Chapter 3

Consent Provisions
in Natural Resources Agreements

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§ 3.01. Introduction.

The natural resources industry is built on agreements. A host of leases and other contracts are necessary in order to ensure that minerals are orderly and (hopefully) profitably, discovered, recovered, processed and sold. The often unenviable task of formulating, negotiating, drafting, and reviewing these agreements falls to attorneys and other professionals in the industry. These people must then expend considerable energy, time and expense crafting agreements designed to accomplish concrete and immediate goals such as assembling the most productive and economical land position, achieving the highest possible royalty or sales price, and finding the most skilled and responsible parties to carry out the work. Given the importance of agreements to the industry, it comes as little surprise that contracting parties are often keenly interested in their ability to control the ongoing relationships these agreements create. Hence, the “consent” provision has become more commonly employed in the industry. Despite its widespread importance to numerous aspects of the industry, however, the effect of various consent provisions and how they should be effectively drafted is rarely examined as a discrete subject. Because these consent provisions have a significant effect on the relationship of the parties to an agreement, and especially on the ability of those parties to engage in future business ventures, a study of the subject is warranted.

This chapter discusses the various “consent” provisions found in all manner of agreements in the natural resources industry. These provisions, sometimes carefully negotiated and drafted, but often slapped on to the end
of an agreement as “boilerplate,” require that one party to the agreement seek the consent of their contracting counterpart prior to engaging in some activity, usually the transfer of some interest in the agreement. Perhaps most commonly found in leases of mineral property, consent provisions are also found in a host of other agreements. In many instances, these consent provisions grant considerable leverage to the party whose consent is required, or impose significant hurdles to the future business ventures of the party who must seek consent. Anyone involved in negotiating or drafting agreements in the natural resources industry should have a basic knowledge of some of the rules governing consents, and how they can affect operations.

Understanding where to look for consent provisions is the first step toward interpreting, negotiating and drafting effective consent provisions. Therefore, the chapter begins with a brief overview of where to look for consent clauses. Next, special treatment is given to consent provisions in the context of real property agreements, primarily leases, as these agreements are governed by real property law, primarily that of landlord and tenant, and are among the most likely to contain a consent requirement. Consent provisions are next addressed in the context of a host of other agreements governed primarily by contract law. The chapter also examines trends in judicial interpretation of consent requirements, focusing particularly on cases where the withholding of consent was determined to be unreasonable. Finally, the chapter concludes by examining the effect of breach of consent requirements, or in other words, what happens when a contracting party acts without asking the permission of its contractual counterpart. Throughout the chapter, drafting recommendations and examples are provided.

§ 3.02. Where to Find Consent Requirements.

It is impossible to provide an exhaustive list of agreements that feature consent requirements. The ability of players in the natural resources industry to draft agreements dealing with the unique circumstances of individual deals will always outpace any inventory of typical agreements. But several types of agreements commonly feature consent provisions, and therefore, should always be closely examined for such provisions during negotiations and drafting. The first and perhaps most important is the lease. Whether for coal, oil or gas, the real property lease will contain a consent provision in most cases. Because of their importance, leases are discussed in considerable
detail below. In addition to real property leases, equipment leases may require the consent of the lessor to a variety of activities involving the leased equipment. Coal, oil and gas sales contracts may contain consent requirements. The same is true to many of the agreements specific to the oil and gas industry, such as joint operating agreements (JOAs) and their specific sections, such as area of mutual interest (AMI) and maintenance of uniform interest (MUI) provisions. Service contracts are also quite likely to contain consent requirements aimed at restricting the ability of the service provider to assign its interest. Therefore, look for consent provisions in contract mining agreements or drilling services contracts.

§ 3.03. Consent Issues in Leases.

The production of natural resources often begins with the lease of mineral property. Whether in the oilfield, coalfield or natural gas play, most who produce natural resources lease their mineral property from someone or some organization who holds fee title to the property. When mineral leases are being negotiated, parties have a tendency to focus on more immediate concerns, such as whether the lease grants sufficient rights for mining and drilling, and whether the amount of royalties is agreeable to both lessor and lessee. As a result, many leases, especially older ones negotiated with unsophisticated lessors, contain only a boilerplate consent requirement, or none at all. But consent requirements — especially to the extent they require the consent of the lessor or lessee prior to a transfer of a party’s interest under the lease — are vitally important, and should be carefully negotiated.

From the lessor’s perspective, there is significant incentive to control the activities of the lessee, and especially to prevent the lessee from simply transferring its rights and obligations under the lease to someone else. The particular lessee was often selected due to its reputation as a reliable and efficient producer. The mineral lessor, therefore, is often anxious to prevent his leasehold from falling into the hands of an unproven or unfamiliar lessee. Thus, the lease commonly requires that the lessor consent to any assignment or sublease of the lessee’s interest. Of course, the producer often has its own interests to protect. The ability to freely transfer or encumber the leasehold gives the lessee a more valuable asset, and as a result, the lessee will often seek to remove the consent provision, or at least impose conditions on the lessor’s ability to withhold consent to an assignment or sublease.
While the restriction on assignment and subleasing is most common, obtaining the lessor’s consent may also be required before the lessee can grant an overriding royalty interest in the leasehold, or grant a leasehold mortgage. Similarly, the lease may restrict the lessee’s ability to enter into contract mining agreements, or change the ownership or corporate control of its organization. Because leases are increasingly requiring lessor consent for a wider variety of activities, and because the consent provisions themselves are becoming increasingly complex, attorneys and others in the natural resources industry must be aware of the effect of these clauses and how they are likely to be interpreted. The first step is understanding the nature and legal effect of the various activities covered by the lessor consent requirement.


[a] — Assignment.

An assignment of a lease passes a party’s entire interest in the leased premises to a third party.\(^1\) In most cases discussed in this chapter, the contemplated assignment is of a lessee’s interest. In order to constitute an “assignment,” the transfer must be of the lessee’s entire interest in the estate and must be for the entire duration of the lease.\(^2\) If any lesser interest is transferred, the transfer will be deemed a sublease, not an assignment.\(^3\) In determining whether a transfer constitutes an assignment, courts will look only at the extent of the interest transferred, and the language used by the parties to the transfer will not be determinative.\(^4\)

An assignment does not change the obligations of the lessee or the lessor, but only changes which party will be fulfilling these obligations.\(^5\) The

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1 Cities Service Oil Co. v. Taylor, 45 S.W.2d 1039 (Ky. 1932).
3 Id.
assignment does, however, create privity of estate between the lessor and the assignee. As such, the new assignee is liable to the lessor for performance of the various lease covenants that run with the land, such as the payment of rents and royalties, and obligations regarding production, and the lessor can look directly to the assignee for the performance of such covenants. By the same token, the assignee is free to enforce lease covenants against the lessor, regardless of the presence of the original lessee. The lessor may also enforce these covenants against the original lessee based on privity of contract, but as a practical matter, an action against the assignee as the party currently in possession of the leasehold premises would likely be considered more convenient.

Given the significant effect of assignments, modern mineral leases almost universally contain language concerning whether the lessee is permitted to assign or sublet the leasehold. Leases permitting assignment generally require as a condition to such assignment that the lessee seek the lessor’s consent before the leasehold interest is assigned. The usefulness of a freely assignable leasehold to the lessee is readily apparent. Such a lease can be transferred to an assignee for valuable consideration when increased prices make the property profitable. Conversely, a freely assignable lease may be unloaded to avoid production and royalty obligations in the event that a decline in price or some other unforeseen event makes production on the property unprofitable for the lessee. A lessor, meanwhile, has an interest in achieving diligent production of his mineral resources and as a result, will often seek to hold the original lessee to its obligations to drill or mine. Assignments have the effect of delaying such production, and are therefore, generally not favored by lessors. Additionally, where a lease is to be transferred in times of increasing prices, the lessor will not want to be shut out of any increase

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6 See American Law of Mining § 131.11[3][a]; see also Comley v. Ford, 64 S.E. 447 (W. Va. 1909)

7 See Cresson v. Scott, 275 S.W.2d 406 (Ky. 1955). It should be noted that the assignor can retain some rights to bring an action on the lease, but whether such a right is maintained is an issue of contract, not real property, and is subject to the express language in the document of assignment. See, e.g., HN Corp. v. Cyprus Kanawha Corp., 465 S.E.2d 391 (W. Va. 1995).

8 See American Law of Mining § 131.11[3][a].
in any financial benefit that will accompany the assignment. As such, the
lessor will want to be informed of a transfer of the lease (and to be able to
veto such a transfer) so that the lessor can negotiate an increased royalty
with the assignee/lessee.\textsuperscript{9}

\[\textbf{[b] — Sublease.}\]

A sublease is a transfer of only a portion of the lessee’s interest in the lease,
or a transfer of the lessee’s entire interest for a portion of the lease term.\textsuperscript{10} A
transfer of any interest in the lease short of the lessee’s entire interest will be
deemed a sublease, and not an assignment. This includes a transfer in which
the lessee retains a reversionary interest, or a transfer of the entire interest for
a shorter term than that remaining on the original lease.\textsuperscript{11} In most instances,
the distinction between an assignment and sublease will not be particularly
difficult to make, and the document of transfer need only be examined to
determine whether it transfers the lessee’s entire interest in the lease for the
entire term of the lease. Caution should be taken during this examination,
however, because courts have held that seemingly innocuous terms in the
lease transfer document create reversionary interests, and as a result have
classified the transfer as a sublease, rather than an assignment.\textsuperscript{12}

In its effect on the relationship between lessors, lessees, and transferees,
the significant feature of a sublease is that it creates no privity of estate
between the sublessee and the lessor.\textsuperscript{13} This creates a host of concerns for all
of the parties involved. First, the sublessee is not bound by the terms of the
lease, but only of the sublease. This could create significant problems for the

\textsuperscript{9} For a similar discussion on the considerations influencing the views of lessees and
lessors to the assignment of a lease, \textit{see} Thomas E. Meng, “Limitations on the Right to
\textsuperscript{10} \textit{See} Ann Peldo Cargile, Michael B. Noble, \textit{Assignments and Subleases: The Basics},
\textit{17 Oct. Prob. & Prop.} 40 (2003); Friedman on Leases \textit{§ 7:4.1}.
\textsuperscript{11} \textit{See} id. and cases cited therein.
\textsuperscript{12} \textit{See}, e.g., Orchard Shopping Ctr., Inc. \textit{v.} Campo, 485 N.E.2d 1248 (Ill. App. 1985)(where
transferee retains the right to terminate a lease transfer for seven days, original lessee retained
a reversionary interest in the leased premises, and as such, the transfer is a sublease, not an
assignment).
\textsuperscript{13} \textit{See American Law of Mining} \textit{§ 131.11[3][b]} and cases and authorities cited therein.
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lessor, who must take action only against the original lessee in the event that the sublessee breaches a covenant of the original lease. The original lessee may experience difficulty in the context of a sublease, as it remains bound by the terms of the lease, and the lessor is free to take action against the original lessee directly for any breach of the lease by the sublessee. It is important, therefore, that the original lessee carefully select its sublessee and provide for protection in the sublease document in the event the sublessee breaches the lease. Finally, the sublessee may encounter difficulty as it must look to the lessee to enforce any covenants of the lease against the lessor, because the sublessee is not in privity — either of contract or estate — with the lessor. Not only does this lack of privity prevent the sublessee from enforcing existing covenants in the lease, but it also prevents the sublessee from renewing the lease, or exercising options related to the lease. Instead, the sublessee must seek to include within the document of transfer rights against the original lessee to exercise options or renew the lease upon the sublessee’s demand. As will be discussed in greater detail below, the distinction between assignments and subleases is particularly important when examining the effect of lease provisions requiring lessor consent to transfer of the lease.

[c] — Grant of an Overriding Royalty Interest.

An overriding royalty is a share in the production, or the value of the proceeds of production, free of the costs of production carved out of the lessee’s interest under a lease.14 The overriding royalty interest may be conveyed by the lessee separately from the lease itself, or it may be reserved upon a subsequent assignment of the lease.15 Overriding royalties are frequently used in the oil and gas field to compensate those who have assisted in the start-up of a drilling operation. They may also be used in both

The holder of an overriding royalty takes a separate interest in the lease, that is largely detached from the lease itself. Authorities have noted that the “overriding” nature of the royalty interest indicates that it is to “be free of the burdens” of the lease interest from which it is “carved out.”16 As such, the holder of the overriding royalty interest is not a transferee of rights acquired by the lessee from the lessor, but the holder of an independent interest in property originating from the lessee’s interest. Therefore, the owner of an overriding royalty interest is in essentially the same position as any other owner of a bare royalty interest, meaning that the right to a share in production (or more frequently, the value of the proceeds of production) is essentially the only incident of ownership of the overriding royalty owner possesses. The holder of the interest has no ownership interest in the minerals themselves.

