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Contracts—Looking for "Something": Minnesota's New Rule for Interpreting Anti-Assignment Clauses in Travertine Corp. V. Lexington-Silverwood

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CASE NOTE: CONTRACTS—LOOKING FOR "SOMETHING": MINNESOTA'S NEW RULE FOR INTERPRETING ANTI-ASSIGNMENT CLAUSES IN *TRAVERTINE CORP. V. LEXINGTON-SILVERWOOD*

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"'That's a great deal to make one word mean,' Alice said in a thoughtful tone. 'When I make a word do a lot of work like that,' said Humpty Dumpty, 'I always pay it

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extra.'"[1]

I. INTRODUCTION

The words "shall not be assigned" probably ought to ask for a raise based on the amount of work they have performed in American courts. Parties often use such a phrase in contract clauses prohibiting the parties from transferring their contractual rights to third parties in a transaction known as an assignment.[2] Courts have agreed on very little concerning the form and effects of anti-assignment clauses,[3] other than the general rule that such clauses are valid unless either the contract itself or a statute dictates otherwise.[4] In a contract, the innocent-looking words "shall not be assigned" may have at least three different meanings, depending on the court and the context.[5] As one commentator remarked, "Unfortunately . . . the law on the subject is in a very confused state."[6] Apparently, the courts have been working these words particularly hard.

In the recent decision *Travertine Corp. v. Lexington-Silverwood*,[7] the Minnesota Supreme Court examined the question of how it would interpret the words of an anti-assignment clause.[8] The court concentrated on enforcing the plain language of the contract, holding that as long as something in the contract demonstrated the parties' intent that the contractual rights would not be assignable, the attempted assignment will be ineffective.[9] This stance represents a break from the trend in other jurisdictions toward construing such clauses strictly because they act as restraints on

1. LEWIS CARROLL, ALICE IN WONDERLAND AND THROUGH THE LOOKING GLASS 197 (Western Pub. Co. 1986) (1871).

2. *See* RESTATEMENT (SECOND) OF CONTRACTS § 317(1) (1981) ("An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance."); BLACK'S LAW DICTIONARY 128 (8th ed. 2004) (defining "assignment" as "[t]he transfer of rights or property").

3. *See* JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 138, at 931 (4th ed. 2001) (explaining that courts have shown confusion on the subject).

4. *See* discussion *infra* Part II.A.3.

5. *See* discussion *infra* Part II.A.

6. Grover C. Grismore, *Effect of a Restriction on Assignment in a Contract*, 31 MICH. L. REV. 299, 300 (1933).

7. 683 N.W.2d 267 (Minn. 2004).

8. *Id.* at 269.

9. *Id.* at 272-74.

alienation.[10]

This Case Note first examines the history of anti-assignment clauses, three approaches courts use to interpret anti-assignment clauses, and Minnesota's prior case law on the subject.[11] Next, it details the *Travertine* decision,[12] critiques the court's reasoning in that case, and examines the policy implications of the court's holding.[13] The Case Note concludes that the court's analysis disregards some subtleties of case law and implications of policy in reaching an inflexible standard of interpretation, instead of following the modern trend toward strict construction of anti-assignment clauses.[14] Because of this, *Travertine* may cause inconsistencies in future cases, while denying Minnesota citizens the benefits of the modern majority rule.

II. HISTORY

The history of non-assignment clauses in Anglo-American law demonstrates a "basic tension between freedom of contract principles and concerns about restraints on alienation."[15] Although most cases demonstrate a trend toward imposing fewer restrictions on assignments, courts have been pulled between the two competing principles over the years and approaches vary based on the jurisdiction and the circumstances.[16]

A. Three Approaches

Under medieval common law, anti-assignment clauses were entirely unnecessary. Assignments were not allowed because contract rights were viewed as personal to the contracting parties.[17] This rule made sense in a society where defaulting debtors faced

10. *See* Gregory Scott Crespi, *Selling Structured Settlements: The Uncertain Effect of Anti-Assignment Clauses*, 28 PEPP. L. REV. 787, 795-96 (2001) (stating the favored approach to anti-assignment clauses "minimize[es] their restraint on alienation consequences by interpreting them whenever reasonably possible as only imposing a duty not to assign and not rendering this attempted assignment ineffective"); *see also infra* Part II.A.2.

11. *See infra* Part II.

12. *See infra* Part III.

13. *See infra* Part IV.

14. *See infra* Part V.

15. Crespi, *supra* note 10, at 794.

16. *Id.*

17. E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 11.2, at 781 (Richard A. Epstein et al. eds., 2d ed. 2001); MURRAY, *supra* note 3, § 135, at 913.

severe penalties and credit was infrequently used; attempts to assign were viewed suspiciously, "as tending to encourage litigation."[18] During the seventeenth century, however, courts started to enforce assignments, albeit grudgingly.[19] First, the courts allowed assignees to bring suits in the assignor's name, but this right was "fragile" because it was lost if the assignor revoked it, died, or went bankrupt.[20] Eventually, the courts of law followed the chancery courts' lead in granting assignees greater rights, recognizing that if they did not, plaintiffs would simply go to the chancellor to obtain the desired result.[21]

By the late 1800s, courts regularly held contract rights freely assignable, unless the terms of the contract indicated otherwise.[22] The *Restatement (First) of Contracts* promulgated this view: "A right may be the subject of effective assignment unless . . . the assignment is prohibited by the contract creating the right."[23] This view is now undisputed, unless a specific statute dictates the contrary.[24] Courts, however, have not agreed on how to determine when a contract has effectively prohibited assignment.[25] Three approaches to interpreting the clauses are used by most courts. The first approach holds that assignments made in violation of an anti-assignment clause are invalid;[26] the second approach considers assignments breaches of the contract, unless specific words are used to make the assignment invalid;[27] and the third approach upholds any assignment, rendering the anti-assignment clause ineffective.[28]

1. Early Approach—Assignments Are Void

In cases dating back to the 1890s, some courts have held anti-assignment provisions destroyed parties' very ability to assign their

18. FARNSWORTH, *supra* note 17, § 11.2, at 781.
19. *Id.* at 782.
20. *Id.*
21. *Id.* at 783.
22. *See, e.g.*, LaRue v. Groezinger, 24 P. 42, 43 (Cal. 1890); Devlin v. New York, 63 N.Y. 8, 17 (1875).
23. RESTATEMENT (FIRST) OF CONTRACTS § 151 (1932).
23. *See* Grismore, *supra* note 6, at 299.
25. *See* MURRAY, *supra* note 3, § 138, at 931 (listing three ways to interpret anti-assignment clauses); Crespi, *supra* note 10, at 794-95 (listing four ways).
26. *See infra* Part II.A.1.
27. *See infra* Part II.A.2.
28. *See infra* Part II.A.3.

contractual rights.[29] Thus, any attempted assignments were void and not breaches of the original contract,[30] although the rule did not prevent the purported assignee from maintaining rights against the assignor.[31] In the recent case *Parrish Chiropractic Centers, P.C. v. Progressive Casualty Insurance Co.*,[32] the Supreme Court of Colorado held a non-assignment clause stating that interest in the contract might not be assigned without written consent eliminated the insurance policy holders' ability to assign their policy benefits.[33] As the court wrote, "[T]he public policy in favor of the freedom of contract, and the corollary right of the insurer to deal only with the party with whom it contracted, outweigh the general policy favoring

29. *See* Burck v. Taylor, 152 U.S. 634, 655 (1894); Tabler, Crudup & Co. v. Sheffield Land, Iron & Coal Co., 79 Ala. 377, 378-80 (1885) (holding labor tickets which had the words "not transferable" on them could not be assigned by employees who received them for the labor they had done); Behrens v. Cloudy, 97 P. 450, 451 (Wash. 1908) (holding attempted assignment by a lessee of an option to purchase "confer[red] no benefits on the assignee" because of a contract clause under which the lessee agreed not to "assign this lease or any part thereof without . . . written consent"). For modern cases, see, e.g., Kent General Hospital, Inc. v. Blue Cross & Blue Shield of Del., Inc., 442 A.2d 1368, 1370-72 (Del. 1982) (holding an anti-assignment clause that stipulated "payment shall not be assignable without the written approval of [Blue Cross]" allowed Blue Cross not to honor assignments of health insurance benefits made by its insureds to Kent General Hospital); Augusta Medical Complex, Inc. v. Blue Cross of Kan., Inc., 634 P.2d 1123, 1125, 1127 (Kan. 1981) (holding an anti-assignment clause providing that "benefits of the Contract . . . are not assignable" was "valid and enforceable" by Blue Cross); Cloughly v. NBC Bank-Seguin, N.A., 773 S.W.2d 652, 655 (Tex. App. 1989) (concluding an anti-assignment clause stating that the "Seller shall not have the right to make any assignment . . . without the prior written consent of the Purchaser" made an attempted assignment invalid).

