a relationship of personal . . . confidence."[71]

The negative side of the use of intention as the predominant test for personal service nonassignability is that any contract can be made "personal" if it can be shown that the parties intended it to be so. Such an unlimited use of the personal service label was enumerated in *Frissell et ux. v. Nichols*:[72] "It is competent for the parties to make any contract a personal one *no matter what the subject-matter.* If the intention is manifested by the parties... it effects the same object as where the law implies the intention from the subject-matter.[73]

Almost a half century later, this contention that any contract can be made personal and thus by implication, nonassignable, was reaffirmed in *Clayman v. Goodman Properties, Inc.*[74] Thus, the innocent labelling that the services of an opera singer were "personal" and *per se* nonassignable, had evolved into a universe of almost infinite fact patterns which can justify application of *per se* nonassignability. The history of the 20th century case law has been an unsuccessful attempt to quantify the notion of "personal" and to rationalize the *per se* rule.[75] The extent of this failure was illustrated in a recent case. Despite over one hundred years of personal service jurisprudence, a court boldly stated that "[t]here is no case law which specifically discusses the meaning of 'personal services[!]'"[76]

2. The Essence of the Subject Matter Must Be Personal

Another line of cases acknowledged that the analysis aimed at determining the intention of the parties, by implication, was lacking and subject to abuse. Instead, intention was to be viewed as only one factor in the analysis regarding assignability. More importantly, the nature or subject matter of the contract has to be inherently "personal." In *Walker Electric Co. v. New York Shipbuilding Co.*[77] the court forwarded a two-pronged test in order to determine the assignability of a subcontract to build electrical switchboards for a navy ship.[78] "In determining whether... [there is] the right to demand personal performance . . . we must consider first the subject matter of the

[71] *Id.* Numerous courts have concluded any contract based upon the "credit" of one of the parties must have been intended to be personal. *See* Menger v. Ward, 30 S.W. 853 (Tex. 1895). *See also* Tifton, T. & G. Ry. Co. v. Bedgood, 43 S.E. 257 (Ga. 1903).

[72] 114 So. 431 (Fla. 1927).

[73] *Id.* at 434 (emphasis added).

[74] 518 F.2d 1026 (D.C. Cir. 1973).

[75] *Infra* Section III.

[76] Yellow Cab of Cleveland v. Greater Cleveland Regional Transit Auth., 595 N.E.2d 508, 510 (Ohio Ct. App. 1991).

[77] 241 F. 569 (3d Cir. 1917).

[78] *Id.*

contract and then the relation of the parties."[79] However, the court noted the difficulty of its undertaking to determine the personal nature of a given subject matter.[80] In the end the court applied the *per se* rule to what seemed to be a simple transaction in specialized goods because "it is difficult to exclude the personal equation."[81]

The focus on the nature of the subject matter[82] of a contract has done little to reign in the breadth of personal service labelling that was evident in the "intent of the parties" cases.[83] Instead of a uniformity of decision as to what is by "nature" a personal service, the courts have used different personal service rationales[84] to weave a decisional roadway filled with potholes of inconsistency. The difficulty of attempting to label a contract as personal due to the nature of its subject matter was noted in the turn of the century case of *Swarts v. Narragansett Electric Lighting Co.*[85] The case involved a contract for the installation of electric fixtures.[86] The court stated that:

> In the present case [we are] *unable to say, as a matter of law, to what extent the personal service . . . may have been important.* [Such work] . . . is not a matter of such common knowledge that the court can say how far it should or should not be held to call for personal services. . . .[87]

The court noted that this was a case "where the personal element may be as real [as a painting of a portrait], though less apparent."[88] It concluded that the installation of electrical fixtures was personal from "the nature of the work to be done."[89]

The danger of basing *per se* nonassignability upon the nature of the subject matter is well illustrated in the case of *Johnson v. Vickers*.[90] The case involved a contract to

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[79] *Id.* at 574.

[80] *Id.*

[81] *Id.*

[82] The subject matter approach implies that there is some uniqueness to the contract that makes it a nonassignable personal service contract.

> A current example would be a contract for Luciano Pavarotti to appear. . . . In other words, *the specific expertise of* a particular artist *is the subject-matter of the contract.* Unique talent is involved; the performers are not fungible. The same would be true of a top-flight talent in other professions. A tort plaintiff hiring Melvin Belli or a famous surgeon would look askance at substitution of lesser luminaries.

Drewes v. FM Da-Sota Elevator Co. (*In re* Da-Sota Elevator Co.), 939 F.2d 654, 656 (8th Cir. 1991) (emphasis added).

[83] *See supra* Section II.A.1.

[84] *Infra* Section II.B.

[85] 59 A.77 (R.I. 1904).

[86] *Id.* at 77.

[87] *Id.* at 77-78.

[88] *Id.* at 77.

[89] *Id.* at 78.

[90] 120 N.W. 837 (Wis. 1909).

construct and equip a canning factory.[91] The court held that by its "nature" the contract was personal since it involves special skill, knowledge and experience to construct such a "complex plant."[92] In this case the contractor assigned the contract without knowledge of the adverse party.[93] The factory was built according to prescribed specifications and the assignee received the required certificate of completion from the adverse party's executive committee.[94] Subsequently, the adverse party refused to accept the work and to make payment.[95] The court found for the adverse party because of the nature of the subject matter.[96] The assignment was *per se* invalid: "there [can] be no substitution of contractors."[97]

The application of *per se* nonassignability to fully executed contracts are offered to support the argument that the dangers of *per se* rules often outweigh their usefulness. The dangers are magnified in this instance, when coupled with the courts subjectively using the personal service rationales of "confidence," "trust," "skill," "knowledge," and "expertise" to label contracts "personal by nature." I next turn to a review of the history of applying the above rationales in determining if a contract is nonassignable.

B. The Personal Service Rationales of "Trust" and "Confidence," "Skill," "Knowledge," and "Expertise"

In the courts labelling of contracts as *per se* nonassignable, they have wrestled with such concepts as (1) trust, confidence, and (2) special skill, knowledge and expertise,[98] in order to term contracts as personal. In fact, these terms have become the buzzwords whose real meanings have become as unquantifiable as the "personal service" label they are elicited to define. The following is a selective review of cases that have expressly utilized these rationales. Also, I will analyze how some courts have attempted to sidestep these expressed rationales and the harshness of the *per se* rule, by bifurcating personal services into areas of personal and "truly" personal.[99]

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[91] *Id.* at 837-38.

[92] *Id.* at 838.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] Most of the cases seem to be polarized between the rationales of trust and confidence versus cases which focus upon the special skills, knowledge and/or expertise of the obligor. Linn County Abstract Co. v. Beechley, 99 N.W. 702 (Iowa 1904), uses both poles of the personal service rationales to justify its conclusion. However, it clearly separates the rationales into two traditional poles. The case involved preparation of real estate abstracts. *Id.* at 702. In one sentence the court states that "a thorough *knowledge* of real estate law [is] essential" *Id.* (emphasis added). In the following sentence the court switches "poles": "In the employment of an abstracter, a high degree of *trust and confidence* is reposed." *Id.* (emphasis added). Also, other words have also been applied along with the above rationales. Examples of other such rationales include: "talent," "credit," and "special training." *See e.g.*, Drewes v. FM Da-Sota Elevator Co. (*In re* Da-Sota Elevator Co.), 939 F.2d 654 (8th Cir. 1991).

[99] *Infra* notes 130-34 and accompanying text.

1. "Trust" and "Confidence"

Trust and confidence has been utilized many times to affix the personal service label of nonassignability to contracts which would normally be assignable as "routine commercial functions."[100] Thus, any contract can be made to be personal if it is imbued with trust and confidence.[101] For example, the court held in *Linn County Abstract Co. v. Beechley*[102] that a contract to provide title abstracts involved "a high degree of trust and confidence"[103] and could not be assigned.

One court put it very simply: "Do the terms of the contract *seem* to require [the] personal confidence and skill on the part of the [obligee]?"[104] When stated as such, it would be difficult to find many contracts which do not "seem" to involve at least a certain degree of trust and confidence.[105] For example, it has been held that a contract to select and furnish lecturers, musicians and entertainers was not assignable.[106] This was despite the facts that: (1) the contract possessed express assignment language,[107] (2) there were allegations that the bookings were of the "same or better quality" than that which would have been provided by the obligor,[108] and (3) that the obligee did not act in good faith by failing to cooperate in producing the program. The court declined to fully analyze the above factual assertions. Instead, it held that the contract was not assignable and analogized it to the law of agency.[109] "It [is] somewhat in the nature of an agency contract, and one involving a relationship of personal credit and confidence."[110]

Another area where *per se* nonassignability has firmly embossed its stamp, has been in the area of insurance contracts. It has been universally held that insurance contracts

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[100] *Linn County Abstract Co.*, 99 N.W. 702.

[101] *See supra* notes 65-71 and accompanying text.

[102] *Linn County Abstract Co.*, 99 N.W. 702.

[103] *Id.* There had been an enormous increase in the number of title abstract companies existing today. This is most likely due to the dramatic rise in real estate sales and the use of title insurance in real estate transactions. Thus, one would be hard-pressed to characterize abstract preparation as a "unique" skill. Furthermore, "trust and confidence" as a justification is less forceful given the standardized nature of today's title requirements and the existence of state licensing standards for title insurance companies.

[104] *In re* Seiffert, 18 F.2d 444, 445-46 (D. Mont. 1926) (emphasis added). In this case, it was held that a contract to provide labor to farm a certain parcel of land was a nonassignable personal service contract and could not be performed by the assignee's personal representative. *Id.* at 446.

[105] The likelihood of abuse of such subjective standards is obvious when framed by such a question.

[106] Standard Chautauqua System v. Gift, 242 P. 145 (Kan. 1926).