As such, he cannot take possession of any portion of the leasehold, engage in mining or drilling operations, demand a partition of the property, lease any part of the premises, or take any other action normally accompanying a possessory interest in property.17 It has generally been observed that the grant of an overriding royalty interest does not implicate the interests of the lessor, because it burdens only the lessee’s interest, not the mineral estate itself.18 While true from a legal standpoint, lessors may disagree with this assessment from a practical standpoint, since the overriding royalty interest has the effect of making the mineral interest more expensive to produce which, in turn, could make it less likely that the mineral can be profitably

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16 Id.
17 See American Law of Mining § 85.02[2].
18 See, e.g., American Law of Mining § 85.02[2][c], fn. 52 (“Theoretically, an override burdens the leasehold interest and not the mineral estate.”); see also Kuntz § 63.2 (“the overriding royalty interest has been regarded as an encumbrance on the working interest”). Despite this apparent agreement that the lessor’s interest is not burdened by the grant of an overriding royalty interest, it has been maintained that the grant of an overriding royalty interest falls within a lease restriction on transfer of the lessee’s interest. The various issues raised by such provisions as they relate to the grant or reservation of an overriding royalty interest are discussed in Section III(D), infra.
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recovered, and thus, less likely that the lessor will realize the value of its retained royalty interest.

[d] — Grant of a Leasehold Mortgage.

A mineral lessee may desire to mortgage his interest in the leasehold as a means of providing collateral for financing. The grant of a leasehold mortgage in a mineral lease is generally governed by the general rules of mortgages prevailing in a jurisdiction. The nature and treatment of mortgages depends on whether a particular jurisdiction has adopted the “lien” theory or “title” theory of mortgages. In a title theory jurisdiction, the mortgage is treated as a “vested fee simple interest subject to complete defeasance by the timely payment of the mortgage debt,” and mortgages are in many instances regarded as “conditional conveyances.”\textsuperscript{19} In lien theory states, the mortgage is treated not as a conveyance of property, but instead as a lien or security interest in property.\textsuperscript{20} Finally, a select number of states have adopted an “intermediate” theory of mortgages. Under this theory, legal and equitable title do not pass with the grant of a mortgage, but title does pass to the mortgagee immediately upon default.\textsuperscript{21}

The title theory/lien theory dichotomy bears heavily on the relationship between the lessor, lessee, and the holder of the mortgage on the mineral leasehold. In a title theory state, in granting a leasehold mortgage, the lessee has essentially conveyed his right and title in the leasehold to the mortgagee, granting to the mortgagee a host of rights that normally accompany the transfer of property interests. This could create concerns for the lessor that are akin to those arising when the leasehold is assigned. In a lien theory state, the mortgagee acquires only a security interest in the leasehold, but no other incidents of ownership. A mortgage in a lien theory state, therefore, has considerably less impact on the interests of the lessor.

\textsuperscript{19} 54A Am. Jur. 2d Mortgages § 1 (citing cases from title theory states).
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} For a discussion of the intermediate theory, and a state-by-state breakdown of which states have adopted each of the three mortgage theories, see Restatement (Third) of Property: Mortgages § 4.1 (1997, 2008 supp.).
A review of the law of mortgages in the eastern mineral producing states reveals that each of the three theories has gained some acceptance. Illinois, Indiana, Kentucky and West Virginia each apply the lien theory. Tennessee and Alabama use the title theory. Ohio and Pennsylvania appear to apply an intermediate theory, and courts are in dispute as to whether Virginia applies a lien theory or an intermediate theory. Most western mineral-producing states, including Alaska, California, Colorado, Kansas, Montana, New Mexico, Oklahoma and Texas, follow the lien theory.

24. See Douglas v. Cline, 12 Bush 608 (Ky. 1877) (“mortgages are now treated in this state as mere securities”); Smith v. Berry, 181 S.W. 379 (Ky. 1916); Hart v. Hill, 203 S.W.2d 13 (Ky. 1947).
[e] — Change in Control of Lessee.

As used in this discussion a “change in control” is a form of indirect transfer of the lessee’s interest resulting from a sale of stock in a corporate lessee, a change in the ownership of the controlling interest in a limited liability company lessee, the sale of the lessee by its parent organization, or a change in management or other key personnel employed by the lessee. In essence, any indirect transfer of the lessee’s interest can be considered a “change in control” depending on how that or a related term is defined in the lease document itself. Well drafted leases, therefore, will specify which events constitute a change in control so as to effectively protect the lessor’s interest in remaining in contractual privity and privity of estate with a lessee upon whom he can rely to diligently comply with lease obligations, while also maintaining the lessee’s ability to engage in a variety of business transactions that may require changes in corporate ownership or control.


Restraints on the transfer of a lessee’s interest in a leasehold estate are subject to interpretation under two competing common law rules. The first rule recognizes that because the lease is an interest in real property, it should be freely transferable, as the common law disfavors restraints on the alienation of property. The second rule is that the lessor should be able to freely choose his tenant. The conflict between these related doctrines is clear — a lessor cannot freely choose his tenant when that tenant is free to transfer his leasehold interest to someone else. Conversely, a tenant cannot freely transfer his estate if the lessor’s approval of the tenant is required.

To resolve this conflict, the courts eventually settled on the general rule that absent some provision in the lease restricting transfer, the lease is freely transferable. In this regard, the nature of the lease as a real property interest is emphasized, and the common law rule against restricting alienation of property interests is given effect. But, if the lease contains an express restriction on the lessee’s ability to transfer its interest, this restriction will be upheld. Thus, the contractual nature of the lease, and the lessor’s interest in controlling the identity of its tenant, are given effect. Finally, the courts
in many states have also concluded that, while restrictions on transfer are enforceable, this restrictive language should be strictly construed against the lessor, as the party likely enforcing the transfer restriction. Application of these concepts is best demonstrated by a review of the case law in several jurisdictions.39


Appendix A contains a brief overview of the prevailing law of restraints on the transfer of a lessee’s interest in a variety of mineral-producing states. This review of individual state court decisions reveals several basic rules that are applicable in most states. First, courts will enforce provisions requiring the lessor’s consent to transfer of the lessee’s interest, provided the lease is treated as a lease of the mineral, and not conveyance of fee simple title in the mineral.40 Second, any restriction on transfer will be strictly construed against the lessor and in favor of allowing transfer of the lessee’s interest.


Having reviewed both the legal nature of the various lessee activities that may be restricted by a lessor consent requirement, as well as the treatment of these transfer restrictions by the courts of several states, the effect of a consent requirement on a variety of activities can be addressed. While this chapter advocates for specificity in drafting any transfer restrictions that require the consent of a lessor or contracting party, in many cases, existing leases will simply contain a boilerplate provision requiring the lessor’s consent to an assignment or sublease, without any further detail. Among the most common of these provisions are:

39 See Appendix.
40 See In re Essex Coal Co., 192 A.2d 675 (Pa. 1963). Arguably, rules regarding restraints on alienation apply more strongly in jurisdictions such as Pennsylvania that treat the mineral lease as a conveyance of fee title to minerals in place. For more discussion on the Essex Coal case and the treatment of restraints on alienation in Pennsylvania, see Appendix.
1) “Lessee shall not assign its interest without lessor’s consent, which consent will not be unreasonably withheld.”

2) “Lessee shall not assign, sublease or otherwise transfer its interest without lessor’s consent.”

3) “Lessee shall not assign, sublease, or otherwise transfer this agreement or the rights granted herein without the written consent of the Lessor, said consent not to be unreasonably withheld.”

The following is a discussion of how various activities are affected by these common transfer restrictions and consent requirements in leases, and tips for insuring that transfer restrictions are drafted to cover these activities.

[a] — Assignment and Sublease.

The typical provision requiring lessor consent for an assignment requires consent for the ordinary assignment of a lease, in which the lessee’s entire interest in a lease is transferred. As could be predicted based on the discussion above, the lessor consent clause restricting “assignment” alone will be narrowly interpreted to require consent only for an assignment. Thus, if a lease provision required consent in the event of an “assignment,” the lessee’s interest could be subleased without the lessor’s consent. In order to require consent to a sublease, actual language regarding sublease must be included. This result is in keeping with the general rule that the requirement of the lessor’s consent is a restraint on the transferability of the leasehold, and as such, is subject to strict construction.

[b] — Leasehold Mortgage.

Whether a lessor’s consent to the grant of a leasehold mortgage is required often creates an important issue both for lessees who need to use the mortgage as a financing vehicle, as well as lessors who wish to restrict the granting of such a mortgage. The lessor’s interest in preventing or conditioning the grant of a mortgage of the lessee’s interest is motivated by the fact that the lessee may default on its obligations to its mortgagee, who may then foreclose on the leasehold. For a variety of reasons, it is not advantageous to a lessor for a bank or similar institution to hold a lease to its minerals. Conversely, a
lessee who lacks the freedom to grant such a mortgage may find its ability
to raise sufficient capital significantly restrained.

If a clause in the lease states that the lessee may not “mortgage” or
“encumber” its interest, little controversy arises, and consent is required.
But in many instances, a lease will not contemplate specifically whether the
lessee’s granting of a mortgage on its leasehold interest requires the lessor’s
consent. Instead, the lease may only require consent to an “assignment” a
“sublease” or a “transfer” of the lessee’s interest. In the face of this generic
language, a lessor is likely to argue that the grant of the mortgage effectively
transfers the lessee’s interest. By contrast, lessees will argue that the rule
of strict construction of restraints on transfer holds that if mortgages are
not explicitly restricted or conditioned upon consent, then they are freely
allowed.

Whether generic language requiring lessor consent to assignment also
requires consent where the lessee seeks to grant a leasehold mortgage is
largely governed by the prevailing theory of mortgages in the jurisdiction
whose law controls interpretation of the lease. While there is little case
law directly addressing the issue, it appears that in states adopting the lien
theory of mortgages, the grant of a leasehold mortgage does not require
a lessor’s consent where the consent clause requires consent only in the
event of “assignment” or “transfer” of the lessee’s interest. This rule,
and its rationale, were articulated by the Supreme Court of California, in
Chapman v. Great Western Gypsum Co. There, the court held that the grant
of a leasehold mortgage in a mineral lease did not violate a lease covenant
against “assignment, sublease or other transfer” of the lessee’s interest.41 As
the court explained:

[W]e do not believe that a covenant against assignment contained in
a lease is violated by the giving of a mortgage on the lease. It hardly
needs citation of authority to the principle that covenants limiting the
free alienation of property such as covenants against assignment are
barely tolerated and must be strictly construed. Thus it has been held

that a covenant against assignment is not violated by an assignment from one cotenant to another. . . . Likewise a covenant against assignment is not violated by a subletting. . . . These cases and many others that might be cited establish the rule that it is only a technical assignment that is prohibited by such a covenant. A mortgage of the lease, of course, does not constitute a technical assignment thereof. In this state a mortgage does not operate to transfer the title to the mortgaged property; it simply creates a lien thereon. The decisions in other states where the lien theory of mortgages prevails clearly hold that a covenant against assignment is not violated by the giving of a mortgage.\textsuperscript{42}

\textit{Chapman} stands for the proposition that in a state adopting the lien theory of mortgages, the granting of a leasehold mortgage does not violate a lease restriction against assignment or subleasing. In arriving at its decision, the \textit{Chapman} court relied upon certain basic principles discussed above regarding the strict construction of covenants restricting the alienation of property and the maintenance of strict distinctions among assignments, subleases, and other transfers of property, as well as basic principles related to the nature of mortgages in lien theory jurisdictions.\textsuperscript{43} The result is a logical one, and would likely apply in any jurisdiction applying the lien theory of mortgages and strictly construing restrictions on the transfer of property interests. If a mortgagee does not acquire any title in property, but instead holds only “an equitable lien to the extent of his debt,”\textsuperscript{44} where one grants a mortgage, there has been no transfer of rights in the property. Instead, there has been only the transfer of some possible future interest in property in the event of a contingency (foreclosure) that is uncertain to occur. By contrast, an assignment passes all of the lessee’s interest in the property to the assignee, and a sublease similarly passes the lessee’s interest, but only a

\textsuperscript{42} \textit{Id.} at 760-761 (citing cases from New York, Michigan and Kansas holding the same).
\textsuperscript{43} \textit{See} § III(A) \textit{supra.} (contrasting assignment and sublease); \textit{see also} § III(A)(4) \textit{supra} (nature of mortgage).
\textsuperscript{44} \textit{Smith v. Berry, 181 S.W. 379 (Ky. 1916).}
proportionate share, or the entire interest with a reversionary interest retained by the sublessor.

Because a mortgage does not represent an “assignment, transfer, or sublease” of the lessor’s rights in property, it cannot violate a clause restricting the right of transfer in a state adopting the lien theory of mortgages. This result has been recognized by commentators as well. As stated in one influential publication, “[t]he courts are fairly consistent in holding that a general restriction against assignment is not applicable to the encumbrance of an interest through pledge, mortgage, or other transfers for security purposes only.”

Note, however, that the assignment of a lease by a mortgagee following foreclosure on its security interest would violate a general restriction against assignment.