30. MURRAY, *supra* note 3, § 138, at 931; *see supra* note 29 and accompanying text.

31. *See, e.g.*, *In re* Cooper, 242 B.R. 767, 771 (Bankr. S.D. Ga. 1999) ("[T]he anti-assignment clause is to be construed 'for the benefit of the obligor, and not to prevent the assignee from acquiring rights against the assignor.'" (quoting Fox-Greenwald Sheet Metal Co. v. Markowitz Bros. Inc., 452 F.2d 1346, 1351 (D.C. Cir. 1971))); Garden State Bldgs., L.P. v. First Fid. Bank, N.A., 702 A.2d 1315, 1322 (N.J. Super. Ct. App. Div. 1997) ("An anti-assignment clause protects the obligor and does not affect the transaction between the assignor and the assignee."); *In re* Kaufman, 37 P.3d 845, 855 (Okla. 2001) ("[A]n assignor of a contract containing a valid anti-assignment provision may not invoke the clause as against its assignee."); RESTATEMENT (SECOND) OF CONTRACTS § 322(2)(c) (1981) ("A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested . . . is for the benefit of the obligor, and does not prevent the assignee from acquiring rights against the assignor . . . .").

32. 874 P.2d 1049 (Colo. 1994).

33. *Id.* at 1051, 1054.

the free alienability of choses in action."[34] Under this approach, the words used in the anti-assignment clause matter little. As long as the contract "prohibits assignment in 'very specific' and 'unmistakable terms' the assignment will be void against the obligor."[35] Cases from several jurisdictions—for example, Colorado[36] and Washington[37]—still follow this approach, refusing to enforce assignments made in violation of an anti-assignment clause, regardless of the wording of the prohibition.

2. Modern Approach—Assignments Are Breaches of the Contract

Some courts have distinguished between the *right* to assign and the *power* to assign, holding that generally-worded anti-assignment clauses destroy the right but not the power.[38] In other words, a person who signs a contract with a provision saying rights "shall not be assigned" retains the ability, or the power, to make a valid assignment, but the clause eliminates the person's right to do so without breaching the contract. Under this theory, the non-assignment clause is merely a promise creating a duty not to assign.[39] Thus, when the assignor breaches this duty, the obligor will be able to sue for breach, but the assignor's rights under the assignment will have passed validly to the assignee.[40] This means a promise not to assign, like most other contractual promises, is not self-executing; a court order for specific performance would be needed to make the promisee fulfill the promise, rather than pay for any damages caused by breaching it.[41] In early cases, courts often followed this approach in special situations—for leases,[42] land

34. *Id.* at 1054.

35. Portland Elec. & Plumbing Co. v. City of Vancouver, 627 P.2d 1350, 1351 (Wash. Ct. App. 1981) (holding an anti-assignment clause that said the plaintiff contractor "shall not assign" the contract "without the prior written approval" prevented the contractor from assigning a claim for non-payment by the city); *see also Parrish Chiropractic*, 874 P.2d at 1055 ("When a contractual provision is clear and unambiguous, courts should neither rewrite it nor limit its effect by a strained construction.").

36. *Parrish Chiropractic*, 874 P.2d at 1054.

37. *Portland Elec.*, 627 P.2d at 1351.

38. MURRAY, *supra* note 3, § 138, at 931; Crespi, *supra* note 10, at 795.

39. MURRAY, *supra* note 3, § 138, at 931; Crespi, *supra* note 10, at 795.

40. MURRAY, *supra* note 3, § 138, at 931.

41. *See* Grismore, *supra* note 6, at 303 ("It is extremely difficult to see why such a promise, more than any other, should be made self-executing.").

42. *Id.* at 303 (listing lease cases including Garcia v. Gunn, 51 P. 684 (Cal. 1897); Randol v. Tatum, 33 P. 433 (Cal. 1893); and Den v. Post, 25 N.J.L. 285

sales,[43] and assignments of the right to receive payment.[44]

An increasing number of courts are following this second approach, holding assignments effective as long as the contract's non-assignment clause does not expressly take away the parties' power to assign or state that attempted assignments would be invalid.[45] The *Restatement (Second) of Contracts* propounds this approach: "A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested . . . gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective."[46] In the recent case *Rumbin v. Utica Mutual Insurance Co.*,[47] the Supreme Court of Connecticut examined several dozen cases and concluded the majority of jurisdictions followed this rule, which the court called the "modern approach."[48] This rule, the court explained,

(1855)).

43. *Id.* at 303-04 (discussing land contract cases including Hull v. Hostettler, 194 N.W. 996 (Mich. 1923) and Grigg v. Landis, 21 N.J. Eq. 494 (1870)).

44. *See* Portuguese-Am. Bank of S.F. v. Welles, 242 U.S. 7 (1916); State St. Furniture Co. v. Armour & Co., 177 N.E. 702 (Ill. 1931), *noted in* Grismore, *supra* note 6, at 306.

45. *See, e.g.*, Bel-Ray Co. v. Chemrite, Ltd., 181 F.3d 435, 443 (3d Cir. 1999); Cedar Point Apts., Ltd. v. Cedar Point Inv. Corp., 693 F.2d 748, 754 (8th Cir. 1982); Garden State Bldgs., L.P. v. First Fid. Bank, N.A., 702 A.2d 1315, 1321 (N.J. Super. Ct. App. Div. 1997); *see also* Crespi, *supra* note 10, at 794 ("[I]n recent years . . . the adverse consequences of restraints on alienation have become better appreciated.").

46. RESTATEMENT (SECOND) OF CONTRACTS § 322(2)(b) (1981).

47. 757 A.2d 526 (Conn. 2000).

48. *Id.* at 533. The *Rumbin* court's list of cases supporting the modern rule included opinions applying law from the following eleven states: Arizona (Hanigan v. Wheeler, 504 P.2d 972 (Ariz. Ct. App. 1972)), California (Randol v. Tatum, 33 P. 433, 433 (Cal. 1893)), Delaware (Paccom Leasing Corp. v. E.I. du Pont de Nemours & Co., Civ. A. Nos. 89-255-CMW, 90-311-CMW, 1991 WL 226775, at *7 (D. Del. Oct. 30, 1991)), Florida (*In re* Freeman, 232 B.R. 497 (Bankr. M.D. Fla. 1999)), Illinois (Lomas Mortgage U.S.A., Inc. v. W.E. O'Neil Constr. Co., 812 F. Supp. 841, 844 (N.D. Ill. 1993)), Michigan (Wonsey v. Life Ins. Co. of N. Am., 32 F. Supp. 2d 939, 943 (E.D. Mich. 1998)), Missouri (*Cedar Point Apts.*, 693 F.2d at 754), New Jersey (*Bel-Ray Co.*, 181 F.3d at 442), New York (Allhusen v. Caristo Constr. Corp., 103 N.E.2d 891 (N.Y. 1952)), Utah (U.S. Indus., Inc. v. Touche Ross & Co., 854 F.2d 1223, 1233 (10th Cir. 1988)), and Vermont (Grieve v. Gen. Am. Life Ins. Co., 58 F. Supp. 2d 319, 321 (D. Vt. 1999)). *Rumbin*, 757 A.2d at 532-35. Decisions from Texas are split: The court in *Rumbin* listed one as following the modern approach (Reuben H. Donnelley Corp. v. McKinnon, 688 S.W.2d 612, 615 (Tex. App. 1985)) and another as backing the older rule that holds assignments invalid regardless of the language in the anti-assignment clause (Cloughly v. NBC Bank-Seguin, N.A., 773 S.W.2d 652, 655 (Tex. App. 1989)). *Rumbin*, 757 A.2d at 532-34.