[107] *Id.* at 145. The contract states that it "shall bind and benefit the parties thereto, their successors or assigns." *Id.*

[108] *Id.* at 146.

[109] *Id.* "In the law of agency is to be found the old maxim '*delegatus delegare non protest*' indicating that the power of a agent is not assignable" Corbin, *supra* note 1, at 208.

[110] Corbin, *supra* note 1, at 208. As to the express assignment language the court held that the language was too general and when interpreted as a whole the contract was one involving "personal credit and confidence" and not assignable. *Id.*

are by their "nature" not assignable when owners sell their properties. The rationale usually asserted is that the insurance contract was issued based on the insurers trust and confidence in the insured. This rationale can be challenged in a number of ways. First, the true risk factors revolve around the nature and the hazards posed by the property itself and not its owner. Second, insurance companies generally inspect commercial and industrial properties from time to time to insure that the nature and use of the property has not changed in a way to increase the insurers risk. As to residential homes, the fungibility of the risk and of homeowner policies in general indicate that insurance companies are unlikely to know or even care to know the homeowner. Trust and confidence is unlikely to enter into their risk management equation. Third, nothing prevents the courts from fashioning a similar test to that which has been utilized in the area of landlord-tenant law.[111] The insurance company should be allowed to withhold its consent to an assignment only if it can show that its risk has increased due to the assignment. For example, a mortgagee endorsed in an insurance policy may assign it when reselling its mortgage. This is allowed because the owner has remained the same and therefore the insurers risk has remained unchanged. I would argue that the same test or rationale should be applied if the owner attempts to assign the policy upon a sale: Does the transfer increase the hazard or substitute a different risk, or is the hazard for all purposes the same?[112]

A somewhat analogous area of the law is the ability of government officials, units, or agencies to enter contracts binding upon a subsequent administration. It is generally held that a contract involving a unitary performance or act may extend and bind a subsequent administration. On the other hand, if the contract is for "personal or professional services" it may be avoided by a successor administration.[113] Although, generally upheld, this dichotomy has been difficult to apply in practice.[114] "[H]undreds of cases found nationwide which in some fashion consider the subject, afford justification for almost any result desired."[115] This area of law lends further support to the difficulty of quantifying "personal" and its "trust and confidence" rationales.[116]

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[111] *See infra* Section V.B. For example, the courts could impose upon insurance companies a "duty to investigate" the assignee of the insurance contract and to offer a good faith reason for not consenting to the assignment.

[112] Central Union Bank of South Carolina v. New York Underwriters' Ins. Co., 52 F.2d 823, 825 (4th Cir. 1931). This test was taken from a case which upheld the nonassignability of insurance contracts by the insured-owner. *Id.* at 827. The question was posed regarding the assignment of a mortgagee's interest in the policy. *Id.* at 825.

[113] *See* Mariano & Assoc., P.C. v. Sublette County Comm'rs, 737 P.2d 323 (Wyo. 1987).

[114] *Id.* at 326.

[115] *Id.*

[116] *See id.* The court held that the services of an accounting firm did possess the requisite "[t]rust and reliance, intrinsic to certain personal service contracts." *Id.* at 331. It reasoned that such services were analogous to those of a lawyer or doctor. *Id.* However, the court did acknowledge that such nonassignability "would not be available in the magnitude of other business relationships." *Id.*

Another code word for trust and confidence can be found in contracts requiring the use of the "best efforts" of one of the parties.[117] This term is often implied in sales representation, agency and promotional contracts.[118] Simply stated, a party may elect a certain agent, salesperson, or promoter based on an implied belief that the individual or company will use its best or "reasonable efforts"[119] to promote the interests of the contracting party. This is one area where the trust and confidence rationale serves a useful purpose.[120] Such contracts are at the core of the "personal" in personal service contracts. Whatever new approaches are posed by this article[121] or any other should find these types of contracts to be nonassignable. I now turn to the other pole of personal service rationales.

2. "Skill," "Knowledge," and "Expertise"

A classic example of the use of these rationales involved the issue of whether a contract with an architectural firm involved special skill, knowledge and expertise. The court answered the question strongly in the affirmative in *Smith v. Board of Education.*[122] It described the services provided by architects as follows: "The business of an architect has the dignity of a learned profession. [It involves] person[s] of peculiar skill and taste.... [Women and men] of culture, of disciplined mind[s] artistic eye[s], and trained hand[s]."[123] It has been generally held that professional services are personal and nonassignable based on the rationales enunciated in *Smith v. Board of Education.*[124]

The nonassignability of contracts involving the so-called "learned professions"[125] is easier to justify. However, the application of these rationales to other professions is more susceptible to criticism. For example, the court in *Eastern Advertising Co. v,*

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[117] *See* Mellencamp v. Riva Music Ltd., 698 F.Supp. 1154 (S.D. N.Y. 1988).

[118] Some states have codified the "best efforts" standard into law: "A lawful agreement by either the seller or the buyer for exclusive dealing ... imposes unless otherwise agreed an obligation by the seller to use *best efforts* to supply the goods and by the buyer to use *best efforts* to promote their sale." TEX. BUS. & COM. CODE ANN. § 2-306(b) (West 1968) (emphasis added). *See also* Sally Beauty Co. v. Nexxus Prods. Co., Inc., 801 F.2d 1001, 1009 (7th Cir. 1986) (Posner, J., dissenting).

[119] Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (N.Y. 1917).

[120] This was the finding in Don King Productions, Inc. v. Douglas, 742 F.Supp. 741 (S.D. N.Y. 1990).

[121] *See infra* Section IV.

[122] 222 P. 101 (Kan. 1924).

[123] *Id.* at 101.

[124] *See* Corson v. Lewis, 109 N.W. 735 (Neb. 1906) (a contract for legal services held to be "personal in nature, and consequently unassignable"); Deaton v. Lawson, 82 P. 879 (Wash. 1905) (contract involving physician services held to be nonassignable); Mariano & Assoc., P.C. v. Sublette Cty. Comm'rs, 737 P.2d 323 (Wyo. 1987) (held that accounting services were professional services and nonassignable). In the age of health care plans and health maintenance organizations (HMO's) it can be debated whether the nature of such services have changed to the point to make physician services assignable. In fact, ofter times patients are limited as to their selection of physicians under such plans.

[125] *See* Smith v. Board of Educ., 222 P. 101 (Kan. 1924).

Mcgaw[126] held that a contract to make and display advertisements in street cars was nonassignable because the obligee relied upon the skill and experience of the specific company.[127] In a more extreme case, a contract for printing was held to be nonassignable because the court "assumed" that the printer was chosen because of its qualifications and "artistic skills."[128]

It can be argued that the rationales of skill, knowledge and expertise provide the courts a firmer basis[129] than those involving the more vague notions of "trust and confidence." However, the farther the courts have moved away from the learned professions, the more difficult it is to distinguish the cases from those involving trust and confidence. Some courts have attempted to avoid this confusing matrix of personal service rationales. The following is one example of such an ill-fated attempt.

3. Personal Versus "Truly" Personal: The Bankruptcy Code Cases

A number of courts in the area of bankruptcy law have interpreted the Bankruptcy's Code prohibition against the assignment of personal service contracts,[130] by a trustee in bankruptcy, to apply only to contracts which are "truly personal."[131] The notion of

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[126] 42 A. 923 (Md. 1899).

[127] *Id.* at 925-26.

[128] Campbell v. Board of Comm'rs 67 P. 866, 867 (Kan. 1902).

[129] The rationales of unique skills, knowledge and ability have been utilized by courts to enforce "covenant not to compete" clauses. *See, e.g.*, New England Patriots Football Club, Inc., v. Univ. of Colo., 592 F.2d 1196 (1st Cir. 1979) (football coach); Dallas Cowboys Football Club, Inc. v. Harris, 348 S.W.2d 37 (Tex. Civ. App. 1961) (football player). *Contra* Smith, Waters, Kuehn, Burnett & Hughes, Ltd. v. Burnett, 548 N.E. 1331 (Ill. App. Ct. 1989) (held that an attorney did not possess exceptional or unique skills to warrant the enforcement of a negative covenant in an employment contract). The "uniqueness" requirement used to enforce covenants not to compete, also known generically as "negative covenants," was broadly extended in Mission Independent School Dist. v. Diserens, 188 S.W.2d 568 (Tex. 1945). The court granted an injunction to prevent a public school music teacher from obtaining a similar job anywhere in the state! *Id.* The court noted that the music teacher possessed "extraordinary and unique talents." *Id.* at 568. See also the following cases involving the law of negative covenants: Equifax Serv., Inc. v. Hitz, 905 F.2d 1355 (10th Cir. 1990); Pino v. Spanish Broadcasting System of Fla., 564 So.2d 186 (Fla. Dist. Ct. App. 1990); Safelite Glass Corp. v. Fuller, 807 P.2d 677 (Kan. Ct. App. 1991); Alexander & Alexander, Inc. v. Koelz, 722 S.W.2d 311 (Mo. Ct. App. 1986).

