DO I HAVE TO BE REASONABLE?: THE RIGHT TO ARBITRARILY RESTRICT TRANSFER OF OCCUPANCY AND MINERAL LEASES

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You desire to enter into a long-term commercial lease and are equally interested in four available sites. The terms of the proposed leases are identical except as to the right to transfer:

> Lease 1: This lease may not be assigned, subleased, or otherwise transferred.
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> Lease 2: This lease may not be assigned, subleased, or otherwise transferred without the consent of the lessor, which the lessor may withhold in its sole discretion.
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> Lease 3: This lease may not be assigned, subleased, or otherwise transferred without the consent of the lessor.
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> Lease 4: This lease may be assigned, subleased, or otherwise transferred with the consent of the lessor.

You are also a landowner with two offers to lease your land for oil and gas development. Both proposed leases initially contain the following provision: "This lease may be assigned, subleased, or otherwise transferred." In response, you countered with language that says, "This lease may not be assigned, subleased, or otherwise transferred without the consent of the lessor, *which the lessor may withhold in its sole discretion*." Neither prospective lessee, however, is willing to accept this italicized language and after further negotiations, you are presented with the following two choices:

> Lease A: This lease may not be assigned, subleased, or otherwise transferred without the consent of the lessor.
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> Lease B: This lease may not be assigned, subleased, or otherwise transferred without the consent of the lessor, which consent shall not be unreasonably withheld.

What to do? As a tenant, you should select the commercial lease that least restricts your ability to transfer.[1] But do any of these leases actually

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restrict the right to withhold consent? Lease 1 expressly prohibits transfers, but the lessor could choose to waive the provision.[2] The other three leases suggest that transfers are permitted, but Lease 2 makes it clear that the decision to approve a transfer request is left in the lessor's "sole discretion."[3] As discussed below,[4] some states have held that the lessor's veto power in Lease 3 and Lease 4 is constrained by an implied "reasonableness" standard.[5] Other states, however, continue to adhere to the traditional view that the lessor, in both Lease 3 and Lease 4, "may arbitrarily withhold his assent without giving any reasons, and in granting his assent may impose such conditions as he sees fit."[6] In the "traditional" states, consequently, all four leases are the same; the lessor has total control over whether to permit a transfer.

The choice between the two oil and gas leases appears more straightforward. As a landowner, you want to maximize your control over the transfer of the oil and gas lease and therefore would select Lease A,

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[1] You would likely prefer a lease that expressly states the "lease may be assigned, subleased, or otherwise transferred." Prospective lessors, however, will not agree to an unrestricted transfer right.

[2] *See* Susan E. Myster, *Protecting Landlord Control of Transfers: The Status of "Sole Discretion" Clauses in California Commercial Leases*, 35 SANTA CLARA L. REV. 845, 877 (1994–95) (noting that, if the lease contains a provision prohibiting a transfer, "the landlord would be free to unilaterally waive this provision.").

[3] *See* Nev. Atl. Corp. v. WREC Lido Venture, LLC, No. G039825, 2008 WL 5065977, at *1 (Cal. Ct. App. Dec. 2, 2008) (the lease gave the landlord the right to withhold consent to a proposed assignment "for any reason whatsoever or for no reason.").

[4] *See infra* Section IV.

[5] *See, e.g.*, Dick Broad. Co. v. Oak Ridge FM, Inc., 395 S.W.3d 653, 656–57 (Tenn. 2013) ("[W]here . . . the agreement is silent regarding the anticipated standard of conduct in withholding consent, an implied covenant of good faith and fair dealing applies and requires the non-assigning party to act with good faith and in a commercially reasonable manner . . . .").

[6] Abrahamson v. Brett, 21 P.2d 229, 232 (Or. 1933). *See also infra* Section III (The lessor with absolute discretion to grant or withhold consent can choose to condition consent on the payment of a "transfer" fee or an upward adjustment of the rent; this would not be permitted if the right to withhold consent is subject to a reasonableness standard); Julian v. Christopher, 575 A.2d 735, 739 (Md. App. 1990) ("Where, as alleged in this case, the refusal to consent was solely for the purpose of securing a rent increase, such refusal would be unreasonable unless the new subtenant would necessitate additional expenditures by, or increased economic risk to, the landlord.").

Under the traditional view, the lessor in Lease 3 is telling the lessee "you cannot transfer unless I say you can," whereas the lessor in Lease 4 is telling the lessee "you can transfer unless I say you cannot." The end result is the same. *See, e.g.*, Friedman v. Thomas J. Fisher & Co., 88 A.2d 321, 322–23 (D.C. Mun. Ct. 1952) (the effect of a typewritten provision that the lessee may sublet with consent was the same as the printed provision that the lessee shall not sublet without consent).

which does not include a reasonableness standard. There are, however, two potential problems. First, it is possible that *any* constraint on the transferability of a mineral lease will be held invalid as an impermissible restraint on alienation.[7] If so, the negotiations regarding the right to transfer are pointless! Second, even if the clause is a permissible restraint on alienation, in states that imply a reasonableness standard, an argument can be made that the only difference between Lease A and Lease B is that the reasonableness standard in the latter lease is expressly stated rather than implied. It is thus possible that Lease A—despite the absence of a reasonableness standard—grants precisely the same transfer rights as Lease B!

This article addresses the right to arbitrarily restrict the transfer of occupancy and mineral leases.[8] With respect to occupancy leases, the emphasis will be on commercial leases, although the arbitrary restriction of

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[7] *See generally, e.g.*, Shields v. Moffitt, 683 P.2d 530 (Okla. 1984). In *Shields*, the issue was "whether . . . [a] clause in the oil and gas lease which provides that the lease may be assigned only with the written consent of the lessors constitutes an unlawful restraint on alienation which renders the restrictive clause void." *Id.* at 532. The Court held that the clause in question is "void and of no force or effect." *Id.* at 533. *See also infra* Section II.

[8] The right to act arbitrarily is equated with the right to act unreasonably. *See* Slavin v. Rent Control Bd., 548 N.E.2d 1226, 1228 (Mass. 1990) ("A majority of jurisdictions subscribe to the rule that a lease provision requiring the landlord's consent to an assignment or sublease permits the landlord to refuse arbitrarily or unreasonably."). *See also* Gamble v. New Orleans Hous. Mart, Inc., 154 So.2d 625, 626 (La. App. 1963), *writ refused*, 156 So.2d 229 (La. 1963) (describing a silent consent clause as giving the lessor "the arbitrary and absolute right, without any reason and even in bad faith, to refuse to give the permission required by the provision."); Henry Conklin & Sons, Inc. v. Conklin, No. 14-80-19, 1982 WL 6741, at *4 (Ohio Ct. App. Mar. 1, 1982) (stating that, under a silent consent clause, "[T]he lessor has the full and arbitrary right to refuse to give his consent irrespective of the character of the proposed assignee and although actuated by mere caprice or whim."); Paul v. Bd. of Zoning Appeals, 110 A.2d 619, 621 (Conn. 1955) ("'Arbitrary' means '[d]epending on will or discretion,' that is, not governed by any fixed rules or standards."). The lease may expressly state that the consent may be withheld "for any reason," "unreasonably," "arbitrarily," or in a party's "sole discretion." The lessor is the sole arbiter of the transfer request.