"offers the advantage of free assignability together with full protection for any obligor who actually suffers damages as a result of an assignment," because the obligor would be able to sue the assignor for any losses that in fact resulted.[49] The *Restatement (Second) of Contracts* also explains that concern about restraints on alienation is the basis for its rule for interpreting anti-assignment clauses: "[T]he policy which limits the validity of restraints on alienation has been applied to the construction of contractual terms open to two or more possible constructions."[50]

But courts have been inconsistent in deciding when a non-assignment clause sufficiently manifests an intention to make the assignment invalid.[51] Some courts make distinctions based on the precise wording of the non-assignment clause, requiring the contract to expressly state that attempted assignments are "void" or "invalid" before voiding the assignment.[52] A subset of these courts also will invalidate assignments if the contract asserted that the "power to assign" was precluded.[53] Other jurisdictions follow an approach suggested by a *Restatement (Second)* comment, which states the decision depends on "all the circumstances."[54] The comment explains that courts may need to examine other factors because the same words may have different meanings depending on their context; for example, "'[n]ot transferable' has a clear meaning in a theater ticket; in a certificate of deposit the same words may refer

49. *Rumbin*, 757 A.2d at 534.

50. RESTATEMENT (SECOND) OF CONTRACTS § 322 cmt. a (1981).

51. Crespi, *supra* note 10, at 796-97.

52. *E.g.*, Garden State Bldgs., L.P. v. First Fid. Bank, N.A., 702 A.2d 1315, 1321 (N.J. Super. Ct. App. Div. 1997) (holding assignment invalid because the clause said assignments without consent "shall be void"); Univ. Mews Assocs. v. Jeanmarie, 471 N.Y.S.2d 457, 461 (Sup. Ct. 1983) (explaining the anti-assignment clause "must contain express provisions that any assignment shall be void or invalid if not made in a certain specified way").

53. Liberty Life Assurance Co. v. Stone St. Capital, Inc., 93 F. Supp. 2d 630, 638 (D. Md. 2000) (holding anti-assignment clause that took away the power to assign made assignment invalid); *Grieve*, 58 F. Supp. 2d at 322-23 (same); *Rumbin*, 757 A.2d at 535 (holding assignment valid because the contract did not expressly limit power to assign).

54. RESTATEMENT (SECOND) OF CONTRACTS § 322 cmt. c (1981); s*ee also* Bank of Am., N.A. v. Moglia, 330 F.3d 942, 948 (7th Cir. 2003) (citing *Restatement (Second) of Contracts* section 322, comment c, and holding assignment invalid after considering the alternative remedy, a claim for breach of contract); Henderson v. Roadway Express, 720 N.E.2d 1108, 1112 (Ill. App. Ct. 1999) (holding the assignment invalid because the anti-assignment clause was a "bargained-for provision that was intended to benefit all parties").

to negotiability rather than assignability."[55] Despite the inconsistency, most of the courts that have recently considered the issue have followed one of the forms of the modern approach.[56]

3. Statutory Approach—Anti-Assignment Clauses Are Invalid

The third approach holds anti-assignment clauses themselves ineffective. Under this theory, such clauses neither invalidate assignments[57] nor create a cause of action for breach of contract;[58] instead, all contract terms are assignable. This approach is limited to contracts that fall under statutes covering particular situations and is prompted by the same concerns about restrictions on alienation that inform the "modern approach" to anti-assignment clauses.

One of the most widely used examples of an anti-assignment statute is contained in Article 9 of the Uniform Commercial Code, which has been adopted in almost all jurisdictions.[59] Section 406 of Article 9 invalidates terms that restrict or prohibit assignments of accounts,[60] which are payment obligations arising from regular commercial transactions[61] for both "goods sold" and "services rendered."[62] A comment in the Code states that the provision "build[s] on common-law developments that essentially have eliminated legal restrictions on assignments of [certain] rights to payment."[63]

State and federal statutes with similar effects cover a variety of situations. Assignments of wages to creditors, with a few

55. RESTATEMENT (SECOND) OF CONTRACTS § 322 cmt. c (1981).

56. *Rumbin*, 757 A.2d at 535.

57. *E.g.*, U.C.C. § 9-406(d)(1) (2000) (stating "a term in an agreement between an account debtor and an assignor" that prohibits assignment is ineffective).

58. *E.g.*, U.C.C. § 9-406(d)(2) (2000) (stating "a term in an agreement between an account debtor and an assignor" that an assignment may give rise to a breach is ineffective).

59. Crespi, *supra* note 10, at 792.

60. U.C.C. § 9-406(d). For exceptions see U.C.C. § 9-109(d) (2000).

61. Crespi, *supra* note 10, at 792.

62. U.C.C. § 9-106 (2000); *see also* Knecht Bros. v. Ames Constr., Inc., 404 N.W.2d 859, 861 (Minn. Ct. App. 1987) (applying Minnesota Statutes section 336.9-318(4), then Minnesota's version of U.C.C. section 9-406(d), to determine that a subcontractor for a seeding project could assign its rights to payment from the general contractor to its financiers, despite an anti-assignment clause in the contract).

63. U.C.C. § 9-406 cmt. 5 (2000).

exceptions, are prohibited by the Federal Trade Commission's Creditor Practices Rule.[64] Many states have similar rules, often based on a provision from the Uniform Consumer Credit Code.[65] These rules are based on the recognition that such assignments interfere with employment, disrupt family finances, and deny debtors a chance to defend themselves before their wages are subject to collection.[66] Some states decided that rights to the payment of money always should be assignable; for example, an Arkansas statute states that all written agreements for the payment of money or property "shall be assignable,"[67] a statement the Arkansas Supreme Court held invalidated an anti-assignment clause in a health insurance contract.[68] And under federal bankruptcy law, a trustee in bankruptcy has the ability to assign an executory contract or lease despite an anti-assignment restriction.[69]

Despite these examples, the applications of this approach remain restricted. Courts have not been willing to flout the common law acceptance of anti-assignment clauses by holding clauses invalid in the absence of statutes specifically invalidating the clauses.

B. Mixing Approaches

Over the centuries, courts' general position on the assignment of contract rights has rotated 180 degrees, from the days when assignments were not recognized at all to the current proliferation of statutes that stop parties from preventing assignments. But the

64. MARY DEE PRIDGEN, CONSUMER CREDIT AND THE LAW § 11:5 (2006).

65. UNIF. CONSUMER CREDIT CODE § 3.305(1) (1974) ("A creditor may not take an assignment of earnings of the consumer for payment or as security for payment of a debt arising out of a consumer credit transaction. An assignment of earnings in violation of this section is unenforceable by the assignee of the earnings and revocable by the consumer."). Many states have adopted laws on this topic. *See, e.g.*, IDAHO CODE ANN. § 28-43-304 (2001); KAN. STAT. ANN. § 16a-3-305 (1995); MINN. STAT. § 181.05 (2004); OKLA. STAT. tit. 14A, § 2-410 (2004); WYO. STAT. ANN. § 40-14-334 (2005).

66. PRIDGEN, *supra* note 64, at § 11:5. Such provisions may interfere with employment by leaving an employee with little incentive to perform adequately: "From the viewpoint of the wage earner there is little difference between not earning at all and earning wholly for a creditor." Local Loan Co. v. Hunt, 292 U.S. 234, 245 (1934).

67. ARK. CODE ANN. § 4-58-102 (West 2005).

68. Am. Med. Int'l, Inc. v. Ark. Blue Cross & Blue Shield, 773 S.W.2d 831, 834 (Ark. 1989).

69. 11 U.S.C.S. § 365(f)(1) (LexisNexis 2005).

overall march toward free assignability has not been without many meanderings and detours. Approaches vary significantly between jurisdictions, and in any particular case, the court's decision depends as much on the policies it wishes to promote under those specific circumstances as on the jurisdiction's overall approach.

For example, in cases involving assignments of payments from tort victims' structured settlements, some courts are particularly willing to hold assignments invalid when made in contravention of an anti-assignment clause because of the desire to protect the tort victim.[70] Several courts also have concluded that assignments of health insurance benefits should be invalidated because the anti-assignment clauses in the health insurance contracts supported the compelling public policy of controlling the growth of medical costs.[71] Thus, the rule for anti-assignment contracts is anything but consistent; the case law is filled with quirks and caveats that depend on the wording of the contract, any applicable statutes, and possibly public policies, apart from the general approach adopted by the state.

C. Minnesota Case Law

In Minnesota, case law on the subject of anti-assignment clauses is limited;[72] until recently, Minnesota's courts apparently had not adopted any of the interpretive approaches for general use. In *Wilkie v. Becker*,[73] the court stated a right to payment of money could be assigned "unless there is something in the terms of

70. *See, e.g.*, Liberty Life Assurance Co. v. Stone St. Capital, Inc., 93 F. Supp. 2d 630, 633-34 (D. Md. 2000) (determining that no Missouri cases specifically address the assignment of a right to payments under a structured settlement; considering other states' structured settlement cases instead of looking to Missouri cases that addressed other anti-assignment clauses in general). For a detailed analysis of structured settlement cases, see *infra* notes 160-166 and accompanying text.