Whether the mortgage of a leasehold violates an anti-assignment provision is less clear in states adopting a “title” or “conveyance” theory of mortgages. Consent should likely be obtained prior to the grant of a leasehold mortgaged in a title theory state if the lease requires consent to “transfer” of the leasehold. If for some reason, consent cannot be obtained, and the prospective transferor has a high tolerance for risk, it can be argued that the distinction between title and lien theory states has diminished over time, to the point that even a title theory state would not recognize a leasehold mortgage as violating a generic “transfer” restriction. As the Restatement drafters have stated:

Today, however, title jurisdictions differ in only a few respects from their lien theory counterparts. Such states recognize that mortgagees hold title for security purposes only, and for both practical and theoretical purposes, they usually view the mortgagor as the owner of the land. Moreover, title theory states have eliminated or reduced numerous incidents of legal title, although this process has often been uneven and inconsistent. In a few states this process has gone so far that a mortgagee’s interest is characterized as a chattel

46 See id. at 916.
interest or chose in action. In addition, two other developments have placed significant limitations on the title theory. First, statutes in some states do not give the mortgagor the right to possession until default. Second, commonly used mortgage forms containing similar provisions achieve the same result.\textsuperscript{47}

But the Restatement drafters also caution that the above does not mean “that the title theory is now irrelevant,” and that lessees should keep in mind that “in the absence of agreement to the contrary, the mortgagee has a right to immediate possession against the mortgagor.”\textsuperscript{48} Thus, in a title theory state, consent should likely be obtained if possible before the grant of a leasehold mortgage by the lessee, if the lease requires consent to any transfer of the lessee’s interest.

[c] — Overriding Royalty.

Whether the grant of an overriding royalty interest violates a lease clause against assignment, sublease or other transfer presents a difficult question. Whereas the grant of a mortgage has been held in many states to convey no property interest, the overriding royalty has been described as a property interest. There is no question that the grant of an overriding royalty interest does not violate a lease covenant that bars only an assignment or sublease without consent, because those clauses are strictly construed to include only actual assignments and subleases. But many leases also restricts any “transfer” of a right or duty of the lessee under the lease. Thus, it must be determined whether the grant of an overriding royalty interest is a “transfer” of a right or obligation of the lessee under the mineral lease.

Numerous authorities have held that an overriding royalty interest is an interest in real property.\textsuperscript{49} Few authorities have discussed the nature of the

\textsuperscript{47} Restatement (Third) of Property (Mortgages) § 4.1, comment a(1).
\textsuperscript{48} Id.
\textsuperscript{49} See, e.g., Kuntz § 63.2 (“the overriding royalty interest is generally regarded to be an interest in land.”); see also American Law of Mining § 85.02 (royalty interest is a property interest). While most commonly analyzed in the oil and gas producing states, the nature of the overriding royalty interest has been analyzed in states more closely associated with coal mining, see, e.g., MSD Energy, Inc. v. Gognat, 507 F. Supp. 2d 764, 773 (W.D. Ky. 2007)(“An overriding royalty interest constitutes real property under Kentucky law.”).
overriding royalty interest in the context of coal leases. Oil and gas law, where overriding royalties are considerably more common, has provided most treatment of the issue. The oil and gas law authorities have described the overriding royalty interest as follows:

An overriding royalty interest is a nonoperating interest that is carved out of the working interest of an oil and gas lease. It may be created by conveyance of the overriding royalty by the owner of the lease, but it is more commonly created by reservation upon the transfer of an oil and gas lease. According to the common definition of overriding royalty, the owner of such an interest is entitled to the specified share of oil or gas produced under the terms of the lease, free and clear of drilling, completing, and operating costs. It is likely that the word “overriding,” as a further descriptive term to modify “royalty” is intended to express the intention that the interest is to override or to be free of the burdens normally incident to the working interest out of which it is carved.

This definition emphasizes several important characteristics regarding the overriding royalty interest that are important in the context of a grant of an overriding royalty from the lessee under any type of mineral lease. Most importantly, the overriding royalty interest is “carved out” of the lessee’s interest under the lease. The overriding royalty can be conceptualized, therefore, as originating from a new grant from the lessee to the grantee of the overriding royalty, and not as the transfer of rights acquired by the lessee from the lessor. Additionally, the holder of the overriding royalty does not share in the burdens of the lessee from whom the interest was acquired.

The overriding royalty, as it is employed in the hard mineral context, has been described as follows:

The term “overriding royalty” is a recognized term of art to denote a royalty interest carved out of a leasehold estate. It is a royalty interest,

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50 For example, in the major coal mining state of Kentucky, only three recorded state court decisions have used the term “overriding royalty” in the context of mineral leases involving coal, and none of these cases discuss the nature of the overriding royalty interest.

51 Kuntz § 63.2.
which, like an independent royalty, is not held in conjunction with a reversionary interest in the mineral estate.

There are three parties to transactions involving an overriding royalty: the original lessor, the original lessee, and the owner of the overriding royalty. The rights and obligations between these parties will depend largely upon the terms of the original lease and the nature of the transaction between the original lessee and the holder of the overriding royalty. Whether the overriding royalty is reserved to the original lessee upon assignment or sublease of the original lease or whether it is carved out of the leasehold interest as a grant of an independent royalty to a third party, the royalty interest is a creature of the lease. A termination of the lease will therefore terminate the override.

Like the definition employed by oil and gas authorities, this definition of the overriding royalty emphasizes that the interest is created from the leasehold interest and is not a direct interest in the minerals themselves. The definition does raise some concern, however, because it states that the original lessor is a party to a transaction involving the overriding royalty. The treatise cites no authority for this position, and in fact, has been contradicted by other sources. This contention should be addressed, however, because if the lessor’s interest is implicated in the grant of an overriding royalty, this would support the inclusion of such a grant within the lease’s restriction on the lessee’s ability to transfer its interests.

It appears that the lessor’s interest in the leasehold is directly implicated by the grant of an overriding royalty only where the lessee reserves an overriding royalty after assigning the leasehold itself. Where an overriding royalty interest is independently granted by a lessee who retains all operating rights and duties under the lease, the lessor’s interest in the lease is not implicated. As one commentator explained:

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52 American Law of Mining § 85.02[2][c].
The mere relation created by an overriding royalty, under the weight of authority, does not modify the rights or duties incident to the operating rights under the original lease. However, it may create problems of royalty payments to the original lessor where the operating rights are granted and the overriding royalty is reserved to the original lessee. A sublease may be created in this type of transaction. 54

This commentary and the authorities cited therein, while not dispositive of whether the independent grant of an overriding royalty effects a transfer of the lessee’s interest, do point out that the grant of the overriding royalty, absent an accompanying assignment of the lease, does not significantly change the rights and duties of the parties to the original lease. To that extent, it at least supports the position that the policies of a lease clause requiring consent to assignment or transfer of the lessee’s interest are not implicated by the independent grant of an overriding royalty interest. Thus, for purposes of restrictions on the lessee’s ability to transfer its interest, the method by which the override is created is crucial.

Regardless of whether the grant of an overriding royalty actually has any effect on the lessor’s interest, it may be argued that because the overriding royalty is an interest in real property, and because the anti-assignment clause of the lease prevents the transfer of any interest acquired under the lease, the anti-assignment clause prevents a lessee from granting an overriding royalty that derives from production on the leased premises. The better argument, however, is that the overriding royalty, while an interest in real property, is not subject to the covenant against assignment, sublease or transfer of the lessee’s interest because it is not a “right or duty” of the lessee created by the mineral lease itself. Instead, the overriding royalty is a separate interest created only out of the lessee’s interest, and not deriving from the interest conveyed from the lessor to the lessee. As explained by one commentator:

An overriding royalty is an interest carved out of the lessee’s interest, sometimes called the working interest. The lessor is not a

party to its creation. It is the only true royalty which is not created by the terms of the coal lease. It is a lease burden in addition to or ‘overriding’ the production royalty payable to the mineral owner under the lease.55

To illustrate this point, compare the rights and duties acquired by a coal lessee under a coal lease with the rights and duties conveyed by the lessee to the grantee of an overriding royalty interest. Primarily, the coal lease conveys to the lessee the right to enter onto the property, to mine coal within the leased premises, and to sell that coal. All other rights granted under the lease are generally incident to the right to mine and sell coal. Similarly, the coal lease imposes numerous duties on the lessee, the most important being the duty to mine coal, sell coal, and pay a royalty to the lessor. By contrast, none of these rights and duties are conveyed from the coal lessee to the grantee of the overriding royalty interest. A leading treatise explains the distinction:

[A] fundamental characteristic of a solid mineral royalty is that it is not a possessory interest and carries with it no executive rights. It is this aspect of a solid mineral royalty which principally distinguishes it from an interest in the mineral estate. An owner of an interest in the mineral estate has the right to execute leases and conduct mining operations as well as the right to compel partition, if his interest in the mineral estate is an undivided one. By contrast, the royalty holder typically possesses none of these rights, and the economic value of his interest is dependent upon the mining of the property by the owner of the mineral estate.56

Thus, when the rights and obligations transferred under a mineral lease are compared with the rights and obligations conveyed pursuant to the grant of an overriding royalty interest, it is revealed that no rights pass from the original lessor to the grantee of the overriding royalty interest. Because none of these rights and duties are transferred, the covenant against assignment, sublease, or transfer of the lessee’s interest is not violated.

56 American Law of Mining § 85.02[2].
The contrary argument is simply that because an overriding royalty interest is an interest in real property, and because the “real property” from which the interest derives is the property leased under the original coal lease, any grant of an overriding royalty interest is necessarily the grant of some right obtained by the lessee pursuant to the mineral lease. This argument ignores the language of the typical covenant requiring the lessor’s consent to assignment, sublease and transfer. Such language restricts only the assignment, sublease, or transfer of rights specifically acquired by the lessee under the lease. A right to share in the production from the property, absent any working of the interest in the form of mining, is not a right conveyed by the lessor to the lessee. Because the lessee never had the right to receive payments based on production without actually mining coal, or producing oil and gas, he could not then “transfer” this interest as the term “transfer” is understood in the lease itself.

It should also be noted that viewing the grant of an overriding royalty interest as outside the scope of a lease covenant prohibiting transfer of the lessee’s interest comports with the policy of anti-transfer/assignment provisions. In *Murphy v. Reynolds*, the court noted that one of the “primary purposes” of a covenant restricting the lessee’s power of assignment or subleasing is to “preserve the personal responsibility and accountability of the party selected as Lessee, restrict the occupancy to him, and to prevent a delegation of the authority just granted.” Where an overriding royalty is granted, none of these interests of the lessor is implicated. Thus, from a policy perspective, none of the lessor’s interests are implicated or threatened by the grant of an overriding royalty interest by the lessee.

Other authorities implicitly support the position that the independent grant of an overriding royalty is outside the scope of a non-assignment provisions by viewing the overriding royalty as an encumbrance or burden on the leasehold. As discussed at length above, where the grant of a mortgage

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57 *Murphy v. Reynolds*, 212 S.W.2d 686 (Tenn. 1948).
58 *Id.*
59 *See, e.g., American Law of Mining* § 85.02[2][c], fn. 52 (“Theoretically, an override burdens the leasehold interest and not the mineral estate.”); *see also* Kuntz § 63.2
merely encumbers property, it does not assign, sublease or transfer any rights under the lease, and is therefore not barred by the non-assignment or consent clause, unless that clause specifically requires consent to an encumbrance or mortgage. To the extent an overriding royalty resembles a mortgage, a similar analysis and result is appropriate.

Finally, the default rule of strict construction of restraints on alienation supports the position that the grant of an overriding royalty does not violate the lease covenant against “assignment” or “transfer” of the lessee’s interest. This is because the term “transfer” is at best ambiguous as to whether it encompasses the grant of an overriding royalty interest. If restraints on alienation are to be strictly construed in favor of the free use of property, all doubts should be resolved in favor of the lessee, and the lessee should be free to grant an overriding royalty interest.

[d] — Change in Control.

Specific and careful drafting is required to restrict the “change in control” of a lessee or other contracting party because state corporation statutes often provide that corporate mergers do not result in the assignment or transfer of lease or contract rights. In order to restrict the ability of the lessee to undergo a change in the ownership or control of its organization, it is necessary to explicitly state each potential “change in control” scenario covered by a transfer restriction clause. The rule of strict construction of transfer restriction clauses is perhaps most evident here. For example, if a lessor’s consent is required for any “change in control of the lessee” such language only restricts activities such as a sale of the controlling interest in the lessee itself, not in any parent or affiliate corporation. As such, lessors seeking to draft an effective change in control provision must either word their clause very broadly, or be very familiar with the corporate structure of their lessee.

(“the overriding royalty interest has been regarded as an encumbrance on the working interest”).