Additionally, the right to arbitrarily withhold consent does not confer total freedom of choice. *See* William G. Coskran, *Assignment and Sublease Restrictions: The Tribulations of Leasehold Transfers*, 22 LOY. OF L.A. L. REV 405, 423 (1988–89) (noting that even a sole discretion standard "does not allow the lessor total freedom. For example, he or she cannot engage in prohibited discrimination."). *See also Nev. Atl. Corp.*, 2008 WL 5065977, at *6 ("A landlord exercising sole discretion in considering an assignment cannot make the decision based on illegal grounds."); Forest Lake Facilities, LLC v. Wells Fargo Bank, N.A., No. 17-1766, 2017 WL 4736716, at *2 (D. Minn. Oct. 19, 2017) (even though the mortgage gave the lender "sole discretion" to withhold consent to lease modifications, in light of allegations of bad faith, the Court concluded that the breach of contract claim could not be resolved on a motion to dismiss).

residential lease transfers will also be discussed. With regard to mineral leases, the focus will be on oil and gas leases and related agreements.[9]

There are two overarching issues. First of all, is there a right to arbitrarily restrict lease transfers? Part I of this article examines why a party to an occupancy lease would want the absolute right to veto transfers, and discusses whether parties should be permitted to bargain for such a right. Residential and commercial leases that contain "sole discretion" clauses have been upheld in the past, and are endorsed by the Restatement (Second) of Property, which states that a landlord can unreasonably withhold consent to lease transfers if "a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent."[10]

Part II addresses the same issue in the context of mineral leases. The validity of an absolute veto power may depend on the type of lease involved. Commercial and residential leases are increasingly considered to be contracts for occupancy rather than property transactions: whereas the leasing of oil, gas, and other minerals is viewed in many states as the transfer of a defeasible fee property interest.[11] The characterization of the lease may impact the applicability and importance of contract and property principles, such as the implied duty of good faith and fair dealing, and the restraints against alienation doctrine.[12] Some commentators assert that consent-to-transfer provisions in mineral leases are unenforceable because "restrictions which unreasonably interfere with the free transfer of real property interests are void under the common law rule on restraints against alienation."[13] Other scholars disagree and argue that labels, such as

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[9] Because mineral leases involve the right to extract a resource (such as coal, shale, or uranium), it stands to reason that the rules regarding the right to arbitrarily restrict the transfer of oil and gas leases should also govern the right to arbitrarily restrict the transfer of other mineral extraction leases.

[10] RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 15.2(2) (AM. LAW INST. 1977).

[11] *See Differences Between a Residential and Commercial Lease*, FREE ADVICE LEGAL, https://real-estate-law.freeadvice.com/real-estate-law/real-estate-law/residential_lease_commercial.htm [https://perma.cc/Z3HV-PV79]. *See also* Hobart M. King, *Mineral Rights*, GEOLOGY.COM, https://geology.com/articles/mineral-rights.shtml [https://perma.cc/E4AH-QV5V].

[12] *See* Gary B. Conine, *Property Provisions of the Operating Agreement – Interpretation, Validity, and Enforceability*, 19 TEX. TECH L. REV. 1263, 1380 (1988).

[13] *Id.* *See also* Mark K. Glasser & Scott Humphrey, *The Assignment of Oil & Gas Leases: Conditions, Constraints, and Consequences*, *in* CTR. FOR AM. & INT'L L., 62ND ANN. INST. ON OIL & GAS L., at 38 (2011), *available at* https://www.lexology.com/library/detail.aspx?g=d574433a-4d41-4483-9375-6ef6a0e73f11 ("[A]s it appears that the common justifications for restrictions on the assignability of an oil and gas lease do not

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contract, fee, and lease, "should not be mechanically applied" to resolve the validity of transfer restrictions.[14]

If such a right does exist, how is it obtained? This second overarching issue is initially addressed in Part III. One way to secure the right to arbitrarily restrict lease transfers is to expressly declare that the right to withhold consent is not subject to any constraints (such as reasonableness), but rather is left entirely to the discretion and judgment of the person holding the absolute and unlimited veto power. But is this necessary? The provision in Lease 3 and Lease A ("This lease may not be assigned, subleased, or otherwise transferred without the consent of the lessor") is often described as a "silent consent" clause.[15] There is a split of authority

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outweigh the public and private harm resulting from the enforcement of such clauses, Texas courts should decline to enforce them . . . .").

[14] Luke Meier & Rory Ryan, *The Validity of Restraints on Alienation in an Oil and Gas Lease*, 64 BUFF. L. REV. 305, 307–08 (2015–16) (arguing that express alienation restraints in mineral leases should generally be enforced).

[15] *See, e.g.*, Julian v. Christopher, 575 A.2d 735, 736 (Md. App. 1990); Dick Broad. Co. v. Oak Ridge FM, Inc., 395 S.W.3d 653, 659 (Tenn. 2013). Lease 4 ("This lease may be assigned, subleased, or otherwise transferred with the consent of the lessor") is also a silent consent clause. One commentator contends that the phrase "silent consent clause" is problematic because it "could be misconstrued to imply that 'silent' describes the character of the consent, when it really describes only the fact that the clause provides no standard." Jon M. Laria, *Julian v. Christopher: New Standards for Landlords' Consent to Assignment and Sublease*, 50 MD. L. REV. 464, 464 n.5 (1991) (recommending an "unqualified" consent clause).

This clause has also been called an "unlimited consent" clause and a "hard consent" clause. *See* Jones v. O'Connell, 458 A.2d 355, 358 (Conn. 1983) & Brief for Respondent on the Merits at 1, Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc., No. 17-0332 (Tex. Sup. Ct. May 17, 2018) ("[A] hard consent to assignment provision does not set a standard for consent . . . ."). The term "hard consent" appears to be limited to the oil and gas industry, and it also appears to be used most often when the clause not only fails to provide a standard for consent, but it also sets forth a consequence for unapproved transfers. *See* Mitchell E. Ayer & David Cias, *Consent Provisions in Oil and Gas Leases*, 34TH ANN. TXCLE ADVANCED OIL, GAS & ENERGY RES. L. 19.I (2016) ("hard consents" refers to clauses in oil and gas leases that provide that the lease itself will be forfeited—or alternatively, the attempted lease transfer will be voided—if the lessor does not approve the transfer). *See also* John McFarland, *Consent-to-Assign Provisions in Oil and Gas Leases*, OIL & GAS LAW. BLOG (Mar. 23, 2017), https://www.oilandgaslawyerblog.com/2017/03/consent-assign-provisions-oil-gas-leases.html [https://perma.cc/LR2E-AW8U].

> A "hard-consent" provision specifies the consequences of failure to obtain consent – for example, that such a breach is grounds for cancelling the lease, or that specified liquidated damages must be paid for the breach. A "soft consent" is one that prohibits assignment without consent but does not specify a remedy for the breach.

Id.

regarding the interpretation of silent consent provisions in occupancy leases. Under the traditional view, if a lease provides that it "may not be assigned, subleased, or otherwise transferred without the consent of the lessor," it will have the same effect as a lease that "may not be assigned, subleased, or otherwise transferred without the consent of the lessor, *which the lessor may withhold in its sole discretion*."[16] If a silent consent clause confers the right to arbitrarily restrict lease transfers, it is unnecessary, and arguably inadvisable, to expressly provide for the right.

The traditional view, however, has been replaced in many states in the last fifty years with the opposite approach: if a lease provides that it "may not be assigned, subleased, or otherwise transferred without the consent of the lessor," it will have the same effect as a lease that "may not be assigned, subleased, or otherwise transferred without the consent of the lessor, *which consent shall not be unreasonably withheld*." Under this interpretive approach, a silent consent clause is considered misleading because it suggests that—if a suitable replacement is found—the lease will be transferred.[17] There are three justifications for attaching a reasonableness standard to a silent consent clause: (1) the clause does not clearly state that the lessor may arbitrarily withhold consent; (2) a lease is a contract and should be governed by the general contract principles of good faith and commercial reasonableness;[18] and (3) restraints on alienation of leased property are looked upon with disfavor and are strictly construed against the lessor.[19] This "implied reasonableness" interpretation of silent consent clauses is consistent with other evolving property and contract rules, and promotes full disclosure while upholding freedom of contract.[20]

Part IV of this article examines whether the "implied reasonableness" interpretation of silent consent clauses applies to mineral leases as well as

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[16] *See* Laria, *supra* note 15, at 471 n.49.