71. *See, e.g.*, St. Francis Reg'l Med. Ctr. v. Blue Cross Blue Shield of Kan., 810 F. Supp. 1209, 1220 (D. Kan. 1992); Parrish v. Rocky Mountain Hosp. & Med. Servs. Co., 754 P.2d 1180, 1182 (Colo. Ct. App. 1988); Kent Gen. Hosp., Inc. v. Blue Cross & Blue Shield of Del., Inc., 442 A.2d 1368, 1371-72 (Del. 1982). In these cases, insureds had attempted to assign benefits from their health insurance contracts to medical providers who did not have contracts with the insurance company. These assignments eliminated any incentive for those providers to enter contracts with the insurance company, contracts that would limit the amount the providers could charge for services.

72. Travertine Corp. v. Lexington-Silverwood, 670 N.W.2d 444, 449 (Minn. Ct. App. 2003), *rev'd*, 683 N.W.2d 267, 269 (Minn. 2004).

73. 268 Minn. 262, 128 N.W.2d 704 (1964).

the contract manifesting the intention of the parties that it shall not be assigned."[74] However, the court did not specify what terms were needed to qualify as that "something" manifesting intention, or what the effects on the parties would be if that "something" were included. Three decades later, in *Vetter v. Security Continental Insurance Co.*,[75] the court repeated the general rule that assignments were allowed "in the absence of a contractual provision to the contrary,"[76] again without specifying what that provision ought to say or how it should be interpreted. Reflecting the general confusion in this area, recent Minnesota Court of Appeals decisions involving anti-assignment provisions followed each of the first two approaches. In *S O Designs USA, Inc. v. Rollerblade, Inc.*,[77] the court assumed an assignment in violation of an anti-assignment clause was valid;[78] but in *Blue Cross & Blue Shield v. Mount Sinai Hospital*,[79] the court held the attempted assignment was not effective until the anti-assignment clause was waived.[80]

Minnesota also has statutes following the third approach, making anti-assignment clauses ineffective under certain circumstances.[81] Furthermore, case law suggests assignments cannot be prohibited in some situations. In *Wilkie*, the Minnesota Supreme Court stated that the right to receive money due under a contract "may be assigned even though the contract itself may not be assignable."[82] In another case, the court of appeals suggested contracts may not prohibit the right to receive damages for a breach of contract.[83] Thus, Minnesota has case law that uses all

74. *Id.* at 267, 128 N.W.2d at 707.
75. 567 N.W.2d 516 (Minn. 1997).
76. *Id.* at 521.
77. 620 N.W.2d 48 (Minn. Ct. App. 2000).
78. *Id.* at 55.
79. No. C7-01-1287, 2002 WL 378129, at *1 (Minn. Ct. App. Mar. 12, 2002).
80. *Id.* at *3.
81. *See* MINN. STAT. § 336.9-406 (2004) (Minnesota's version of U.C.C. § 9-406 (2000)); MINN. STAT. § 181.05 (2004) (making assignments of unearned wages or salary invalid).
82. Wilkie v. Becker, 268 Minn. 262, 267, 128 N.W.2d 704, 707 (1964); *see also In re* Jones, 337 F. Supp. 620, 625 (D. Minn. 1971) ("[I]t is possible under Minnesota law to assign the proceeds of a contract even if the contract itself is not assignable.").
83. Mears Park Holding Corp. v. Morse/Diesel, Inc., 427 N.W.2d 281, 284 (Minn. Ct. App. 1988) ("In analyzing anti-assignment provisions, a distinction must be drawn between the right to assign performance under a contract, which may be prohibited, and the right to receive damages for its breach, which may not be prohibited."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 322(2)(a)

three approaches, although no case specifically analyzes and adopts a particular position. Against this confused backdrop, *Travertine Corp. v. Lexington-Silverwood*[84] arrived on the Minnesota court scene.

III. THE *TRAVERTINE* DECISION

A. Facts

In *Travertine*, the Minnesota Supreme Court faced the anti-assignment question that had perplexed so many other courts.[85] The case began with James Lennon and George Berkey's formation of a real estate company, Travertine Corp., in 1989.[86] Lennon and Berkey found investors for the corporation, which then purchased 960 acres of real estate in California.[87] Lennon and Berkey planned to prepare the land for residential development and sell it to a developer.[88] To further that end, Lennon and Berkey signed a management agreement with Travertine Corp.,[89] which entitled the pair to a percentage of Travertine's net profits from the land sale and provided for "reasonable compensation for their services to date" if the agreement were terminated.[90] The agreement also stated that Lennon and Berkey would serve on the corporation's board of directors and as corporate officers, it bound all parties to arbitration in case of a dispute, and asserted it would be binding on the parties' "representatives, successors and assigns."[91] The contract included a non-assignment clause stating that "the rights and obligations of Berkey/Lennon shall not be assignable except that Berkey may assign to Lennon or Lennon assign to Berkey such

(1981).

84. 683 N.W.2d 267 (Minn. 2004).

85. *Id.* at 269.

86. Brief of Appellant Travertine Corp. at 3, Travertine Corp. v. Lexington-Silverwood, 683 N.W.2d 267 (Minn. 2004) (No. A-03-0210).

87. *Id.*; Respondent's Brief and Appendix at 3, Travertine Corp. v. Lexington-Silverwood, 683 N.W.2d 267 (No. A-03-0210).

88. Respondent's Brief and Appendix, *supra* note 87, at 3.

89. Brief of Appellant Travertine Corp., *supra* note 86, at 4.

90. *Id.* at A-32. The percentage of compensation the managers were entitled to receive shrank the longer the land remained unsold. If the property sold within eighteen months, the managers would receive 50%; if it sold between eighteen and thirty-six months, 40%; and if the sale took place after thirty-six months, 25%. *Id.* at A-30.

91. Travertine Corp. v. Lexington-Silverwood, 683 N.W.2d 267, 269 (Minn. 2004).

rights and obligations."[92]

Seven years later, to settle a judgment against him in an unrelated matter, Lennon attempted to assign his rights to compensation under the management agreement to Lexington-Silverwood, a Minnesota limited partnership.[93] The agreement between Lennon and Lexington-Silverwood did not discharge Lennon's personal liability if payment from the assignment were not received.[94] In May 1998, Lennon delivered an agreement with VGS Consulting to sell Travertine's property for $22.5 million, but the deal's closing date was postponed four times, and the sale was finally cancelled.[95] According to Lennon, the deal fell apart because Travertine's board of directors made "commercially unreasonable" demands on buyers while some of its members were offering to buy the property themselves at "a bargain price."[96] In 1999, Travertine's board of directors first removed Lennon from the board and then terminated him as president, leaving the remaining Travertine board members in control of day-to-day operations.[97] Finally, citing Lennon's inability to find a "willing and qualified buyer,"[98] Travertine's directors and shareholders voted to cancel the management agreement in January 2000.[99] Travertine Corp. had not paid Lennon any proceeds under the management agreement because the land had not been sold, and Lennon received no compensation upon termination despite the provision in the agreement for "reasonable compensation" for services he had contributed upon termination.[100]

B. Procedure

Lexington-Silverwood filed a demand for arbitration, arguing Lennon's assignment entitled the partnership to compensation of $3 million to $4.5 million, which Lexington-Silverwood said

92. *Id.* at 269-70. In 1992, Berkey assigned his rights to Lennon. *Id.* at 270.

93. *Id.* at 270. The judgment against Lennon was for $757,774. Brief of Appellant Travertine Corp., *supra* note 86, at 5-6, A-39. Lennon's stock in Travertine Corp. already was subject to liens worth $226,170 when he attempted the assignment. *Id.* at A-39.

94. Respondent's Brief and Appendix, *supra* note 87, at 22.

95. Brief of Appellant Travertine Corp., *supra* note 86, at 7, A-24.

96. *Id.* at A-26.

97. Respondent's Brief and Appendix, *supra* note 87, at 6.

98. Brief of Appellant Travertine Corp., *supra* note 86, at 2.

99. Respondent's Brief and Appendix, *supra* note 87, at 7.

100. *Id.*; *see* Brief of Appellant Travertine Corp., *supra* note 86, at A-21.

