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# Make the Case: Anti-Assignment and Anti-Delegation Clauses in Hotel Management Agreements

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***Key Take:*** *With the increasing number of mergers and acquisitions occurring within the hospitality industry, hotel owners and operators will need to pay attention to the developing case law determining the effect of anti-assignment and anti-delegation provisions in HMAs.*

Anti-assignment and anti-delegation provisions in hotel management agreements (HMAs), as in other contracts, ensure that the parties to the contract cannot be replaced without consent, preserving the relationship between the contracting entities to be exactly what they bargained for. Such provisions are of paramount importance in the context of HMAs, given these contracts usually involve the provision of personal services. Personal services contracts—i.e., those involving personal skill, trust, or confidence—are generally not assignable without consent from the other party to the contract.[1]

In the context of an operator's decision to merge with another company or sell its assets (including its HMAs), determination of whether that operator has breached the anti-assignment and/or anti-delegation provisions in an HMA is highly factual in nature.

## The Case for Hotel Owners

Where a hotel owner can demonstrate that its contract with an operator is one for personal services, the case for a breach of an anti-assignment or delegation provision in the context of a merger or acquisition is stronger, as such contracts, by virtue of longstanding precedent and public policy, cannot be assigned. As an initial matter, hotel owners must be able to demonstrate that the transaction at issue did not result in a mere change of control, as the law is clear that "change of ownership, ***without more***, does not constitute an assignment as a matter of law."[2] In determining whether an assignment and/or delegation of duties occurred in the context of a merger or asset acquisition, courts look at the consequences to and effects on the parties, including whether the transaction involved an increased risk to the non-merging party.[3] For instance, courts look at factors such as (1) who is performing the services under the HMA; (2) whether the operator's employees were transitioned over to the acquiring entity's payroll; (3) whether the operator entity still exists; (4) whether the operator entity still maintains its offices; and (5) the post-transaction structure of the operator entity.[4] This type of inquiry is heavily fact-dependent and often requires targeted discovery.

## The Case for Hotel Operators

In the context of a merger or acquisition, hotel operators are likely to rely heavily on the plethora of case law in which courts have held mergers do not violate anti-assignment clauses.[5] However, it is important to note that these cases deal with anti-assignment provisions in ***leases and insurance contracts***—which are not personal services

agreements. Accordingly, in order to defend against a claim for breach of an anti-assignment and/or anti-delegation provision, hotel operators will need to delve into the specific factual circumstances surrounding the transaction at issue.

Hotel operators may also attempt to argue that the HMA is not a contract for personal services. While this is a harder argument to make, courts have, in certain cases, determined that an HMA is not a personal services contract due to the hotel owner's sustained level of managerial involvement under the contract.[6]

With the increasing number of mergers and acquisitions occurring within the hospitality industry, hotel owners and operators will need to pay attention to the developing case law determining the effect of anti-assignment and anti-delegation provisions in HMAs.

## Citations

[1] *See* Am. Jur. 2d Assignments § 26. "[I]t is indeed the general rule that contracts for personal services cannot be assigned [...] Performance, in other words, cannot be delegated to another ... Thus if a specific artist is hired to paint a picture, the artist cannot delegate his duty of performing..." *Rsrv. Realty, LLC v. Windemere Rsrv., LLC*, No. DBDCV136013161S, 2015 WL 4726795, at *10 (Conn. Super. Ct. July 1, 2015).

[2] *See Meso Scale Diagnostics, LLC v. Roche Diagnostics GMBH*, 2011 WL 1348438, at *12 (Del. Ch. Apr. 8, 2011)

[3] *TXO Prod. Co. v. M.D. Mark, Inc.*, 999 S.W.2d 137, 141 (Tex. App. 1999).

[4] *Buchanan Cap. Markets, LLC v. DeLucca*, 150 A.D.3d 436, 51 N.Y.S.3d 417 (2017); *Merritt v. MGC Sports LLC*, No. 3:17-CV-01372, 2019 WL 3531877

(M.D. Tenn. Aug. 2, 2019); *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 12 A.D.3d 65 (1st Dep't 2004), *rev'd*, 6 N.Y.3d 471, 846 N.E.2d 1201 (2006); *Nassau Hotel Co. v. Barnett & Barse Corp.*, 162 App.Div. 381, *aff'd* 212 N.Y. 568, 106 N.E. 1036.

[5] *See Brunswick Corp. v. St. Paul Fire & Marine Ins. Co.*, 509 F. Supp. 750, 753 (E.D. Pa. 1981) (holding "under state corporation law, the surviving corporation in a merger is vested with all rights and benefits under a liability insurance policy formerly due the merged corporation"); *Dodier Realty & Inv. Co. v. St. Louis Nat. Baseball Club*, 361 Mo. 981, 988, 238 S.W.2d 321, 323 (1951) (holding that lessee's merger into another corporation did not violate the anti-assignment provision in the lease and noting "[f]orfeitures of leaseholds are looked upon with disfavor")

[6] *See IHG Management (Maryland) LLC v. West 44th Street Hotel LLC*, No. 655914/2017, 2018 WL 1730840, at *2 (N.Y. Sup. Ct. Apr. 10, 2018)