[17] *See, e.g.*, Gamble v. New Orleans Hous. Mart, Inc., 154 So.2d 625, 627 (La. App. 1963), *writ refused*, 156 So.2d 229 (La. 1963) (the lease, which permits subleasing provided that the lessee obtains the written consent of the lessor, "suggests or connotes that, when the lessee obtains a subtenant acceptable or satisfactory to the lessor, he may sublet. . . . Otherwise the provision simply would prohibit subleasing."). *See also* Granite Tr. Bldg. Corp. v. Great Atl. & Pac. Tea Co., 36 F.Supp. 77, 78 (D. Mass. 1940) (the use of a silent consent clause suggests that "it must have been in the contemplation of the parties that the lessor be required to give some reason for withholding consent.").

[18] *See, e.g.*, Fernandez v. Vazquez, 397 So.2d 1171, 1173–74 (Fla. App. 1981); Boss Barbara, Inc. v. Newbill, 638 P.2d 1084, 1085–86 (N.M. 1982).

[19] *See, e.g.*, Funk v. Funk, 633 P.2d 586, 589 (Ida. 1981); Kendall v. Ernest Pestana, Inc., 709 P.3d 837, 843–44 (Cal. 1985).

[20] *See Kendall*, 709 P.3d at 842–43 (describing the prior history of the rule and the court's modernization by adopting the implied reasonableness rule).

occupancy leases. While an oil and gas lease is viewed in many states as a transfer of a defeasible fee, the agreement that governs the ongoing relationship between the lessor and the lessee is also contractual in nature. If the transfer restrictions in mineral leases are not deemed to be void as impermissible restraints against alienation, they should be strictly construed.

Consequently, the arguments for an "implied reasonableness" interpretation of silent consent clauses apply to mineral leases as well as occupancy leases. Under this alternative view, a silent consent clause—in the absence of countervailing indications—does *not* confer the right to arbitrarily restrict lease transfers and it is necessary to provide for the right. The most effective way to provide for the right is to do so expressly, but it is also possible to establish the right by demonstrating that the parties otherwise addressed the issue and intended to create an absolute power to withhold consent.[21]

Part V of this article examines the right to restrict the transfer of occupancy and mineral leases in two jurisdictions: Texas and Ohio. Texas adheres to the traditional view of silent consent clauses.[22] However, the issue may be revisited by the Texas Supreme Court in the case of *Carrizo Oil and Gas, Inc. v. Barrow-Shaver Resources Company*,[23] which concerns the assignability of an oil and gas "farmout" agreement.[24] The agreement between lease owner Carrizo and Barrow-Shaver states that it "may not be

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[21] *See* Pac. First Bank v. New Morgan Park Corp., 876 P.2d 761, 767–68 (Or. 1994) (rejecting the traditional view of silent consent clauses, but nevertheless treating a standardless consent clause for assignments as the equivalent of a sole discretion clause in light of the fact that the parties had provided, in a separate provision, that the landlord would not "unreasonably withhold its consent" to requests to sublease). *See also* Carrizo Oil & Gas, Inc. v. Barrow-Shaver Res. Co., 516 S.W.2d 89, 97 (Tex. App. 2017) ("A contract is silent when it fails to address a particular issue . . . . The parties explicitly negotiated out the "not be unreasonably withheld" option . . . . We hold that the consent-to-assignment provision of the farmout agreement was not silent when we are informed by its surrounding circumstances."). The *Carrizo* case is discussed more fully below. *See infra* Section V.

[22] *See* Reynolds v. McCullough, 739 S.W.2d 424, 429 (Tex. App. 1987) (in a silent consent clause, "there is no implied covenant by the lessor to act reasonably in withholding his consent" to the transfer of the leasehold estate). *See also* Trinity Prof'l Plaza Assocs. v. Metrocrest Hosp. Auth., 987 S.W.2d 621, 625 (Tex. App. 1999) (because the lessee did not contract for a reasonableness provision in the ground lease, the lessor has "the absolute right to withhold consent.").

[23] 516 S.W.2d 89 (Tex. App. 2017) (petition for review filed May 1, 2018).

[24] A farmout agreement "is an assignment by a lease owner of all or a portion of the lease to another operator who desires to drill on the tract." Exxon Mobil Corp. v. Valence Operating Co., 174 S.W.3d 303, 313 (Tex. App. 2005).

assigned, subleased or otherwise transferred in whole or in part, without the express written consent of Carrizo."[25] When its request to assign was refused, Barrow-Shaver sued and argued that Carrizo unreasonably withheld consent.[26] Instead of arguing to overturn the traditional interpretation of silent consent clauses, Barrow-Shaver contended that a reasonableness standard should be implied because it is "custom in the industry" for consent to be withheld absent a reasonable concern about the potential assignee.[27] This position was rejected by the Texas Court of Appeals.[28] The Appellate Court agreed that "evidence of custom and usage is admissible to add to a contract that is silent on a particular matter," but the Court held that the disputed provision was *not* silent regarding the type of consent required.[29] Since the clause was not silent, the case does not raise the issue of the proper interpretation of a silent consent clause. The Court instead held that it was inappropriate to imply reasonableness based on industry custom because "prior drafts of the farmout agreement clearly establish that the absence of a restriction on [the] ability to withhold consent was intentional."[30]

Ohio was one of the first states to interpret a silent consent clause to require that the consent cannot be unreasonably withheld, but the issue has received inconsistent and inconclusive treatment.[31] The groundbreaking 1971 Cuyahoga County Municipal Court decision, however, was reversed one year later in an unreported decision at the Eighth District Court of Appeals.[32] In 1984, the same Court of Appeals, by a 2-1 decision, reaffirmed the traditional interpretation of a silent consent clause.[33] Twenty-one years later, the First District Court of Appeals went in the

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[25] *Carrizo Oil*, 516 S.W.2d at 93.

[26] *Id.* at 93–94.

[27] *Id*. at 94.

[28] *Id*. at 99 (the Trial Court favored Barrow-Shaver by jury).

[29] *Id.* at 96.

[30] *Id. See also id.* at 97 ("We hold that the consent-to-assignment provision of the farmout agreement was not silent when we are informed by its surrounding circumstances."). The example given at the beginning of this article involving oil and gas leases is loosely based on the facts of the *Carrizo* case. In both situations, the party who agreed to remove the reasonableness standard subsequently argues that the lease is implicitly governed by the standard that the other party refused to include in the lease.

[31] *See generally* Shaker Bldg. Co. v. Fed. Lime & Stone Co., 277 N.E.2d 584 (Ohio Mun. Ct. 1971).

[32] *See generally* Shaker Bldg. Co. v. Fed. Lime & Stone Co., No. 31451, 1972 WL 20379 (Ohio App. Mar. 2, 1972).

[33] *See generally* F&L Ctr. Co. v. Cunningham Drug Stores, Inc., 482 N.E.2d 1296 (Ohio App. 1984).

opposite direction and endorsed "the trend of recent cases which have held that a lessor must act reasonably in withholding consent . . . ."[34] The issue resurfaced again in 2015 in the context of an oil and gas lease.[35] While acknowledging contrary cases in Ohio and elsewhere, the Seventh District Court of Appeals in *Love v. Beck Energy Corporation* held that—because the lease was signed in 1988—it was "compelled" to apply the reasoning of the 1984 Court of Appeals' decision upholding the traditional view.[36]

This article concludes by expressing its agreement with the *Carrizo* decision from Texas and its disagreement with the *Love* decision from Ohio. Given its unusual facts, *Carrizo* does not raise the issue of whether reasonableness should be implied when there is no standard governing the consent decision. While the most effective way to provide for an absolute right to withhold consent is an express "sole discretion" clause, it is also possible to provide for the right by demonstrating that the parties otherwise addressed the issue and intended to create an absolute veto power. Because the negotiations in *Carrizo* established that the "reasonableness standard" was a deal-breaker, the agreement was *not* silent on this particular matter and evidence of an industry custom of reasonableness should not be used to impose a standard that was previously rejected.[37] The silent consent provision in *Carrizo* was understood to be the equivalent of a "sole discretion" clause and should be enforced as such.[38]

On the other hand, the Appellate Court in *Love* missed the opportunity to endorse the modern view equating a silent consent clause with a reasonable consent clause. The Seventh District Court of Appeals was not compelled to abide by an earlier (and subsequently criticized) decision of the Eighth District Court of Appeals. When presented with the opportunity, the Ohio Supreme Court should reject the traditional view of silent consent clauses and imply a reasonableness standard when the

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[34] Littlejohn v. Parrish, 839 N.E.2d 49, 52 (Ohio. App. 2005) (finding that a silent consent clause in a mortgage does not permit the mortgagee to unreasonably withhold approval of a request to prepay the loan).