A typical restriction on assignment and subleasing would not require lessor consent to a contract mining agreement, unless the agreement granted the contract miner some estate in land. Of course, where a lease specifically addresses a contract mining agreement, any consent requirement or restriction on the grant of the contract mining agreement will be upheld. If as is often the case, however, one is faced with only a typical “assignment or sublease” consent provision, and the need to employ a contract miner, the drafting of the contract mining agreement will control whether consent is required. Normally, a contract mining agreement can be drafted narrowly enough to grant the contract miner only a license or privilege to remove minerals, rather than an actual leasehold estate. The following factors should be considered when drafting a contract mining agreement so as to avoid any restriction on assignment or sublease of the leased premises: the extent of mining rights granted, exclusivity of possession, the term of the operation, control of the operation, use of conveyancing language, whether ownership of the mineral is granted in place or after removal, and the compensation payable.

§ 3.04. Agreements Other than Leases.

While the foregoing discussion focused on leases, the lease is but one agreement necessary for a natural resources operation. Consent provisions are also found in numerous other agreements commonly executed in order to produce and sell minerals. Because these agreements are numerous and varied, only a sampling are discussed in detail below. Each of these agreements is likely to contain some consent requirement — usually a consent to the transfer of a party’s interest under the agreement. Commentators are largely in agreement that these consent requirements are enforceable. Additionally, to the extent they do not directly implicate real property

61 Meng, Limitations at § 12.04[1][a].
62 Id.
63 Id. (citing United States v. Atomic Fuel Coal Co., 383 F.2d 1 (4th Cir. 1967) and Kelly v. Rainelle Coal Co., 64 S.E.2d 606 (W. Va. 1951) for factors determining whether an agreement grants a lease or license.).
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interests, these contractual arrangements are not affected by the common law doctrines restricting restraints on transfer or alienation.


Joint Operating Agreements (JOAs)\(^{65}\) are used where multiple owners of interests in mineral properties, whether co-tenants or holders of interests in a common area or geologic formation, designate one party (the operator) to perform certain exploration or production obligations in the area as a whole. JOAs attempt to set forth in detail all rights and liabilities of the parties with respect to the area being worked. JOAs often feature a provision restricting the transfer or encumbrance of a participant’s interest that is subject to the JOA by requiring the consent of the other parties to the JOA. These restrictions are motivated by several concerns. Most basically, the parties to a JOA realize they are in a joint venture, and want to control who they are venturing with.\(^{66}\) The ability to obtain future financing is also a significant concern — the grant of an encumbrance on one participant’s interest could affect financing for the interest as a whole. At one time, the restrictions were necessary for tax classification purposes, though this is no longer the case.\(^{67}\)

[a] — Enforceability of Consent Requirements in JOAs.

To the extent a JOA is treated as a contract, there is little dispute or concern regarding the enforceability of the consent to transfer requirement.\(^{68}\)

\(^{65}\) For a thorough discussion of all pertinent aspects of the JOA and drafting considerations related to JOAs, see American Law of Mining, Chapter 141, “Standard Operating Agreement Provisions.”

\(^{66}\) In this regard, the transfer restriction is motivated by the same concerns faced by lessors and lessees — the parties want to insure that they are in privity with parties who have the wherewithal to accomplish the goals of the agreement — the production of minerals.

\(^{67}\) See id. at § 140.03[2]. The free transferability of interests is considered a corporate characteristic, thus, preventing transfers was a way to avoid creating a corporate or partnership arrangement by signing a JOA.

\(^{68}\) See id. at § 141.09[1], note 4 and sources cited therein.
But to the extent the transfer restriction in a JOA is a restriction on the transferability of the real property subject to the JOA, this transfer restriction is subject to many of the rules applicable real property transfer restrictions discussed in the preceding section on leases.\(^6^{9}\) Additionally, the relationship of parties to a JOA is generally considered to be that of co-tenancy. As such, the restriction on transfer can be viewed as an unenforceable restriction if used to prevent the outright sale or other conveyance of a real property interest subject to the JOA.\(^7^{0}\) However, out of policy considerations, many courts in oil and gas producing jurisdictions have enforced such transfer restrictions so long as the restriction is “indirect and ancillary to a legitimate commercial purpose.”\(^7^{1}\)

[b] — Drafting Strategies and Considerations.

In order to avoid running afoul of common law doctrines regarding restrictions on the sale or transfer of real property interests, JOAs will commonly define such transfers as an event of default under the agreement. Thus, the JOA does not restrict transfer of the interest, but requires that the party to the agreement choose between breaching the contract or transferring its interest. In practical effect, this strategy can accomplish the goal of a transfer restriction. Faced with possibly breaching the agreement, a participant wishing to transfer its interest would likely seek the consent of the other parties to the JOA prior to the transfer. The default provision can then be waived or amended to accommodate the transfer if the other parties so desire.

JOAs frequently contain exceptions to the transfer restriction and consent requirement for transfers to affiliated entities. Where the transfer is to an affiliate who, for all intents and purposes is the same entity, the purpose behind the consent requirement is not implicated. Parties should also consider

\(^6^{9}\) See § III supra.

\(^7^{0}\) See American Law of Mining § 141.09[2] at note 9 and sources cited therein.

\(^7^{1}\) See Gary B. Conine and Bruce M. Kramer, Property Provisions of the Joint Operating Agreement, Paper No. 3, Rocky Mountain Mineral Law Institute: Oil and Gas Agreements: Joint Operations (May 27-28, 2008) at notes 206 and 207 and accompanying text.
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excepting other types of transfers and encumbrances. In many instances, a party to a JOA may need to grant some encumbrance to a lender in order to obtain necessary financing related to the JOA venture. An unreasonable restriction on encumbering these interests would, therefore, do damage to all participants of the joint venture. When making such exceptions, however, parties should be cautious to limit the power of encumbering, and require consent for encumbrances outside the narrow exceptions. Particularly, this would include the limitation that a participant can only encumber its own interest, that the secured creditor’s interest is subject to the other terms of the JOA, and most importantly, that the secured creditor’s interest upon foreclosure or enforcement of the security agreement are subordinate to, or at least equal to the interest of the other joint venturers.

As the foregoing discussion illustrates, numerous issues are involved in determining the proper scope of a consent provision in a JOA. While largely enforceable, such consent requirements must be tailored to the specific situation for which the JOA was drafted. Given the difficulty transfers of interests under a JOA may create, some JOAs avoid the consent transfer restriction subject to consent formula in favor of simply granting the other participants in a JOA a right of first refusal to purchase a party’s interest in the event it seeks to transfer that interest.72

[c] — Effect of Transfer of Interest Subject to Joint Operating Agreement.

The effect of a party’s transfer of its interest under a JOA was recently discussed in the Texas case of Seagull Energy v. Eland Energy, Inc.73 In Seagull Energy, a party to a JOA assigned its interest to another party,

72 For a discussion of the application of the right of first refusal in the context of JOAs, see id. at § 141.09[3]. Also, as discussed supra, the consent requirement issue may be avoided by simply defining a prohibited transfer as an event of default.

who thereafter failed to fulfill certain obligations of the assignor under the JOA. Applying contract law principles, the Texas Supreme Court held that because the obligations of a contract assignor generally survive assignment, and because the JOA was silent on this issue, the assignor remained liable to the other participants for fulfillment of these obligations, unless specifically released.\textsuperscript{74}

While the issue of consent to assignment was not addressed in \textit{Seagull Energy}, the case suggests that because the assignor remains liable for its obligations after an assignment, the other participants have less reason to refuse consent to such assignment. A general rule related to consent to assignment is that consent cannot reasonably be withheld where the assignor remains liable for the obligations of its assignee.\textsuperscript{75} Additionally, the \textit{Seagull Energy} decision is illustrative of the treatment of JOAs almost exclusively as contracts, despite the fact that they control interests in leases, which are governed in large part by landlord-tenant law, as well as the law of contracts. \textit{Seagull Energy} could, therefore, have the collateral effect of expanding the power of JOA participants to impose transfer restrictions and stricter consent requirements, as such restrictions are much easier to enforce under contract law, as opposed to property law.

\textbf{[d] — Area of Mutual Interest Provision.}

Area of Mutual Interest (AMI) agreements and provisions have been described as agreements wherein parties “agree to share leases acquired by any of them in the future” in a particular geographic area and have as their purpose “to insure every party to the operating agreement an opportunity to acquire a proportionate interest in any acquisitions within a specified area encompassing the contract area, regardless of the state of development of the newly acquired acreage.”\textsuperscript{76} As a practical matter, this means that parties bound to the AMI must offer the other parties an ability to share in the newly

\textsuperscript{74} Id. at 347.

\textsuperscript{75} See § V infra.

acquired property, either by granting an option or other right to purchase a portion of the newly acquired interest, or by subjecting it to the terms of an existing agreement. The AMI agreement may be a separate agreement, but is often simply a provision of a larger agreement, such as a JOA, farmout agreement, or seismic contract. The AMI may cover only a small area around the area covered by a JOA, or it may cover hundreds of square miles. AMIs have variously been held to be covenants running with the land, binding on the successors and assigns of the owners of the underlying leases, and as personal covenants between the parties, not binding on subsequent holders of the underlying leases. This distinction appears to be based on whether the AMI agreement or provision contains language indicating that it is binding on successors and assigns. Because AMI provisions seek to insure that all parties have an interest in a particular area of property, they often impose consent requirements on the transfer of a party’s interest that is subject to the AMI. More often, however, the AMI will simply grant a right of first refusal to purchase the interests of a party seeking to transfer all or a portion of its interests subject to the AMI. As discussed in the section on JOAs above, the treatment of these consent requirements will largely hinge on whether a court considers them a restraint on the transferability of real property subject to strict construction in favor of free transferability, or as freely negotiated contract terms, enforceable as negotiated without particular bias toward transferability.


Another provision frequently found in oil and gas agreements such as JOAs is the maintenance of uniform interest (MUI) provision. A typical MUI provision requires:

No party shall sell, encumber, transfer, or make other disposition of its interest in the Oil and Gas Leases and Oil and Gas Interests embraced within the contract area or in wells, equipment, and production unless such disposition covers either:

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77 See Westland Dev. Corp., 637 S.W.2d 903.
1. the entire interest of the party in the Oil and Gas Leases, Oil and Gas Interests, wells, equipment and production; or
2. an equal, undivided percent in the party’s present interest in all Oil and Gas Leases, Oil and Gas Interests, wells, equipment and production in the contract area.\(^79\)

The right to transfer interests covered by the clause above could, of course, be conditioned upon obtaining the consent of the other parties. While the MUI provision has been described as “arguably the most ignored provision of the operating agreement” and one that is “frequently breached,” the trend in drafting MUI provisions is toward making them stronger and more enforceable.\(^80\) Importantly, the language in the 1989 form is focused on the maintenance of uniform \textit{interests} in the area — not just the maintenance of uniform property interests. Thus, it clearly prohibits (or conditions upon consent of the other parties) not only the transfer of leases, but also the grant of overriding royalty interests or net profits interests because it requires the maintenance of uniform interests in “production.”\(^81\) As noted above, these interests in production are not interests in land itself, but the MUI has a broader purpose of maintaining uniformity not only of possessory interests in land, but also a uniform share in the stake of the venture itself.\(^82\) As a result, consent will be frequently required for a variety of activities where an operating agreement contains an MUI provision.

\textbf{[2] — Seismic Contracts.}

The oil and gas industry relies heavily on the availability of seismic geophysical survey data to evaluate potential production.\(^83\) Agreements

\(^{79}\) This example clause was taken from Section VIII.D of the 1989 Model AAPL Form 610 – “Model Operating Agreement” (American Association of Petroleum Landmen, 1989).

\(^{80}\) Cross, \textit{supra} note 63 at 231.

\(^{81}\) \textit{Id.}

\(^{82}\) \textit{See id.} (noting that the primary purpose of the MUI is to insure that all parties are similarly situated and motivated as well as ensuring smooth operation of the covered area).

\(^{83}\) For a thorough discussion of the myriad legal issues related to seismic data, see Warren J. Ludlow, \textit{Cutting Your Prospects Down to Seismic: The Legal Aspects of Contracting}
regarding the license and use of seismic data are a hotbed of restrictions on transfer and related consent requirements because the value of seismic data is directly related to its confidentiality; seismic data is only valuable to the extent that others do not have access to it. One way of granting access to the data is, of course, the transfer of the data to a third party. Similarly, where companies undergo mergers and related changes, one party to the merger may bring with it seismic data obtained under a license of similar arrangement from a seismic contractor. When this occurs, the seismic contractor sees the value of its license decrease, as the data become more widely available. Seismic contracts, therefore, are replete with provisions designed to prevent transfers, assignments, mergers, and any other activity that may result in increased access to seismic data.

In the typical seismic license agreement, a company (whether a seismic contractor or exploration company) has produced a proprietary seismic survey, and intends to license the use of the survey to another exploration company or contractor. The agreement governing this license will almost certainly contain a provision restricting the transfer of the seismic data. Without a restriction on transfer, the license is considered freely assignable, although a licensor under a contract without a restriction on transfer may argue that the contract is still not assignable as a personal services contract or contract based on a confidential relationship. Given that the rule of free assignability applies to seismic licenses, licensors should be particularly vigilant to insure that their consent is required to an assignment or other transfer of the data, or that such transfer be prohibited altogether.

