# Assigning Claims and Contracts in Texas

**Presented to:**
**37th Annual Construction Law Conference**

**Karly A. Houchin**
Allensworth

## TABLE OF CONTENTS

## I. INTRODUCTION

This is not the first paper about assignments to be presented at the annual State Bar of Texas Construction Law Conference,[2] and it won't be the last. As construction lawyers, most of us have already run into assigning contracts, assigning claims, or drafting liquidating agreements for pass-through claims. And if you haven't yet, you probably will. This paper is intended as a starting point.

## II. ASSIGNMENTS GENERALLY

In Texas, claims can be freely assigned unless doing so is prohibited by statute or public policy. *City of San Antonio v. Valemas, Inc*., No. 04-11-00768-CV, 2012 WL 2126932, at *8 (Tex. App.—San Antonio Jun. 13, 2012, no pet.) (mem. op.) (citing *State Farm Fire & Cas. Co., v. Gandy*, 925 S.W.2d 696, 705–07 (Tex. 1996)). Historically, the common law prohibited assignment of most claims.[3] Over time, Texas courts eroded this prohibition, and carved out exceptions to effectively reverse the rule in Texas so that parties could freely assign claims, unless prohibited.[4] In sum, the free assignability of claims remains the default rule, subject to specific prohibitions set forth by the Legislature or through public policy (as dictated by the courts). When courts evaluate whether an assignment is allowed under new circumstances (especially when a statute is silent on the issue), they still return to older common-law principles to determine whether public policy prohibits the assignment.[5]

### A. Collateral versus Absolute Assignment

Texas courts differentiate between so-called collateral assignments and absolute assignments. Collateral assignment means assigning some right or claim as collateral to a

---

[2] *E.g.,* John C. Warren, *Mind If I Pass-Through?*, presented at the 32nd Annual State Bar of Texas Construction Law Conference (2019); Jeffrey A. Ford, *What's In Your Assignment?*, presented at the 33rd Annual State Bar of Texas Construction Law Conference (2020).

[3] *Gandy*, 925 S.W.2d at 706.

[4] *PPG Indus., Inc. v. JMB/Houston Centers Partners Ltd. P'ship*, 146 S.W.3d 79, 86–87 (Tex. 2004) ("In some cases of statutory silence, we have also looked to related common-law principles. With respect to the assignment of claims, we have recognized the collapse of the common-law rule that generally prohibited such assignments. But the assignability of *most* claims does not mean *all* are assignable; exceptions may be required due to equity and public policy.").

[5] *Jackson v. Thweatt*, 883 S.W.2d 171, 175 (Tex. 1994) ("As the Fifth Circuit noted in *Bledsoe*, '[a]s the statute at hand is silent as to the rights of assignees, we turn to the common law to fill the gap.'") (cleaned up).

debt owed. For example, assigning property as collateral security for a loan. *Coffey v. Singer Asset Fin. Co.,* 223 S.W.3d 559, 566 (Tex. App. Dallas—2007, no pet.). In the construction context, this comes up most often as a subcontractor selling (or factoring) their accounts receivable in exchange for a loan from a factoring company. Courts seldom consider a collateral assignment to be a true assignment of claims or rights.[6] While the terms are confusing, focus on first principles. The importance of something being a collateral assignment versus an absolute assignment is that the former is not an assignment at all. The salient feature of an *actual* assignment is that the assignee can sue for the assigned claim. A mere collateral assignment (not really an assignment!) may give the collateral assignee the right to sue the collateral assignor, but does not give the collateral assignee the right to sue the person who owed the collateral assignor the money. *Marhaba Partners*, 457 S.W.3d at 219 ("An 'absolute' assignment occurs when the assignor 'loses all control over the property assigned and can do nothing to defeat the rights of the assignee.'"). Example: general contractor hires subcontractor and owes them $100K. Some factoring company receives an "assignment" from the subcontractor entitling the factoring company to the $100K. If courts decide this is a "collateral assignment," the factoring company's sole relief may be from the subcontractor, and not from the general contractor. This is an oversimplification of a wildly confusing area of law, which I have tried to illuminate more below.

Contrast a "collateral assignment" (not an assignment) with an "absolute assignment," which means assigning the right or claim *entirely* to another party, such that the assignor has released its rights and cannot raise estoppel or waiver later against the assignee. *Univ. of Tex. Med. Branch at Galveston v. Allan*, 777 S.W.2d 450, 453 (Tex. App.—Houston [14th Dist.] 1989, no pet.); *see also Marhaba Partners*, 457 S.W.3d at 219 ("An 'absolute' assignment occurs when the assignor 'loses all control over the property assigned and can do nothing to defeat the rights of the assignee.'"). The main feature of an absolute assignment is that the assigned right belongs to the assignee, and no longer belongs to the assignor. But just because it looks and smells like an "absolute assignment" does not make it so. "An assignment, though absolute in form, can be shown by parol evidence to be intended only as collateral security." *Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n*, 710 S.W.2d 551, 556 (Tex. 1986).

---

[6] *Id*. ("Consequently, [the security agreements] do not contain language that we can construe to constitute an assignment. In fact, the documents specifically state that appellants pledge their future periodic payments as collateral for loans, and each transaction includes a security agreement creating a security interest in the collateral."); *see also Marhaba Partners Ltd. P'ship v. Kindron Holdings, LLC*, 457 S.W.3d 208, 219 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (holding that assigning receivables as collateral to secure a loan evidenced that the parties did not intend an absolute assignment); *Taylor v. Brennan*, 621 S.W.2d 592, 595 (Tex. 1981) ("In any event, as the assignment of rentals was given as further and additional security to the first lien mortgagee, it was a mere pledge and not an absolute assignment.").

You are now confused, though not intentionally. Collateral assignments are mostly a feature of the Byzantine nature of finance law, which I do not understand, either. As construction lawyers, we are typically dealing with "absolute assignments" (assigning subcontracts to owners, etc.), and this paper is not intended to address the intricacies of loans, financing, or security-related collateral assignments. The UCC has its own assignment overlay, some of which is related to financing. I will touch on but not dive deeply into those matters. The distinction between collateral and absolute assignments is referenced here only so practitioners are unsurprised when they see these terms in the case law.

There are also equitable assignments, though there's scant case law addressing them in detail.[7]

> To recover on an assigned cause of action, one must plead and prove that a cause of action capable of being assigned existed and was assigned to the party alleging the theory of assignment. If no express assignment can be established, a party may argue equitable assignment. To constitute equitable assignment, the agreement must evidence an intent to transfer the interest, and the transferor must relinquish control over the interest.

*Cap. One, N.A. v. Nationstar Mortg. LLC*, No. 14-10-00733-CV, 2011 WL 3332145 (Tex. App.—Houston [14th Dist.] Aug. 4, 2011, no pet.) (mem. op.).[8] Most published cases about equitable assignments have to do with transferring property in a decedent's estate or disputes over mortgage loan servicing agreements. And equitable assignments are not to be confused with equitable subrogation, which is discussed below. The importance of equitable assignment is fairly limited to the collateral versus absolute assignment distinction. Think of an equitable assignment as the last refuge of a party who has failed to secure an absolute assignment, but still wants to sue the person who the assignor could so sue.

---

[7] The latest Supreme Court of Texas case to address equitable assignments was *PPG Industries Inc. v. JMB/Houston Centers Partners Ltd. Partnership*, and only did so in a passing manner. 146 S.W.3d at 92 ("Finally, our holding does not prohibit equitable assignments, such as a contingent-fee interest assigned to a consumer's attorney."). Prior to *PPG*, the most recent Supreme Court of Texas case about equitable assignments is from 1953, with the oldest cases dating back to the 1800s. Thankfully, there are more recent opinions from various Courts of Appeals addressing equitable assignments.

[8] *See also Pape Equip. Co. v. I.C.S., Inc.*, 737 S.W.2d 397, 402 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.) ("To make an equitable assignment, an equitably constructive appropriation of the subject matter should be made so as to confer a complete and present right in the part for whose benefit the assignment is meant, even where the circumstances do not admit of its immediate exercise.") (citing *Colleps v. George W. Smith Lumber Co.*, 185 S.W. 1043, 1047 (Tex. App.—Beaumont 1916, writ dism'd)).

An example may help clarify what an alleged "equitable assignment" can look like in the construction context. In *Colleps*, the owners hired the general contractor (Colleps), who in turn subcontracted with George W. Smith Lumber Co. *Colleps*, 185 S.W. at 1043. The lumber subcontractor tried to get directly after the owners, by way of a garnishment action, or maybe an equitable lien, or some claim on funds in the owner's possession. *Id*. at 1043–44. The court held that the lumber company had no formal assignment, or informal (equitable assignment), and poured them out, at least on the assignments, holding them "in all things overruled." *Id*. at 1047. This is typical of equitable assignment case law; nobody ever seems to prevail on equitable assignments.

The final teaching point on collateral versus absolute assignments, is although the case law may at first blush appear limited to the financing world, dicta associated with it is often cited in standard assignment cases. So be aware of the distinction.