Lennon had earned by delivering VGS Consulting's offer.[101] Travertine refused to pay and moved to stay arbitration.[102] The trial court held Lennon's assignment was invalid because it was an agreement to transfer future compensation, whereas an assignment must be a present transfer of rights;[103] and even if the assignment were valid, it did not include the right to compel arbitration.[104] With the assignment invalid, the trial court granted the motion to stay arbitration.[105]

The Minnesota Court of Appeals reversed the decision.[106] The court cited *Wilkie v. Becker*[107] for the proposition that the right to receive payment could be assigned, unless "something" in the contract's terms showed the parties intended otherwise.[108] Because no language in the management agreement specifically addressed that right,[109] the court turned to an Eighth Circuit case, *Cedar Point Apartments, Ltd. v. Cedar Point Investment Corp.*, which applied Missouri law.[110] *Cedar Point Apartments* adopted the *Restatement (Second) of Contracts*' position on anti-assignment clauses and interpreted the provision as requiring specific language limiting the power to assign or stating assignments would be void before assignments would be held ineffective.[111] The Travertine-Lennon contract had no such language[112] and it expressly contemplated assignments when it provided assignees would be bound to its terms.[113] Therefore, the court decided, the clause did not make the

101. Brief of Appellant Travertine Corp., *supra* note 86, at A-27.

102. Travertine Corp. v. Lexington-Silverwood, 683 N.W.2d 267, 270 (Minn. 2004).

103. Brief of Appellant Travertine Corp., *supra* note 86, at A-48. The trial court cited *Minnesota Mutual Life Insurance Co. v. Anderson*, 504 N.W.2d 284 (Minn. Ct. App. 1993) in support of this point. *Id.*

104. Brief of Appellant Travertine Corp., *supra* note 86, at A-49 to A-50.

105. *Id.* at A-50.

106. Travertine Corp. v. Lexington-Silverwood, 670 N.W.2d 444, 449 (Minn. Ct. App. 2003), *rev'd*, 683 N.W.2d 267, 269 (Minn. 2004).

107. 268 Minn. 262, 267, 128 N.W.2d 704, 707 (1964).

108. *Travertine*, 670 N.W.2d at 447.

109. *Id.* at 447-48.

110. *Id.* at 447 (citing Cedar Point Apts., Ltd. v. Cedar Point Inv. Corp., 693 F.2d 748, 754 (8th Cir. 1982)).

111. *Id.* at 447-48 (noting that *Cedar Point Apartments* followed the *Restatement (Second) of Contracts* section 322(2)).

112. *See id.* at 448.

113. *Id.*; *see also Cedar Point Apts.*, 693 F.2d at 754 (stating that the contract clause binding the parties *and their assigns* to the contract strongly supported the inference that the non-assignment provision was not meant to prohibit the power to make assignments).

assignment invalid under the *Restatement*'s approach.[114]

C. The Supreme Court's Decision

The Minnesota Supreme Court, however, reversed again.[115] In an opinion written by Justice Russell Anderson, the court concluded that regardless of whether the state followed the *Restatement (Second)* position on anti-assignment clauses, the Lexington-Silverwood assignment would be invalid.[116] First, the court considered the *Restatement (Second)* provision and decided it "need not" adopt the rule because "well-established" Minnesota precedent on the issue already existed.[117] Using *Wilkie v. Becker*[118] and *Vetter v. Security Continental Insurance Co.*,[119] the court repeated the standard used by the court of appeals that there must be "something" in the contract showing the parties intended the right to receive payment would not be assignable.[120] No specific terms were required by these cases, the supreme court added, merely some indication of the parties' intent.[121] Although relying on the same case as the court of appeals, the supreme court reached the opposite conclusion; the statement that "the rights and obligations of Berkey/Lennon shall not be assignable" qualified as the required "something" indicating intent.[122] Under Minnesota precedent, the court held, Lennon's ability to assign his rights was destroyed, so the assignment was invalid.[123]

According to the supreme court, the assignment would have been void even under the modern *Restatement (Second)* approach.[124] The court rejected the interpretation of the *Restatement*'s provision favored by the court of appeals.[125] Instead, the court followed

114. *Travertine*, 670 N.W.2d at 448.
115. Travertine Corp. v. Lexington-Silverwood, 683 N.W.2d 267, 274 (Minn. 2004).
116. *Id.* at 272, 274.
117. *Id.* at 272 (citing Coyle v. Richardson-Merrell, Inc., 584 A.2d 1383, 1385 (Pa. 1991) as stating that courts have the "obligation" to refuse to apply a *Restatement* rule that runs contrary to precedent).
118. 268 Minn. 262, 267, 128 N.W.2d 704, 707 (1964).
119. 567 N.W.2d 516, 521 (Minn. 1997).
120. *Travertine*, 683 N.W.2d at 272 (quoting *Wilkie*, 268 Minn. at 267, 128 N.W.2d at 707).
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*

Judge Posner's analysis from *Bank of America, N.A. v. Moglia*,[126] which rejected the need for "magic words" such as "power" or "invalid" in the non-assignment clause.[127] Instead of "impos[ing] formulaic restraints" on contract language, the Minnesota court held the better approach would be holding assignments void as long as assignment was prohibited in "specific and unmistakable terms."[128] The language in the Travertine-Lennon contract qualified as unmistakable, the court stated: "[I]t is difficult to identify a clearer way to communicate an intent to deny a party the power to assign than to expressly say so."[129] Thus, under either rule, the court held Lexington-Silverwood could not enforce the assignment.[130]

D. Case Epilogue

The Minnesota Supreme Court's decision that the assignment was invalid made it extremely unlikely Lexington-Silverwood could recover anything for its $750,000 judgment against Lennon. Under the assignment, Lennon still was responsible for the debt if the assigned payments were not delivered,[131] but Lennon filed for bankruptcy six months after the management agreement was cancelled, disclosing $23,000 in assets and $4.2 million in debts.[132] After Lexington-Silverwood lost its bid to enforce the assignment, Lennon wanted to proceed against Travertine on his own behalf, a

126. 330 F.3d 942, 948 (7th Cir. 2003).

127. *Travertine*, 683 N.W.2d at 273-74 (quoting *Bank of Am.*, 330 F.3d at 948).

128. *Id.*

129. *Id.* at 273-74. However, the terms of the contract did not expressly deny the parties the power to assign; the contract said the "rights . . . shall not be assignable . . . ." *Id.* at 269.

130. *Id.* at 274. The supreme court did not discuss whether Minnesota's version of section 9-406(d) of the Uniform Commercial Code applied to the case, presumably because the court assumed the situation fell under one of the section's exemptions. *See* U.C.C. §§ 9-109(d)(3) (2000) (exempting assignments for claims of wages), 9-109(d)(7) (exempting assignments of single accounts to satisfy a pre-existing debt). Neither did the court apply Minnesota Statutes section 181.05, which makes an assignment of unearned wages or salary void. The court stated the record was "inconclusive" in establishing whether Lennon was Travertine's employee and when he had earned the compensation purportedly assigned to Lexington-Silverwood. *Travertine*, 683 N.W.2d at 270 n.2.

131. Respondent's Brief and Appendix, *supra* note 87, at 5-6.

132. *In re* Lennon, Bk. No. BK-S-01-17252-BAM, at 3 (B.A.P. 9th Cir. July 20, 2005). Lennon's debts included the Lexington-Silverwood debt and $2.8 million in priority tax claims that would not be discharged by the bankruptcy proceedings. *Id.* at 12.

claim he said was worth $15 million.[133] The trustee in bankruptcy, disagreeing with this "overly optimistic" analysis, settled the claim against Travertine for $900,000.[134] Lexington-Silverwood protested against the settlement to no avail, and it was approved by the Bankruptcy Appellate Panel for the Ninth Circuit.[135]

In the final analysis, Travertine likely realized a windfall when it sold the property, since it did not have to pay anyone the twenty-five percent it would have owed Lennon under the management agreement.[136] Lexington-Silverwood, meanwhile, was left with a cause of action against a deeply indebted bankruptcy estate, and Lennon lost any hope of seeing a benefit from his work for Travertine.

If Lennon's assignment to Lexington-Silverwood had been held valid despite the anti-assignment clause, the situation for Lennon would have been equally grim. Lexington-Silverwood would have received any proceeds directly from Travertine, bypassing Lennon's bankruptcy estate.[137] Travertine would have been able to sue the bankruptcy estate for any damages it incurred because of the assignment, but because the assignment merely would have forced Travertine to send a check to a different party, a viable suit appears unlikely.[138] Lexington-Silverwood might have been the party with a windfall under this scenario, if the proceeds under the management agreement were larger than Lennon's debt to it.