Issues related to the transfer of seismic data often arise where the property subject to the seismic survey is sold. In older seismic contracts, the licensed

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for Seismic Services and Data, Paper No. 4, Rocky Mt. Min. L. Foundation, Oil and Gas Agreements: The Exploration Phase (May 20-21, 2004).

84 This discussion primarily addresses seismic contracts granting a license to use data. There are numerous other ways of obtaining seismic data — producers may perform their own proprietary geophysical surveys, purchase seismic data outright from others, or participate in a “group shoot” with other companies to acquire jointly owned seismic data. Because these methods of acquiring seismic data all involve the acquisition of an ownership interest in the data, the ability to control access to the data is not as strongly implicated.

85 Ludlow, supra note 83 at notes 117-119 and accompanying text.
data often transferred with the property, but most modern seismic contracts prohibit the assignment of the seismic data when the property is transferred. The benefit of such a provision to the licensor is readily apparent, but for the licensee, such a restriction diminishes the marketability of its property. The licensee, therefore, may attempt to negotiate provisions in the contract allowing it to show the seismic data to potential purchasers or lessees. If the licensor grants such an exception, it should make sure that the ability of the licensee to transfer or show the data to a new landowner is contingent on the licensor’s consent. This consent could be further conditioned on the signing of a confidentiality agreement between the licensor and any third parties viewing the data, or the execution of a new license by the transferee of the property.

Corporate mergers often create issues related to seismic data licenses. Where a licensee merges with or acquires another company, the number of individuals privy to the seismic data greatly increases. Because the corporation law of many states does not classify the transfer of contract rights pursuant to a merger as an assignment, a change in control provision requiring licensor consent to merger is essential to the licensor. Where seismic contracts do not contain a carefully drafted provision requiring lessor consent in the event of a merger or related “change in control” of the licensee, many licensees have circumvented traditional transfer restrictions on seismic data by merging with a third party, or by forming a subsidiary, transferring the data/license to that new subsidiary, and then merging the subsidiary with a third party.\(^86\) Courts have generally held that mergers and acquisitions do not trigger the consent requirements of seismic contracts that only prevent assignment to third parties.\(^87\)

\(^{86}\) Of course, such a strategy entails some risk of litigation. See Ludlow, \textit{supra} note 83 at note 124 (discussing unsuccessful litigation against Tenneco Oil Company which engaged in a reorganization similar to that discussed above). For more information on the use of this “Texas Two Step” to avoid the consent requirement in a variety of contexts, see section VI, \textit{infra}.\(^{87}\) See, \textit{e.g.} MD Mark, Inc. v. Nuevo Energy Co., 988 S.W.2d 463 (Tex. App.-Houston 1999); TXO Prod. v. M.D. Mark, 999 S.W.2d 137 (Tex. App.-Houston 1999).

Most producers of coal, oil or gas do not perform each and every operation necessary to produce and sell their product themselves. Instead, they rely on a host of services provided by third parties: trucking companies, railroads and barges haul coal to the marketplace, contractors drill wells for oil and gas, pipelines and treatment facilities make petroleum marketable, and along the way a host of other day-to-day services are performed. The relationships with these third party service-providers are governed by service agreements.

A special feature of service agreements is that the contractor providing the service was often chosen for its particular skill or expertise. Thus, the service provider is not considered fungible, and its identity as an expert at performing its task is often a basic element of the consideration for the contract. As a result of this relationship, a unique body of law governs service contracts. The most salient aspect of this body of law for the present discussion is that rights and duties under certain personal service contracts cannot be transferred, even in the absence of a restriction on transfer or similar consent requirement, due to the unique nature of the services to be provided, or the selection of the centrality of the person selected to perform the task forming the subject-matter of the agreement. Of course, it is better to carefully draft anti-transfer provisions or at least condition the transfer of rights and duties under the contract on the consent of the party receiving the benefit of the service provided. The general rules applicable to consents for non-real property agreements apply equally to service contracts, and they can be analyzed as any other agreement, with the special limitation that service contracts may not always be considered freely transferable.


Contracts for the sale of minerals such as coal, oil or natural gas are contracts for the sale of “goods” and therefore, are governed by Article 2 of the Uniform Commercial Code (UCC). Article 2 expressly provides

that contract rights are to be freely assignable, unless one of the statute’s exceptions applies. The exception most relevant to the present discussion is that contract rights are freely assignable unless the parties to the contract agree that they are not.\textsuperscript{90} Thus, UCC Article 2 expressly contemplates that the parties to a sales contract may condition the assignment of contract rights upon the consent of one of the contracting parties.\textsuperscript{91} In keeping with the UCC’s general theme of enforcing freely negotiated contract terms, consents are left largely up to the parties, subject only to the limitation that the parties act with good faith in deciding to grant or withhold consent.\textsuperscript{92} The “good faith” issue will essentially be analyzed along the lines of “reasonableness” of granting and withholding consent in the next section.

§ 3.05. When Can Consent Be Withheld?

Once it is determined that a party’s consent is required, the next major question becomes whether and for what reasons consent may be withheld. In many instances, the relevant document will be silent as to when consent may be withheld. Such an “unqualified restriction” is common in a short anti-assignment clause which states that a lease shall not be assigned without consent. In the face of such language, jurisdictions differ as to whether the party whose consent is required must be reasonable in deciding to grant or withhold consent.\textsuperscript{93} Other clauses requiring consent will specifically state consent may not be “unreasonably withheld.” This of course raises the age old legal issue of what constitutes “reasonableness” in a given situation. Finally, the document may specify that the consent may be withheld “for any reason,” “unreasonably,” “arbitrarily,” or in a party’s “sole discretion.”

\textsuperscript{90} See U.C.C.§ 2-210(2)(2000).
\textsuperscript{91} See Sally Beauty Co. v. Nexxus Prod. Co., 801 F.2d 1001, 1006 (7th Cir. 1986)(applying Texas version of UCC).
\textsuperscript{92} See U.C.C. § 1-304 (2000).
\textsuperscript{93} For a 50-state break down of whether a jurisdiction has adopted an implied reasonableness requirement regarding consent to assignment and sublease, see Mark S. Hennigh, Negotiating Assignment and Sublease Provisions, Appendix 1, ALI-ABA Course of Study: Commercial Real Estate Leases: Selected Issues in Drafting and Negotiating in Current Markets (May 29-30, 2008).
The effect of these various qualifications on the right to grant or withhold consent is discussed below, first in the context of leases, and then in the context of other agreements.


[a] — Unqualified Transfer Restriction.

In the past, most jurisdictions held that if the consent requirement was not qualified by language requiring reasonableness, then the consenting party could withhold consent for any reason and without explanation—even if the decision to withhold consent was arbitrary.\(^{94}\) There has been a trend in some jurisdictions, however, toward imposing a reasonableness requirement on the consenting party’s decision to withhold consent, even if such requirement is not found in the express terms of the lease.\(^{95}\) This trend has only increased since the adoption of a reasonableness requirement by the drafters of the Restatement (Second) of Property in 1977. According to the Restatement, a requirement that the landlord’s consent be obtained prior to an assignment of the lessee’s interest is valid, but such consent “cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent.”\(^{96}\) A nearly identical provision in the Restatement applies to transfers of the lessor’s interest.\(^{97}\)

The Restatement, therefore, requires that the lessor’s decision to withhold consent be a reasonable one, regardless of whether the lease itself speaks to the issue. As the drafters of the Restatement stated, while the landlord has a considerable interest in controlling who its tenant is, “this justification does not go to the point of allowing the landlord arbitrarily and without reason to refuse to allow the tenant to transfer an interest in the leased property.”\(^{98}\) Therefore, a lessor has the right to arbitrarily or without explanation withhold consent to transfer only if a provision in the lease specifically grants this right. As a practical matter, this means that the lessor must specifically

\(^{94}\) See Meng, Limitations § 12.03[1].
\(^{95}\) Id.
\(^{96}\) Restatement (Second) of Property: Landlord and Tenant § 15.2(2).
\(^{97}\) Id. at § 15.2(1).
\(^{98}\) Id. at comment a.
draft language to this effect into the lease. A specific provision to the effect that the lessor’s consent may be held “for any reason,” “may be arbitrarily withheld,” or “may be granted or withheld in the lessor’s sole discretion” will insure that the lessor can withhold consent for a reason of his choosing, regardless of reasonableness.

The Restatement also requires that the provision allowing the arbitrary withholding of consent be “freely negotiated.” Such a provision is not freely negotiated “where the party which must submit to the withholding of consent has no significant bargaining power in relation to the terms of the lease.” In the mineral lease context, it can often be assumed that the parties are of roughly equal bargaining power. However, in some cases, it is questionable whether mineral lessees would have sufficient bargaining power to remove such provisions from the leases drafted by large, institutional lessors. If a lessee determines that the provision was not freely negotiated, this does not automatically void the provision. Instead, the provision will be enforceable to the extent the lessor’s decision to withhold consent is reasonable, but will be unenforceable where the lessor’s decision to withhold consent is unreasonable.

Since 1977, numerous state courts have adopted the reasonableness requirement of Restatement (Second) § 15.2, especially in the context of residential and commercial leases. In fact, while the Restatement drafters understood that they were adopting the position of only a small minority of states in 1977, the trend is strongly in favor of the Restatement view,

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99 Id. at comment i.
100 The opposite scenario could be true as well — it is conceivable that a court may find a lack of bargaining power on the part of a lessor who owns only a small property or is unsophisticated in mineral leasing matters and unrepresented by counsel if the lessee is a sophisticated mineral producer with a team of attorneys and landmen at its disposal. For this reason, drafters may consider some language in the agreement demonstrating the roughly equivalent bargaining power of the parties.
101 Id.
103 See Restatement (Second) of Property: Landlord and Tenant § 15.2, Reporter’s Note 1.
and it may now represent the majority position. 104 Given the strong trend toward requiring that consent be only “reasonably” withheld, drafters should not neglect this aspect of the lease. If the parties intend that consent may be unreasonably or arbitrarily withheld, this should be stated explicitly and specifically in the consent provision. For example, the provision could state that the lessor’s consent may be withheld “for any reason” or that such consent “may be arbitrarily withheld.”

[b] — Qualified Transfer Restriction.

In many cases, the restriction on assignment or other transfer is conditioned upon obtaining consent, and this consent cannot be unreasonably withheld. Whether consent is withheld “unreasonably” will ultimately depend on the facts of a given case, but courts have offered some guidance in the context of leases.


Many courts have used the “reasonable person” or similar standards when determining whether a lessor has acted reasonably in withholding consent. In these jurisdictions, a lessor can consider a wide variety of factors in determining whether to approve a proposed transfer, but these must be the factors a reasonable man would consider. 105 These factors include the potential insolvency or disreputable character of the lessee, but would not

104 There is some confusion as to whether the view expressed in the Restatement is the majority view. See Homa-Goff Interiors, Inc. v. Cowden, 350 So. 2d 1035 (Ala. App. 1977)(noting that other jurisdictions rejected “general rule” at the time that lessor may act arbitrarily in withholding consent); Fernandez v. Vazquez, 397 So. 2d 1171 (Fla. App. 1981)(describing reasonableness requirement as the majority position); Julian v. Christopher, 575 A.2d 735 (Md. 1990)(adopting Restatement position, but describing it as the minority rule). Regardless of how many courts have adopted it, the trend is clearly in favor of a reasonableness requirement for the withholding of consent. As such, it may be wise to assume such a rule is applicable in every jurisdiction, especially because it may be obviated by careful drafting.

105 See Chanslor-Western Oil & Development Co. v. Metropolitan Sanitary Dist., 266 N.E.2d 405 (Ill. App. 1970)(adopting reasonable man standard); see also Thurman v.
include considerations of personal taste, convenience, or sensibility.\textsuperscript{106} Stated another way, in determining whether to withhold consent, the lessor (and any court reviewing the lessor’s decision) should look only to those factors that relate to the lessor’s interest in preserving the value of his property.\textsuperscript{107} This requirement also necessarily implies that the lessor will provide \textit{some} reason for its decision to withhold consent, and preferably one that demonstrates its exercise of business judgment.\textsuperscript{108}

Other courts have described a similar analysis as answering the question of whether the lessor’s decision to withhold consent is “arbitrary.”\textsuperscript{109} In the Texas case of \textit{Mitchell’s Inc. v. Nelms}, the court examined a host of Texas cases, as well as those from other jurisdictions, in determining whether a landlord’s refusal to consent to a sublease was so arbitrary as to be unreasonable under the terms of the lease.\textsuperscript{110} The \textit{Nelm’s} court stated that a decision was “arbitrary” if it is “capricious, despotic, tyrannical, bound by no law, and [] performed without regard to principles.”\textsuperscript{111} The court also examined the definition of “unreasonable” and found that other courts found it “conveys the same idea as irrational, foolish, unwise, absurd, silly, preposterous, senseless and stupid,”\textsuperscript{112} but also pointed out that “although a decision is mistaken or wrong, it is not necessarily arbitrary.”\textsuperscript{113} Ultimately, whether the decision to withhold consent is arbitrary or unreasonable will be based on an examination of the entire record of the dispute, regardless

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Meridian Mutual Ins. Co., 345 S.W.2d 635, 639 (Ky. 1961)(determination is unreasonable where, under the evidence presented, there is no room for difference of opinion among reasonable minds).