### B. The Basics of Assignments

Assignment of rights under a contract and the assignment of a right to bring a cause of action for breach of that contract are two legally distinct assignments. *Pagosa Oil & Gas, LLC v. Marrs & Smith P'ship*, 323 S.W.3d 203, 211–12 (Tex. App.—El Paso 2010, pet. denied). A party may assign its right to bring a cause of action under the contract without ever assigning its rights under the contract, or the contract itself. The Court in *Pagosa Oil* teased out this issue when evaluating if the assignment of an oil and gas lease, in the face of an anti-assignment provision in the lease, is legally effective to give the claimant (there, Sombrero Oil and Gas Company) the right to sue under the lease. *Pagosa Oil*, 323 S.W.3d at 212. In other words, one party to the contract argued the anti-assignment clause nullifies the attempted assignment, while Sombrero argued that even if the lease itself were not assignable, the claims were. The Court noted that the anti-assignment provision in the lease "did not indicate an intent to limit the parties' rights to assign a cause of action arising from an alleged breach of the lease" and so the parties maintained their "common law right to assign its cause of action for breach[.]"[9] *Id*. So, while the assignment didn't assign the lease itself, it did effectively assign a cause of action for breach of the lease.

[9] For reference, here is the anti-assignment provision in *Pagosa Oil*:

"Lessor expressly reserves the right of approval of any and all assigning in whole or in part, the covenants hereof shall extend to their heirs, executors, administrators, successors, or assigns, and it is hereby agreed that in the event that this Lease shall be assigned as to a part or as to parts of the above described lands that Lessor shall receive a copy of such assignment, farmout, etc. within thirty (30) days of the effective date of same." *Pagosa Oil*, 323 S.W.3d at 211.

The *Pagosa Oil* analysis is echoed in *Elness Swenson Graham Architects, Inc. v. RLJ*, 520 S.W. 3d 145 (Tex. App.—Austin, 2017, no pet.). In the *Elness* case, the Court explained the blackletter law for assigning claims "[t]o recover on an assigned cause of action, the party claiming the assignment occurred must show the existence of a cause of action capable of being assigned and that the cause of action was in fact assigned to that party." *Id*. at 153–54. Courts will look to typical contract interpretation standards for this analysis—what does the contract say, what was the parties' intent, and the plain meaning of the terms of the assignment. *Id*. Whether claims were properly assigned is a matter of law for courts to decide. *Id*.

Below are a few samples of language assigning claims and contracts.[10]

- From the *Pagosa Oil* case, effectively assigning **claims** arising under a lease agreement:

  > Party XYZ ("Assignor") does hereby ASSIGN, GRANT, SELL and CONVEY unto Party ABC ("Assignee") all right title and interest in and to all causes of action that the Assignor has in any way related to the lease of minerals from Mr. Smith to Party XYZ including, but not limited to, all causes of action for the breach of the Lease. TO HAVE AND TO HOLD the above described rights and causes of action, together with, all and singular the rights and privileges thereto in any way belonging, unto the said Assignee, its successors and assigns forever.
  >
  > As consideration for this assignment, Assignee shall remit to Assignor, within 30 days of recovery, 1/3 of the Assignor's pro rata interest in any actual damage award, based on the Assignee's pro rata interest in the Lease, minus actual out of pocket expenses incurred prosecuting the assigned causes of action.
  >
  > Assignor agrees to cooperate and assist as necessary in prosecuting the assigned causes of action, including providing requested documentation and to execute such further documents as necessary to complete the assignment set forth above.

[10] Jeff Ford presented a very helpful presentation at the 33rd Annual Construction Law Conference on collateral assignments of design professional and contractor contracts to construction lenders. Jeffrey A. Ford, *What's In Your Assignment?*, presented at the 33rd Annual State Bar of Texas Construction Law Conference (2020). The paper associated with that presentation has an appendix with forms and I encourage folks to review those. *Id*. at Appendices A–D.

> Assignor covenants that the rights, title and interest assigned herein have not been previously assigned or encumbered.

- From the *Elness* case, effectively assigning **claims**[11] arising under an agreement between hotel owner and architect:

  > Architect hereby sells, transfers, conveys and assigns to RLJ all of Architect's right, title and interest in and to all licenses, permits and all other intangible assets relating to the Property (collectively, "Licenses"), subject, however to the terms and covenants of the Licenses and this Assignment.

- From the *First Citizens Bank* case, effectively assigning a **contract**:

  > [Subcontractor] agrees to sell and assign to the bank obligation[s] owed to [Subcontractor] for goods and services rendered and appointed bank as subcontractor's attorney in fact to demand, take or bring, in the name of the Bank or Client, all steps, actions, suits, or proceedings deemed by the Bank in its sole and absolute discretion necessary or desirable to effect collection of or other realization upon the purchased accounts. Such language establishes an assignment here. In addition, the government defendants themselves have, in their briefing, characterized the contract at issue as an assignment contract, going to so far as to state: The sole purpose of the [accounts receivable purchase contract] is the assignment of accounts receivable from [Subcontractor] to the bank.

One final wrinkle to add to the mix. A string of Supreme Court of Texas cases use the phrase "automatic assignment" or "automatically assigned." The phrase appears to have originated in a footnote in *Gupta v. Ritter Homes, Inc*., 646 S.W.2d 168 (Tex. 1983). In *Gupta*, the Court held "the implied warranty of habitability and good workmanship is implicit in the contract between the builder/vendor and original purchaser ***and is automatically assigned to the subsequent purchaser***." *Id*. at 169 (emphasis added). Then, in *Lennar Homes of Texas Land and Construction v. Whiteley*, 672 S.W.3d 367 (Tex. 2023), the Supreme Court of Texas reaffirmed its "automatic assignment" of implied warranties of good workmanship and habitability to subsequent purchasers. Lennar Homes, 672 S.W.3d at 378 ("Indeed, in extending the warranties of good workmanship and habitability to benefit subsequent purchasers in *Gupta v. Ritter Homes, Inc*., we held that such implied warranties are 'implicit in the contract between the builder/vendor and

[11] Quick note: the court did not reach a decision on whether this assignment also assigned the architectural contract because the court determined as a matter of law that it assigned the causes of action arising from the contract, so there was no need to address assignment of the contract. Importantly, this case walks through a complicated analysis about how the phrase "and all other intangible assets" means causes of action. *Elness*, 520 S.W.3d at 154.

original purchaser and [are] *automatically assigned* to the subsequent purchaser."). And a few months later, the Supreme Court of Texas again recited this "automatic assignment" idea in *Taylor Morrison of Texas, Inc. v. Kohlmeyer*, 672 S.W.3d 422 (Tex. 2023). In *Taylor Morrison*, the Court noted that "the implied warranties of good workmanship and habitability are as much a part of the writing as the express terms of the contract and are automatically assigned to subsequent purchasers[.]" *Id*. at 425. It's unclear how these cases affect the overall landscape of assignment case law because they were limited to compelling nonsignatories to arbitration under the theory of direct benefits estoppel.

### C. Assigning Construction Contracts

A common contractual assignment in construction is when an owner terminates a general contractor and wishes to "take over" the subcontracts. The subcontracts are assigned to the owner, who steps into the shoes of the general contractor, and pays the subcontractors to continue work on the project. Many construction-industry forms include provisions that allow the owner to receive assignment of the subcontracts. For example, the AIA General Conditions A201 – 2017 addresses this scenario:

> § 5.4.1 Each subcontract agreement for a portion of the Work **is assigned by the Contractor to the Owner**, provided that
>
> .1 assignment is effective only after termination of the Contract by the Owner for cause pursuant to Section 14.2 and only for those subcontract agreements that the Owner accepts by notifying the Subcontractor and Contractor; and
>
> .2 assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.
>
> When the Owner accepts the assignment of a subcontract agreement, the Owner assumes the Contractor's rights and obligations under the subcontract.

AIA A201 § 5.4 (emphasis added). The DBIA 535–2022 Standard Form of General Conditions says:

> **11.2.3** Upon declaring the Agreement terminated pursuant to Section 11.2.2 above, **Owner may enter upon the premises and take possession, for the purpose of completing the Work, of all materials, equipment, scaffolds, tools, appliances and other items thereon, which have been purchased or provided for the performance of the Work, all of which Design-Builder hereby transfers, assigns, and sets over to Owner for such purpose**, and to employ any person or persons to complete the Work and provide all of the required labor, services, materials, equipment and other items. In the event of such termination, Design-Builder shall not be entitled

> to receive any further payments under the Contract Documents until the Work shall be finally completed in accordance with the Contract Documents[.]