IV. ANALYSIS

In *Travertine*, the Minnesota Supreme Court reached a conclusion backed by numerous cases; anti-assignment clauses

133. *Id.* at 4.

134. *Id.* at 4, 14. The trustee cited Travertine's possible legal defenses to the claim and the likelihood that pursuing the claim would be extremely costly as influencing his decision to settle. *Id.* at 17.

135. *Id.* at 17.

136. *See supra* note 90.

137. *See In re* Kaufman, 37 P.3d 845, 850-51 (Okla. 2001) ("Valid assignments pass the assignor's title, leaving no interest to be reached by a creditor."); RESTATEMENT (SECOND) OF CONTRACTS § 317(1) (1981) (explaining that in an assignment, the "assignor's right to performance by the obligor is extinguished . . . and the assignee acquires a right to such performance").

138. *See* Wonsey v. Life Ins. Co. of N. Am., 32 F. Supp. 2d 939, 943 (E.D. Mich. 1998) ("[T]he obligor, the party obligated to perform, would not suffer any harm by a mere assignment of payments under a contract.").

invalidate any assignments attempted in violation of the clause, even if the clauses do not specifically state that will be the result.[139] However, the arguments the court used to reach that conclusion are flawed and the failure to adopt the more flexible modern approach means Minnesota is out of step with other states and missing the policy benefits the modern approach provides.

A. The Court's Problematic Assessment of Minnesota Case Law

The court's statement that Minnesota's precedent on the validity of anti-assignment clauses was "well-established"[140] is questionable,[141] and this statement provides the underpinning for the court's entire first argument. Case law holds some evidence that the statement is correct. For example, the supreme court in *Sauber v. Northland Insurance Co.* held an assignment made in violation of an anti-assignment clause was void until the insurance company consented to the assignment.[142] In addition, the court of appeals has held in several cases, albeit in conclusory language with little analysis, that such assignments were void.[143]

However, neither of the cases that the supreme court chose to support its analysis in *Travertine* actually dealt with an anti-assignment clause. In *Wilkie*, the issue was whether a bankrupt

139. *See supra* notes 29-37 and accompanying text.

140. Travertine Corp. v. Lexington-Silverwood, 683 N.W.2d 267, 271 (Minn. 2004).

141. As the appeals court noted, Minnesota case law on the subject is "limited." Travertine Corp. v. Lexington-Silverwood, 670 N.W.2d 444, 447 (Minn. Ct. App. 2003), *rev'd*, 683 N.W.2d 267, 269 (Minn. 2004).

142. 251 Minn. 237, 248, 87 N.W.2d 591, 599 (1958) ("It is of course axiomatic that the policy could not be assigned without the consent of the defendant."). However, the clause in question stated an assignment "shall not bind the company until its consent is endorsed hereon," language which might qualify as taking away the *power* to assign. *Id.* at 247, 87 N.W.2d at 599.

143. *See* Bank Midwest, Minn., Iowa, N.A. v. Lipetzky, 661 N.W.2d 290, 294 (Minn. Ct. App. 2003) (holding clause that stated buyer could not assign without written permission voided an assignment made without consent), *rev'd on other grounds by* 674 N.W.2d 176 (Minn. 2004); Mears Park Holding Corp. v. Morse/Diesel, Inc., 427 N.W.2d 281, 284 (Minn. Ct. App. 1988) (holding assignment was invalid because of the non-assignment clause, the personal nature of the contract, and the fact that the contract was still executory); Blue Cross & Blue Shield of Minn. v. Mount Sinai Hosp., No. C7-01-1287, 2002 WL 378129, at *4 (Minn. Ct. App. Mar. 12, 2002) ("When the terms of the contract provide that it is nonassignable, the contract may not be assigned unless the provision is waived."). *But see* S O Designs USA, Inc. v. Rollerblade, Inc., 620 N.W.2d 48, 55 (Minn. Ct. App. 2000) (assuming both assignor and assignee were liable for royalty payments owed the plaintiff despite the anti-assignment clause).

defendant could make valid assignments of the proceeds from an upcoming sale of his property.[144] In *Vetter*, the court had to decide whether insurance policy holders had agreed to release their insurance company from any future liability when the company delegated its duties to another insurer.[145] Though both decisions recited the rule that parties could agree their contract rights were not assignable, neither provided guidance about the required form or preferred model of interpretation for anti-assignment clauses.[146] Thus, the *Travertine* decision seems to take the casually recited "something" indicating intent suggested by *Wilkie*[147] and turn it into an all-encompassing "anything." The supreme court's leap from this unspecific recital to a broad rule on a controversial subject is troubling. The court was free to reject the *Restatement (Second)* provision,[148] but it could have done so by searching through more Minnesota case law and making a more convincing argument for adopting the early approach. Also, nothing in Minnesota case law prohibited the court from adopting the *Restatement (Second)* approach, despite the supreme court's recitation to the contrary. The vague language in *Wilkie* and *Vetter*, both of which stated that assignments were valid unless prohibited, would have been consistent with the adoption of the modern approach, which defines how assignments may be prohibited.[149] In sum, the court could have taken the opportunity in *Travertine* to adopt the modern approach for interpreting anti-assignment clauses.

B. The Interpretation of the Restatement (Second) *Provision*

The court's reading of *Bank of America, N.A. v. Moglia*,[150] the foundation for its interpretation of the *Restatement (Second) of Contracts*' rule, seems to neglect the key point of the case. Judge

144. Wilkie v. Becker, 268 Minn. 262, 264, 128 N.W.2d 704, 706 (1964).
145. Vetter v. Sec. Cont'l Ins. Co., 567 N.W.2d 516, 521 (Minn. 1997).
146. *Id.*; *Wilkie*, 268 Minn. at 267, 128 N.W.2d at 707.
147. 268 Minn. at 267, 128 N.W.2d at 707.
148. Travertine Corp. v. Lexington-Silverwood, 683 N.W.2d 267, 272 (Minn. 2004).
149. *See Vetter*, 567 N.W.2d at 521 (explaining a right could be assigned "in the absence of a contractual provision to the contrary"); *Wilkie*, 268 Minn. at 267, 128 N.W.2d at 707 (stating a right to payment of money could be assigned "unless there is something in the terms of the contract manifesting the intention of the parties that it shall not be assigned").
150. Bank of Am., N.A. v. Moglia, 330 F.3d 942, 948 (7th Cir. 2003); *see supra* text accompanying notes 126-130.

Posner's opinion did reject the need to use "magic words" in the anti-assignment clause, but it went on to use different criteria to establish whether the assignment should be valid.[151] Instead of examining the precise language, the *Moglia* opinion considered the circumstances of the contract, as suggested by a comment in the *Restatement*.[152] The court considered that the assignee had notice of the anti-assignment provision and that the alternative remedy, a lawsuit for breach of the provision, was untenable[153] and decided to hold the assignment invalid based on those circumstances.[154] The circumstances analysis, not the rejection of specific wording, was the crux of the case. In a later opinion, Judge Posner himself cited *Moglia* in a suggestion that an assignment violating an anti-assignment clause would be invalid if it violated public policy.[155] In *Travertine*, by contrast, the supreme court did not examine the circumstances of the contract; the court merely rejected the need for "magic words" but went no further, finding the parties' intent from the "plain meaning of the words employed."[156]

In addition, all but one[157] of the other cases the supreme court cited to support its reading of the *Restatement (Second)* were structured settlement cases,[158] of which *Grieve v. General American Life Insurance Co.*[159] is representative. A structured settlement is an "arrangement for periodic payment of damages established by settlement or judgment in resolution of a tort claim,"[160] often used to compensate severely injured tort victims who need long-term

151. *Moglia*, 330 F.3d at 948.

152. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 322 (1981)); *see supra* notes 54-55 and accompanying text.

153. Because the lawsuit involved a bankruptcy, a lawsuit for breach of the anti-assignment clause would have had to be filed by the trustee on behalf of the general creditors against the trustee as representative of the bankrupt. *Moglia*, 330 F.3d at 948.

154. *Id.*

155. Cook, Inc. v. Boston Scientific Corp., 333 F.3d 737, 742 (7th Cir. 2003).

156. Travertine Corp. v. Lexington-Silverwood, 683 N.W.2d 267, 269 (Minn. 2004).

157. Parrish Chiropractic Ctrs., P.C. v. Progressive Cas. Ins. Co., 874 P.2d 1049, 1053 (Colo. 1994) (adopting first approach, in which assignments made in violation of an anti-assignment clause are always void, based on two public policy reasons: freedom of contract and the need to keep down medical costs).