[130] The Bankruptcy Code states: "The trustee may not assume or assign any executory contract . . . whether or not such contract . . . prohibits or restricts assignment of rights or delegation of duties, if . . . applicable law excuses a party . . . to such contract . . . from accepting performance from . . . an entity other than the debtor. . . ." 11 U.S.C. § 365(c)(1988). Personal service contracts are generally considered nonassignable under "applicable law," that being, the state law being applied by a given bankruptcy court. This seems to have been the intent of the drafters of the Code: "Second, executory contracts requiring the debtor to perform duties nondelegable under applicable nonbankruptcy law should not be subject to assumption against the interest of the nondebtor party." HOUSE COMM. ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, 93d Cong., 1st Sess. 199 (1973). Furthermore, "[a] majority of Courts, which have considered 11 U.S.C. § 365 (c) when confronted with an issue of nonassignability have found 11 U.S.C. Sec. § 365 (c)(1)(A) to apply to contracts based upon personal services or skills, or upon personal trust or confidence." 2 COLLIER ON BANKRUPTCY para. 365.05, at 365-42 (15th ed. 1989).

something being "truly personal" as opposed to something which is "merely personal" smacks of another semantic attempt[132] to limit the rule of nonassignability. These cases[133] turn the personal service rationales inside out.[134] For example, the trust and confidence rationale is cited, but some courts have indicated that trust and confidence must be the primary basis of the contract in order to reach the level of truly personal.[135] The court in *In re Varisco*[136] ruled that a franchise agreement for the sale of baked goods was assignable under the bankruptcy code.[137] Nonassignment of personal service contracts "is limited to executory contracts which are truly personal . . . [that are ones] that [are] personal service contract[s] based on special trust and confidence. . . ."[138]

The weakness of attempting to quantify a transaction as "truly personal" was manifested in *In re Sunrise Restaurants, Inc.*[139] where the court held that the business of operating a Burger King franchise required "no special knowledge."[140] It reasoned that it was strictly a business transaction for economic gain."[141] Citing *In re Varisco*,[142] the court held that the debtor could assign its franchise agreement because the personal service rationales were missing.[143] Once again the court's use of personal service rationales to avoid *per se* nonassignability is flawed. It is hard to accept that a franchise involving millions of dollars does not require a degree of special knowledge and business

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[131] The notion that there are differend degrees of personal, or alternatively stated, that not all personal service contracts are personal enough to prevent an assignment has been previously stated. For example, the Seventh Circuit Court coined the term "purely personal" in the case of Carlock v. LaSalle Extension Univ., 185 F.2d 594 (7th Cir. 1950). The case involved whether the personal representative of a deceased obligor, would be allowed to be substituted in the "Exclusive Agency" Agreement. *Id.* at 594-95. The court held that as a matter of law it was not proven that the contract was personal enough to prevent the substitution. *Id.* at 595. It enunciated the following standard: "No doubt the facts and circumstances of each particular case will be taken into account in determining whether the contract is *purely personal* in its nature [to prevent substitution or assignment]." *Id.* (emphasis added).

[132] It is this underlying "semantic fog" of personal service contracts that this author believes requires the elimination of the *per se* rule of nonassignability. As another stated, it is my "hope for a tool or device which will lead [us] out of the semantic fog." Donald A. Wiesner & Albert E. Harnum, *Materiality: The Legal Rule of Thumb*, 4 AM. BUS. L. J. 58 (1966).

[133] *See, e.g., In re* Tom Stimus Chrysler-Plymouth, Inc., 134 B.R. 676 (Bankr. M.D. Fla. 1991) (auto dealership franchise agreement was not a personal service contract and is therefore, assignable); Secretary of the Army v. Terrace Apartments, Ltd. (*In re* Terrace Apartments, Ltd.), 107 B.R. 382 (Bankr. N.D. Ga. 1989).

[134] *Supra* Sections II.B.1-2.

[135] *See* Varisco v. Oroweat Food Co. (*In re* Varisco), 16 B.R. 634 (Bankr. M.D. Fla. 1981).

[136] *Id.*

[137] *Id.*

[138] *Id.* at 638. Even though a certain amount of trust and confidence is inherently involved in such a contract involving exclusive marketing and distribution rights, the court held that it was not "*really* a personal service contract based on trust and confidence." *Id.* at 639.

[139] 135 B.R. 149 (Bankr. M.D. Fla. 1991).

[140] *Id.*

[141] *Id.* at 153.

[142] *Id.*

[143] *Id.*

skill, along with a certain amount of trust and confidence in the assignee. The court masked the true reason for allowing the assignment. Simply, the benefit to the debtor of being able to sell a valuable asset, the franchise, outweighed any harm or increased risk that such an assignment would have on the franchisor. The court stressed the facts that the assignee was "no newcomer to fast food restaurant[s]"[144] and that it was willing to "infuse [a sizable amount of] working capital[145] into the franchise."

By clothing the nature of the franchise agreement in personal service contract rationale, the court missed an opportunity to forge a more straightforward approach to assignability.[146] For example, personal or not, the contract should be assignable because the benefit to the obligee is great and the assignment would not cause any appreciable harm to the obligor. In fact, the court expressly points out that the franchisor would "be in no worse a position" after the assignment.[147] The courts should no longer have to justify its avoidance of nonassignability by utilizing personal service labelling and rationales. Instead, new approaches need to be developed. These approaches would allow assignment of any type of contract, if the facts of the particular case provide adequate justification.

C. The Per Se Rule Against Assignability: A Preview

The coupling of a *per se* rule of nonassignability to personal service contracts may have made good sense when all "contractual relations were deemed strictly personal."[148] However, it now seems to serve primarily as a crutch for the courts. First, the *per se* rule is a "nice" mechanical device for courts to avoid a case by case analysis of assignability.[149] Second, courts have been unwilling to rationalize the many inconsistencies which have developed in this area of assignments.[150] The inconsistencies are many times the results of a court's attempt to skirt around the personal service label[151] in order to avoid the harsh

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[144] *Id.* at 150. On one hand the court argues that operating a franchise required no special skill or knowledge to avoid the personal service label. *Id.* at 153. On the other hand, it stresses the special skills of the assignee to further justify the assignment. *Id.*

[145] *Id.* at 151.

[146] *See infra* Section V.

[147] 135 B.R. at 153.

[148] JOSEPH M. PERILLO, CONTRACTS 760 (2d ed. 1977). "*Delectus Personae* was the . . . catch phrase to indicate that a party had a right to choose with whom he would deal." *Id.* However, it should be noted that unjust results are inherent in any rigid application of personal service nonassignability to commercial transactions: "Rules and results [of the English law courts] were articulated in terms of the supposed inherent nature of the rights involved and were adhered to in circumstances which outraged both common and commercial sense." Robert Braucher, *Freedom of Contract and the Second Restatement*, 78 YALE L. J. 598, 608 (1969).

[149] "Probably no other area of the law of assignments is as confusing as the cases under this heading" (referring to the nonassignability of personal service contracts) CALAMARI & PERILLO, *supra* note 17.

[150] *See* Sally Beauty Co. v. Nexxus Prods. Co., Inc., 801 F.2d 1001, 1008 (7th Cir. 1986) ("When performance of personal service is delegated, the trier merely determines that it is a personal service contract. If so *the duty is per se nondelegable*." (emphasis added).

results of the *per se* rule. I next turn to a review of some of these incoherencies in order to examine whether the elimination of the *per se* rule of nonassignability is in order.

III. A REVIEW OF THE BRANCHES OF THE FAMILY TREE OF *PER SE* NONASSIGNABILITY

The following is a synopsis of a number of cases within the personal service exception of the law of assignments. The issue to be examined is whether the uniformity of decision expected from a *per se* rule[152] actually exists in its application to assignability. Lacking such uniformity would place the *per se* rule at odds with today's pro-assignment trends.[153] Included in this analysis is a look at the following topics: (1) the change in the "legal form"[154] of the obligor and its relation to the rule of nonassignability, (2) the assignability of franchises[155] and distributorships[156] and (3) *Northwestern Cooperage, Inc.* line of pro-assignment cases.

A. The Change of Form Cases: Does a Change in the Legal Form of the Obligor Work an Invalid Assignment?

The change of form cases, more than any other line of cases, suggest the unfortunate path that the *per se* rule has taken. Earlier cases more uniformly held that any change in the form of the obligor worked an assignment in violation of the *per se* rule.[157] However, over time the courts began to differ as they became more result-oriented. The harsh result of applying the *per se* rule to allow an obligee out of a contract, because of *any* change in the form of the obligor, began to be questioned. The nature of business transactions and of the parties had changed dramatically. At the turn of the century most transactions involved individuals and partnerships.[158] However, the post World War II

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[151] *See supra* notes 133-45 and accompanying text.

[152] *Per se* rules can be found elsewhere in the law. Certain restrictive practices have been held to be *per se* illegal under Section 1 of the Sherman Act. 15 U.S.C. §§ 1-7 (1988). The application of this *per se* rule in the area of antitrust has resulted in a more uniform decisional matrix than has been the case of *per se* nonassignability. For example, the area of horizontal price fixing is universally regarded as something that is *per se* illegal.

[153] *See* CALAMARI & PERILLO, *supra* note 17, at 760 ("Today . . . the general proposition is that . . . duties are delegable.") Another example of a pro-assignment stance in modern times is the Uniform Commercial Code. *Id.* (citing U.C.C. § 2-210(1)(1977)).

[154] The "legal form" cases include the full range of changes possible in the law of business organizations: death of a partner, replacement of a partner, incorporation, merger, acquisition, etc.

[155] Definition of franchise: License to market a company's products or services, e.g., fast-food franchises.

[156] Definition of distributorship: One who distributes another's goods or products, e.g., a wholesale dealer. The distribution network that exists in a free market economy.

[157] *See, e.g.*, Nassau Hotel Co. v. Barnett & Barse Corp., 106 N.E. 1036 (N.Y. 1914).

[158] For example, the principle of master-servant was still a dominant theory.

era has seen the rise of the corporation as the dominant means of doing business.[159] Furthermore, the growth of the service sector of the national economy was at least partially aided by "the development of franchising and other relational techniques."[160] The *per se* rule of nonassignability could no longer be applied without some repercussions to ordinary commercial transactions. Thus, an increasing number of courts began to find that certain changes in form did not result in an invalid assignment.