DBIA 535–2022 § 11.2 (emphasis added). Contracts with governmental entities can also be assigned. *See First-Citizens Bank & Tr. Co. v. Greater Austin Area Telecommunications Network*, 318 S.W.3d 560, 566–67 (Tex. App.—Austin 2010) (interpreting Texas Local Government Code § 271.152 to waive a local governmental entity's immunity from suit by assignee of a contract the same way immunity from suit is waived for the contract between the local governmental entity and the assignor).[12]

Generally, anti-assignment clauses in contracts will prohibit either party from assigning the contract, but the anti-assignment clauses can be waived. *Johnson v. Structured Asset Services, LLC*, 148 S.W.3d 711, 724 (Tex. App.—Dallas 2004) ("Johnson expressly waived any contractual right he had to assert the anti-assignment provision of the Settlement Agreement by signing the Purchase Agreement, which contained a waiver of restrictions on assignability…"); *Cadillac Bar W. End Real Est. v. Landry's Restaurants, Inc*., 399 S.W.3d 703, 706 (Tex. App.—Dallas 2013) ("It is well established that a provision in a lease prohibiting assignment without the landlord's consent is a provision for the landlord's benefit and may be waived by the landlord.") (quoting *Twelve Oaks Tower I, Ltd. v. Premier Allergy, Inc.*, 938 S.W.2d 102, 112 (Tex. App.—Houston [14th Dist.] 1996, no writ)). Many construction contracts—at all levels of the project—contain anti-assignment clauses. For example, an AIA A201–2017 contract between the owner and general contractor includes this standard anti-assignment clause:

> **§ 13.2 Successors and Assigns**
> **§ 13.2.1** The Owner and Contractor respectively bind themselves, their partners, successors, assigns, and legal representatives to covenants, agreements, and obligations contained in the Contract Documents. Except as provided in Section 13.2.2, **neither party to the Contract shall assign the Contract as a whole without written consent of the other**. If either party attempts to make an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

[12] Interestingly, the case may have involved a collateral assignment rather than an absolute assignment, though the court did not engage in a discussion of the distinction. *Id*. at 565 (discussing assignment between bank and contractor as "accounts receivable purchase and security agreement"). And although the government had asserted that the assignment was barred by an anti-assignment ("no-assignment clause") clause in its underlying construction contract, the government failed to include the contract in the record in its plea to the jurisdiction, so the court had no reason to evaluate whether an anti-assignment provision barred the assignment. *Id*. ("Moreover, the government defendants did not attach the construction contract, so we cannot determine if their argument that the contract prohibits assignment… has merit.").

AIA A201–2017 § 13.2 (emphasis added). Similarly, the EJCDC Contractor/Subcontractor standard form agreement for design-build projects states:

> 14.01 Assignment of Construction Subcontract
> A. **No assignment by Construction Subcontractor of any rights under or interests in the Construction Subcontract will be binding on Design-Builder without Design-Builder's written consent**; and, specifically but without limitation, payments that may become due and money that is due may not be assigned by Construction Subcontractor without such consent (except to the extent that the effect of this restriction may be limited by law), and unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under the Subcontract Documents.

EJCDC D-523– 2016 § 14 (emphasis added). These are examples of anti-assignment provisions that prohibit assignment of the contract itself. That leaves the question of whether these anti-assignment provisions also prohibit assigning *claims* related to the contract. The AIA A201-2017 language says neither party can "assign the Contract as a whole" without the other's consent. This provision is limited to the contract and will not necessarily prohibit either party from assigning claims arising under the contract. The EJCDC D-523–2016 language is different though; it says neither party can assign "any rights under or interests in the Construction Subcontract[.]" Does "any rights" mean all claims arising under the contract? Remember, in *Pagosa Oil* the Court held that the *claims* could be assigned, even in the face of an anti-assignment provision that required approval of any assignment in "this Lease" and after the attempted assignment of the lease failed. *Pagosa Oil*, 323 S.W. 3d at 211.[13]

The takeaway here: many construction industry contracts have anti-assignment provisions that prohibit assigning the contract without the other party's consent. But if the

[13] This is not to say that assigning a claim or contract in the face of an anti-assignment provision has no consequence for the assignor. Under ordinary contract law, an anti-assignment provision is itself a covenant that can be breached, resulting in damages. *See, e.g.*, *Austin Indep. Sch. Dist. v. H.C. Beck Partners, Ltd.*, No. 03-07-00228-CV, 2009 WL 638189 (Tex. App.—Austin Mar. 13, 2009, pet. denied) (allowing property owner to sue contractor in face of contract mandating that owner secure insurance that waived subrogation, while discussing but declining to address contractor's late-pleaded counterclaim that owner breached "construction contract" by failing "to obtain an insurance policy that included an effective waiver of subrogation rights").

parties intend to prohibit the assignment of the contract *and* causes of action arising under the contract, the contract should make that clear.[14]

### D. Assigning Claims

The steps for assignments so far: (1) check if the contract allows for assigning the contract, claims arising under the contract, or both, (2) draft and execute an assignment of the contract or claims, whichever is permitted or desired; and now move to the last step which is (3) make sure if you are attempting to assign claims that can actually be assigned.

#### i. Claims that *can* be assigned

The Supreme Court of Texas provides a helpful discussion of the history of the alienability of choses in action in *Gandy*. For the sake of brevity, I won't recite that full history here. *Gandy*, 925 S.W.2d at 70506. All you need to know is that the default rule *used to be* the inalienability (non-assignability) of choses in action (causes of action) from the person who has the claim. Over time that rule was turned on its head. Texas now favors free alienability of choses in action (claims are freely assignable) *unless public policy or statutes prohibit the assignment*.

A few examples of assignable claims (a non-exhaustive list):

Lien and bond claims. The *MG Bldg. Materials, Ltd. v. Moses Lopez Custom Homes, Inc*. case held that an assignment between a homebuilder and its construction financing company assigned all of the homebuilder's statutory lien rights.[15] 179 S.W.3d

---

[14] *See e.g*., *Elness Swenson Graham Architects, Inc*., 520 S.W.3d at 153-56, n.3; (holding assignment of cause of action was valid despite presence of anti-assignment clause where anti-assignment clause "[did] not prohibit the assignment of causes of action arising from the contract" and thus the assignor retained its "common-law right to assign its cause of action for breach of contract"); *City of Brownsville v. AEP Tex. Cent. Co*., 348 S.W.3d 348, 358 (Tex. App.—Dallas 2011) (holding assignor maintained common law right to assign cause of action where anti-assignment clause "merely" stated the "rights and duties under the agreement were not assignable without written consent of the other party" which "[did] not indicate an intent to limit the parties' ability to assign causes of action arising from an alleged breach [of the contract at issue]"); *Valemas, Inc*., 2012 WL 2126932, at *8 (holding anti-assignment clause that "merely" required assignor to not "assign, transfer, convey, sub-let, or otherwise dispose of this contract, or any portion thereof, or any right, title, or interest in, to or under the same" without the other party's consent did not limit the assignment of a breach of contract action).

[15] The assignment in this case:

51, 60 (Tex. App.—San Antonio 2005) ("Because we conclude that Lopez assigned to MG all rights to assert a mechanic's and materialman's lien claim involving the construction of the Gonzales home, we hold the trial court erred in granting partial summary judgment in favor of Lopez and order the foreclosure sale of the removable improvements."). And, as another example, Texas Government Code Section 2253.075 allows assignment of a payment bond beneficiary's claim on a payment bond. *See also Corpus Christi Bank & Tr. v. Smith*, 525 S.W.2d 501, 506 (Tex. 1975) (holding that bank assignee's interest in project and contract between owner and contractor "were sufficient to give [the bank] a security interest in the retained funds, which is superior to that of general creditors.").

Breach of warranty claims. "Causes of action arising under contracts based on a theory of breach of warranty are assignable." *Kirby Forest Indus., Inc. v. Dobbs*, 743 S.W.2d 348, 354 (Tex. App.—Beaumont 1987). The Court expanded its analysis to state that "[a]ny causes of action [the assignor] might have had for breach of implied or express warranty were assigned to [the assignee]." *Id*.

Insurance claims (in theory). "Generally, a contract of insurance is subject to the same rules of construction as other contracts." *Tex. Farmers Ins. Co. v. Gerdes By and Through Griffin Chiropractic Clinic*, 880 S.W.2d 215, 217 (Tex. App.—Fort Worth 1994, writ denied). So if the insuring agreement doesn't have an anti-assignment provision, a claim by the insured against the insurer could be assignable. The trouble with this is that many insurance policies have anti-assignment provisions. *See, e.g., Id*. at 218 (Tex. App.—Fort Worth 1994, writ denied) (holding that assignee of insured "acquired no rights against" insurer by assignment in the face of anti-assignment provision in underlying insurance agreement).

### ii. Claims that *cannot* be assigned

This paper only addresses claims that courts have declared non-assignable. Below is a (non-exhaustive) list of claims that cannot be assigned in Texas:

---

> Lopez… has sold and conveyed, and does by these presents sell and convey to MG that certain Mechanic's Lien Contract…and the liens and security interests against the following described real property…together with all materials, supplies, equipment and fixtures, incorporated and to be incorporated thereon whether located on the aforesaid real property or elsewhere, to secure the payment of all indebtedness owed under that certain Mechanic's Lien Note of even date herewith…and Lopez does hereby TRANSFER AND ASSIGN unto MG all of Lopez's rights, privileges and equities under and by virtue of the indebtedness, lien and the Mechanic's Lien Contract.

*MG Bldg. Materials, Ltd*., 179 S.W.3d at 58.

DTPA claims cannot be assigned. In *PPG Industries, Inc. v. JMB /Houston Centers Partners Ltd. Partnership*, the Supreme Court of Texas analyzed several policy arguments to hold that DTPA claims (and claims for punitive damages) are not assignable to third-parties. First, the Court noted that the DTPA statute does not mention assignment at all, unlike Chapter 2 of the Texas Business and Commerce Code (the UCC) which allows consumers to bring warranty claims against a seller of goods. *Id*. at 84 ("But we must at least begin our analysis by noting that the Legislature clearly knew hot to indicate that warranty claims were assignable, but did not do so in the DTPA."). Next, the Court evaluated the goals and intent of the DTPA statute to determine that allowing a consumer to assign its DTPA claims to a third-party would defeat the Legislature's goals of the statute entirely. *Id*. at 87 ("In sum, allowing assignment of DTPA claims would ensure that aggrieved consumers do not file them, that some consumers receive nothing in compensation, and others are deceived a second time. All would defeat the very purposes for which the DTPA was enacted."). Finally, the Court determined that allowing DTPA claims to be assigned could "increase or distort litigation" and "skew the trial process, confuse or mislead the jury, promote collusion among nominal adversaries, or misdirect damages from more culpable to less culpable defendants." *Id*. at 90–91.