[35] *See generally* Love v. Beck Energy Corp., No. 14 NO 415, 2015 WL 1453338 (Ohio App. Mar. 31, 2015).

[36] *See id.* at *8.

[37] *See* Carrizo Oil & Gas, Inc. v. Barrow-Shaver Res. Co., 516 S.W.2d 89, 99 (Tex. App. 2017).

[38] *See id.* at 89. The parties in *Carrizo* do not contend that the clause is invalid as an impermissible restraint on alienation; perhaps because the case involves the transfer of a farmout agreement rather than the transfer of an oil and gas lease. However, as discussed in Part I and Part II of this article, when parties address the issue and make clear their intentions to create an absolute veto power, the right to arbitrarily restrict transfers should be enforced in occupancy leases, mineral leases, and other related agreements.

parties have not otherwise made their intention clear that the veto power is absolute.

I. IS THERE A RIGHT TO ARBITRARILY RESTRICT OCCUPANCY LEASE TRANSFERS?

Why do lessors want to hold an absolute and unconstrained veto power over lease transfers? In this part of the article, the issue is addressed in the context of occupancy leases. At first blush, it would seem that landlords do not want to abide by a reasonableness standard because they want the option of acting in an unreasonable manner. However, the lessor's motivations are more nuanced and are not typically predicated on a desire to withhold consent for malicious and capricious reasons.[39] By examining cases that address whether particular objections to lease transfers are reasonable, we can better understand why some landlords prefer the right to arbitrarily restrict occupancy lease transfers. Despite predictions of its demise, the sole discretion clause is commonly included in commercial leases, and the right to arbitrarily restrict lease transfers is consistently upheld.[40]

A. Reasons why lessors object to occupancy lease transfers.

Landlords usually want the power to veto occupancy lease transfers for the following three reasons: (1) concerns about the transferee; (2) concerns regarding the transferee's business; and (3) to use the transfer request as an opportunity to extract economic concessions. As discussed below, if the right to withhold consent is constrained by a reasonableness standard, certain objections to the transferee and the transferee's business will not be allowed. If the lessor must be reasonable, courts will not permit the lessor to withhold consent to an assignment or sublease solely for the purpose of securing a rent increase.[41] In such circumstances, the lessor must expressly bargain for a particular veto right, or otherwise make clear that it retains a general power to arbitrarily restrict lease transfers.[42]

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[39] *See* Coskran, *supra* note 8, at 423 ("It is simplistic to believe that all lessors who bargain for a clause without a reasonableness standard wish to be unreasonable.").

[40] The right to arbitrarily withhold consent to transfers is also enforceable in most states with regard to residential leases, but some states have constrained the lessor's discretion by statute. *See infra* note 92.

[41] *See, e.g.*, Julian v. Christopher, 575 A.2d 735, 739 (Md. 1990).

[42] *See* RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 15.2(2) (AM. LAW INST. 1977).

Some concerns about prospective transferees are reasonable, such as questions regarding their financial responsibility or stability.[43] As noted by the Minnesota Supreme Court, "The purpose of an anti-assignment clause in a lease is to assure the suitability of the tenant for the protection of the landlord in his ownership and operation of his property."[44] Even if there are no qualms regarding the transferee's financial strength, the landlord may wish to refuse consent based on reasonable concerns with the legality

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[43] *See Julian,* 575 A.2d at 739. However, if the original tenant offers to act as the guarantor of the transferee, a refusal to consent based on the potential transferee's financial stability has been deemed unreasonable. *See* RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 15.2 (1977) (Reporter's Note to Section 15.2, No. 7, Consent unreasonably withheld) (citing Adams, Harkness & Hill, Inc. v. Ne. Realty Corp., 281 N.E.2d 262 (Mass. 1972)).

[44] Torgerson–Forstrom H.I. of Willmar, Inc. v. Olmsted Fed. Sav. & Loan Ass'n, 339 N.W.2d 901, 904 (Minn. 1983). *See also* Muller v. Beck, 110 A. 831, 832 (N.J. 1920) ("Such a provision demonstrates that the landlord meant to have a right to choose his tenants, a right which might be of great importance to him in the proper care and management of his property."); F & L Ctr. Co. v. Cunningham Drug Stores, Inc., 482 N.E.2d 1296, 1300 (Ohio Ct. App. 1984) ("To permit Cunningham . . . to assign its leasehold interest to any other party it chooses whose business did not conflict with that of the other tenants would make F & L a virtual prisoner of the lessee . . . ."); Martha Wach, *Withholding Consent to Alienate: If Your Landlord is in a Bad Mood, Can He Prevent You from Alienating Your Lease?*, 43 DUKE L.J. 671, 685 (1993) ("[A] landlord has theoretically chosen his tenant with care and should not be forced to accept an unsuitable tenant should the original tenant choose to sublet or assign to such a person or entity."); RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 15.2(2) cmt. a (AM. LAW INST. 1977) ("The landlord may have an understandable concern about certain personal qualities of a tenant, particularly his reputation for meeting his financial obligations."); Funk v. Funk, 633 P.2d 586, 589 (Idaho 1981).

> A landlord may and should be concerned about the personal qualities of a proposed subtenant. A landlord should be able to reject a proposed subtenant when such rejection reflects a concern for the legitimate interest of the landlord, such as assurances of rent receipt, proper care of the property and in many cases the use of the property by the subtenant in a manner reasonably consistent with the usage of the original lessee.

Id.

> Various facets of income protection concern lessors. Creditworthiness of the new occupant is a typical concern. If the rent is based on a percentage of profits, the new occupant's ability to generate profits is a major consideration. This involves factors such as management ability, business experience and type of business.

Coskran, *supra* note 8, at 420.

of the proposed use, the nature of the proposed tenant's business,[45] the suitability of the business,[46] and the necessity of altering the premises to accommodate the tenant's business.[47]

On the other hand, lessors constrained by a reasonableness standard may not prohibit lease transfers based on "personal distaste,"[48] "immiscible doctrinal differences,"[49] "animosity,"[50] or a "bad experience" with a

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[45] *See, e.g.*, Jones v. Andy Griffith Prods., Inc., 241 S.E.2d 140, 142–44 (N.C. Ct. App. 1978) (landlord received a percentage of the tenants' sales as rent and the occupancy of the premises by the prospective transferee could not reasonably be expected to yield as great a return on plaintiffs' investment); Arrington v. Walter E. Heller Int'l Corp., 333 N.E.2d 50, 59 (Ill. App. Ct. 1975) (desire to have only one "lead tenant" to preserve "image of the building" as tenant's international headquarters); Elwema, Inc. v. Yoder, No. L-85-103, 1985 WL 8198, at *2 (Ohio Ct. App. Oct. 18, 1985) ("Some factors which have been considered by other courts when presented with a question of when consent to sublease is reasonably withheld are . . . the nature of the occupancy, i.e., office, factory, or clinic.").