A number of early cases dealt with the substitution of parties in both formal and informal partnerships. The courts generally held that any tinkering with the partnership worked an invalid assignment of a personal service contract. Thus, the retirement,[161] death, or substitution[162] of a partner allowed obligees of the partnership the ability to terminate their contractual obligations. For example, the 1920 case of *Paige v. Faure*[163] dealt with an "exclusive agency" to sell a dealer's automobile tires.[164] The court held that the dealer had a right not to renew the contract because one of the two obligors had sold his interest to the remaining obligor.[165] This was despite the existence of pro-assignment language in the contract.[166] The court's rationale was that the contract was based upon the "confidence" and "reasonable efforts" of both partners and not just the one.[167] A similar case held that an employment contract was not assignable to the remaining partner of a three person partnership.[168] The court used similar reasoning to prohibit the assignment.[169] "[I]t must be presumed, that in entering into the contract [the employee took into consideration] . . . the experience, industry and business producing ability of [all three and not just one of the partners]."[170]

In the area of legal changes involving the corporate form, the courts have been more willing to allow an assignment. However, they have used different rationales to justify their decisions. For example, one early common law case simply reasoned that any

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[159] Macneil, *supra* note 62, at 694-95. Professor Macneil states that the past fifty years has been characterized by "the increasing dominance of corporate and ongoing intercorporate methods of doing business." *Id.*

[160] *Id.* at 694.

[161] *See* Smith v. Board of Education, 222 P. 101 (Kan. 1924) (retirement of a partner in an architectural firm).

[162] *See* Hardy Implement Co. v. South Bend Iron Words, 31 S.W. 599 (Mo. 1895).

[163] 127 N.E. 898 (N.Y. 1920).

[164] *Id.*

[165] *Id.* at 899.

[166] *Id.* at 899.

[167] *Id.* "In view . . . of the . . . exclusive agency given them, it is fairly to be implied that they were to devote their time and do whatever was reasonable and necessary to selling . . . the product." *Id.*

[168] Leet v. Jones, 139 So. 711 (La. Ct. App. 1932). This case involved an employment contract with an accounting firm. *Id.* at 711. The accounting firm was dissolved with the understanding that one of the partners would continue the business. *Id.* at 711-12.

[169] *Id.* at 712.

[170] *Id.*

contract involving a corporation could not be personal.[171] Therefore, a contract to build a railway was freely assignable by the corporate-obligor.[172]

However, another court from the same state held that a corporation is, in fact, a "person."[173] A "corporate personality" is manifested in the charter rights of the corporation.[174] The court reasoned: "In dealing with natural persons in matters of trust and confidence, personal character . . . may be a dominant factor. In similar transactions with a corporation, a substitute for personal character is the charter rights of the corporation. . . ."[175]

The first logical approach was enunciated by Justice Traynor in *Trubowitch v. Riverbank Canning Co.*[176] Justice Traynor announced an "effects test."[177] The validity of an assignment due to a change in the legal form of the obligor would depend upon "it[s] effects [on] the interests of the parties protected by the nonassignability of the contract."[178] Thus, an assignment was not *per se* invalid merely due to a change in the legal form[179] of one of the parties.[180] Justice Traynor's approach was expressly adopted by other courts within[181] and outside of California.[182]

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[171] New Eng. Iron Co. v. Gilbert Elevated R.R. Co., 91 N.Y. 153 (N.Y. 1883).

[172] *Id.* at 167. The court reasoned that the contract could not involve a "personal relation or confidence" because a corporation was not a person. *Id.*

[173] New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing, 73 N.E. 48 (N.Y. 1905). The case involved the exclusive right to sell a manufacturer's printing press. *Id.* at 48-49. A corporation holding the right transferred it to a successor corporation. *Id.* at 49. The court held that the transfer was invalid. *Id.* at 52-53.

[174] *Id.* at 52.

[175] *Id.*

[176] 182 P.2d 182 (Cal. 1947).

[177] *Id.* at 188.

[178] *Id.* This case involved the dissolution of a corporation with a transfer of all its assets to another company owned by its sole shareholders. *Id.* at 184-85. The court pointed out that all the management personnel remained the same. *Id.* at 189. Goodwill may be another factor a court could look at in making a determination of whether a change in form worked an assignment. That is, has the goodwill of the business been detrimentally impacted by the change of form?

[179] *Id.* It is here that we may see a possible model to replace the rule of *per se* nonassignability. That is, the assignability of a personal service contract could be determined based upon its "effects" on the other party.

[180] An interesting aside is how courts have dealt with the enforcement of "covenant not to compete" clauses involving personal services. The courts have generally held that reasonable noncompete clauses in employment and business sale contracts are assignable. *See* Equifax Servs., Inc. v. Hitz, 905 F.2d 1355 (10th Cir. 1990) (employment contract); Pino v. Spanish Broadcasting System of Florida, 564 So.2d 186 (Fla. 1990) (employment contracts); Safelite Glass Corp. v. Fuller, 807 P.2d 677 (Kan. 1991) (sale of a business). ("The general rule appears to be that valid covenants not to compete are assignable. . . .") *See also* Alexander & Alexander, Inc. v. Koelz, 722 S.W.2d 311 (Mo. Ct. App. 1986).

[181] People v. McNamara Corp., 104 Cal. Rptr. 822 (Cal. Ct. App. 1972). This case involved a foreign corporation who entered into a contract to do state highway work. *Id.* at 823. It subsequently set up a subsidiary corporation in the state and assigned the contract. *Id.* at 824. In holding the assignment to be valid under the "effects test," the court reasoned that: "The contracting parent corporation had . . . an unaltered duty . . . to perform . . .; and [had] . . . complete control over the subsidiary as the means of performing that duty." *Id.* at 826.

[182] Ruberoid Co. v. Glassman Constr. Co., 235 A.2d 875 (Md. 1967). A sole proprietor entered into a subcontract to construct a floor on a school building project. *Id.* at 876. Subsequently, he incorporated the business. *Id.* at 877.

B. Franchises And Distributorships: Is a Zebra White With Black Stripes or Black With White Stripes?

Contemporary business practice has seen the development of new and innovative contractual means of doing business, including franchises, distribution, licensing, and marketing agreements. Although similar in nature, the courts have labeled these arrangements differently for purposes of assignability. Once again the courts have attempted to differentiate based on old personal service labelling. *Berliner Foods*[183] is one of "a long line of cases[184] that make the propriety of delegating the performance of a distribution contract depend on whether or not the contract calls for the distributor's personal (unique, irreplaceable, distinctive, and therefore, nondelegable) services."[185] The court in *Sally Beauty Co. v. Nexxus Products Co., Inc.*[186] held that a distribution contract to sell a manufacturer's hair care products was not assignable.[187] Another court held that a contract between a gas distributor and a gasoline service station, also, was not assignable.[188]

On the other hand, the courts have been more willing to allow the assignment of franchises. For example, an automobile franchise[189] and a franchise to bake and distribute bread[190] have been held to be assignable and not contracts "based on *special* trust and confidence."[191] It is unclear how a court distinguishes between the "trust and confidence" enunciated in the earlier personal service contract cases[192] and "special trust and

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Despite a nonassignment clause in the contract, the court upheld the assignment because it did not "adversely affect" the contractor-obligee. *Id.* at 880. The court reasoned that the contractor was protected because it had the ability to pick any subcontractor, could withhold payment, and could have required a performance bond. *Id. See also* Munchak Corp. v. Cunningham, 457 F.2d 721 (4th Cir. 1972); Alexander & Alexander Inc. v. Koelz, 722 S.W.2d at 311.

[183] Berliner Foods Corp. v. Pillsbury Co., 633 F.Supp. 557 (D. Md. 1986).

[184] *See* Detroit Postage Stamp Serv. Co. v. Schermack, 146 N.W. 144 (Mich. 1914); Paige v. Faure, 127 N.E. 898 (N.Y. 1920).

[185] Sally Beauty Co. v. Nexxus Prods. Co., Inc., 801 F.2d 1001, 1009 (7th Cir. 1986) (Posner, J., dissenting).

[186] 801 F.2d at 1001.

[187] *Id.* at 1008. The key part of the court's argument was that the assignment was invalid because it was to a "competitor" or the manufacturer. *Id.* at 1007. The court viewed this primarily as a conflict of interest problem. *Id.* at 1008. However, it should be noted that the district court found it to be a nonassignable personal service contract. Berliner Foods Corp. v. Pillsbury Co., 633 F.Supp. 557 (D. Md. 1986). The circuit court stated that the district court may be correct, but there was not enough evidence on the record for it to determine whether the contract was entered into based upon "personal confidence and trust." 801 F.2d at 1004-05.

[188] O'Brien v. Union Oil Co. of Cal., 699 F.Supp. 1562 (N.D. Ga. 1988) (court held a portion of Georgia's Gasoline Marketing Practices Act unconstitutional for requiring a distributor to give a reason in writing for withholding its consent).

[189] *In re* Tom Stimus Chrysler-Plymouth, Inc., 134 B.R. 676 (Bankr. M.D. Fla. 1991).

[190] Varisco v. Oroweat Food Co. (*In re* Varisco), 16 B.R. 634 (Bankr. M.D. Fla. 1981).

[191] *Id.* at 638 (emphasis added).