\textsuperscript{106} Id.


\textsuperscript{108} Erban v. Monforton, 740 P.2d 677 (Mont. 1987).


\textsuperscript{110} Id.


\textsuperscript{112} Id. at 814 (citing S. Kan. State Lines Co. v. Pub. Serv. Comm’n, 11 P.2d 985 ((1932)) and Wis. Tel. Co. v. Pub. Serv. Comm’n, 287 N.W. 122, 131 (Wis. 1939)).

\textsuperscript{113} Id.
of whether the court characterizes its analysis as one of “reasonableness” or “arbitrariness.”

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**[c] — Specific Factors for Evaluating Whether Consent Is Arbitrarily or Unreasonably Withheld.**

There are numerous cases examining whether a lessor’s decision to withhold consent is reasonable, and they examine a multitude of factors. The following is a discussion of some of the factors that may be most important in the mineral lease context.

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**[i] — Ability of Tenant to Perform and Proposed Solutions.**

This factor is undoubtedly the most important one in determining whether a lessor’s decision to withhold consent to a transfer of the lessee’s interest was reasonable. No reasonable lessor would want his lessee to transfer its interest to one who cannot perform its obligations under the lease. In a typical mineral lease, the lessee’s primary obligations are to achieve sufficient production, or in the alternative, to pay delay or minimum annual rentals, with production being preferable. A reasonable lessor, therefore, would only consent to an assignment to a lessee who has the resources to drill or mine at a reasonable rate, the financial ability to maintain its drilling or mining operation (or pay delay rentals), and who has a history of legal compliance sufficient to allow it to obtain necessary permits. As such, it is reasonable to

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114 Whether a court characterizes its analysis as one of “reasonableness” or “arbitrariness” will also likely hinge on specific lease language. A consent provision may state that the consent will not be “unreasonably withheld” or “arbitrarily withheld.” While the discussion above indicates that the analysis is roughly the same in either regard, counsel arguing before a court should be prepared to frame the analysis in terms of the language actually used in the lease.

115 For a compilation of these cases, see Annotation, “Construction and Effect of Provision in Lease That Consent to Subletting and Assignment Will Not Be Arbitrarily or Unreasonably Withheld,” 54 A.L.R.3d 679 (1973, 2008 supp.).
refuse consent to an assignment or sublease to one who has a poor payment history, is financially insolvent, or has a history of legal difficulties.\footnote{See, e.g., Riggs v. Murdock, 458 P.2d 115 (Ariz. App. 1969).}

The prospective transferee’s ability to perform is not considered a reasonable basis for withholding consent if the existing lessee offers to guarantee the obligations of its proposed transferee.\footnote{See Caplan v. Latter & Blum, 468 So. 2d 1188 (La. 1985).} In such an event, the objective criteria that a lessor seeks in a lessee — primarily, the ability to produce and pay rentals — are provided for, albeit indirectly, by the original lessee.

Many modern leases are incorporating the lessee’s ability to perform into the consent provision. This removes the subjective, after-the-fact determination of reasonableness from the consent decision in most cases. These leases often refer to a “reasonable and prudent mining company” or some similar description as a specifically permitted transferee. Such a provision would then define the permitted transferee according to criteria negotiated between the parties. The provision might read:

Lessee shall not assign, sublease, or otherwise transfer any interest granted herein without the written consent of Lessor, and such consent may not be unreasonably withheld. Lessor shall not withhold consent to any assignment to a “Reasonable and Prudent Mining Company.” For purposes of this section, a “Reasonable and Prudent Mining Company” is defined as any mining company: 1) with a net worth of over $5 million; 2) who has achieved within the last calendar year from the effective date of this lease a minimum production of 2 million tons of coal; 3) has not been declared or filed a voluntary petition for bankruptcy or similar action for relief from creditors; 4) is not “permit-blocked” or otherwise barred from receiving any necessary permits or approvals from any governmental agency.

While the specific criteria of an approved transferee will vary with the facts of each transaction, this type of provision provides substantial benefits...
by providing an objective set of criteria to evaluate the transferee. Where the transferee meets the requirements — ostensibly the requirements that made the original lessee suitable to the lessor in the first place — the lessor must consent. In this way, the provision protects the lessee’s ability to alienate its interest in the leasehold, and the lessor’s interest in having a lessee who can achieve sufficient production, while removing the need for a subjective judicial determination after-the-fact as to the reasonableness of granting or withholding consent.

[ii] — Right to Information.

Even the relatively objective determination called for above requires that the lessor have sufficient information with which to evaluate the prospective transferee of the lessee’s interest. It appears, therefore, that the lessor is always acting reasonably when it refuses to consent to a transfer based on the lessee’s failure to provide sufficient information about the prospective transferee. Without such information, due diligence and the exercise of reasonable business judgment are impossible. It is certainly not just to place the burden of obtaining this information on the lessor, who is not the party seeking to accomplish the transfer.

The extent of information that must be provided is a question open to debate. At a minimum, the prospective transferee must reveal its proposed use of the property.118 Other information necessary to determine a lessee’s ability to perform should also be provided. This would likely include financial information, permit compliance history, major outstanding obligations, and the other items commonly reviewed as part of a lessor’s due diligence prior to entering into a lease agreement.119

118 See Kroger Co. v. Rossford Indus. Corp., 261 N.E.2d 355 (Ohio Com. Pl. 1969). Of course, given the typical location and suitability for other uses of mineral property, this is unlikely to be a major issue.
119 See Fairchild Realty Co. v. Spiegel, Inc., 98 S.E.2d 871 (N.C. 1957) (where lessor was not “furnished information sufficient to require its assent” refusal to consent to assignment was reasonable).
[iii] — Prospective Transferee as Competitor.

There is apparently a split of authority as to whether a prospective transferee’s status as a competitor of the lessor or the lessor’s other lessees is a reasonable basis for refusing consent. In *Edelman v. F.W. Woolworth*, the court held that if the lessor wished to prevent a sublease to its competitor, it “should have so stated in the lease.”  

Without such a provision in the lease, refusal to consent to a sublease based on the fact that the new sublessee would be a competitor of the lessor was “arbitrary and unwarranted.”  

This decision appears to have been influenced largely by background principles on restraints on alienation — primarily that they are to be strictly construed against the lessor. Other cases appear to reach the conclusion that a lessor has a business interest in restricting the number and type of its lessees, from a business perspective, and therefore, the lessor is only exercising reasonable business judgment in refusing to consent to a transfer to someone who would compete with an existing lessee in the area.

The reasonableness of a refusal to grant consent based upon the status of a prospective transferee as a competitor to existing lessees of the lessor, or of the lessor itself, will likely turn on whether the court views the lessor’s decision as one regarding the lessor’s personal attitude toward the prospective transferee, or a business decision. The lessor’s personal taste and biases against a particular sublessee or assignee are not reasonable bases for the decision to refuse consent. On the other hand, if considerations of sound business judgment weigh in favor of refusing consent, then consent can be withheld.

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121 *Id.* at 2.
123 See *Am. Book Co. v. Yeshiva Univ. Dev. Found.*, Inc., 297 N.Y.S.2d 156 (N.Y. Sup. 1969)(reasonableness of granting or refusing consent must not vary based on identity of landlord, and so long as reasonable, objective bases for granting consent were met, the identity of the lessor and lessee could not be considered, even where the lessee was clearly objectionable to the lessor).
In many cases, a mineral lessor will not particularly care whether land is leased to competing lessees. If anything, such competition increases the lessor's leverage when negotiating lease terms such as royalties. But if the lessor is itself engaged in mineral production in an area, it may have strong business reasons for objecting to an assignment to a competitor. In other words, it would be bad business to accept an assignment from one’s lessee to a competitor, where the lessor is also mining or drilling in the area.

Because the law is uncertain on this point, however, specificity in drafting is once again key. From the lessor's perspective, the best way to avoid the scenario discussed above is to simply negotiate for a provision allowing consent to be withheld for any reason. If this is not possible, the lessor may prefer to specifically list entities who cannot receive an assignment or sublease. When drafting such a provision, however, counsel should keep in mind the various creative ways natural resources companies structure themselves. A lease clause prohibiting assignment of sublease to “Mining Company X” would arguably not prevent an assignment to “Mining Company Y” even though “Mining Company Y” is a wholly-owned subsidiary of “Mining Company X.” Thus, language restricting assignment or sublease to not only particular competitors, but also their various “affiliates, subsidiaries and parents” or related language, should be employed.


It should also be noted that many states have codified a commercial reasonableness standard with regard to withholding consent to assignment of leases.\textsuperscript{124} For example, some statutes provide a list of “reasonable” justifications for the refusal to grant consent.\textsuperscript{125} While these statutes often apply exclusively to residential leases, they may help provide a solid basis for arguing that a justification for refusing consent to an assignment or sublease

\textsuperscript{124} See Alaska Stat. § 34.03.060; Del. Code Ann. tit. 25 § 5512(b).
\textsuperscript{125} See Alaska Stat. § 34.03.060(d)(listing seven reasonable grounds for refusal of consent in context of residential leases).
of a mineral lease is a reasonable one. Practitioners should review the statutes of their jurisdiction when drafting consent provisions or otherwise dealing with the issue of whether consent has been lawfully withheld.


Agreements other than leases are governed by the law of contracts, not real property. Contract law generally holds that contract rights are freely assignable and that parties also have the right to contract away the right to assign interests in the agreement. Thus, consent requirements and other restrictions on transfer are generally enforceable as well. It has been noted, however, that while courts often point out both the freedom of assignment and the enforceability of transfer restrictions and consent requirements, the freedom of assignability often wins out when the two principles are thrown into conflict. In many instances, courts will impose a duty of good faith and fair dealing, or some variation of the “reasonableness” requirement discussed above when analyzing whether a party has the right to refuse consent to an assignment. But where the contract itself demonstrates that the parties expressly considered and addressed the issue of whether consent could be unreasonably withheld, it appears that courts will generally uphold a refusal to consent, even where consent is unreasonably withheld. Nonetheless, parties seeking to refuse consent should be prepared to demonstrate some reason for their decision. The factors set forth in the discussion on leases above should provide some guidance of reasonable bases for refusing consent.


Statutory provisions may also hinder a party’s right to withhold consent, or render transfer restrictions unenforceable altogether. For example,

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126 For a compilation of cases addressing the enforceability of anti-assignment provisions, see “Annotation, Validity of Anti-Assignment Clauses in Contract,” 37 A.L.R.2d 1251.

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U.C.C. § 9-406(d) renders ineffective any requirement that the transfer of a promissory note be conditioned on the account debtor’s consent.128 Some states prohibit restrictions on the assignment of retail installment sales contracts, an issue that may arise if a party attempted to restrict the ability to assignment or transfer equipment purchased on a retail installment sales basis.129 While there are numerous other examples, such restrictions are normally a matter of state law, and counsel are advised to consult the statutes of their jurisdiction.


Louisiana’s civil law recognizes a unique doctrine, known as “abuse of rights,” that may provide an equitable argument against the withholding of consent. Discussed only in the recorded decisions of Louisiana and Puerto Rico,130 the “abuse of rights” doctrine is an equitable remedy applied to render unenforceable otherwise judicially protected rights, where they are being abused to cause harm to another.131 Often invoked by litigants, but rarely accepted by the Louisiana courts,132 the doctrine of abuse of rights will be applied to override a refusal to grant a contractually required consent only where: (1) the predominant motive for refusing consent was to cause harm; (2) there was no legitimate motive for refusing; (3) the refusal was against moral rules, good faith, or elementary fairness; or (4) the right to refuse is being exercised for a purpose other than for which it is granted.133

When the doctrine was invoked by plaintiffs in an action seeking damages

130 See Boshette v. Buck, 916 F. Supp. 91, 98 (D. Puerto Rico 1996) (“Puerto Rico’s civil law recognizes the doctrine of ‘abuso del derecho’ (abuse of law or right).”).
132 Id. at 1154 (noting that between 1977 and 1985, the Supreme Court of Louisiana and the Louisiana courts of appeal applied the doctrine only once).
based on the wrongful withholding of consent to a sublease, the appellate
court noted the rule’s limited applicability, and found that where the lessor
had a predominately economic motive for withholding consent, the abuse
of rights doctrine did not mandate that consent be granted. While the abuse
of rights doctrine is rarely applied, it does provide last-ditch argument for
mineral lessees in Louisiana seeking to breach a consent provision or demand
that consent be granted.