158. *Travertine*, 683 N.W.2d at 274 n.3.

159. 58 F. Supp. 2d 319 (D. Vt. 1999).

160. Rumbin v. Utica Mut. Ins. Co., 757 A.2d 526, 529 n.3 (Conn. 2000) (quoting CONN. GEN. STAT. § 52-225f(a)(5) (2004)).

support.[161] Sometimes, as in *Grieve*, the tort victim attempts to assign the right to future payments from the settlement in return for a smaller but immediate lump sum payment because of dire financial need.[162] In *Grieve*, the court decided circumstances weighed in favor of voiding an assignment of future payments the plaintiff was to receive, without regard to the anti-assignment clause's specific language.[163] The court based its decision on two factors: (1) the tax benefits the insurance company received under the structured settlement, which would be obliterated if the assignment were upheld;[164] and (2) the legislative policy favoring such long-term payment plans for the protection of tort victims, a policy that would be violated if injured parties could assign their benefits "at an exorbitant rate of interest."[165] Thus, the decisions in these structured settlement cases, on which the court's reading of the *Restatement* depends, are based at least partially on the circumstances of the case, not the wording of the clause.[166]

161. Usually, the defendant (or its assignee) purchases an annuity policy to fund the victim's payments. *See, e.g.*, J.G. Wentworth S.S.C. Ltd. P'ship v. Callahan, 649 N.W.2d 695, 696 (Wis. Ct. App. 2002) (discussing rotary mower accident in which victim agreed to settlement of lifetime payments).

162. In *Grieve*, a woman rendered paraplegic in a bicycle accident attempted to assign her structured settlement payments of $104,800 over ten years for a lump sum payment of $39,862 to pay debts incurred as a result of her frequent hospitalizations and inability to work. 58 F. Supp. 2d at 321.

163. *Id.* at 324.

164. *Id.* at 323. In *CGU Life Insurance Co. v. Singer Asset Finance Co.*, the Georgia Court of Appeals explained the tax benefits received by the payor or its assignee for buying an annuity out of which it makes payments to the tort victim: "Under current Internal Revenue Service regulations, the [payor or its assignee] is eligible to have any amounts it receives from the annuity excluded from its gross income so long as, among other things, such periodic payments are not 'accelerated, deferred, increased, or decreased by the recipient.'" 553 S.E.2d 8, 12 (Ga. Ct. App. 2001) (quoting 26 U.S.C. § 130(c)(2)(B) (1997)). Should the IRS determine that the sale or assignment of future benefits to a third party violates the above-listed conditions, such a transfer could jeopardize the tax advantages of the structured settlement agreements under IRS regulations. Payees also receive tax benefits—they can exclude the payments from their taxable income. *Id.*

165. *Grieve,* 58 F. Supp. 2d at 324. In *Grieve*, the rate of interest being charged was 18.88%, compounded daily. *Id.* at 322.

166. Other cases cited by the *Travertine* opinion to support this point include *Liberty Life Assurance Co. v. Stone Street Capital, Inc.*, 93 F. Supp. 2d 630 (D. Md. 2000), *Johnson v. First Colony Life Insurance Co.*, 26 F. Supp. 2d 1227 (C.D. Cal. 1998), *J.G. Wentworth S.S.C. Limited Partnership v. Callahan*, 649 N.W.2d 695, and *CGU Life Insurance Co. v. Singer Asset Finance Co.*, 553 S.E.2d 8 (Ga. Ct. App. 2001), which all decided that an anti-assignment clause that took away the "power" to assign a structured settlement agreement made an assignment invalid based upon—among other factors—the possible loss of tax benefits to the payor. In

The circumstances in *Travertine* do not appear to justify holding the assignment invalid. Neither James Lennon nor Travertine would have suffered any particular adverse consequences because of the assignment. Lennon, who assigned his compensation to satisfy a judgment, was not being exploited as were the structured settlement victims, who were trading the right to long-term payments for a much smaller, immediately payable lump sum.[167] For Travertine Corp., the attempted assignment was merely the transfer of a right to receive payment, so the assignment would have changed nothing except where Travertine sent the check.[168] In this situation, some cases have held that assignments of such a right could not be invalidated because there was no reason to prohibit such transfers.[169] As one court wrote, "The rationale behind these cases is derived from the implicit recognition that the obligor, the party obligated to perform, would not suffer any harm by a mere assignment of payments under a contract."[170] Thus, under the *Moglia* "all the circumstances" rule, the circumstances of Lennon's assignment to Lexington-Silverwood would not weigh in favor of invalidating the transfer.

By rejecting both of the standard interpretive approaches to the *Restatement (Second)* provision, the Minnesota Supreme Court eviscerated the modern *Restatement* rule. Under the court's reading, the subtleties of the *Restatement*'s approach were lost; it became the same as the broad rule the court created under *Wilkie*.[171] This apparently was not the intent of the *Restatement*'s

addition, all of the cited cases specifically eliminated the parties' power to assign, a wording which, under most courts' versions of the modern rule, would invalidate the assignment. *See* Rumbin v. Utica Mut. Ins. Co., 757 A.2d 526, 535 (Conn. 2000) (holding assignment was valid because the contract did not expressly limit power to assign). Thus, these cases do not qualify as rejections of the modern rule.

167. *See supra* notes 158-161 and accompanying text.

168. Travertine Corp. v. Lexington-Silverwood, 683 N.W.2d 267, 270 (Minn. 2004). Tax benefits would not have been at stake in this situation as they were for the payors in the structured settlements, when the payees assigned their rights to payment. *See supra* note 164.

169. *See supra* note 44 and accompanying text; *see also* Am. Med. Int'l, Inc. v. Ark. Blue Cross & Blue Shield, 773 S.W.2d 831, 834 (Ark. 1989) (interpreting Arkansas Code Annotated section 4-58-102 as invalidating an anti-assignment clause in a health insurance contract that attempted to prohibit the assignment of a right to receive payment under the contract).

170. Wonsey v. Life Ins. Co. of N. Am., 32 F. Supp. 2d 939, 943 (E.D. Mich. 1998).

171. *See supra* text accompanying note 124.

drafters who made the change in order to limit restraints on alienation,[172] and it is not the way the majority of courts have interpreted the provision.[173]

Again, the supreme court was free, although not bound, to reject the *Restatement (Second)* provision. Once the court chose to analyze the case under the *Restatement* rule, however, the court should have found the assignment valid.[174] Under the *Cedar Point Apartments* approach to the *Restatement*, the words "shall not be assignable" do not sufficiently demonstrate intent to make the assignment ineffective.[175] Under the *Moglia* approach, the circumstances do not justify making the assignment invalid. No policy reasons, as in the structured settlement cases,[176] or practical impediments, as in *Moglia*,[177] validate the decision to make this mere promise self-executing.[178]

Thus, the court's decision creates an apparently clear-cut precedent on a difficult point of law, but the case's legacy is likely to be confused because its reasoning is flawed. The supreme court analyzed the case under both the early and modern approaches, probably because the court needed to buttress its weak argument under Minnesota precedent.[179] The court forced the outcome in this case to be the same under both the *Restatement* and early approaches, but the two rules should have led to opposite

172. *See* RESTATEMENT (SECOND) OF CONTRACTS § 322 cmt. a (1981) (stating that courts have applied the policy against restraints on alienation when interpreting contractual terms open to more than one construction).

173. Rumbin v. Utica Mut. Ins. Co., 757 A.2d 526, 535 n.10 (Conn. 2000).

174. The appeals court, which also applied the *Restatement (Second) of Contacts*, found the assignment valid. Travertine Corp. v. Lexington-Silverwood, 670 N.W.2d 444, 449 (Minn. Ct. App. 2003), *rev'd*, 683 N.W.2d 267, 269 (Minn. 2004).

175. 693 F.2d 748, 754 (8th Cir. 1982). Travertine Corp. attempted to argue that the language in the anti-assignment clause actually fulfilled the *Cedar Point Apartments* criteria, but the court did not even address Travertine's rather feeble argument, preserved in its brief: "The language of the non-assignment clause ['the rights and obligations of Berkey/Lennon shall not be assignable'] is much broader than that found in *Cedar Point* . . . . The language chosen refers to the 'rights and obligations' and serves to prohibit the power to assign." Brief of Appellant Travertine Corp., *supra* note 86, at 23. This argument makes no sense. The relevant language is "shall not be assignable," which is not specific enough to trigger invalidation under the modern rule. Adding the nouns "rights and obligations" changes nothing.