Claims for punitive damages are not assignable. "Under Texas law, in the absence of an express statutory provision to the contrary, a statutory cause of action is not assignable if it is personal to the one who holds it and would not survive his death." *Bay Ridge Util. Dist. v. 4M Laundry*, 717 S.W.2d 92, 96 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.). Claims for punitive damages and treble damages are intended to punish a wrongdoer and are personal damages which do not survive death. *First Nat'l Bank of Kerrville v. Hackworth*, 673 S.W.2d 218, 220 (Tex. App.—San Antonio 1984). Thus, a claim for punitive damages or treble damages are not assignable.

Certain claims under the Texas Insurance Code are not assignable. Punitive damages under Chapter 542 of the Texas Insurance Code regarding an insurer's duty to promptly pay claims are not assignable. *See Am. S. Ins. Co. v. Buckley*, 748 F. Supp. 2d 610 (E.D. Tex. 2010) (applying Texas law) (holding that "statutory remedies under the Texas Insurance Code are personal and punitive in nature and the Insurance Code makes no provision for assignability").

The Court in *Great American Insurance Co. v. Federal Insurance Co.* analyzed a prior version of the Texas Insurance Code regarding unfair competition and deceptive acts by insurance carriers,[16] which had a statutory damages scheme that allowed punitive and treble damages against insurers. No. 3:04-CV-2267-H, 2006 WL 2263312, at *1 (N.D. Tex. Aug. 8, 2006). Like the analysis in *Buckley*, the Court in *Great American* held that

[16] Tex. Ins. Code § 21.21 (repealed and replaced by Acts 2003, 78th Leg., ch. 1274, § 26(a)(1), effective Apr. 1, 2005, now codified at Tex. Ins. Code Ch. 541).

the Insurance Code was silent about assigning these specific damages and the damages are intended to punish bad behavior, thus the claims for damages under Texas Insurance Code Section 21.21 were not assignable.

Like *Buckley* and *Great American*, the court in *Lee v. Rogers Agency* also noted that claims under the Texas Insurance Code are not assignable. 517 S.W.3d 137, n.3 (Tex. App.—Texarkana 2016, pet. denied) ("Although the Supreme Court has not addressed whether Insurance Code claims are assignable, three federal district courts applying Texas law have ruled that they are not for the same reasons discussed in *PPG Industries, Inc*. and we agree with the reasoning in those cases.").

Some legal malpractice claims *probably* cannot be assigned. In *State Farm Fire and Casualty Co. v. Gandy*, the Supreme Court of Texas relied on the reasoning in *Zuniga v. Groce, Locke & Hebdon*[17] and held that "the disadvantages to assignments of legal malpractice claims clearly outweighed the advantages" and do not "justify the detrimental impact that assignment would have on the legal system." 925 S.W.2d 696, 709 (Tex. 1996). Thus, public policy reasons can disallow assigning legal malpractice claims.

Later in *Mallios v. Baker*, the Supreme Court of Texas declined to hold that a client had waived its legal malpractice claim against a law firm by partially assigning its malpractice claim contrary to *Gandy*. 11 S.W.3d 157, 159 (Tex. 2000). In his concurrence (joined by three other Justices, including now-Governor Abbott), Justice Hecht thoughtfully argued that certain legal claims should remain assignable: "a person may obtain a loan to finance prosecution of a claim and pledge the proceeds as security for repayment without necessarily ceding significant control of the litigation to the lender." *Id*. at 170. Instead, Justice Hecht suggested that assigning legal malpractice claims are "contrary to public policy if the assignee takes the interest purely as an investment unrelated to any other transaction" and acquires "a significant right of control over the prosecution of the claim." *Id*.

Claims among joint tortfeasors are not assignable. "A tortfeasor cannot take an assignment of a plaintiff's claim as part of a settlement agreement with the plaintiff and prosecute that claim against a joint tortfeasor." *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 710 (Tex. 1996). The Supreme Court of Texas held in *Int'l Proteins Corp. v. Ralson-Purina* Co. that it is against public policy to allow a joint tortfeasor to buy a cause of action from a plaintiff when the joint tortfeasor contributed to the plaintiff's injury. 744 S.W.2d 932, 934 (Tex. 1988).

Debtors cannot assign an extension of credit or duties owed to a creditor without the creditor's consent. The idea here is that there is an exception to the general rule that claims

[17] 878 S.W.2d 313, 318 (Tex. App.-San Antonio 1994, writ ref'd).

are freely assignable when the contract relies on "the personal trust, confidence, skill, character or credit" of the parties. *In re FH Partners, LLC*, 335 S.W.3d 752, 762 (Tex. App.—Austin 2011, no pet.). While Texas law allows creditors to assign their rights to payment from a debtor, the converse is disallowed. "This reflects a view that a creditor's agreement to extend credit inherently contemplates a specific debtor and that the creditor should not be effectively forced to extend credit to a different debtor without the creditor's consent." *Id*. at 763.[18]

Mary Carter agreements. The *Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex. 1992) case is instructive here:

> A Mary Carter agreement exists . . . when the plaintiff enters into a settlement agreement with one defendant and goes to trial against the remaining defendant(s). The settling defendant, who remains a party, guarantees the plaintiff a minimum payment, which may be offset in whole or in part by an excess judgment recovered at trial. This creates a tremendous incentive for the settlement defendant to ensure that the plaintiff succeeds in obtaining a sizable recovery, and thus motivates the defendant to assist greatly in the plaintiff's presentation of the case…. Indeed, Mary Carter agreements generally, but not always, contain a clause requiring the settling defendant to participate in the trial on the plaintiff's behalf.

*Elbaor*, 845 S.W.2d at 250 (Tex. 1992) (internal citations omitted). You might be asking, what does this have to do with assignments? But at least one construction case invalidated an assignment of claims based on the assignment being a Mary Carter agreement. *Coronado Paint Co., Inc. v. Global Drywall Sys., Inc*., 47 S.W.3d 28, 32–33 (Tex. App.—Corpus Christi-Edinburg 2001) (pet. denied). In *Coronado Paint*, Bridgepoint Condominiums (the project owner) filed suit against Global Drywall Systems (the paint contractor) for faulty painting of the exterior of the condominiums. Global Drywall Systems counterclaimed against Bridgepoint Condominiums and also filed third-party actions against Coronado Paint (the paint supplier) and KTA (the engineer who specified the paint used). *Id*. at 30–31. Later, the owner added direct claims against KTA and Coronado Paint. Eventually, Bridgepoint Condominiums and Global Drywall Systems settled their claims. *Id.* As part of the settlement agreement, Bridgepoint Condominiums agreed to assign its claims against KTA and Coronado Paint to Global Drywall Systems. *Id*.

[18] *See also Menger v. Ward*, 30 S.W. 853, 855 (Tex. 1895) ("Rights arising out of a contract cannot be transferred if they involve a relation of personal confidence, such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.").

The Court held that the assignment between Bridgepoint Condominiums and Global Drywall Systems "runs afoul" of public policy prohibiting Mary Carter agreements *and* public policy prohibiting assignment of causes of action to a joint tortfeasor. *Id*. at 32. The Court's issue with the settlement agreement is that the "assignment clearly created a financial stake for Global in Bridgepoint's recovery, satisfying the first prong of *Elbaor*. Also, while Global and Bridgepoint dismissed their causes of action against each other, Global remained a party in the case at trial." *Id*.

The *Coronado Paint* case is only one example of impermissible assignments creating Mary Carter agreements. "One of the evils fostered by assignment of causes of action between parties is the skewing of the dynamics of the trial, whereby a defendant argues for high damages or a plaintiff seeks exoneration of a defendant he has sued." *Id*. at 33.

## III. EQUITABLE SUBROGATION

> The doctrine of equitable subrogation allows a party who would otherwise lack standing to step into the shoes of and pursue the claims belonging to a party with standing. Texas courts interpret this doctrine liberally. Although the doctrine most often arises in the insurance context, equitable subrogation applies 'in every instance in which one person, not acting voluntarily, has paid a debt for which another was primarily liable and which in equity should have been paid by the latter.' **Thus, a party seeking equitable subrogation must show it involuntarily paid a debt primarily owed by another in a situation that favors equitable relief.**

*Frymire Eng'g Co., Inc. v. Jomar Int'l., Ltd.*, 259 S.W.3d 140, 143 (Tex. 2008) (emphasis added).

The elements for a claim of equitable subrogation are (1) one party stepped into the shoes of another party, (2) that party made an *involuntary* payment on the other party's behalf, and (3) the involuntary payment should have been made by the other party based on principles of equity.[19] As the Court in *Frymire* noted, claims for equitable subrogation most often arise in the world of insurance claims being settled by an excess carrier on the insured's or primary carrier's behalf.

[19] "There are two types of subrogation. Contractual (or conventional) subrogation is created by an agreement or contract that grants the right to pursue reimbursement from a third party in exchange for payment of a loss, while equitable (or legal) subrogation does not depend on contract but arises in every instance in which one person, not acting voluntarily, has paid a debt for which another was primarily liable and which in equity should have been paid by the latter." *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co*., 236 S.W.3d 765, 774 (Tex. 2007).