[46] *See, e.g.*, Warmack v. Merch. Nat'l Bank of Fort Smith, 612 S.W.2d 733, 735 (Ark. 1981) ("the tenant mix was critical to the mall's success."); List v. Dahnke, 638 P.2d 824, 825 (Col. App. 1981) (refusal to consent to assignment was reasonable where lessor believed proposed specialty restaurant would not succeed at the location); *Julian*, 575 A.2d at 739 ("examples of reasonable objections could include . . . the unsuitability or incompatibility of the intended use of the property by the transferee."); Myster, *supra* note 2, at 856–57 ("If the shopping center has a particular image, the transferee business must be closely examined to determine if it properly meshes with the center's atmosphere."); Joshua Stein, *Assignment and Subletting Restrictions in Leases and What They Mean in the Real World*, 44 REAL PROP., TR. & EST. L.J. 1, 23 (2009) (a landlord reasonably may deny consent if a "proposed subtenant would compete with other businesses in the same shopping center, prejudicing the landlord's relationship with other tenants . . . .").

[47] *See, e.g.*, Buck Consultants, Inc. v. Glenpointe Assoc., No. 03-454, 2004 WL 5370571, at *6 (D. N.J. July 23, 2004) ("factors include . . . the suitability of proposed tenant's business for the premises and the general business area; and . . . the necessity of altering the premises to suit the tenant's business."); Coskran, *supra* note 8, at 421 (the proposed occupant may disturb other tenants, increase the use of parking areas, elevators and other common areas, or require alterations to the building such as partition walls and signs).

[48] *See* Ernst Home Ctr., Inc. v. Sato, 910 P.2d 486, 493 (Wash. Ct. App. 1996) (prospective transferee sold second-hand clothing to a "niche" market which included "grunge" rock groups).

[49] *See* Am. Book Co. v. Yeshiva Univ. Dev. Found., Inc., 59 Misc.2d 31, 34 (N.Y. Sup. Ct. 1969). The lessor, affiliated with a religious university, withheld its consent to a proposed sublease to a planned parenthood organization due to its stated belief that "the activities of the proposed subtenant [is] inconsistent with the present use of the premises and with the educational activities of the University." *Id.* at 32. The Court held that "when a religious or religiously affiliated or educational institution operates a commercial enterprise or owns commercial property, it is to be held to the established standards of commercial responsibility, its acts and conduct being vested with no greater and no lesser sanctity than those of any other owner." *Id.* at 36. The Court emphasized that the lessor's "absolute right to withhold consent" contained in a form lease had been modified by a typewritten rider to provide instead that "consent shall not to be unreasonably withheld." *Id.*

(*continued*)

particular type of tenant.[51] Likewise, it is not reasonable to withhold consent because the new tenant would be a business competitor,[52] is currently an existing tenant,[53] or conducts a business that does not meet the lessor's approval.[54]

What about a landlord's desire to use its veto power to extract economic concessions? When a reasonableness standard applies, it is impermissible for a landlord to withhold consent to a proposed transfer "solely to . . . improve its economic position."[55] On the other hand, if the

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at 32–33. *See also* Stein, *supra* note 46, at 24 n.93 (noting that a landlord "with special sensitivities . . . may wish to build appropriate restrictions into the lease or insist on an absolutely discretionary right of approval.").

[50] *See* Basnett v. Vista Vill. Mobile Home Park, 699 P.2d 1343, 1347 (Colo. App. 1984), *rev'd on other grounds*, 731 P.2d 700 (Colo. 1987) ("the trial court found that the lessor's refusal to consent was made solely as a result of defendants' animosity toward [the transferee,] Mr. Monroe . . . .").

[51] *See* Stern v. Taft, 361 N.E.2d 279, 280 (Ohio Ct. App. 1976). The lessor withheld consent to a proposed sublease because the prospective tenant was a widow. *Id.* The lessor explained that a prior tenant, also a widow, "got married and I had nothing else than trouble with her husband." *Id.* The Court held that, despite this prior bad experience, "the decision not to rent to any other single or widowed women . . . can only be characterized as illogical, arbitrary and unreasonable." *Id.* The lease provided that the lessee would not "underlet said premises, nor any part thereof, without the written consent of said lessors, which shall not be unreasonably withheld." *Id.* at 279.

[52] *See* Edelman v. F.W. Woolworth Co., No. 33,124, 1929 WL 3172, at *2 (Ill. App. Mar. 11, 1929) ("we think their objection to the subtenant, namely, that he would be a business competitor of plaintiffs, was arbitrary and unwarranted.").

[53] *See* Krieger v. Helmsley-Spear, Inc., 302 A.2d 129, 129 (N.J. 1973) (it is unreasonable for the landlord to object on the ground "that the proposed subtenant was then a tenant occupying office space in another building owned by the landlord so that if it consented to a sublease to the particular subtenant, it would lose him as a tenant in its other building.").

[54] *See* Roundup Tavern, Inc. v. Pardini, 413 P.2d 820, 821–22 (Wash. 1966) (landlord's personal objection to assignment for use as tavern, where lease placed no restriction on use, was unreasonable).

[55] *See* 1010 Potomac Assocs. v. Grocery Mfr. of Am., Inc., 485 A.2d 199, 210 (D.C. App. 1984). *See also* Chanslor-Western Oil & Dev. Co. v. Metro. Sanitary Dist. of Greater Chi., 266 N.E.2d 405, 408 (Ill. App. 1970); Ringwood Assocs., Ltd. v. Jack's of Route 23, Inc., 379 A.2d 508, 512 (N.J. Super. Ct. 1977); Fernandez v. Vazquez, 397 So.2d 1171, 1174 (Fla. Dist. Ct. App. 1981); Funk v. Funk, 633 P.2d 586, 589 (Idaho 1981); Campbell v. Westdahl, 715 P.2d 288, 294 (Ariz. Ct. App. 1985); Kendall v. Ernest Pestana, Inc., 709 P.3d 837, 847–48 (Cal. 1985); Julian v. Christopher, 575 A.2d 735, 739 (Md. 1990); D.L. Dev., Inc. v. Nance, 894 S.W.2d 258, 260 (Mo. Ct. App. 1995); Pantry, Inc. v. Mosley, 126 So.3d 152, 160 (Ala. 2013); Alex M. Johnson, Jr., *Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: Toward a Theory of Relational Leases*, 74 VA. L. REV. 751, 760 (1988).

> The lessor might try to justify his refusal on the ground that any transfer represents an opportunity to renegotiate the lease to reflect the

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veto is absolute and unconstrained, courts have upheld the right to withhold consent unless the lease is modified to increase the rent.[56] If the lessor may arbitrarily withhold consent, it follows that "in granting his assent [he] may impose such conditions as he sees fit."[57]

Lessors also have reasons for wanting an absolute veto over transfers that have nothing to do with personal viewpoints, doctrinal anathema, business competition, or the ability to "extort" money from existing and/or prospective occupants. The right to arbitrarily restrict lease transfers greatly reduces the likelihood that a lessor's decision will be subjected to judicial review.[58] The Idaho Supreme Court in *Funk v. Funk* held that a reasonableness standard applies when lease transfers are conditioned on the lessor's consent, but no standard is provided to constrain or define the lessor's discretion.[59] In his dissenting opinion, Chief Justice Robert Bakes not only complains that the majority interfered with "the right of persons to freely contract,"[60] but he also points out why lessors have legitimate reasons for avoiding a reasonableness standard:

> The unsettling nature of the majority opinion is magnified when one realizes that the effect of the decision is to potentially subject every denial of consent to

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> unanticipated (and therefore unaddressed) changed conditions that have occurred since the lease was executed. Nonetheless, the lessor's desire to renegotiate the lease to capture part of the appreciation of the premises is not regarded as reasonable.

Id.

[56] *See, e.g.*, Food Pantry, Ltd. v. Waikiki Bus. Plaza, Inc., 575 P.2d 869, 874–75 (Haw. 1978) (in light of an agreement that the lessor may refuse consent "in its discretion" to any assignment, sublease, or mortgage of the leasehold, it was permissible to require an increase in rent as a condition to consent). *See also* Herlou Card Shop, Inc. v. Prudential Ins. Co. of Am., 73 A.D.2d 562, 562 (N.Y. Sup. Ct. App. Div. 1979) (the landlord, with an unlimited right to withhold consent, "was merely exercising its legal contractual rights in refusing to consent to an assignment of the lease unless the lease was modified to increase the rent.").