176. *See supra* note 165 and accompanying text.

177. *See supra* notes 150-154 and accompanying text.

178. *See supra* note 41.

179. Travertine Corp. v. Lexington-Silverwood, 683 N.W.2d 267, 274 (Minn. 2004); s*ee supra* Part IV.A.

outcomes.[180] The court appeared to be unnecessarily closing avenues toward the adoption of the modern approach, despite the advantages it includes.

C. Policy Implications of the Modern Approach

The true problem with the Minnesota Supreme Court's snub of the modern approach is that the decision ignores the policy advantages of the more nuanced rule. Under the modern rule, the burden of a breach falls on the party less likely to sustain an injury[181] and all parties avoid restraints on alienation, with their resulting transaction costs.[182] Finally, although an obligor may argue that a mere breach of contract is not what it meant to bargain for, the modern approach simply enforces the literal agreement of the parties, whatever that happens to be.[183]

First, whether the assignment is held valid or invalid, the party most disadvantaged will be the proper one—the assignor, who presumably knew about the anti-assignment clause and attempted to transfer rights anyway. The assignment's validity merely changes which of the other two parties still has cause of action against the assignor. If the assignment is held valid, the obligor will have a claim for breach of contract;[184] if it is held invalid, the assignee will.[185]

The obligor often will not be quantifiably harmed by an assignment of rights, in an assignment of the right to payment, the obligor merely has to pay another party.[186] In other circumstances, the obligor likely will not be harmed by having to perform its pre-existing duty for the assignee if the assignor and assignee share similar attributes.[187] Also, under both the *Restatement (First)* and

180. *See supra* text accompanying notes 29-31, 38-40.
181. *See infra* text accompanying notes 184-189.
182. *See infra* text accompanying notes 190-192.
183. *See infra* text accompanying notes 193-195.
184. RESTATEMENT (SECOND) OF CONTRACTS § 322(2)(b) (1981); *see supra* note 40 and accompanying text.
185. RESTATEMENT (SECOND) OF CONTRACTS § 322(2)(c) (1981) ("A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested . . . (c) is for the benefit of the obligor, and does not prevent the assignee from acquiring rights against the assignor . . . .").
186. *See* Wonsey v. Life Ins. Co. of N. Am., 32 F. Supp. 2d 939, 943 (E.D. Mich. 1998).
187. *See* Matthew Horowitz, Resolving Performance Bond Exposures Through Assignment of Bonded Contracts 4 (Sept. 30-Oct. 1, 2004) (unpublished document presented at the Fifteenth Annual Northeast Surety and Fidelity Claims

Restatement (Second) approaches to assignments, obligors already are protected from having to perform if their duty would be materially changed by the assignment, even without an anti-assignment clause.[188] If the obligor is left with a cause of action, a lawsuit likely will not be necessary. For the assignee, however, holding the assignment invalid means it loses the benefit of its bargain with the assignor and gains merely a cause of action for breach.[189] When the language of the anti-assignment clause is open to more than one interpretation, the modern approach properly leaves the cause of action to the party less likely to have an injury to redress.

Second, allowing assignments freely whenever extra costs will not be imposed on the obligor is economically efficient. An assignment of an existing contract saves transaction costs for the obligor and the assignee, who otherwise might have to renegotiate a contract that already exists in a presumably acceptable form.[190] In general, restraints on alienation, such as assignments, are disfavored because they increase transaction costs, keeping

Conference) (on file with author) (explaining that it would be "difficult" or "impossible" to show a loss when rights under a construction contract are assigned to a competent replacement; "[t]herefore, while the opportunity exists for a party to seek damages for an assignment in a jurisdiction that applies the majority rule, the reality is that there will generally be no damages caused by an assignment").

188. RESTATEMENT (FIRST) OF CONTRACTS § 151(a) (1932) ("A right may be the subject of effective assignment unless, (a) the substitution of a right of the assignee for the right of the assignor 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 . . . ."); *see* RESTATEMENT (SECOND) OF CONTRACTS § 317(2)(a) (1981) (repeating the *Restatement (First)* rule and adding that assignments also are invalid if the substitution of the assignee would "materially reduce [the contract's] value to [the obligor]"); *see also* Cedar Point Apts., Ltd. v. Cedar Point Inv. Corp., 693 F.2d 748, 753 (8th Cir. 1982) (citing *Restatement (Second) of Contracts* section 317(2)(a) when explaining an assignment was valid partially because the seller's duty to convey title to real property was not changed by the assignment); Estate of Frantz v. Page, 426 N.W.2d 894, 898 (Minn. Ct. App. 1988) (citing *Restatement (Second)* section 317(2)(a) when explaining an assignment of a note did not release guarantors from their obligations because the evidence did not clearly show the guarantors' risk was materially increased after the assignment).

189. RESTATEMENT (SECOND) OF CONTRACTS § 322(2)(c) (1981) ("A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested . . . is for the benefit of the obligor, and does not prevent the assignee from acquiring rights against the assignor . . . .").

190. *See* Horowitz, *supra* note 187, at 6 ("An assignment . . . may obviate the need for the obligee to execute any new contract documents. Drafting new contract documents can be time-consuming and contentious . . . .").

property out of the hands of the user to whom it is most valuable.[191] Because the obligor is unlikely to incur extra expense,[192] the modern approach of enforcing assignments unless the parties expressly agreed to invalidate them makes economic sense.

Finally, the modern approach allows contracting parties who truly believe they would be disadvantaged by an assignment to bargain for and enforce an anti-assignment clause. The modern approach does not infringe on the parties' freedom to contract, it executes what the parties literally agreed.[193] On occasion, the rule might upset the expectations of obligors who believed the other party did not have the power to assign the contract, but if the obligor actually suffered any injury, those damages still would be recoverable.[194]

This rule is more equitable not only in the abstract, but also as applied to *Travertine*. Leaving Travertine, not Lexington-Silverwood, with a cause of action against Lennon for breaching the contract would have been a fairer result. If the assignment had been valid, Travertine merely would have had to pay Lexington-Silverwood whatever it owed Lennon instead of realizing a windfall and Lexington-Silverwood would have gained some recompense for its judgment against Lennon.[195]

V. CONCLUSION

Over the years, courts, like Humpty Dumpty, have made the words of anti-assignment clauses do a great deal of work, employing them in many different meanings. In *Travertine*, the Minnesota Supreme Court resolved the historical inconsistencies, though it

191. Richard A. Epstein, *Symposium on Law and Economics: Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 972 (1985) ("Most voluntary transactions move property from lower to higher value uses. . . . [A]ny gratuitous proliferation of the number of necessary parties to the transaction [as occurs when restraints on alienation are imposed] can only impede the frequency with which these transactions take place, creating in the long run substantial losses for the original owners. In addition, there are apt to be substantial losses to third parties as well. Voluntary exchanges work for the mutual benefit of both sides, and where these are restrained, potential purchasers share in the losses that are held by original owners.").

192. *See supra* note 186 and accompanying text.

193. *See, e.g.*, Reuben H. Donnelley Corp. v. McKinnon, 688 S.W.2d 612, 615 (Tex. App. 1985) ("[B]ecause the contract term only forbids assignment; it does not render an assignment ineffective.").

194. *See supra* text accompanying note 40.

195. *See supra* Part III.D.

had to stretch its own case law and raze a *Restatement* provision to do so.[196] By holding that assignments attempted in violation of a "specific and unmistakable" anti-assignment clause would always be ineffective, whatever the precise wording of the clause or the circumstances, the court appeared to create a firm precedent for future cases.[197] However, because of the flaws under the surface of the court's reasoning, *Travertine*'s rule could lead to difficult or conflicting results in future cases.[198] Nothing in Minnesota case law mandated the court's rejection of the modern approach,[199] which is followed by a majority of jurisdictions, promoted by the *Restatement (Second) of Contracts*,[200] and supported by a policy analysis.[201] In sum, the court could have adopted the modern approach as Minnesota's rule for interpreting anti-assignment clauses and created a precedent with clearer and more equitable implications for future cases.

196. *See supra* Part IV.
197. *See supra* text accompanying note 128.
198. *See supra* Part IV.B.
199. *See supra* Part IV.A.
200. *See supra* Part II.A.2.
201. *See supra* Part IV.C.