In *Frymire*, Renaissance Hotel (owner) hired Price Woods (general contractor) to remodel a hotel meeting room. Price Woods subcontracted with Frymier for the HVAC and sheet metal work. The subcontract required Frymire to pay for owner's and general contractor's damages caused by Frymire's performance of its work. The subcontract also required Frymire to carry liability insurance, which it did. Frymire installed a chilled water line that ruptured and caused approximately $500,000 in water damage to the hotel. Frymire's insurer paid for the damage, then Frymire, its insurer, and the owner signed a settlement agreement releasing "all actions, claims, and demands" from the burst pipe. Two years later, Frymire sued the manufacturers of the pipe to recoup the $500,000. The pipe manufacturers filed motions for summary judgment that the trial court granted. The court of appeals affirmed and held that "Frymire lacked standing to assert its claims because it failed to establish a right to equitable subrogation." *Id*. at 142. The court of appeals determined that Frymire did not have an equitable subrogation claim because Frymire (and its insurer) paid the $500,000 based on Frymire's contractual obligation to do so, so it was a voluntary payment. The Supreme Court of Texas reasoned that "[e]quitable subrogation applies in '*every* instance in which one person…has paid a debt for which another was primarily liable.'" *Id*. at 143. Frymire's expert opined that Frymire's employees installed the chilled line according to the manufacturer's instructions, so the Court determined that Frymire met its summary judgment burden and thus the manufacturer was "primarily responsible for the resulting damage." Because the manufacturer was responsible for the damage, the Court reasoned that Frymire's payment of the $500,000 was an *involuntary* payment.

## IV. PASS-THROUGH CLAIMS FOR CONSTRUCTION PROJECTS

### A. *Interstate Contracting* Case and *Severin* Doctrine

Nearly twenty years ago the Supreme Court of Texas recognized certain pass-through claims on certified question in *Interstate Contracting Corp. v. City of Dallas*. 135 S.W.3d 605 (Tex. 2004). In that case the City of Dallas had hired ICC as the general contractor for a water treatment plant. *Id*. at 607. ICC in turn subcontracted with MSI to provide levee construction and excavation. MSI had intended to use fill from a designated source, but discovered the designated fill was unsuitable for the Project. *Id*. at 607–08. Instead, MSI was forced to manufacture fill, allegedly decreasing MSI's productivity and increasing its costs *Id*. at 608. ICC made a claim upstream to the City of Dallas, who denied the claim because the fill was beyond the scope of the prime contract. *Id*.[20] The City argued

[20] For postscript, the case was tried to a jury, who entered a verdict awarding ICC (and MSI) ~$3M. *Interstate Contracting Corp. v. City of Dallas, Tex.*, 407 F.3d 708, 711 (5th Cir. 2005). But the Fifth Circuit reversed, holding through a *Lonergan* analysis that the contract's unambiguous language placed the risk of defective fill material on ICC. *Id*. at 723.

that ICC could not pursue damages suffered by MSI due to a lack of privity between MSI and the City. *Interstate Contracting*, 135 S.W.3d at 610. ICC countered that it should be allowed to make a pass-through claim. *Id*. The Fifth Circuit certified two questions to the Supreme Court of Texas: First, does Texas recognize a pass-through claim for a contractor acting as an intermediary on behalf of its subcontractor, despite the lack of direct privity between the owner and subcontractor? Second, if so, what are the elements of a valid pass-through claim? *Id*. at 607.

The Court defined a pass-through claim as: "a claim (1) by a party who has suffered damages (in this case, a subcontractor); (2) against a responsible party with whom it has no contract (here, the City); and (3) presented through an intervening party (the contractor) who has a contractual relationship with both." *Id*. at 610. And it noted that under "the typical pass-through arrangement" the contractor remained liable to its subcontractor, though normally only "to the extent the contractor receives payment from the owner." *Id*. The Court noted that these types of pass-through claims had decades of approval in the federal courts, dating back to at least *Severin v. United States*, 99 Ct. Cl. 435, 444 (1943), *cert. denied*, 322 U.S. 733 (1944).[21]

The Supreme Court of Texas constructed its approving case methodically. First, the Court noted the approval of them under federal law (*Severin* and its progeny), other states' laws, and even informal approval by several Texas intermediate appellate courts. *Interstate Contracting*, 135 S.W.3d at 610–15. Second, the Court directly confronted a major policy concern with pass-through agreements—their perceived similarity to impermissible Mary Carter agreements (discussed above). The Court resolved its concern on several grounds. First, Mary Carter agreements tend to extend litigation, but pass-through claims do not. Instead, pass-through claims can *reduce* litigation by confining what would have been two suits (one by the subcontractor against the general contractor, and another by the general contractor against the owner) to one suit. *Id*. at 616. The Court did acknowledge "that pass-through claims distort litigation to a degree" in that the contractor (who is arguing against its own interests, at trial) enhances its own credibility to the jury. *Id*. But the Court overcame those concerns, relying on the industry's comfort with pass-through claims generally. Finally, the Court noted that traditional Mary Carter agreements involved an assignee who "is at least partially responsible for the damages sought." *Id*.

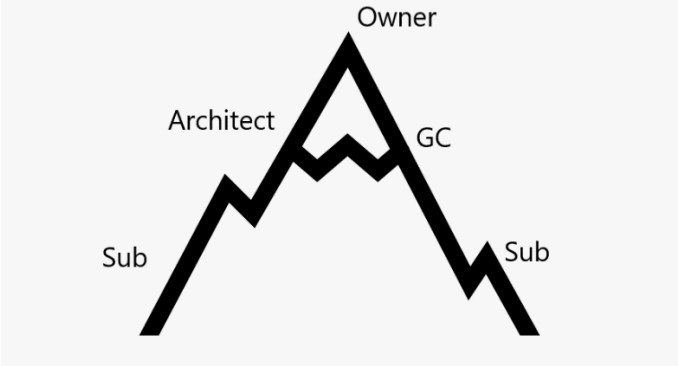
There aren't many cases shifting legal landscape post-*Interstate Contracting* in 2004; only 60 cases cite *Interstate Contracting*, and most are simply reciting the blackletter law of pass-through claims. Recall that in *Interstate Contracting*, the Supreme Court of

[21] The following year the United States Supreme Court approved a general contractor's recovery for a subcontractor's claim. Although noting that "[c]learly the subcontractor could not recover this claim in a suit against the United States" due to a lack of privity, it affirmed an award to the general contractor for the subcontractor's damages. *United States v. Blair*, 321 U.S. 730, 824 (1944).

Texas declined "to extend our answers in this case to the issue of sovereign immunity, which is well beyond the scope of the questions certified." *Interstate Contracting*, 135 S.W.3d at 620. But in 2012, the San Antonio Court of Appeals took up whether the City of San Antonio waived immunity from suit for a subcontractor asserting a pass-through claim. *Valemas*, 2012 WL 2126932, at *5. The Court held that "just as it is inconsistent with the purpose of section 271.152 to construe it to deny waiver to assignees of those who enter into contracts subject to subchapter I, so is it inconsistent to deny waiver [of immunity from suit] to pass through claims brought by a contractor against a local governmental entity on a subcontractor's behalf." *Id*. at *7.

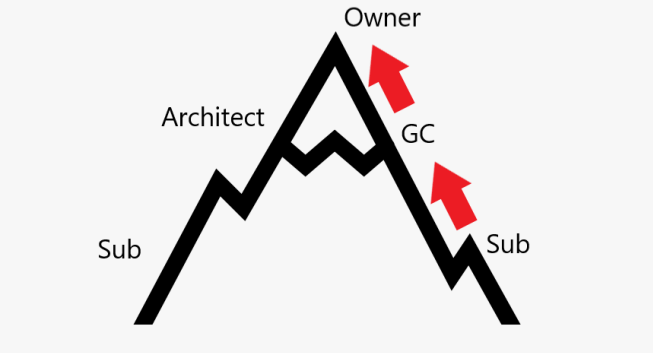
### B. Potential Pass-Through Scenarios

Here is our construction project mountain. The owner is at the peak, and the construction and design teams flow down either side of the mountain. I've identified five potential scenarios where parties on a construction contract could try (whether or not it's allowed by Texas case law) to bring various pass-through claims. Each of the five scenarios discussed below explains if current law allows that type of pass-through claim, and if not, poses questions about whether Texas law *should* allow that type of claim.[22]

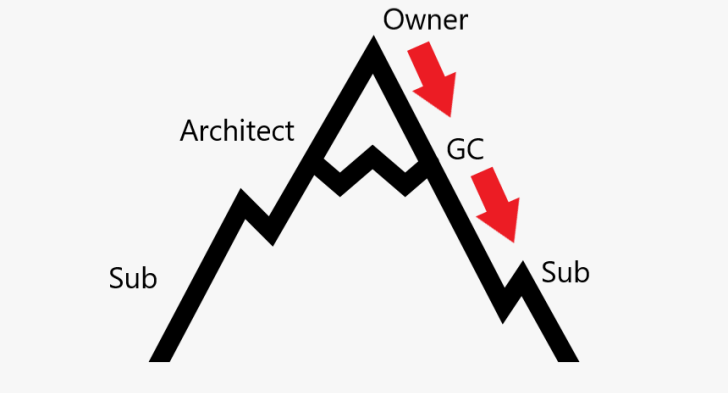



<u>*Scenario 1*</u>: Pass-through claim brought by prime contractor against the owner on behalf of subcontractor. I call this "up the mountain" pass-through claims, and this is the same scenario in the *Interstate Contracting* case. This is allowed in Texas.