[6] — Rights and Remedies when Consent Unreasonably
Withheld.
Where a lessor withholds consent in violation of the terms of a lease,
contract, or legally implied obligation of reasonableness, the lessee must
make an initial determination of whether to file an action at the time consent
is refused, or to make the transfer despite the lack of consent. The latter
approach entails significant risk. A court may simply disagree with the
lessee/assignor’s legal theory and find either that the agreement did require
consent, or that consent was not unreasonably withheld. If this were the
case, the lessee could be subject to an action for breach of the agreement.
Additionally, if the lessee fails to even request consent prior to the transfer,
a court is likely to find that the lease was breached, even if the lessor was
ultimately expected to unreasonably withhold consent.\textsuperscript{134} The advantage to
proceeding without litigation in the face of withheld consent is that a lessor
may simply waive the breach of the consent requirement, saving the assignor
the time and expense of litigation. Clearly, this decision is based on factors
that can only be known by the parties to a particular transaction.

In many cases, the prospective transferor will not risk a breach of the
consent requirement, and will file suit if consent is refused unlawfully.
This action could take many forms. The prospective transferee may seek a
declaration of rights to the effect that the proposed transfer is valid, seek the
remedy of specific performance and court-ordered consent, raise a claim of

1984).
tortious interference with contractual obligations, or simply sue for damages based on a breach of the agreement.\textsuperscript{135}

\textbf{§ 3.06. Avoiding the Consent Requirement.}

Frequently, consent either cannot be obtained, or can only be obtained at a price that is determined to be too costly. In such cases, parties to agreements containing a consent requirement will want to examine means of avoiding it. The following is a discussion of when the consent requirement is abrogated by some other background principle of law, and other means of avoiding the consent requirement.

\textbf{[1] — Waiver and Estoppel.}

In many cases, a lessor or other contracting party has waived the right to refuse consent, or is estopped from doing so. In the lease context, the lessor may waive the consent requirement by accepting rents from the new lessee with knowledge of the assignment.\textsuperscript{136} The Restatement takes a broad view of waiver, and states that any time a lessor is aware of a breach of the consent requirement, but fails to promptly enforce its right to grant or deny consent, then the right to consent is waived.\textsuperscript{137} Other jurisdictions, however, may find waiver only where the lessor’s conduct demonstrates an intent to waive the consent requirement.\textsuperscript{138} Whether a lessor has waived its right to require consent to an assignment or other transfer is, therefore, ultimately a factual matter. Lessees and their transferees are advised not to rely on waiver where consent is required, but instead to seek such consent in writing as set forth in the terms of the lease. Waiver does provide an argument, however, when a consent provision has already been violated.

A simple way to avoid waiving the consent requirement and also receive payments from a transferee is to expressly provide for scenarios normally

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{135} See Meng at § 12.06.
  \item \textsuperscript{136} See Meng at § 12.05[1] (and cases cited therein).
  \item \textsuperscript{137} See Restatement (Second) of Property: Landlord and Tenant § 15.2, comment f and illustration 5.
  \item \textsuperscript{138} See 28 Am. Jur. 2d Estoppel and Waiver § 206.
\end{itemize}
\end{footnotesize}
constituting waiver in the agreement itself. For example, a lease may provide
that the lessor’s acceptance of rentals under the lease with knowledge of a
breach of the lease by the tenant shall not constitute waiver of the breach.
Such a provision is likely to be enforceable and will prevent waiver where
an assignee pays rent that is accepted by the lessor.139 Where one holds an
existing agreement it did not draft, and is faced with an assignment of the
other parties interest in the agreement in breach of a consent requirement,
it may be possible to accept rents or payments without waiving this breach,
provided some indication of non-waiver is provided on the receipt. Courts,
however, have not been consistent in holding that this manner of accepting
payment prevents waiver.140

The related doctrine of estoppel may also be invoked to prevent a lessor
or other contracting party from refusing consent to an assignment or transfer
where the lessor has notice of the assignment and does nothing to indicate
disapproval of the transfer. Thus, where a lessee assigned a lease in violation
of a transfer restriction, but the lessor had notice of the assignment and
accepted royalties from the production obtained by the assignee, the lessor
was estopped from declaring a forfeiture of the lease.141 Estoppel does not
apply, however, in every instance where the party whose consent is required
accepts payments after the prohibited transfer. For example, where an oil
and gas lease is drilled prior to the assignment of the lease, and the lessor
continues to accept payments while objecting to the assignment of the well,
the lessor’s mere acceptance of royalty payments does not estop him from
enforcing the consent requirement or transfer restriction in the lease.142


A bankruptcy trustee need not seek consent in order to assume an
executory contract or unexpired lease, despite the presence of a consent

139 See, e.g., In re Willow Cafeterias, 95 F.2d 306 (2d Cir. 1938)(and cases cited
therein).
140 See Annotation, “Landlord’s Acceptance of Rents Accruing Subsequent to Known
Breach of Condition as Waiver of Forfeiture,” 109 A.L.R. 1267, 1287 (compiling cases and
noting that they are not in accord).
142 See Stanolind Oil & Gas Co. v. Guertzgen, 100 F.2d 299 (9th Cir. 1938).
requirement or restraint on transfer. The bankruptcy trustee may also assign or transfer the lease or executory contract without regard to the transfer restriction or consent requirement so long as the assignee provides adequate assurance of performance.


Once a lessor has consented to one assignment of the lease, he has waived his right to refuse consent to any future assignments of that same lease. This is the rule of Dumpor’s Case, an oft-maligned English decision from the 16th century. Abolished in England by statute in 1859, the rule has held on in a majority of American jurisdictions. The lessor’s waiver of the consent requirement to future assignments occurs regardless of whether the lessor affirmatively consented to the first assignment, or merely waived the transfer restriction by conduct.

While numerous scholars and courts have ridiculed the reasoning underlying the original decision in Dumpor’s Case, few have actually overturned it. Generally, it is held that while the doctrine is unsound, it is too well-settled to overturn. Wyoming, however, broke from rigid adherence to Dumpor’s Case in Investors’ Guaranty Corp. v. Thompson. Thus, in Wyoming, one waiver of the consent requirement does not prevent the landlord from insisting that the assignee seek consent for any additional assignment. Other courts, while stopping short of overturning the rule, have refused to apply it on policy grounds.

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144 Id. at § 365(f)(2)(B).
146 Dumpor’s Case has been subject to a considerable amount of negative commentary. For a compilation of criticism of Dumpor’s Case, see Friedman on Leases § 7.3.6 at note 325.
147 See Friedman on Leases § 7.3.6 (2007).
148 Id.
149 Id.
Dumpor’s Case does not apply to subleases.\textsuperscript{152} Thus, where the lessor has consented to an earlier sublease, any restriction on subleasing applies to a subsequent sublease.

It can be argued that where a lessor’s written consent expressly incorporates the lease and makes its terms binding on the assignee, Dumpor’s Case does not apply.\textsuperscript{153} Lessors granting consent, therefore, should do so in writing, making their consent subject to the provisions of the earlier lease. However, the best way to abrogate the operation of the rule is to do so expressly in the lease. In order to avoid application of Dumpor’s Case, leases and other agreements should always state that consent to or waiver of the right to seek consent to one transfer does not apply to subsequent assignment, subleasing or other transfer. These provisions are enforceable,\textsuperscript{154} which is no surprise given the reluctance of modern courts to rigidly apply the rule of Dumpor’s Case.

\textbf{[4] — The Texas Two-Step.}

Discussed briefly in the section on seismic contracts, the “Texas Two-Step” is a means of avoiding the consent requirement in any type of agreement where the agreement does not contain a carefully drafted change in control provision, or contains a change in control provision or transfer restriction exempting transfers to affiliate entities. Where transfers to affiliates are exempted, the clever lessee or contracting party simply transfers 100 percent of its interest in a lease or contract to a subsidiary organization. The subsidiary — not bound by the anti-transfer language or consent requirement — can then transfer 100 percent of its stock to a third party. Thus, in two simple transactions, the lease or contract interest has been transferred to a third party, and the lessor or other contracting party’s consent was never required.

\textsuperscript{152} See Annotation, “Landlord’s Consent to One Assignment or Sublease as Obviating Necessity of Consent to Subsequent Assignment or Sublease,” 31 A.L.R. 153 (1924).
\textsuperscript{153} See American Law of Mining § 132.05[4][b] at note 38 (noting that this reasoning supports the result in Reconstruction Fin. Corp. v. Ky. River Coal Corp., supra).
\textsuperscript{154} See Friedman on Leases § 7.3.6 at note 329 and accompanying text.
One solution to the scheme above is to simply require consent for transfer to affiliates. Such a provision may be difficult to negotiate into an agreement, however. A well-drafted “change in control” provision should also be sufficient to avoid the use of the Texas Two-Step. By defining a change in control as the change in ownership of not only the immediate contracting party, but also any of its affiliates as of the date of the lease, the subsequent merger becomes either a transfer requiring consent, or an event of default under the agreement, depending on what usage is employed in the change in control provision.\footnote{For example, the agreement could state that “any change in ownership or control of lessee or any of its parent, affiliate or subsidiary organizations as represented to lessor on [date of agreement] is a change in control” and “change in control” could then be defined as an event of default, or the transfer to any entity not owned not sharing the same ownership structure could be defined as a prohibited transfer.}

§ 3.07. Failure to Obtain Consent: Effect of Breach and Remedies.


When consent provisions have been violated, the focus turns to the effect of this breach. Ordinarily, if the agreement does not explicitly state that the agreement is “void” due to a breach of the consent requirement, such breach is treated like any other breach of a covenant, giving rise to an action for damages, but not otherwise voiding or invalidating the agreement.\footnote{See Bel-Ray Co. v. Chemrite (Pty) Ltd., 183 F.3d 435 (3d Cir. 1999); Murray First Thrift and Loan Co. v. Stevenson, 534 P.2d 909 (Utah 1975); Palmer v. Liles, 677 S.W.2d 661 (Tex. Civ. App.-Houston 1984).} This rule has been applied to leases as well as other agreements.\footnote{Cities Serv. Oil Co. v. Taylor, 45 S.W.2d 1039 (Ky. 1932).} The parties are free, however, to provide in their agreement that a breach of the consent requirement will result in the termination of the agreement or the forfeiture of the lease. Such provisions will be enforced.\footnote{See, e.g., Morrisville Shopping Ctr. v. Sun Ray Drug Co. (Keystone Prop. v. Batey Moving and Storage Co.), 505 S.W.2d 472 ((Tenn. 1974)); see also Friedman on Leases § 7.3.4 at note 205 (compiling cases).} It is, therefore, quite common to find provisions in oil and gas or coal leases stating that the breach of the
non-assignment provision will result in a forfeiture of the lease. It should finally be noted that in some jurisdictions, a transfer of a lessee’s interest in breach of an anti-assignment provision will allow the lessor to declare forfeiture, even in the absence of explicit language to that effect.\textsuperscript{159}

In most cases, a transfer of a lease interest in violation of a covenant to seek the lessor’s consent prior to such transfer will not void that transfer, just as it does not void the underlying lease or agreement. To ensure that a transfer without consent is ineffective, a carefully drafted consent provision should provide that an assignment made without consent is void, that the assignee shall acquire no rights if the assignment is made without consent, or that the non-assigning party shall not recognize any assignment made without consent. Such explicit language indicating an intent to void any transfer made without consent will be enforced.\textsuperscript{160}


Depending on the language in a relevant lease or agreement, the violation of the consent provision will give rise to a claim for damages, or give a party the right to declare the agreement void. Where a lease is forfeited due to a breach of the transfer restriction and consent requirement, the actual method of forfeiture will be prescribed in state statutes, and will usually take the form of an action for ejectment or forcible detainer.\textsuperscript{161} While not as widely used, it has also been suggested that an injunction may be a means of preventing a transferee tenant from taking possession.\textsuperscript{162}

In the ordinary case where damages are the appropriate remedy, the proper measure of damages is an issue. One issue that often arises is the lessor’s duty to mitigate damages where a lessee transfers its interests in violation of a consent provision. Many jurisdictions require the non-breaching party to mitigate damages, for example, by re-leasing the premises to another

\textsuperscript{159} See Stanolind Oil & Gas Co. v. Guertzgen, 100 F.2d 299 (9th Cir. 1938).
\textsuperscript{160} See, e.g., Midland Oil Co. v. Turner, 179 F. 74 (8th Cir. 1910).
\textsuperscript{161} See, e.g., Ky. Rev. Stat. § 383.200 \textit{et seq.}; Gilbert v. Williams, 211 S.W.2d 829 (Ky. 1948).
\textsuperscript{162} See Meng, \textit{Limitations} at 12.06[1].
suitable lessee. Such a requirement could significantly reduce the amount of damages available to the non-breaching party, especially in a jurisdiction imposing a reasonableness requirement on the withholding of consent. As one commentator explains:

In those jurisdictions requiring a lessor to mitigate damages upon a breach by the lessee, a lessor unreasonably withholding consent to a proposed transfer by the lessee may not be able to recover damages or, at least, may have to give credit for the amount which would have been paid by the transferee had the lessor consented. Where a lessor is required to mitigate damages, this rule may have the practical effect of forcing the lessor to consent to a transfer to a suitable proposed transferee. 163

In jurisdictions where the lessor bears no duty to mitigate damages, a transfer in violation of a consent provision, and corresponding failure of the original lessee to pay rent entitles the lessor to the rent due under the lease for the remainder of the lease term. 164

The discussion above has focused primarily on leases and other agreements subject to some form of the common law. As discussed earlier, sales agreements are subject to the Uniform Commercial Code, and thus, available damages are set out in the relevant statutes. In many cases, it will be difficult to demonstrate actual damages so as to entitle a non-breaching party to a remedy under party to a remedy under these codes. If an assignment or transfer of interest under a sales agreement is made in violation of the consent provision, but the buyer continues to receive coal on time, meeting the specifications in the supply contract, at the agreed-to price, it is difficult to comprehend how the buyer has been damaged by the seller’s breach of the consent requirement. Similarly, if the buyer wrongfully assigns the right to receive coal in violation of a consent provision, yet the assignee pays promptly and accepts the amount specified in the contract, it is difficult to argue that the seller is damaged.