[57] Abrahamson v. Brett, 21 P.2d 229, 232 (Or. 1933). *See also* Alwen v. Tramontin, 228 P. 851, 852 (Wash. 1924) (landlord who had unlimited discretion was within his rights to demand money in exchange for his consent to a proposed lease assignment "however much [the lessee] or others may think the exaction was not justified in morals.").

[58] *Funk,* 633 P.2d at 591. Even if the refusal of consent need not be reasonable, courts will still review whether the lessor has engaged in prohibited discrimination, illegal grounds, or (possibly) bad faith. Forest Lake Facilities, LLC v. Wells Fargo Bank, N.A., No. CV 17-1766 (DWF/TNL), 2017 WL 4736716, at *2 (D. Minn. Oct. 19, 2017); Nevada Atl. Corp. v. Wrec Lido Venture, LLC, No. G039825, 2008 WL 5065977, at *1, **5–6 (Cal. Ct. App. Dec. 2, 2008), *review denied* (2009); Coskran, *supra* note 8, at 423.

[59] *See* 633 P.2d at 588–90.

[60] *Id.* at 590.

> litigation and approval by a judge. Rather than the lessor being sure of his right to control his property by retaining an unrestricted right to deny consent to assign or sublease, by its decision today this Court has destroyed that right and vested in the courts the power to determine what the lessor should have intended and award control of the property based upon that determination.[61]

The observation is apt: as evidenced by the annotations on the subject, the issue of whether a lessor was reasonable in withholding consent to a proposed lease transfer is the subject of frequent litigation.[62]

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[61] *Id.* at 591. William Coskran addresses this point at length in his comprehensive article on assignment and sublease restrictions:

> Does a lessor who chooses and negotiates for a sole discretion standard do so to be unreasonable? It is simplistic to believe that all lessors who bargain for a clause without a reasonableness standard wish to be unreasonable. For example, a lessor with a small transaction and a short-term lease may simply wish to avoid the expense and time involved in evaluating new parties during the lease term, or may wish to avoid litigation over reasonableness. . . .
>
> Some requirements are vague and perhaps somewhat personal. For example, a lessor may wish to create and maintain a certain "image" for his shopping center or building. This appears perfectly reasonable and even necessary to the lessor. However, the prospect of having a jury of people with no interest in the property evaluate the reasonableness of his or her image and its enforcement may not be appealing to the lessor. . . .
>
> A lessor may want to avoid the expense, delay and uncertainty of litigation. He or she may want to avoid having his or her judgment second-guessed in a trial, perhaps years after exercising his or her judgment, by persons with no interest in the property. The lessor may also wish to avoid exposure to a risk of substantial punitive damages.

Coskran, *supra* note 8, at 423–24, 426. *See also* Johnson, Jr., *supra* note 55, at 759 ("A lessor may have idiosyncratic reasons for refusing consent to a 'reasonable' transfer. Because a hypothetical 'reasonable lessor' would not have individualized, subjective concerns, the court might hold that a lessor's idiosyncratic refusal to consent to a transfer was unreasonable, notwithstanding his particular motivation."); Murray S. Levin, *Withholding Consent to Assignment: The Changing Rights of the Commercial Landlord,* 30 DEPAUL L. REV. 109, 139 (1980) ("[A]n objective reasonableness standard does not permit consideration of genuine concerns peculiar to the particular landlord.").

[62] *See* the cases discussed throughout: W. J. Dunn, Annotation, *Right of Lessor Arbitrarily to Refuse or Withhold Consent to Subletting or Assignment Which Is Barred Without Such Consent*, 31 A.L.R.2d 831 (1953); Gary L. Hall, Annotation, *Construction and Effect of Provision in Lease That Consent to Subletting or Assignment Will Not Be Arbitrarily or Unreasonably Withheld*, 54 A.L.R.3d 679 (1973); James C. McLoughlin, Annotation, *When Lessor May Withhold Consent under Unqualified Provision in Lease*

(*continued*)

B. The right to arbitrarily restrict commercial lease transfers has been consistently upheld.

Although the default rule is that a lessee may assign or sublet, occupancy leases often displace this rule by requiring landlord approval.[63] In consent-to-transfer leases, the landlord's veto power may be constrained, unqualified, or undefined. As discussed in Part III of this article, there is a split of authority regarding undefined consent provisions and many states now hold that silent consent clauses in occupancy leases—in the absence of contrary indications—are governed by an implicit reasonableness standard.[64] Some jurists and scholars have suggested that this new interpretive approach to silent consent clauses will also lead courts to invalidate leases where landlords have expressly bargained for the unqualified right to prohibit transfers.[65] Reports of the imminent death of sole discretion clauses, however, turned out to be greatly exaggerated and the right to arbitrarily restrict occupancy lease transfers is alive and well, particularly with respect to commercial leases.[66]

The primary justifications for enforcing sole discretion clauses in occupancy leases are liberty of contract and the right of landowners to maintain control over their property.[67] As stated by the South Carolina

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Prohibiting Assignment or Subletting of Leased Premises Without Lessor's Consent, 21 A.L.R.4th 188 (1983).

[63] *See* Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 829 (2001). *See also* RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 15.1 (AM. LAW INST. 1977) ("The interests of the landlord and of the tenant in the leased property are freely transferable, unless . . . the parties to the lease validly agree otherwise.").

[64] *See* Kendall v. Ernest Pestana, Inc., 709 P.3d 837, 841 (Cal. 1985); Dick Broad. Co., Inc. of Tenn. v. Oak Ridge FM, Inc., 395 S.W.3d 653, 665–66 (Tenn. 2013).

[65] *See Funk,* 633 P.2d at 591 (Bakes, C.J., dissenting); Johnson, Jr., *supra* note 55, at 753, 770; Hayner Lynn, *Assignment of Commercial Leases - The Reasonableness Standard and Withholding Consent: Kendall v. Ernest Pestana, Inc.*, 36 DEPAUL L. REV. 304–05 (1987).

[66] *See* Aimee L. Williams, *Restrictions on Assignment (Consent to Assign, Preferential Right to Purchase and Maintenance of Uniform Interest Provisions)*, 49 ANN. INST. ON MIN. L. 224, 224, 256 (2002).

[67] *See, e.g.*, Shoney's LLC v. MAC East, LLC, 27 So.3d 1216, 1221 (Ala. 2009) (liberty of contract confirms "that parties are free to negotiate a contract to whatever standard they please, particularly where there is an arm's length negotiation of a commercial lease or assignment by commercial entities."); Segre v. Ring, 170 A.2d 265, 266 (N.H. 1961) ("[A]n unequivocal and unqualified restriction against assignment in a lease, freely entered into between the parties, is valid. The Court will not rewrite the agreement to compel the [lessors] to permit the assignment or to give their reasons for not doing so."); Zucker v. Dehm, 26 A.2d 564, 565 (N.J. 1942) ("A written agreement is enforced, according to its terms, and courts of law cannot create new bargai the cases

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Supreme Court, "The judicial function of a court of law is to enforce contracts as made by the parties and not to re-write or distort, under the guise of judicial construction, the terms of an unambiguous contract."[68] In another lease transfer dispute, the Indiana Supreme Court likewise proclaimed that—"when a contract is clear in its terms and the intentions of the parties apparent"—"[i]t is not the province of courts to require a party acting pursuant to such a contract to be 'reasonable,' 'fair,' or show 'good faith' cooperation."[69] The Restatement (Second) of Property also upholds the absolute right of a landlord to withhold consent to a lease transfer, but only so long as it is the product of "a freely negotiated provision in the lease."[70] The clear inference, of course, is that a lessor cannot unreasonably withhold consent—even if the lease expressly provides for an absolute veto power—if the lease is an adhesion contract or is otherwise not "freely negotiated."[71]

Just four years after the 1977 Restatement (Second) suggested there should be a "freely negotiated" limitation on the right to arbitrarily restrict occupancy lease transfers, Chief Justice Bakes of the Idaho Supreme Court expressed doubts about the viability of the sole discretion standard: "It is not clear . . . whether lessors in the future will have the right to contract for

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discussed ns however hard the old ones seem. A bargain may not be changed, even if the refusal of change might seem unreasonable and to serve no useful purpose."). *See also* Lynn, *supra* note 65, at 297 ("A fundamental principle of property law is that an owner of property may transfer as much or as little control over his property as he pleases.").