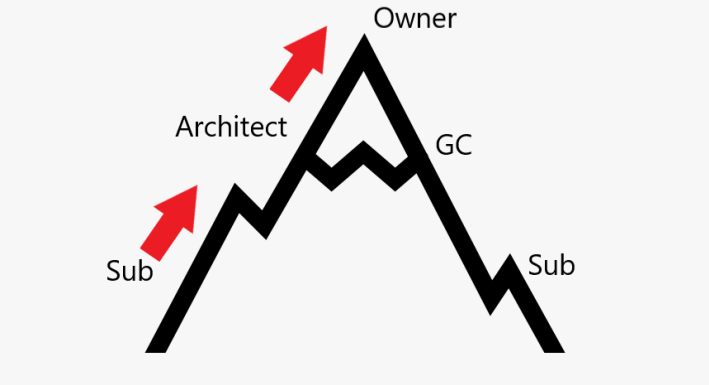
[22] This paper is not the first to consider these scenarios and consider if certain pass-through claims should be allowed in Texas. See George C. Baldwin, JD Holzheauser, *Pass-Through Claims Against Design Professionals*, 16 CONSTR. L. J., Winter 2020 (examining application of pass-through claims asserted by design subconsultants through architect against owner, among others).



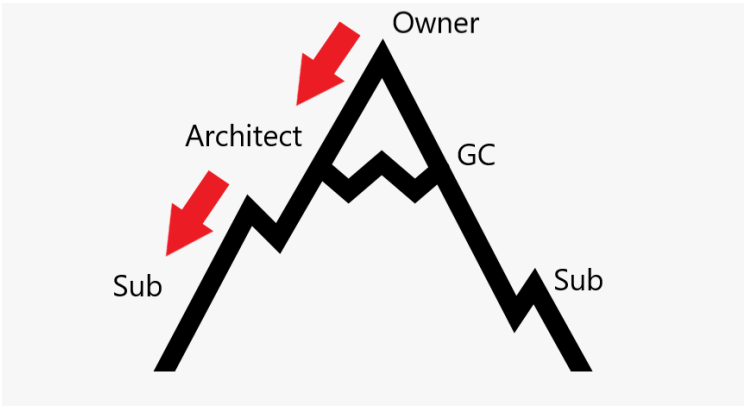

*Scenario 2*: Pass-through claim brought by the prime contractor against its subcontractor on behalf of the owner. I call this "down the mountain" pass-through claims. It is unclear if this is recognized in Texas law. In *Interstate Contracting*, the Supreme Court "explicitly confine[d]" its "rationale to construction contracts involving owners, contractors, and subcontractors." *Interstate Contracting*, 135 S.W.3d at 618. But it also said that in context, "it is not potential liability but continuing liability *that gives the contractor standing to sue the owner*." *Id*. (emphasis added). I have not found a Texas case authorizing pass-through claims by owners, against subcontractors, through general contractors. Before *Interstate Contracting*, Texas courts had rejected such claims, though on traditional privity grounds. *See, e.g.*, *Raymond v. Rahme*, 8 S.W.3d 552, 561–62 (Tex. App.—Austin 2002, no pet.).



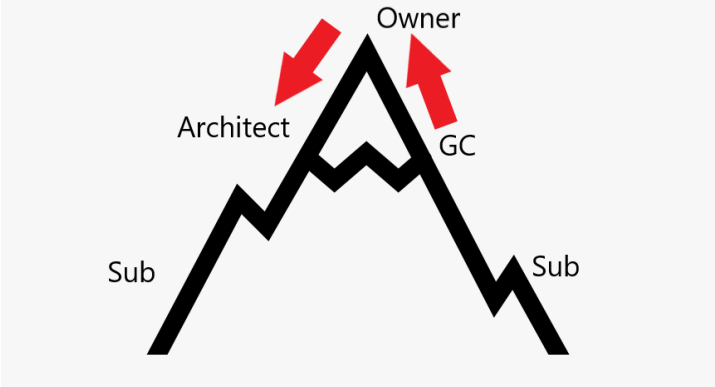

*Scenario 3*: Pass-through claim brought by prime design professional against the owner on behalf of its design subconsultant. Again, this is an "up the mountain" pass-through claim. As discussed, these types of claims are not expressly approved by *Interstate Contracting* (since it was limited to the contractor context), but they probably meet most of the same policy bases articulated in *Interstate Contracting*.

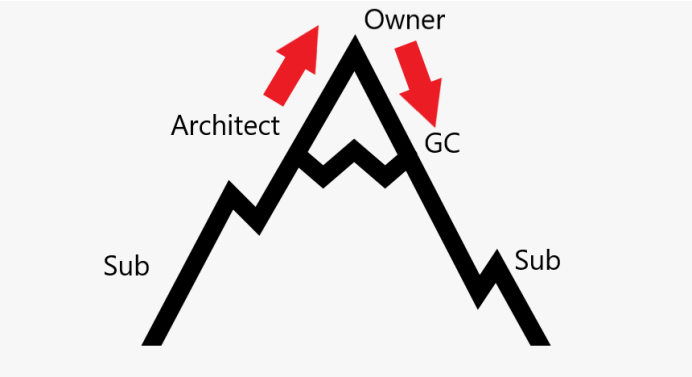



*Scenario 4*: Pass-through claim brought architect against its design subconsultant on behalf of the owner. This is another version of "down the mountain" pass-through claims. While the pass-through claim in *Interstate Contracting* has this structure, the Supreme Court has not, to my knowledge, ever explicitly approved an up-the-mountain pass-through claim by a design sub-consultant. It is hard to see why these types of claims would be disallowed, if subcontractor pass-through claims are allowed.




*Scenario 5*: Pass-through claim brought by prime contractor against the prime design professional on behalf of the owner, or vice versa. I call this hypothetical "over the mountain" pass-through claims. There are no cases in Texas allowing the application of pass-through claims in this context or extending the principles in *Interstate Contracting* to allow this type of "over the mountain" claim.




Other states allow "over the mountain" pass-through claims.[23] The closest Texas courts have been to addressing this scenario is in *LAN/STV v. Martin K. Eby Construction Co., Inc*., 435 S.W.3d 234 (Tex. 2014). In *LAN/STV*, the Supreme Court of Texas held that the general contractor's claim for negligent misrepresentation against the design professional failed and the general contractor must look at the remedies available to it in its contract with the project owner. *Id*. at 246–48. Assuming that this was allowed in Texas, by not being expressly prohibited via case law, the only argument I suggest is that any "over the mountain" pass-through claim allowed for general contractors through the owner against the architect should apply in reverse as well (architect against general contractor through the owner)

## V. LIMITS ON PASS-THROUGHS AND ASSIGNMENTS

### A. Statutes of limitations

In *Jackson v. Thweatt*, 883, S.W.2d 171 (Tex. 1994), the Supreme Court of Texas analyzed a complicated scenario where a borrower, Mr. Jackson, defaulted on his

[23] *E.g.*, *N. Moore St. Developers, LLC v. Meltzer/Mandel Architects, P.C.*, 23 A.D.3d 27 (N.Y. App. Div. 1st Dep't 2005); *Roof Techs Int'l, Inc.v. State*, 57 P.3d 538 (Kan. Ct. App. 2002); *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. I*, 881 P.2d 986 (Wash. 1994).

promissory note held by the People's National Bank of Lampasas in 1984. *Id*. at 172. In 1985, the Federal Deposit Insurance Corporation ("FDIC") owned the note, and FDIC subsequently sold the note to Mr. Thweatt. *Id*. In 1991, Mr. Thweatt sued Mr. Jackson to recover the amount owed in the note. *Id*. Mr. Jackson (who defaulted on the note) argued that the claim was barred by the four-year statute of limitations in Texas Civil Practice & Remedies Code Section 16.004. Id. at 174. Mr. Thweatt (the assignee) argued that his claim was subject to a six-year statute of limitations under 12 U.S.C. Section 1821(d)(14), which allows a six-year statute of limitation to accrue on the date that the FDIC was appointed receiver of the note. *Id*. The Court held that Mr. Thweatt was "entitled to the benefits of section 1821(d)(14) pursuant to the common law maxim that 'an assignee stands in the shoes of his assignor.'" *Id*. A note of caution about this case: I read this holding to apply very narrowly to the instance where a federal statute creates a longer statute of limitations preempts state law. I do *not* read this case to stand for the broad proposition that the statute of limitations begins running after the claim is assigned. *Sw. Bell Tel. Co. v. Mktg. on Hold, Inc*., 308 S.W.3d 909, 920 (Tex. 2010) ("Further, an assignee under Texas common law stands in the shoes of his assignor.").