[192] *Supra* notes 100-10 and accompanying text.

confidence" in some of the more recent cases. The problem with this distinction is evident when one compares the following two cases involving fast food restaurant franchises. In *In re Sunrise Restaurants, Inc.*,[193] the court allowed the assignment of a Burger King franchise.[194] It held that operating such a franchise did "not require . . . special knowledge [or] judgment, taste, skill or ability."[195] Contrast *Schupack v. McDonald's System, Inc.*[196] where the court held that a right of first refusal was "personal" and could not be assigned by a prospective franchisee.[197] The court described personal as a contract involving reliance upon a party's "trust and confidence."[198]

C. *Northwestern Cooperage: The Pro-Assignment Cases*

The law has not been uniform in its stand against assignability in this area of the law of assignments. A line of cases[199] stemming from the 1903 *Northwestern Cooperage*[200] case worked from a mind set of favoring assignability and viewed most commercial fact situations in that light. Instead of focusing on the personal element in the contract, the court took a stand that when in doubt, assignability should be favored: "I think that the true doctrine is that where an executory contract is *not necessarily personal* in its character . . . it is assignable."[201]

A line of Michigan cases followed that applied and extended the doctrine of *Northwestern Cooperage*. Contracts to build a factory in exchange for tax abatements,[202] to purchase steam heat,[203] to transport gravel on credit,[204] and a contract to construct a telegraph system[205] were all held to be assignable.

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[193] 135 B.R. 149 (Bankr. M.D. Fla. 1991).

[194] *Id.*

[195] *Id.* at 153.

[196] 264 N.W.2d 827 (Neb. 1978).

[197] *Id.*

[198] *Id.* at 830-31. McDonald's president, Ray Kroc, stated that he would grant a Right of First Refusal based on the following standard: "If I got that funnybone feeling; if I got that feeling of trust and faith and confidence, then I would give it." *Id.* at 831.

[199] A early line of cases includes Devlin v. Mayor, 63 N.Y. 8 (N.Y. 1875). *Devlin* was one of the first cases to enumerate the "not necessarily personal" terminology. *See id.* at 16.

[200] Northwestern Cooperage & Lumber Co. v. Byers, 95 N.W. 529 (Mich. 1903). This case involved the assignment of contract in which a stave mill company agreed to build and operate a factory in exchange for use of land and tax abatements. *Id.* at 530.

[201] *Id.* at 531 (emphasis added).

[202] 95 N.W. at 529.

[203] Voigt v. Murphy Heating Co., 129 N.W. 701 (Mich. 1911).

[204] C.H. Little Co. v. Codwell Transit Co., 163 N.W. 952 (Mich. 1917). The case involved a factor of credit given to the obligee. *Id.* at 952. This has generally been held to be fatal to assignability. The courts have argued that credit is necessarily "personal." Nonetheless, this court concluded: "It is difficult to see how the personal element entered into the contract involved here." *Id.* at 953.

[205] Detroit T. & I. R. Co. v. Western Union Tel. Co., 166 N.W. 494 (Mich. 1918) "The so-called personal element which enters into it is very small." *Id.* at 495.

Thus, the *Northwestern Cooperage* line of cases demonstrate that a finding of trust, confidence, skill, knowledge, and expertise need not be the death knell of assignability. Instead, a court may still hold a contract to be assignable if it is "not necessarily" personal. However, the courts have been down this path before.[206] The fundamental problem remains: What approach or approaches should the courts use to draw the line of demarcation between "personal" and "not necessarily personal"?[207] What contracts should be assignable despite the personal element? It is these two questions to which I now turn.

IV. ALTERNATIVE APPROACHES TO THE *PER SE* RULE: SHOULD ASSIGNABILITY BE ALLOWED?

The preceding review of the case law and comment on the rationales contained therein illustrates that the time has come to expressly remove the facade of *per se* nonassignability.[208] Given the scope and sophistication of today's transactions, the continued application of a *per se* rule serves a disservice to our jurisprudence[209] and to the stability of our commercial transactions.[210] I now turn to an examination of some possible approaches to assignability.

A. "Material Change" or "Adversely Effects" Test

This approach was hinted at in the review of the *Trubowitch* line of cases.[211] The traditional focus in personal service contract nonassignability has been in two areas: (1) the expressed intent of the parties[212] or (2) the intent of the parties implied from the nature of the subject matter or duty to be performed.[213] Justice Traynor's "effects test"[214] shifted

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[206] *See supra* notes 130-47 and accompanying text ("personal" versus "truly personal").

[207] The court in MacKay v. Clark Rig Bldg. Co., 42 P.2d 341 (Cal. Dist. Ct. App. 1935), took a different tack. It focused on whether the services were of "such a character that they may be as well performed by others." *Id.* at 348. This test for assignability seems to be superior to the *Northwestern Cooperage's* coinage of the "not necessarily personal" doctrine. It has the sound of being more empirical and is at least one step removed from the old personal service baggage.

[208] The Court in Mariano & Assoc. P.C. v. Sublette County Comm'rs, 737 P.2d 323, 326 (Wyo. 1987), stated the issues as follows: "[T]he first . . . decision [is] whether [the] exception-dominated subject retains sufficient specificity or vitality to deserve retention as a court-created principle. *Id.* at 326. This author believes the answer is no regarding *per se* nonassignability.

[209] "The legal relations created by any particular contract must be analogized and the assignability of each one must be considered separately." Corbin, *supra* note 1 at 208.

[210] This article has shown that the application of the *per se* rule of nonassignability has been anything but rational or stable.

[211] *Supra* notes 176-82 and accompanying text.

[212] *Supra* notes 64-76 and accompanying text.

[213] *Supra* notes 77-97 and accompanying text.

[214] Trubowitch v. Riverbank Canning Co., 182 P.2d 188 (1947).

the focus away from the intent of the parties to the effect the specific assignment in question would have upon the party intended to be protected by nonassignability.[215]

The question then becomes does the assignment "materially change" the duty to be performed? Or, alternatively, does the assignment adversely affect the interests of the other party? The latter question was the one posed by Justice Traynor. However, it has been mostly applied in the change of legal form cases. The author believes that such an approach should be expanded and applied to every contract assignment. The personal element would be only one factor in the determination of whether the assignment is likely to have an adverse effect.

The issue then becomes is any potential adverse effect (e.g. risk of nonperformance) enough to prohibit an assignment? It is offered that the negative answer more strongly promotes good public policy. The adverse effect must be of the type that *materially*[216] changes or alters the performance of the duty. A number of courts have applied this standard to the assignability of personal service contracts. For example, one court held that a television anchorman's employment contract was assignable[217] because it did not "vary materially the duty of the obligor, increase materially the burden of risk imposed by the contract, or impair materially the [the anchorman's] chance of obtaining return performance."[218] In short, there was "no material change in the contract obligations and duties of the employee."[219]

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[215] The vice to be avoided is not the enforcement of *specific* nondelegation or nonassignment clauses negotiated by the parties. At issue is only the assignability of contracts silent about assignment. *See, e.g.*, Rother-Gallagher v. Montana Power Co., 522 P.2d 1226, 1228 (Mont. 1974), *where the Court* upheld the express "provisions for nonassignment in a contract." It noted the effects test applied in *Trubowitch* but failed to apply it because of the express nonassignability clause. *Id.* However, courts have used other means, such as waiver and estoppel to avoid the enforcement of a nonassignment clause. *See* Sillman v. Twentieth Century-Fox Film Corp., 144 N.E.2d 387 (N.Y. 1957).

[216] Numerous legal doctrines, causes of actions, and defenses pivot on the question of materiality. For example, in the area of accounting, the Generally Accepted Auditing Standards (GAAS) uses *materiality* as its "operative parameter." 1 AICPA PROFESSIONAL STANDARDS, U.S. Auditing Standards AU Sec. 312.01-04 (Statement on Auditing Standards No. 47) (Am. Inst. of Certified Pub. Accountants) (CCH 1990). "Auditors consider themselves responsible for detecting only material misstatements. Materiality is a relative term referring to the magnitude of the misstatement compared with the total financial activity of the enterprise under audit." Jordan H. Leibman & Anne S. Kelley, *Accountants' Liability To Third Parties For Negligent Misrepresentation: The Search For A New Limiting Principle*, 30 A.M BUS. L. J. 345, 410-11 (1992). *See also* Wiesner & Harum, *supra* note 132; Egan, *supra* note 7. "The most significant factor determining materiality of a breach is the extent to which the breach will deprive the injured party of the benefit . . . [of] the exchange." *Id.* at 276 (citing E. ALLAN FARNSWORTH, CONTRACTS 612 (1982)).

[217] Evening News Ass'n v. Peterson, 447 F.Supp. 77 (D.C. 1979).

[218] *Id.* at 80 (citing 4 A. CORBIN, CONTRACTS § 868; RESTATEMENT (FIRST) OF CONTRACTS § 152 (1932).

[219] Alexander & Alexander, Inc. v. Koelz, 722 S.W.2d 311, 313 (Mo. Ct. App. 1986). *See also* Munchak Corp. v. Cunningham, 457 F.2d 721 (4th Cir. 1972); Decatur North Assoc. v. Builders Glass Inc., 350 S.E.2d 795 (Ga. 1986).

This approach to assignability has been proposed in the Restatement of Contracts,[220] has been adopted by the Uniform Commercial Code,[221] and has been applied in the area of requirement and output contracts.[222] It appears that a similar approach would be effective to determine the assignability of any contract, including so-called personal service contracts. At the least, this approach could be a part of a cluster of standards to be used in place of *per se* nonassignability.

Another developing issue is whether a change in key corporate personnel should be considered paramount to an assignment. Does a change in personnel "materially alter" the contract? In the past, the answer has been in the negative.[223] However, the answer may not be as clear, today. The presence of key personnel may have been an implied part of the basis of the bargain. This may be especially true in the entertainment and creative arts industries.[224] The personnel within the corporation can be more important than the corporation itself. For example, a motion picture producing corporation may be sold to another company resulting in a change in key personnel. The general rule is that a change in the corporate form does not prevent the assignment of contracts held by the predecessor corporation.[225] However, that same corporation would normally be prohibited from

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[220] *See* RESTATEMENT (FIRST) OF CONTRACTS, § 151 (1932). "[An assignment is] effective... unless [it]... would vary materially the duty of the obligor, or increase materially the burden or risk imposed upon him by his contract, or impair materially his chance of obtaining return performance...." *Id. See also* RESTATEMENT (SECOND) OF CONTRACTS, § 317 (1981).