[68] Dobyns v. S.C. Dep't of Parks, Recreation & Tourism, 480 S.E.2d 81, 84 (S.C. 1997) (citing Patterson v. Aetna Life Ins. Co., 149 S.E.2d 915 (S.C. 1966)).

[69] First Fed. Sav. Bank of Ind. v. Key Mkts., Inc., 559 N.E.2d 600, 604 (Ind. 1990). The Court, however, did acknowledge "equitable principles which might require the court to refuse to recognize the provisions of a contract where there is allegation and proof of fraud, misrepresentation, overreaching, undue influence, unjust enrichment or undue advantage of one party over the other." *Id.*

[70] RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 15.2(2) (AM. LAW INST. 1977).

> A restraint on alienation without the consent of the landlord of the tenant's interest in the leased property is valid, but the landlord's consent to an alienation by the tenant cannot be withheld unreasonably, unless a *freely negotiated provision in the lease* gives the landlord an absolute right to withhold consent.

Id. (emphasis added).

[71] *See* Lynn, *supra* note 65, at 304 (citing Guy Earl Wall, *The Right to Sublease,* 53 TUL. L. REV. 556, 561 (1979)). The tentative draft of the Restatement §14.2 did not permit the lessor to act arbitrarily under any circumstances. *Id*. at 303.

'an absolute right to withhold consent.'"[72] When the California Supreme Court, in *Kendall v. Ernest Pestana, Inc.*,[73] subsequently held that silent consent clauses are governed by a reasonableness standard, the Court also emphasized that it was not deciding "the validity of a clause absolutely prohibiting assignment, or granting absolute discretion over assignment to the lessor."[74] Nevertheless, commentators discerned "mixed signals" in *Kendall* regarding the continued validity of lease transfer provisions that prohibit transfers or expressly grant the lessor sole discretion and absolute power to withhold consent.[75] In a 1987 article, Hayner Lynn contended that:

> [A] narrow reading of *Kendall* . . . would be difficult to reconcile with the court's reasoning for requiring the new standard. After all, the tenant who agrees to an express provision allowing for unreasonableness is not really any different than the tenant who agrees to a general consent provision, considering that the majority of courts interpret

[72] Funk v. Funk, 633 P.2d 586, 591 (Idaho 1981) (Bakes, C.J., dissenting). The majority in *Funk* noted that "no desirable public policy is served" by allowing a landlord "to arbitrarily refuse consent to a sublease for what is in effect no reason at all . . . ." *Id.* at 589. The Court further held that the imposition of a reasonable standard when the consent clause is silent "gives greater credence to the doctrine that restraints on alienation of leased property are looked upon with disfavor and are strictly construed against the lessor." *Id.* According to Chief Justice Bakes, the "broad language of the majority opinion" suggests that an express and freely negotiated absolute veto power would also violate the majority's "public policy." *Id.* at 591.

[73] 709 P.3d 837 (Cal. 1985).

[74] *Id.* at 844 (The Court did observe that "under the Restatement rule such a provision would be valid if freely negotiated.").

[75] *See* Coskran, *supra* note 8, at 414–15. *See also* Johnson, Jr., *supra* note 55, at 753 ("*Kendall* and the other recent cases raise the significant question of when, if ever, the lessor may expressly or impliedly retain the right to refuse consent arbitrarily to the transfer of the leasehold by the lessee."); Lynn, *supra* note 65, at 305 ("The *Kendall* court's rationales cannot be reconciled with the allowance of contract provisions providing for the absolute right to deny consent. Consequently, the future impact of the decision may be extensive.").

> While the restatement allows a landlord to be arbitrary where the written agreement has been "freely negotiated," the California court uses a reasonableness test in all leases before permitting an owner to act arbitrarily, even if the agreement provides otherwise. Consequently, we must look to future authority to ascertain which of these doctrines ultimately will prevail.

Alan M. DiSciullo, The Kendall Case: Momentum for a Reasonableness Standard Lease Transfer Clauses, 1 PROB. & PROP. 32, 34 (May/June 1987).

> such a provision to include unreasonableness. The reasons behind the *Kendall* court's holding are equally as applicable to explicit contract provisions allowing for unreasonableness as they are to general provisions for consent.[76]

A year later, Alex Johnson concurred and wrote that *Kendall* "makes sense only as the first step in a line of cases that will bar the lessor from arbitrarily restricting alienability."[77] Johnson, however, acknowledged that the *Kendall* decision can be read "as merely interpreting an ambiguous clause in a lease" and that the Court "was simply requiring lessors who draft leases to state unambiguously in the approval clause the parties' understanding that the lessor may arbitrarily withhold refusal."[78] According to Johnson, if *Kendall* "stands solely for the narrow position that a lessor can arbitrarily restrict alienability as long as the right to do so is stated clearly," then "arguably such a rule would yield some benefit of greater clarity, and create no new costs."[79]

The dire predictions regarding the demise of "absolute prohibition" and "sole discretion" lease transfer provisions were incorrect. The new interpretive approach to silent consent clauses has *not* led courts to invalidate consent-to-transfer provisions in occupancy leases that expressly grant an unqualified right to prohibit transfers. The issue was presented to the Alabama Supreme Court in *Shoney's LLC v. MAC East, LLC*[80] by the

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[76] Lynn, *supra* note 65, at 304. "The most important question left open by *Kendall* is whether an unreasonable consent allowance can be drafted into commercial leases. The rationale of the *Kendall* decision suggests that this would not be allowed." *Id.* at 307.

[77] Johnson, Jr., *supra* note 55, at 770 ("the widespread adoption of the minority position [on silent consent clauses] presages an absolute prohibition on a lessor's right to restrict alienation arbitrarily.").

[78] *Id*. at 768.

[79] *Id*. at 768, 770. *See also* Lynn, *supra* note 65, at 303–04.

> The essential question unresolved by the *Kendall* court is whether contract provisions which allow the lessor to withhold consent for any reason are still enforceable. The court declined to decide this issue, but noted that the Restatement would allow such a provision if the provision was freely negotiated. If the court allows commercial lessors to easily circumvent the reasonableness standard imposed by the *Kendall* holding, the impact of *Kendall* may be narrow. Drafters will simply revise their leases to include such express provisions, subject only to the Restatement's requirement that the provision be freely negotiated.

Id.

[80] 27 So.3d 1216 (Ala. 2009).

following certified question: "Under Alabama law, when an assignment contract gives the assignor 'sole discretion' to withhold consent to the assignee's proposed sublease, is the assignor's exercise of that discretion subject to a commercial reasonableness standard, or any other standard?"[81] The Court answered in the negative and held that "parties *are* free to negotiate a contract to whatever standard they please, particularly where there is an arm's length negotiation of a commercial lease or assignment by commercial entities."[82] Numerous other courts have upheld the right to arbitrarily restrict occupancy lease transfers.[83]

The three justifications for requiring reasonableness when a consent clause is otherwise silent are the probable expectations of the parties, the

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[81] *Id*. at 1218.

[82] *Id*. at 1221 (emphasis in original). *See also id*. at 1223 ("an unqualified express standard such as 'sole discretion' is also to be construed as written . . . [and] is not subject to a commercial-reasonableness standard.").