### B. Texas Business and Commerce Code Section 2.210

The Texas Business and Commerce Code limits the assignability of certain contracts and claims. For example, Section 2.210(a) allows delegation of duties in a contract "unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract."[24] Tex. Bus. & Com. Code Ann. § 2.210(a). And in subsection (b), assignments are allowed unless the assignment "would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance."[25] Tex. Bus. & Com. Code Ann. § 2.210(b). Subsection (d) adds another limitation: an anti-assignment clause prohibiting assignment of the contract only applies to delegation of "the assignor's performance." In other words, under Section 2.210(d), an anti-assignment of the contract provision will not be construed to also prohibit assigning claims under the contract. Which brings us to subsection (e): "An assignment of 'the contract' or of 'all my rights under the contract' or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances…indicate the contrary, it is a delegation of performance

[24] *See Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp*., 823 S.W.2d 591, 596 (Tex. 1992) (superseded by statute and on other grounds in *Lesley v. Veterans Land Bd. of State*, 352 S.W.3d 479, 490 n. 72 (Tex. 2011)) ("As a general rule, all contracts are assignable. An exception to this rule is that a contract that relies on the personal trust, confidence, skill, character or credit of the parties, may not be assigned without the consent of the parties.").

[25] *See Tennell v. Esteve Cotton Co*., 546 S.W.2d 346, 352 n.3 (Tex. App.—Amarillo 1976, writ ref'd n.r.e.) (holding that the assignment for a cotton purchasing contract did not materially alter the terms of the agreement by "mere addition of a party to whom [the contracting party] could look for performance…").

of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract." Tex. Bus. & Com. Code Ann. § 2.210(e).

### C. Texas Construction Trust Funds Act

Whether or not claims under the Texas Construction Trust Funds Act (Texas Property Code Chapter 162) can be assigned is a tricky question and depends on which project participant is making the claim. At least one court has attempted to untangle this mess in *Dakota Utility Contractors, Inc. v. Sterling Commercial Credit, LLC*, 583 S.W.3d 199 (Tex. App.—Corpus Christi-Edinburg 2018, pet. denied). There, Dakota Utility Contractors (Dakota), a drilling service provider, subcontracted with Dambold & Wilson Pipeline (Dambold), a general contractor, to work on several construction projects. At the same time, Dambold was working as a contractor for Atmos Energy Corporation (Atmos). Dambold fell into financial trouble and factored its accounts receivable via Restated Accounts Purchase and Security Agreement with Sterling Commercial Credit LLC. Sterling assigned its interest in the factoring agreement to CM Sterling, LLC (Sterling). Sterling advanced over $2,000,000 to Dambold in exchange for any payments due to Dambold on these construction projects, and the factoring agreement was secured by granting lien rights to Sterling.

Dambold defaulted on the factoring agreement and eventually filed for bankruptcy. Both Sterling and Dakota filed proofs of claim. In the bankruptcy case, the parties reached a settlement agreement under which Dambold paid Sterling $400,000 in exchange for a release from Sterling for Dambold's outstanding invoices. Dambold, Atmos, and Dakota then settled and Atmos paid $900,000 to Dambold and Dambold paid Dakota $311,000. Dakota still claimed it was owed money, so Dakota filed suit against Sterling alleging that Sterling misapplied construction trust funds that were owed to Dakota. Dakota alleged that Sterling was a trustee of construction trust funds and knowingly misapplied, disbursed, or retained trust funds "without first fully paying all of the current or past due obligations…to the beneficiaries of the construction payments[.]" So Dakota had two main arguments: (1) Sterling was a trustee of trust funds and (2) Dakota was a beneficiary of the trust funds. Both parties moved for summary judgment as a matter of law on whether Texas Property Code Chapter 162 applies to factoring companies. Sterling argued it was not an agent of Dambold and was instead a lender that is exempt under the trust fund act. The trial court granted Sterling's motion.

The Court of Appeals discussed the basics of statutory construction, interpreting the trust fund act, and ultimately held that Sterling was neither an agent of Dambold nor a trustee of trust funds. The Court reasoned that "Sterling, as a financing entity, is not a 'trustee' under the Act because it is not a 'contractor, subcontractor, or owner or an officer, director, or agent of a contractor, subcontractor, or owner.'" *Id*. at 208. And the factoring agreement between Sterling and Dambold "did not imbue or vest Dambold with the right

to control Sterling's actions regarding the accounts receivable" so Sterling was not an agent for Dambold. *Id*. Finally, the Court stated that the payments Atmos paid to Sterling were not "made under a construction contract" and instead were made per the factoring agreement. The conclusion: Sterling, a factoring company that advanced money to a contractor in exchange for the contractor's future accounts receivable, was not a trustee under the trust fund act when it received funds.[26]

### D. Texas Property Code Chapter 12

"A judgment or part of a judgment of a court of record or an interest in a cause of action on which suit has been filed may be sold, regardless of whether the judgment or cause of action is assignable in law or equity, **if the transfer is in writing**." Tex. Prop. Code Ann. § 12.014(a) (emphasis added). This statute is intended to provide written notice to parties "dealing with a cause of action" that the cause of action has been assigned. *Magill v. Watson*, 409 S.W.3d 673, 678 (Tex. App.—Houston [1st. Dist.] 2013, no pet.). Under Section 12.014, assigning the judgment does not operate as a "credit" for the judgment; it "keeps the judgment alive and in full force by giving the assignee the right to collect on it." *Hibernia Energy III, LLC v. Ferae Naturae, LLC*, 668 S.W.3d 745, 767 (Tex. App.—El Paso 2022). And assigning a judgment entitles "the assignee to use every remedy, lien, or security available to the assignor as a means of enforcing the judgment." *Casray Oil Corp. v. Royal Indem. Co*., 165 S.W.2d 244, 248 (Tex. App.—Galveston 1942).

## VI. CONCLUSION

As I hope is obvious, some things about assignments are straightforward, and others are about as clear as mud. My hope is that this paper can be used as a starting point for practitioners and, at a minimum, get someone pointed in the right direction for whichever complicated assignment or pass-through related problem you are researching. There's a lot left to be decided by the Supreme Court of Texas, like perhaps dispensing of the collateral

[26] In *Dakota*, the Court helpfully cites to other cases with similar holdings. *See, e.g*., *City of Galveston v. Consol. Concepts, Inc*., 274 F. Supp. 3d 687, 694 (S.D. Tex. 2017) (concluding that there was no evidence that the city, who held interpleaded federal funds after a contractor failed to pay subcontractors, constituted a trustee under the Act), appeal dism'd sub nom. *City of Galveston*, No. 17-40485, 2017 WL 5157557 (5th Cir. June 9, 2017); *In re Heritage Consol*., LLC, 765 F.3d 507, 517 (5th Cir. 2014) (concluding that the Act did not provide a remedy against the owners of a well because they "were not contractors"); *In re Waterpoint Int'l LLC*, 330 F.3d 339, 349 (5th Cir. 2003) (concluding that the "trust fund provisions in Chapter 162" did not apply to a bank with a security interest in the contractor's accounts receivables); *J.P. Morgan Chase Bank, NA v. Tex. Cont. Carpet, Inc*., 302 S.W.3d 515, 528 (Tex. App.—Austin 2009, no pet.) (concluding that a lender for a low-income housing construction project was explicitly exempted under the Act, rejecting arguments that the lender served as the contractor's agent under the Act, and declining to "impose a new common-law duty on financial institutions that administer construction accounts").

versus absolute assignment language altogether, or rendering an opinion on "over the mountain" pass-through claims. Much credit is also owed to those who have tackled this topic before me with helpful papers of their own: Jeff Ford, George Baldwin, JD Holzheauser, and Ben Wheatley, to name a few.

# Sign, Sign, Everywhere Assignments:
## What You Need to Know About Assigning Construction Contracts and Claims

Presented to:

37th Annual Construction Law Conference
San Antonio, Texas

Presented by:

Karly A. Houchin
Allensworth Law
Austin, Texas

# Sign, Sign, Everywhere Assignments:
# What You Need to Know About Assigning Construction Contracts and Claims

*Presented By:*
*Karly Houchin*
*Partner, Allensworth*
*khouchin@allensworthlaw.com*

Construction Law Foundation of Texas, 37th Annual Construction Law Conference

1

## SCHEDULE

- Key terms and fundamentals
- Assigning contracts vs. assigning claims
- Assigning contracts
- Assignable claims
- Unassignable claims
- Equitable subrogation
- Pass-through claims

Construction Law Foundation of Texas,
37th Annual Construction Law Conference

2

## FUNDAMENTALS OF ASSIGNMENTS

**"In Texas, claims can be freely assigned unless doing so is prohibited by statute or public policy"**

*City of San Antonio v. Valemas, Inc.*, No. 04-11-00768-CV, 2012 WL 2126932, at *8 (Tex. App.—San Antonio June 13, 2012, no pet.) (mem. op.)

- Historical common law bar to assignments
- If statute silent about assignments, look to common-law principles



3

## FUNDAMENTALS OF ASSIGNMENTS

- Collateral versus absolute assignments
- Equitable assignments
- Statute of limitations



4

## ASSIGNING CONTRACTS VS. CLAIMS

**Assignment of rights under a contract and the assignment of a right to bring a cause of action for breach of that contract are two legally distinct assignments.**

*Pagosa Oil and Gas, LLC v. Marrs and Smith P'ship*, 323 S.W.3d 203, 211–212 (Tex. App.—El Paso 2010, pet. denied).



5

## ASSIGNING CONTRACTS: WHAT *IS* ALLOWED

Examples:

- Assignment of lease agreement
- Assignment of subcontract agreements upon contractor termination
- Assignment of some contracts with governmental entities

Basically, any assignment of a contract is allowed *so long as* doing so is not prohibited by (1) the contract itself, (2) public policy, or (3) statute.