163 Id.
164 See Jordan v. Nickell, 253 S.W.2d 237 (Ky. 1952).
§ 3.08. Conclusion.

Consent provisions continue to play an important role in delineating the rights and obligations of parties to various agreements. As the natural resources industry continues to innovate and mature, the intricacy of such provisions is bound to grow as well. As the foregoing illustrates, numerous legal issues arise when boilerplate consent provisions are applied to more complicated transactions. While these provisions must be tailored to individual transactions, the foregoing can hopefully provide guidance in drafting, and a roadmap for dealing with less than ideal provisions in earlier leases.

§ 3.09. Appendix: General Treatment of Restraints on Transfer in Selected Mineral Producing States.

The following is a brief overview of the prevailing law of restraints on the transfer of a lessee’s interest in a variety of mineral-producing states.


At least one Alabama decision has suggested that the Alabama courts may not construe restraints on lease transfers as rigidly as the courts of other states. In Faucet v. Provident Mut. Life Ins. Co. of Philadelphia, the court noted the rule prevailing at the time was that transfer restrictions were “construed with utmost jealousy” and that “easy methods have always been countenanced for defeating them.” The court continued, “[w]e would not give such construction application under all conditions. There may be strong reasons for such restrictions in a particular case.” This suggests that the Alabama courts may be persuaded to grant more consideration to a lessor’s interest in controlling activities on his lease if a compelling justification was offered. No recorded Alabama decision has examined, however, which “strong reasons” for a transfer restriction are sufficient to support the abandonment of the general rule disfavoring restrictions on transfer.

166 Id.

Alaska has adopted the Restatement (Second) of Property, which emphasizes the free assignability of leases, but the state’s courts have also emphasized the validity of restrictions on the right to transfer a leasehold interest. As the state Supreme Court has stated, “[p]rohibitions against assignment are a valued right in that they enable the lessor to retain a desirable tenant in possession and give a degree of control over the type of individual or entity which may follow him.”167


Mining leases are freely assignable under California law,168 and restraints on the ability of lessees to transfer lease interests are “barely tolerated and must be strictly construed.”169


Colorado recognizes the distinction between assignments and subleases, so that a restriction on sublease would not bar assignment and vice versa.170


The courts of Illinois have long adopted the prevailing rule that restraints on transfer of leasehold interests are enforceable, but “not favored in the law” and strictly construed.171


The prevailing rule that restraints on transfer of a lessee’s interest are enforceable, but strictly construed was recently reaffirmed in the case of

Collins v. McKinney.\textsuperscript{172} There, the court reiterated that the purpose behind its enforcement of restrictions against lease transfer was the lessor’s interest in controlling who occupied the premises.\textsuperscript{173}

\textbf{[7]— Kansas.}

Under Kansas law, “a lease constitutes property and restrictions against assignments of a lease constitute prohibitions against the right of alienation and are strictly construed.”\textsuperscript{174} This rule has been applied to covenants against assignments and subleases.\textsuperscript{175}

\textbf{[8]— Kentucky.}

Kentucky courts strictly construe restraints on the free alienation of property, favoring the free transferability of a lease to the lessor’s right to control whom his tenant shall be. As stated in \textit{Cities Service Oil Co. v. Taylor}\textsuperscript{176} “[r]easonable restrictions on the alienation of property are enforced, but they are rigidly construed so as to confine their operation within the exact limits defined by the precise terms of the restraint.” Therefore, where a lease prevented the lessee of a gas station property from \textit{subletting} the property without the lessor’s consent, this clause did not prevent the lessee from \textit{assigning} the leasehold interest without the lessor’s consent.\textsuperscript{177} The rule of strict construction announced in \textit{Taylor} is supplemented by another general rule of lease construction — that when interpreting restrictive covenants in leases, “where two constructions are possible, the one which does not limit the use of property should be adopted.”\textsuperscript{178} Thus, even if transfer restriction language is held to be ambiguous, Kentucky courts would likely adopt the

\textsuperscript{172} Collins v. McKinney, 871 N.E.2d 363 (Ind. App. 2007).
\textsuperscript{173} Id. at 371 (citing Indianapolis Mfg. & Carpenter’s Union v. The Cleveland C.C. & I. Ry. Co., 451 Ind. 281, 288 (1873)).
\textsuperscript{175} See Borgen v. Winglesworth, 375 P.2d 601 (Kan. 1962).
\textsuperscript{176} Cities Serv. Oil Co. v. Taylor, 45 S.W.2d 1039, 1040-41 (Ky. 1932).
\textsuperscript{177} Taylor, 45 S.W.2d at 1041.
\textsuperscript{178} Keyes v. Carrick, 268 S.W.2d 397 (Ky. 1954).
narrowest reasonable construction of it in order to encourage free use of the property.


Louisiana’s civil code allows for the “sale” of “all things corporeal or incorporeal, susceptible of ownership.”\textsuperscript{179} Mineral leases, therefore, are freely transferable under the code.\textsuperscript{180} It can also be assumed, that because Louisiana law treats the mineral lease as a \textit{profit a prendre} to remove minerals, the nature of the lease as a real property interest is diminished, making restrictions on transfer enforceable without significant regard for the common law rule regarding restraints on alienation.


The enforceability of reasonable restrictions on transfer of property is recognized in New Mexico, but like other states, New Mexico’s courts have recognized that such restrictions are to be strictly construed.\textsuperscript{181} Thus, a prohibition on the mortgage, assignment or transfer of a leasehold was not violated where the lessee transferred its interest under the lease for only a portion of the remaining term, such transfer being deemed a sublease, not a prohibited assignment.\textsuperscript{182}


In North Dakota, restrictions on the transfer of lease interests are strictly construed against the lessor.\textsuperscript{183} Thus, restrictions against assignment will not bar subleasing.\textsuperscript{184}

\textsuperscript{179} L.S.A.-C.C. Art. 2448.
\textsuperscript{180} See Anse La Butte (La Danois) Oil & Mineral Co. v. Babb, 47 So. 754 (La. 1908); Tomlinson v. Thurmon, 181 So. 458 (La. 1938). For additional authority on issues related to lease transfer in Louisiana, see Leslie Moses, “The Distinction Between a Sublease and an Assignment of a Mineral Lease in Louisiana,” 18 Tex. L. Rev. 159 (1940); Leslie Moses, “Assignments and Subleases of Oil, Gas and Mineral Leases in Louisiana,” 23 Tulane L. Rev. 231 (1948).
\textsuperscript{181} See De Baca v. Fidel, 297 P.2d 322 (N.M. 1956).
\textsuperscript{182} Id.
\textsuperscript{184} Id.

In Ohio, it has been held that restrictions against the assignment of leases are restraints on the alienation of property and therefore “are not looked upon with favor by the courts, and from the earliest times have been construed by courts of law with the utmost jealousy to prevent the restraint from going beyond the express stipulation.”\(^{185}\)


Oklahoma law allows the free transfer of leases unless language in the lease indicates an intention to condition the transfer on the lessor’s consent.\(^{186}\) Oklahoma law is also in accord with other jurisdictions by recognizing a distinction between assignments, subleases, and other transfers of lease interests.\(^{187}\)


Pennsylvania strictly construes restraints on transfer as restraints on the alienation of a fee interest in property. Generally, in Pennsylvania, a coal lease is considered a sale of the mineral in place, subject to a possibility of reverter, and therefore, the lessor retains no vested interest in the premises and is divested of any right to prohibit assignment. This concept was applied to a coal lease in the case of \textit{In Re: Essex Coal Company}.\(^ {188}\) There, the court found that the presence of a covenant against assignment was of no effect where the coal lease grants fee simple to the coal in place, which it often does under Pennsylvania law. The lessor, retaining only a royalty interest and possibility of reverter, therefore, had no right to control the assignment of the premises.\(^ {189}\)

\(^{185}\) Fairbanks v. Power Oil Co. of Ohio, 77 N.E.2d 499, 503 (Ohio App. 1945).
\(^{186}\) See, e.g., Whale v. Rice, 49 P.2d 737 (Okla. 1935).
\(^{187}\) See Jackson v. Sims, 201 F.2d 259 (10th Cir. 1953)(applying Oklahoma law).
\(^{189}\) Id.

Tennessee follows the general rule that leases are freely assignable without lessor consent absent some provision to the contrary, and the rule that lease provisions restricting transfer are construed strictly against the lessor.\(^{190}\)

[16] — Texas.

Texas law on the transferability of leasehold interests is unique due to a statutory restriction on an lessee’s ability to assign or sublease the premises. Under Texas law, all leases contain an implied covenant not to assign or sublease the premises without the consent of the lessor.\(^{191}\) If parties wish to make a lease freely assignable, they must expressly provide language in the lease to that effect.\(^{192}\)


A lease of realty is assignable in Utah, absent language restricting such assignment.\(^{193}\) But where a lease restricts a lessee’s ability to assign its interest, such restrictions are enforceable.\(^{194}\)

[18] — Virginia.

Leases are freely assignable in Virginia absent a restraint on assignment.\(^{195}\) While public policy disfavors restraints on assignment, and they are therefore subject to strict construction, where restraints on assignment are “clearly and definitely” in the lease, they will be enforced.\(^{196}\)

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\(^{190}\) Kroger Co. v. Chem. Sec., Inc., 526 S.W.2d 468 (Tenn. 1975).


\(^{192}\) See 718 Associates Ltd., 1 S.W.3d 355, 362.

\(^{193}\) See Powerine Co. v. Russells, Inc., 135 P.2d 906 (Utah 1943).


While the law governing construction of restraints on assignment developed in the area of “landlord-tenant” law in most states, the leading West Virginia case on restraints against assignment is a coal case. In *Easley Coal Co. v. Brush Creek Coal*, two coal leases contained the following clause: “This lease shall not be assigned or mortgaged by the lessees, or any part thereof sublet, except by consent of the lessor in writing.” The lessor consented in writing to an initial assignment of the leases, but refused to consent to a second assignment. On appeal, the original lessor argued that the lease should be forfeited by the initial assignee due to its violation of the anti-assignment clause, whereas the initial assignees argued that the lessor’s consent to the initial assignment waived the consent requirement for subsequent assignments of the lease. In reaching its ultimate conclusion that the lessor had waived the consent to assignment provision by consenting to the first assignment, the court also laid out the basic principles applying to such clauses in West Virginia in syllabus point 2 of its opinion:

Being a restraint upon alienation, a condition against assignment by a lessee or an assignee of a lessee is governed by the rule of strict construction, and it does not exist unless it has been clearly and definitely provided in the lease or some other written instrument made collateral thereto.198

This point has been cited approvingly and discussed extensively in other West Virginia cases.199 West Virginia has also provided statutory guidance on interpreting restraints on subleasing and assignment, though this statute largely supplements, rather than alters, the common law announced in *Easley Coal*.200

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197 *Easley Coal Co. v. Brush Creek Coal*, 112 S.E. 512, 513 (W. Va. 1922).
198 *Id.*
200 See W. Va. Code § 36-4-11 (“In a lease, a covenant by the lessee ‘that he will not assign or sublet without leave,’ or a covenant of like import, shall have the same effect as a covenant that the lessee will not, during the term, assign, transfer, set over, or sublet the premises, or any part thereof, to any person, without the consent in writing of the lessor, his representatives or assigns.”).

The courts of Wyoming have noted that lease transfer restrictions are to be strictly construed.\textsuperscript{201} Wyoming has also expressly overruled the rule of Dumpor’s Case that consent to one assignment waives the consent requirement with regard to future assignments.