[221] Article 2 and Article 2A of the Uniform Commercial Code deal with the sale and lease of goods. Its assignability provision is similar to the RESTATEMENT. *See* U.C.C. § 2-210(2)(1977).

[222] *See* Annotation, *Assignability of Contract to Furnish All of Buyer's Requirement or To Take All of Seller's Output*, 39 A.L.R. 1192 (1925). It states: "Although no court has put it that way, a study of the decisions indicates that the *question* of *assignability depends*, not upon the provisions of the contract, but *upon whether its enforcement by the assignee will render it more onerous upon the other party.*" *Id.* at 1192 (emphasis added).

[223] In the earlier cases the courts simply looked at the corporations and not the personnel within the corporation. "It is true that in dealing with corporations a party cannot rely on what may be termed the human equation in the company." New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co., 73 N.E. 48, 52 (N.Y. 1905). More recent cases have recognized the importance of the personnel within a corporation. However, the author has been unable to find any case which prohibited an assignment or allowed a party out of a contract because of a change in personnel. *See e.g.*, Munchak Corp. v. Cunningham 457 F.2d 721, 725 (4th Cir. 1972). ("To us it is inconceivable that the rendition os services by a professional basketball

player... could be affected by the personalities of successive corporate owners.") Evening News Ass'n v. Peterson, 477 F.Supp. 77, 79 (D.D.C. 1979). ("The close, intimate and personal relationship [plaintiff] points to as characterizing his assocation [with the personnel of the selling corporation] was highly subjective....").

[224] This was the key issue in a recent lawsuit brought by rock star George Michael. "*A Top Star Says of Sony He Wants Out*," N.Y. TIMES, Nov. 1, 1993, at C13. Mr. Michael is attempting to invalidate a long-term recording contract he had signed with CBS Record who was subsequently acquired by the Sony Corporation. *Id.* He argues that the change in personnel has stunted his growth as an artist and should be grounds to dissolve the long-term contract. *Id.* "[S]ince the Sony Corporation bought my contract,... I have seen the great American music company that I proudly signed to as a teenager become a small part of a production line for a giant electronics corporation who ... have no understanding of the creative process." *Id.*

[225] *See supra* notes 171-72 and accompanying text.

delegating its duties to another company so as "to deprive the other party of the contemplated performance of certain 'stars', directors, or other key figures within the delegating corporation's structure."[226]

Two arguments can be raised to support the *status quo* that a change in corporate personnel does not result in an assignment. First, when contracting with a corporation it is foreseeable that a change in the corporation and its personnel is likely.[227] Second, in the age of hundred page contracts and specialized law firms, the parties should be able to negotiate provisions dealing with the change of personnel issue. However, the use of a materially change or alter approach to assignability may make it difficult to avoid this issue.

B. The "Adequate Assurance" Test

Another possible approach would be that an assignment should be allowed if the assignor or the assignee can provide "adequate assurance" to the obligee regarding performance. This approach could be coupled with the preceding "material change" approach. For example, if it is unclear whether the assignment works a material change of the contract, it should be allowed if adequate assurance is provided.[228]

The law provides existing "adequate assurance" models that can be used for guidance. For example, in the law of mortgages an entire body of law has developed in the area of assumability.[229] At one time almost all mortgages were freely assumable. However, recent decades witnessed the wide use of "due-on-sale" provisions[230] which prevent the assumption of a mortgage. Today, generally the only mortgages that may be assumed are government guaranteed residential loans.[231] Prior to 1989 these mortgages were freely assumable.[232] Subsequently, the Department of Housing and Urban Devel-

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[226] CALAMARI & PERILLO, *supra* note 17, at 762 n.83.

[227] *See* Alexander & Alexander, Inc. v. Koelz, 722 S.W.2d 311, 313 (Mo. Ct. App. 1986).

[228] The issue of whether assurances can be utilized to offset even severe alterations in the duties to be performed will be left to the courts to fine tune. This would likely entail a factual analysis of the change, along with the proposed assurances.

[229] Assumption is the term used when someone sells a parcel of real estate and an existing mortgage is transferred along with the land to the new owner. Assumption is in essence an assignment of the mortgage obligations of the mortgagor.

[230] Due-on-sale provisions provide for an acceleration of all amounts owing under a mortgage in the event of a "sale" by the mortgagor. Sale has been construed to include any transfer or conveyance of title.

[231] These are loans guaranteed by the Federal Housing Administration (FHA) and the Veterans Administration (VA).

[232] "Freely assumable" is interpreted by some as the releasing of the original mortgagor from liability to repay the mortgage upon the transfer of the property to a new owner. The government's only recourse upon default would be against the new owner. However, the exact language in the mortgage instrument will determine whether: (1) an assumption is allowed without the consent of the mortgagee and (2) if allowed, whether the assumption releases the original mortgagor from further liability. If the assumption does not release the original mortgagor, then she would remain liable upon default. She would then be able to seek damages against the assuming party.

opment will release the original mortgagor from liability if adequate assurance is given as to the ability of the assuming party to make the payments.[233]

Other examples of the use of assurance principles can be found in the Bankruptcy Code[234] and in the Uniform Commercial Code.[235] The Uniform Commercial Code provides that the obligee may "demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return."[236]

The Bankruptcy Code contains a number of provisions requiring the trustee to provide adequate assurance to contracting parties of the debtor.[237] Section 365(b)(3) provides an example of how an adequate assurance model may be utilized to safeguard the interests of the obligee and still allow for an assignment.[238] It provides that before the trustee can assign a lease in a shopping center she must provide adequate assurance.[239] The Code then lists a number of elements which can be considered in making an adequate assurance determination: (1) "financial condition and operating performance"[240] of the proposed assignee, (2) the percentage rent due under the lease "will not decline substantially,"[241] and (3) the assignment "will not disrupt any tenant mix or balance."[242]

This type of assurance model should be utilized to allow the obligor a greater ability to assign his rights and duties under a contract. Furthermore, if it is unclear whether an assignment may "materially change" the contract, then assurance may provide the vehicle to allow the assignment and at the same time to allay the concerns of the obligee.

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[233] This normally entails a review of the credity history of the prospective mortgagor.

[234] 11 U.S.C. §§ 365(b), (f)(1988).

[235] U.C.C. §§ 2-210(5), 609 (1977).

[236] *Id.* § 2-609(1). Furthermore, the obligee may negotiate directly with the assignee for adequate assurances without risking a claim of waiver as to the original obligor: "The other party may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without prejudice to his rights against the assignor demand assurances from the assignee." *Id.* §2-210(5).

[237] *See* 11 U.S.C. §§ 365(b)(1)-(f)(2)(B)(1988).

[238] *See In re* Sunrise Restaurants, Inc., 135 B.R. 149 (Bankr. M.D. Fla. 1991) (adequate assurance in assignment of fast food franchise). *See also In re* Pioneer Ford Sales, Inc., 729 F.2d 27, 30 (1st Cir. 1984) (prospective assignee's history of losses and its failure to meet required capital requirements weighed against a finding of adequate assurance).

[239] 11 U.S.C. § 365(b)(3)(1988). Even though this section deals with the lease of real estate, such leases may still be construed as personal service contracts. For example, in a shopping center the personal elements may be central, e.g., management and marketing skills, along with taste and reputation, are vital in operating such a center or a store within the center.

[240] *Id.* § 365(b)(3)(A). For legislative history see S. REP. NO. 989, 95th Cong., 2d Sess. 59 (1978); H.R. REP. NO. 595, 95th Cong., 1st Sess. 348-49 (1977).

[241] 11 U.S.C. § 365(b)(3)(B)(1988).

[242] *Id.* § 365(b)(3)(D).

C. *A "Factors" Test: Antonelli's "Particularized, Practical Approach"*

The court in the 1992 case of *In re Antonelli*[243] coined the following language in referring to the *per se* rule of nonassignability: "Application of the rule, however, calls for a particularized, practical approach rather than a conceptual one to the assignment question."[244] This approach would look to the fact pattern of a particular case for "factors" that can be balanced by the courts in making a determination on the issue of assignability. A number of potential factors that may be scrutinized by the courts include: (1) whether the party to the contract is "adversely effected," (2) whether "adequate assurance" can be given by either the obligor or her assignee,[245] (3) the "fungibility" of the service being rendered, and (4) are the elements of discretion and supervision required in the performance of the duty. These factors, among others, can be weighed by the courts in reaching a decision on assignability.

1. Is a Party "Adversely Affected" By An Assignment?

A fundamental factor in the analysis is whether the original obligor remains liable after the assignment. For example, under the Uniform Commercial Code the delegating-obligor remains primarily liable if the assignment is without the consent of the obligee.[246] However, the assignment remains legal and the original obligor's liability would be removed upon the satisfactory performance by the assignee.[247]

Of course, the *per se* rule of nonassignability prevents the issue of multiple liabilities, that of the obligor and her assignee, from ever being raised. The facts of a particular case may dictate whether a "true assignment"[248] is allowed or whether the obligor remains liable after the assignment.

Nonetheless, the remaining liability of the obligor should be one factor to be weighed on whether to allow an assignment.[249] If, for example, the assignor expressly agrees to remain liable for the performance of the assignee then the pendulum should swing in

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[243] 148 B.R. 443 (D. Md. 1992).

[244] *Id.* at 448.

[245] *Supra* notes 228-42 and accompanying text.

[246] "No delegation of performance relieves the party delegating of any duty to perform or any liability for breach." U.C.C. § 2-210(1)(1977).

[247] *See* Corbin, *supra* note 1, at 213. "A duty can never be escaped by . . . delegation but any duty can be extinguished by performance." *Id.* at 217.