6

## ASSIGNING CONTRACTS: WHAT *IS* ALLOWED

Automatic assignments?

- *Gupta v. Ritter Homes, Inc.*, 646 S.W.2d 168 (Tex. 1983)
- *Lennar Homes of Texas Land and Construction v. Whiteley*, 672 S.W.3d 367 (Tex. 2023)
- *Taylor Morrison of Texas, Inc. v. Kohlmeyer*, 672 S.W.3d 422 (Tex. 2023)



7

## BEWARE! ANTI-ASSIGNMENT PROVISIONS

- Prohibition on assigning the contract
- Prohibition on assigning claims arising under the contract
- Anti-assignment provisions can be waived
- Some anti-assignment provisions unenforceable



8

## ASSIGNMENTS: SAY WHAT YOU MEAN

Some industry form contracts have anti-assignment provisions that are not clear; do they prohibit assigning the contract, claims, or both?

**AIA A201 – 2017**

§ 13.2.1 The Owner and Contractor respectively bind themselves, their partners, successors, assigns, and legal representatives to covenants, agreements, and obligations contained in the Contract Documents. Except as provided in Section 13.2.2, **neither party to the Contract *shall assign the Contract* as a whole without written consent of the other.** If either party attempts to make an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.



9

## ASSIGNMENTS: SAY WHAT YOU MEAN

EJCDC 523 – 2016 § 14

**14.01 Assignment of Construction Subcontract**

**No assignment by Construction Subcontractor *of any rights under or interests in the Construction Subcontract* will be binding on Design-Builder without Design-Builder's written consent;** and, specifically but without limitation, payments that may become due and money that is due may not be assigned by Construction Subcontractor without such consent (except to the extent that the effect of this restriction may be limited by law), and unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under the Subcontract Documents.



10

# ASSIGNMENTS: SAY WHAT YOU MEAN

Assignment of Licenses, Permits and Intangibles

[Ausaircourt] hereby sells, transfers, conveys and assigns to [RLJ] all of[Ausaircourt's] right, title and interest in and to all licenses, permits **and all other intangible assets** relating to the Property (collectively, "Licenses"), subject, however, to the terms and covenants of the Licenses and this Assignment.

*Elness Swenson Graham Architects, Inc. v. RLJ II-C Austin Air, LP*, 520 S.W. 3d 145 (Tex. App.—Austin, 2017, no pet.)



11

# ASSIGNING CLAIMS: WHAT *IS* ASSIGNABLE

- *Old*: inalienability in choses in action
- *Current*: Texas favors free alienability of choses in action, unless public policy or statutes prohibit doing so.



12

## ASSIGNING CLAIMS: WHAT *IS* ASSIGNABLE

- Lien and bond claims
- Breach of warranty claims
- Insurance claims
- Contingent Payment



13

## ASSIGNING CLAIMS: WHAT *IS NOT* ASSIGNABLE

- DTPA claims
- Claims for punitive damages
- *Some* Texas Insurance Code claims
- *Some* legal malpractice claims



14

## ASSIGNING CLAIMS: WHAT *IS NOT* ASSIGNABLE

- Claims among joint tortfeasors
- Debtors cannot assign extension of credit or duties without creditor's consent
- Mary Carter agreements



15

## STATUTORY ASSIGNMENTS AND LIMITATIONS

- Statutes of Limitations
- Texas Business and Commerce Code Section 2.210
- Texas Construction Trust Funds Act
- Texas Property Code Chapter 12



16

## EQUITABLE SUBROGATION

Elements:

(1) one party stepped into the shoes of another party,

(2) that party made an involuntary payment on the other party's behalf, and

(3) the involuntary payment should have been made by the other party based on principles of equity.

*Frymire Engineering Co., Inc. v. Jomar Intern., Ltd.*, 259 S.W.3d 140, 143 (Tex. 2008)



17

## TRADITIONAL PASS-THROUGH CLAIMS

Pass-through is "a claim (1) by a party who has suffered damages (in this case, a subcontractor); (2) against a responsible party with whom it has no contract (here, the City); and (3) presented through an intervening party (the contractor) who has a contractual relationship with both."

*Interstate Contracting Corp. v. City of Dallas*, 135 S.W.3d 605 (Tex. 2004).



18

# TRADITIONAL PASS-THROUGH CLAIMS

What about immunity?

"[J]ust as it is inconsistent with the purpose of section 271.152 to construe it to deny waiver to assignees of those who enter into contracts subject to subchapter I, ***so is it inconsistent to deny waiver [of immunity from suit] to pass through claims brought by a contractor against a local governmental entity on a subcontractor's behalf.***"

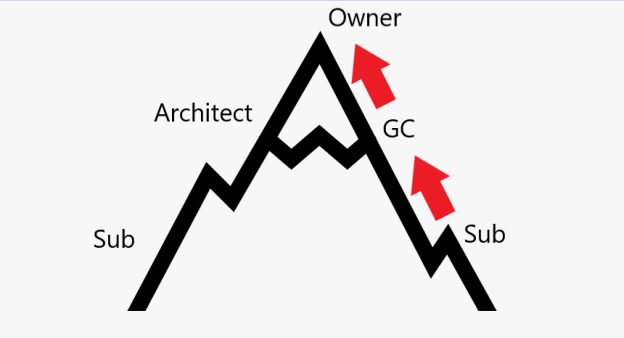
*City of San Antonio v. Valemas, Inc.*, No. 04-11-00768-CV, 2012 WL 2126932, at *8 (Tex. App.—San Antonio June 13, 2012, no pet.) (mem. op.)



19

# EXPANDED PASS-THROUGH SCENARIOS

"Up the Mountain" Construction Side

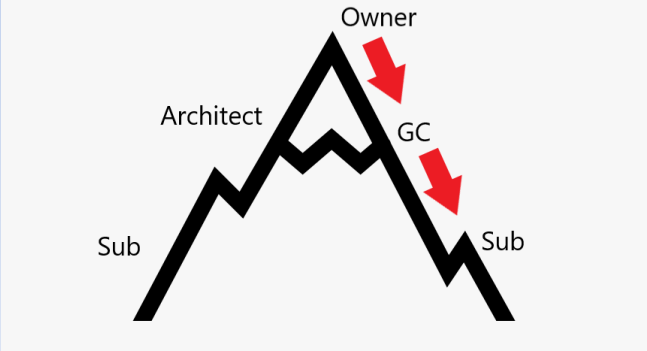





20

# EXPANDED PASS-THROUGH SCENARIOS

"Down the Mountain" Construction Side

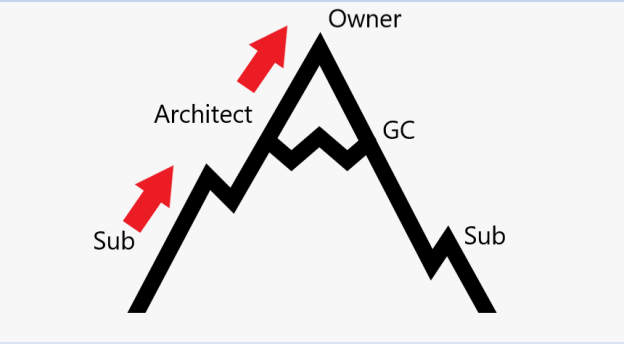





21

# EXPANDED PASS-THROUGH SCENARIOS

"Up the Mountain" Design Side

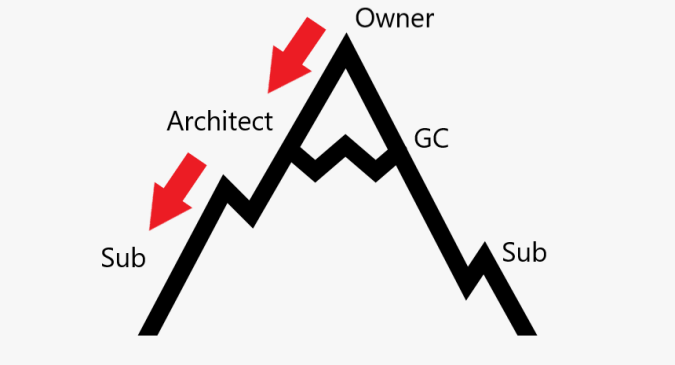





22

# EXPANDED PASS-THROUGH SCENARIOS

"Down the Mountain" Design Side

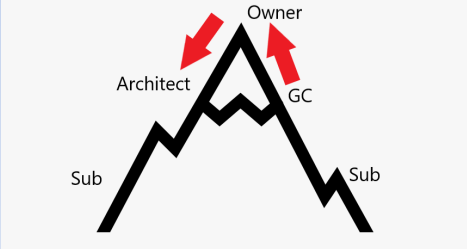


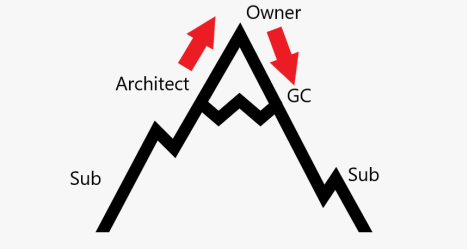



23

# EXPANDED PASS-THROUGH SCENARIOS

"Over the Mountain"






24

# QUESTIONS/COMMENTS?

Khouchin@allensworthlaw.com

(512) 291-3101