[248] By "true assignment" the author means where the performance of the assignee is substituted for that of the obligor-assignor and the latter party is released from any further liability in the case of nonperformance.

[249] *See* Western Oil Sales Corp. v. Bliss & Wetherbee, 299 S.W. 637, 638 (Tex. 1927) ("The mere fact that a contract is invested . . . with the quality of assignability, does not signify that either party may, by assigning the contract, release himself from liability under it.").

favor of assignability. As one commentator phrased it: "The other party is thus not frustrated from having the right to enforce [the] contract against the person on whose credit and reputation she relied."[250]

2. "Fungibility" Of The Services To Be Rendered

The degree that the services are "fungible" should aid a court in a finding of assignability. A sample test for fungibility is the availability of substitute performance.[251] The court in *Pingley v. Brunson*[252] held that the "general rule [is] that if the subject matter of a contract is such that its substantial equivalent is readily obtainable from others," then relief is not warranted.[253] The court in *In re Da-Sota Elevator Co.*[254] cited *Lumley v. Wagner*[255] and then determined that its logic did not apply to the assignment of an elevator maintenance contract.[256] It acknowledged that "skilled workmanship" was required to perform the service and that confidence in the particular obligor was a factor in the contracting decision.[257] Nonetheless, it allowed an assignment of the contract, reasoning that it involved a "more routine commercial function"[258] and did not require "outstanding genius."[259]

Our increasingly fungible world may be attributed to a number of factors: (1) the tremendous expansion in the service sector of our economy,[260] and (2) the increased standardization of services. For example, today's transactions have been standardized

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[250] CALAMARI & PERILLO, note 17, at P. . *See also* Grismore, *supra* note 4, at 318 ("The most that can happen . . . is that the assignor will be subjected to liability for damages. . . .").

[251] This test can be applied as in the preceding section to the substituted performance of the particular assignee. "Delegation . . . is permitted unless a substantial reason can be shown why the substitute performance will not be as satisfactory as personal performance" ROSKOWSKI, *supra* note 37, at 262. In this Section the focus is on the availability of substituted performance or the fungibility of the service in general.

[252] 252 S.E.2d 560 (S.C. 1979). This case involved a suit for specific performance and an injunction against an organ player. *Id.* at 560. Evidence indicated that this particular organ player was a crowd favorite. *Id.* at 560. However, the court held that the player's talent was not unique enough and denied the relief. *Id.* at 561.

[253] *Id.*

[254] 939 F.2d 654 (8th Cir. 1991).

[255] 1 De. G., M. & G. 604, 619, 622 (Ch. App. 1852).

[256] 939 F.2d at 655-56.

[257] *Id.* at 656.

[258] *Id.* We saw similar reasoning given in *In re* Sunrise Restaurants, Inc., 135 B.R. 149 (Bankr. M.D. Fla. 1991). The court held that operating a fast-food restaurant was a "strict business transaction" not involving special abilities. *Id.* at 153.

[259] 939 F.2d at 656. The court noted that the short-term nature of the ocntract would be motivation for the assignee to "demonstrate their skill and reliability" in order to persuade the obligee to renew the contract. *Id. See also* MacKay v. Clark Rig Bldg. Co., 42 P.2d 341 (Cal. Dist. Ct. App. 1935).

[260] *See* sources cited *supra* note 3.

by a wide array of consumer protection laws,[261] warranty statutes,[262] and professional and nonprofessional licensing laws.[263] This was noted by Judge Posner in arguing that an assignment to a possible competitor of the obligee may still be valid because today's transactions are not as affected by their relational aspects.[264] "[J]udges can go astray by assuming that the legal-services industry is the pattern for the entire economy.... What in law would be considered a fatal conflict of interest is in business a commonplace and legitimate practice."[265] Some have argued that the greater the degree of supervision or discretion required by the contract makes the duty less fungible and more likely to be nonassignable. I now turn to the idea of supervision or discretion as a factor in assignability.

3. *Yellow Cab's* Dichotomy: "Discretion" Versus "Specificity"

The 1991 *Yellow Cab of Cleveland v. Greater Cleveland Regional Transit Authority*[266] case stressed the importance of discretion in the determination of assignability.[267] Alternatively, the greater the specificity within the contract on how the duties are to be performed, the easier it is for a court to allow an assignment. The court's mind-set in allowing the assignment of a contract to provide transportation services for elderly and handicapped persons is made clear by the following language:

> [A] "personal services" contract [is] one in which the offeree is vested with discretion in accomplishing the assigned tasks... and could not be duplicated by others.... As the ability to define the task... expand[s], discretion to add input and knowledge to the outcome lessens. Thus, where specific guidelines exist, the need for a personal service diminishes [and assignment should be allowed][268]

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[261] Truth in Lending Act, 15 U.S.C. §§ 1601-1693 (1988); MINN. STAT. ANN. § 325G.31 (West 1981) (plain language required); 73 PA. CONS. STAT. ANN. § 1967 (1993) (lemon law).

[262] *See e.g.*, Magnuson-Moss Waranty Act, 15 U.S.C. § 2301-12 (1988) (Federal provisions for warranties provided in sale of consumer goods); N.Y. GEN. BUS. LAW § 777 (McKinney & Supp. 1994) (new home warranty law).

[263] Examples include: professional licensing (attorneys, architects, professional engineers) and nonprofessional services (surveyors, contractors, real estate brokers, mortgage brokers, insurance agents).

[264] Sally Beauty Co. v. Nexxus Prods. Co., Inc., 801 F.2d 1001, 1010 (8th Cir. 1986) (Posner, J., dissenting).

[265] *Id.* Judge Posner gives a few examples of this phenomena: "Steel companies both make fabricated steel and *sell raw steel to competing fabricators.* General Motors sells cars manufactured by a *competitor*, Isuzu." *Id.* (emphasis added).

[266] 595 N.E.2d 508 (Ohio Ct. App. 1991).

[267] *Id.*

[268] *Id.* at 511.

The courts can make a factual determination[269] that a contract is so vague as to the task to be performed and so imbued with discretion, to make it unassignable. A court has already allowed for a partial delegation of a personal service contract where the obligor retained certain supervisory controls over the assignee.[270] Thus, discretion and supervision are factors to be weighed when making an assignment determination.[271]

The author believes, the time is at hand to eliminate *per se* nonassignability. Furthermore, it is this author's belief that it is justifiable to swing the pendulum in favor of the obligor in all assignments. The person challenging an assignment should be required to overcome a presumption of assignability.

V. PRESUMPTION OF ASSIGNABILITY

It is offered that strong practical reasons argue in favor of overturning the *per se* rule of nonassignability and replacing it with a presumption of assignability. This is supported by the following: (1) The case law has shown that the decisional matrix surrounding the *per se* rule is hopelessly confused.[272] (2) Alternative approaches can be utilized to make more rational and direct determinations on assignability.[273] (3) Public policy considerations strongly favor assignability of many of the contracts which have come under the purview of the *per se* rule. (4) Precedent currently exists within the law of assignments for such an approach.

A. *Public Policy Considerations*

1. The Nature of Transactions

The world has changed since the adoption of the *per se* rule of nonassignability. In the past almost all contracts were of a personal nature. They involved mostly one-on-one dealings for the sale of goods and services. The nature of relational contracts[274] has

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[269] The importance of discretion and supervision can be found elsewhere in the law. For example, tax courts look to such factors in making a determination as to whether someone is an "employee" or an "independent contractor." Everhart v. United States, 71-1 T. C.M. (CCH) 9368, 9368 (W.D. N.C. 1971) ("The fundamental question is whether the person who makes an agreement with another has or retains the right to control the details or the way the job is done. . . .").

[270] Arnold Prods., Inc. v. Favorite Films Corp., 298 F.2d 540 (2d Cir. 1962). *Contra* Bd. of Comm'rs v. Diebold Safe & Lock Co., 133 U.S. 473 (1890).

[271] *See* Madison v. Moon, 306 P.2d 15, 20-21 (Cal. Dist. Ct. App. 1957).

[272] *Supra* Sections II and III.

[273] *Supra* Section IV.

[274] One commentator noted the modern phenomena of "relationizing in transactions." Macneil, *supra* note 58, at 763. As he puts it: "Why are relations increasingly the dominant form of economic activity . . . in modern society? . . . [W]hy are transactions increasingly taking place in relational frameworks?" *Id.*

changed dramatically over the last fifty to one hundred years.[275] In the age of large corporations, mega-sized law firms, the large size of the financial stakes,[276] and the length and sophistication of today's contracts,[277] the *per se* rule is out of touch with the reality of the times.

At the same time relational contracts have expanded in scope, they have also in some areas become more fungible or standardized.[278] Thus, many transactions considered strictly personal in the past have become more transactional in nature and more akin to a sale of goods.[279] "The mere fact, however, that a contract calls for . . . service [should] not [be] sufficient to render it nonassignable. . . ."[280]

2. Conformity To General Rule of Assignability

The fact that the *per se* rule is an exception, should allow one to utilize the public policy matrix espoused in support of general assignability. The major premise at the foundation of assignability has been stated as the preservation of "the sanctity of contract and providing uniformity and certainty in commercial transactions."[281] This article has shown that the application of the *per se* rule has failed to provide any such uniformity or certainty. A presumption of assignability is warranted for all contracts and would be consistent with the fundamental policy that "free alienability . . . is essential to commerce."[282]

Because of the failure of the *per se* rule,[283] an entirely new approach is needed. In commenting upon the differences between transactional and relational contracts, Professor Macneil argues for the "development of [a new] overall structure of contract law for both relations and transactions."[284]

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[275] *See* Peter J. Bishop, *The Modern Employment Contract*, 12 ADVOC. Q. 245, (1989) ("In our view, 18th and 19th century principles of contract law . . . are not sufficient to deal with the modern employment relationship.").

[276] "[B]y far the greatest number of scholars and commentators explored the relationship of contract law to economics." E. Allan Farnsworth, *Developments in Contract Law During the 1980's: The Top Ten*, 41 CASE W. RES. L. REV. 203, 227 (1990).

[277] "The complexity of most agreements insures that such agreements will rarely be fully completed." *See* Egan, *supra* note 7 at 312.

[278] *Supra* notes 260-65 and accompanying text.

[279] For example, this author would argue that the standards relating to title abstracts and title insurance have become so standardized that contracts to provide them should be assignable to any other reputable title company. *But see* Linn County Abstract Co. v. Beechley, 99 N.W. 702 (Iowa 1904).

[280] *In re* Compass Van & Storage Corp., 65 B.R. 1007, 1011 (1986). *See also* Schultz v. Ingram, 248 S.E.2d 345, 350 (1978) ("Nevertheless, personal service contracts may be assigned. . . .").

[281] Pino v. Spanish Broadcasting System of Florida, 564 So.2d 186, 189 (Fla. Dist. Ct. App. 1990).

[282] CALAMARI & PERILLO, *supra* note 148, at 633. In reference to the history of the law of assignments the authors state that it has been a "struggle between commercial needs and the tenacity of legal conceptualism." *Id.* at 724.

[283] "The modern history of . . . assignments is one of piecemeal reform by statute or decision. The legal pattern of any particular moment was usually a disgrace." Braucher, *supra* note 148, at 608.

[284] Macneil, *supra* note 62, at 608.

The author believes that in the area of assignability, a presumption of assignability would be easy to rebut for those duties which should remain nondelegable by application of the approaches discussed earlier in this article.[285] Thus, a contract for the services of Luciano Pavarotti would still be nonassignable as a uniquely relational duty.[286]

3. The "New Spirit" of Assignment

The author's support for freer assignability by way of a presumption is consistent to what is often referred to as the "new spirit of contract."[287] Simply put, "every contract imposes upon each party a duty of good faith and fair dealing."[288] The use of a presumption of assignability would be a way of requiring that the obligee gives a "good faith" reason for not consenting to an assignment.[289]

Since, many relational contracts are long-term this duty of good faith is especially important. A "duty to bargain should be imposed when unanticipated changes occur during the performance of a long-term contract."[290] An assignment by an obligee could be considered such an "unanticipated change." Instead of allowing one party the absolute right to treat the assignment as a breach,[291] the parties should attempt to negotiate in order to salvage the essence of the contract. For example, the obligee should be allowed to negotiate reasonable assurances of performance in exchange for her consent to the assignment. I believe that a presumption of assignability would help compel such good faith bargaining.

Another factor to be weighed is the continuing liability of the assignor. If it is clear that the assignor is to remain liable, then the obligee would be on weaker ground if she refuses to give consent to the assignment. If it is clear that the obligor will not or can not personally give performance, then all the parties can only benefit from the assignment.[292] In short, why foreclose all chances for performance? The obligee is protected by the general rule of assignability that "a duty can never be escaped by . . . delegation; but any duty can be extinguished by performance."[293] If the substituted performance does not

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[285] *Supra* Section IV.

[286] Macneil would explain this type of contract as one involving a "primary relation" where the "participants interact as unique and total individuals. Uniqueness means that response is to a particular person. . . ." Macneil, *supra* note 63, at 722 (citing SOCIOLOGY 120-21 (4th ed. 1968)).

[287] Richard E. Speidel, *The New Spirit of Contract*, 2 J.L. & COM. 193, 193 (1982).

[288] RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

[289] It would prevent the "bad faith . . . 'abuse' [of] the power to terminate a contract." Macneil, *supra* note 63 at 722.

[290] *Id.*

[291] This current right under the *per se* rule is inconsistent with an aggrieved party's duty to mitigate which is found elsewhere in the law of contracts.

[292] It should be remembered this will allow the interests of innocent third party assignees to be entered into the equation of assignment. A presumption of assignability would be protective of those rights.

[293] Corbin, *supra* note 1, at 217.

satisfy the basis of the bargain, then the obligee would still be able to sue the assignor-obligor for damages for breach of contract.[294]

A major side benefit to the presumption of assignability approach is that it may increase the awareness of the parties at the time of contracting to the issue of assignment. It is presumed that most parties to today's contracts, with the aid of legal counsel, are capable of protecting their own rights and interests. They should be encouraged to negotiate express nonassignability clauses into their contracts. These express nonassignment clauses should be as specific as possible.[295] They should unbundle all the rights and duties within the contract and state which ones are assignable. For example, can the right to collect monies under the contract be assigned? What is the importance of a party's specific credit to the other party to the contract?[296] What effect will a change in the legal form of one of the parties have on the contract?[297] Finally, does the change in "key" personnel within the business organization of one of the parties violate the nonassignability clause?[298] If a presumption of assignability makes parties more aware of the assignment issue, then it will have served its purpose.

B. The Landlord-Tenant Model of Assignment

The approach suggested in this article is not without precedent in the law of assignments. An analogy can be found in the "consent shall not be unreasonably withheld" principle found in the area of assignments involving real estate leases. In essence, leases are *presumed* to be assignable unless the landlord can give a good faith or commercially reasonable reason for withholding consent. This rule has been applied even in cases

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[294] This approach, in contrast to the *per se* rule, would fulfill "the court's duty to sustain the legality of a contract." 17A AM. JUR. 2d *Contracts* § 264 (1991). Furthermore, it may help prevent unnecessary lawsuits in the assignments allow for completion of contract performance without court interference.

[295] An example of an express nonassignability clause is one commonly found in mortgage brokerage agreements: "Broker may not assign or transfer its duties or rights under this Agreement without prior written consent of ABC Mortgage Company. A change in the ownership, merger or consolidation of Broker shall be considered as assignment for purposes of this Agreement." Wholesale Agreement, American Residential Mortgage Corporation (on file with the *Akron Law Reveiw*).

[296] The clause may provide that consent "shall not be unreasonably withheld." If so it should spell out what types of assurances would be considered sufficient to allow an assignment. *See infra* Section V.B.

[297] The clause should be specific as to what types of changes in legal form will work an assignment and require the consent of the other party. *See supra* note 295.

[298] The parties would be even more prudent if they provided for arbitration in case of dispute over the meanings of the provisions in the nonassignment clause. *See, e.g.*, Gerald Aksen, *Legal Considerations in Using Arbitration Clauses to Resolve Future Problems Which May Arise During Long-Term Business Agreements*, 28 BUS. LAW. 595 (1973).

where the lease specifically precludes assignment.[299] An increasing number of states, either by judicial decision[300] or by statute,[301] have enacted this principle into law.[302]

At one time leases of property were considered personal in nature and *per se* nonassignable by the lessee.[303] Over time, the courts have recognized the changing nature of such contracts. "Relationships between lessor and lessee have tended to become more and more impersonal."[304]

The court in *Fernandez v. Vazquez*[305] listed a number of reasons for the evolution of the "consent not to be unreasonably withheld" principle: First, "[t]he law generally favors free alienation."[306] Second, the increased prominence of the "general contract principles of good faith and commercial reasonableness."[307] Third, the law is capable of developing "factors" which can be considered "in applying the standards of good faith and commercial reasonableness."[308] For example, the financial stability of the proposed assignee, the nature of the business and its effect upon the existing tenant mix, the legality of the proposed use, are all considered legitimate reasons for withholding consent.[309] "Denying consent solely on the basis of personal taste, convenience or sensibility"[310] would be considered unreasonable. It is this type of approach that should be expanded and applied to the area of assignments to be vacated by the elimination of the *per se* rule.

VI. CONCLUSION

Whether we label this approach objective or subjective is not material. The time is right to install more uniformity and predictability into the law of assignments. The times and the nature of transactions have changed since the days of *Lumley v. Wagner*.[311]

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[299] *See* Fernandez v. Vazquez, 397 So.2d 1171 (Fla. Dist. Ct. App. 1981).

[300] *Id.*; Kendall v. Ernest Pestana, Inc., 709 P.2d 837 (Cal. 1985).

[301] ALASKA STAT. § 34.030.060 (1975); DEL. CODE ANN. tit. 25, § 5512(b) (1974); HAW. REV. STAT. § 516-63 (1985); N.Y. REAL PROP. LAW § 226-b (McKinney 1982).

[302] The law at one time almost universally allowed a landlord to arbitrarily refuse to accept an assignee. *Fernandez*, 397 So.2d at 1171.

[303] *Kendall*, 709 P.2d at 843-44. The *Kendall* case is a good example of how the old rule of nonassignability was subject to abuse. In that case the assignee was a more qualified tenant than the original lessee. *Id.* at 839-40. It possessed a stronger financial statement, had greater net worth, and was willing to be bound by the terms of the lease. *Id.* Nonetheless, the lessor withheld its consent in order to obtain increased rent." *Id.* at 840.

[304] *Id.* at 844. *See also* Murray S. Levin, *Withholding Consent to Assignment: The Changing Rights of the Commercial Landlord*, 30 DEPAUL L. REV. 109 (1980).

[305] 397 So.2d 1171 (Fla. Dist. Ct. App. 1981).

[306] *Id.* at 1172.

[307] *Id.* at 1174.

[308] *Id.*

[309] *Id.* The court lists a total of five factors to be considered. *Id.*

[310] *Id.*

[311] 1 De G., M. & G. 604, 619, 622 (Ch. App. 1852).

The economics, relative bargaining powers, and public policy concerns of the 1990's support the elimination of the *per se* rule of nonassignability that is attached to personal service contracts. Instead, a completely different approach is needed. A presumption of assignability should be seriously considered to replace the *per se* rule.