[83] *See, e.g.*, Larese v. Creamland Dairies, Inc., 767 F.2d 716, 718 (10th Cir. 1985) ("We do not hold that a provision which expressly grants . . . an absolute right to refuse to consent is unenforceable when such an agreement was freely negotiated."); Pac. First Bank v. New Morgan Park Corp., 876 P.2d 761, 768 (Ore. 1994) ("[T]he parties agreed to . . . a unilateral, unrestricted exercise of discretion by Landlord."); Cafeteria Operators L.P. v. AMCAP/Denver Ltd. P'ship, 972 P.2d 276, 278 (Colo. App. 1998) ("[U]nder Colorado law, without a freely negotiated provision in the lease giving the landlord an absolute right to withhold consent, a landlord's decision to withhold must be reasonable."); Nev. Atl. Corp. v. WREC Lido Venture, LLC, No. G039825, 2008 WL 5065977, at *6 (Cal. App. Dec. 2, 2008) ("We hold a freely negotiated sole discretion clause is a permissible standard . . . ."); Dick Broad. Co., Inc. of Tenn. v. Oak Ridge FM, Inc., 395 S.W.3d 653, 669 (Tenn. 2013) ("The parties are free to contract for a standard of decision-making that is subject to a party's sole, absolute, unfettered discretion, allowing for the denial of consent for any reason, however arbitrary, or for no reason. Such an agreement will be enforceable absent any other public policy . . . .").

> If the parties intend to preclude any transfer by assignment or sublease, they may do so by a freely negotiated provision in the lease. If the parties intend to limit the right to assign or sublease by giving the landlord the arbitrary right to refuse to consent, they may do so by a freely negotiated provision of the lease clearly spelling out this intent.

Julian v. Christopher, 575 A.2d 735, 740 (Md. 1990).

Following the *Kendall* decision, the California legislature in 1989 confirmed that commercial leases may include absolute prohibitions against transfer or express conditions on landlord consent to transfer. *See* Myster, *supra* note 2, at 845–46. However, the legislation did not conclusively resolve whether a landlord may enforce a commercial lease's "sole discretion" clause. *Id.* at 845–46. The state supreme court, however, subsequently upheld the validity of a commercial lease clause which granted the lessor the absolute right to terminate the lease on the lessee's request to sublet a portion of the premises. *See generally* Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc., 826 P.2d 710 (Cal. 1992).

contract principle of good faith and fair dealing, and the general property policy disfavoring restraints on alienation.[84] These arguments do not likewise support the invalidation of the right to arbitrarily restrict occupancy lease transfers. The lessee cannot credibly claim it was misled when the lease expressly provides that the lessor may withhold consent "in its sole discretion."[85] The duty of good faith and fair dealing "does not apply where a party to the contract has the absolute and exclusive authority to make the decision at issue."[86] The strongest argument for invalidating absolute prohibition and sole discretion clauses is the property policy disfavoring restraints on alienation.[87] The common law, however, did not view the lease as a freehold estate and consequently allowed absolute restrictions on lease transfers.[88] Consequently, although restraints on

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[84] *See Dick Broadcasting*, 395 S.W.3d at 669.

[85] *See Shoney's*, 27 So.3d at 1223 ("an unqualified express standard such as 'sole discretion' is also to be construed as written.").

[86] DavCo. Acquisition Holding, Inc. v. Wendy's Int'l, Inc., No. 2:07-cv-1064, 2008 WL 755283, at *7 (S.D. Ohio Mar. 19, 2008). *See also Carma Developers*, 826 P.2d at 728 ("We are aware of no reported case in which a court has held the covenant of good faith may be read to prohibit a party from doing that which is expressly permitted by an agreement."); *Shoney's*, 27 So.3d at 1223 ("Where the parties to a contract use language that is inconsistent with a commercial-reasonableness standard, the terms of such contract will not be altered by an implied covenant of good faith."); Great Water Cap. Partners, LLC v. Down–Lite Int'l, Inc., Nos. C–150015, C–150023, 2015 WL 7459284, at *3 (S.D. Ohio Nov. 18, 2015) (the duty of good faith and fair dealing "cannot be used to supplant the express terms of an agreement.").

[87] The Nebraska Supreme Court expressly reserved "for another day" the question of "whether an express lease provision permitting a lessor to withhold consent amounts to a restraint on alienation, in contravention of public policy in Nebraska." Newman v. Hinky Dinky Omaha–Lincoln, Inc., 427 N.W.2d 50, 55 (Neb. 1988). The Court did, however, quoting other authority, state that a "provision in a deed, will, contract, or other legal instrument which, if valid, would tend to impair the marketability of property, is a restraint on alienation." *Id.* (citing Occidental Sav. & Loan Ass'n v. Venco P'ship, 293 N.W.2d 843, 846 (Neb. 1980)).

[88] *See* Mann Theatres Corp. v. Mid–Island Shopping Plaza Co., 94 A.D.2d 466, 470–71 (N.Y. Sup. Ct. App. Div. 1983) ("Since provisions limiting assignment or underletting are a restraint on the free alienation of land, they are not favored by the law, and are to be strictly construed. Nevertheless, landlords are entitled to the enforcement of such provisions because of their substantial interest in controlling the assignability of leases."). *See also* Lynn, *supra* note 65, at 300 ("[T]he common law has long provided that leases are an exception to the general rule against restraints on alienation."); Coskran, *supra* note 8, at 427 ("Although the common-law prohibition against restraints on fee transfers is virtually absolute, restrictions on leasehold transfers are allowed because of the lessor's continuing interest in the property during and after the term of the lease.").

> Two of the basic axioms of property law are that restraints upon alienation are looked upon with disfavor and that covenants are most strictly construed against the party to be benefited. In view of these

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alienation of leased property are looked upon with disfavor and are strictly construed against the lessor, "most courts have summarily rejected lessees' claims that the use of this theory impermissibly restrains alienability."[89]

Whereas the right to arbitrarily restrict commercial lease transfers has been consistently upheld, residential leases have received different treatment. While the 1977 Restatement did not create an explicit exception for residential leases, its "freely negotiated" limitation on the right of a landlord to withhold consent to a lease transfer will most likely apply when residential tenants sign non-negotiable form leases.[90] There are numerous reasons why commercial and residential leases should be treated differently:

> First, in the commercial context a tenant's right to assign is best characterized as an object of value that is often the subject of bargaining . . . [whereas] the typical residential tenant has little concern for assignment rights. . . . Second, the residential landlord and tenant relationship is traditionally so one-sided that, like most lease provisions, rights of assignment are usually not a subject for bargaining. Third, a landlord's concerns may be quite different regarding commercial and residential leases. For example, a commercial lease is usually for a substantially

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> principles it is mysterious that in this one narrow area of property, assignment of leasehold interests, courts have historically been so favorably disposed toward landlords.

William H. Cotter, *Effect of Leasehold Provisions Requiring the Lessor's Consent to Assignment*, 21 HASTINGS L.J. 516, 523 (1970).

[89] Johnson, Jr., *supra* note 55, at 757. Because constraints on lease transfers are strictly construed, a restriction against a sublease does not prevent an assignment and a restriction against an assignment does not prevent a sublease.

[90] *See* Cotter, *supra* note 88, at 530 ("[T]enants are . . . coerced by the shortage of urban housing into signing standard-form leases that have been drafted to serve the interests of the landlord and deceptively worded to trap the prospective tenant into making unintended concessions."). *See also* Wall, *supra* note 71, at 561.

> The drafters [of the Restatement (Second) of Property] decided that a lessor may reserve the right to refuse a sublease unreasonably if the provision is express and freely negotiated. Thus, where the lease is an adhesion contract, a lessor may not unreasonably refuse a sublease even if the lease explicitly so provides. Without this rule, form leases would be amended to give the lessor the explicit right to refuse a sublease unreasonably.

Id.

> longer term, and the commercial tenant's identity is apt to affect the long-term market value of the rental property. Thus, commercial landlords scrutinize tenants more closely than their residential counterparts.[91]

Consequently, some states have enacted legislation that prohibits lessors from arbitrarily withholding consent to lease transfers. Most, but not all, of the statutes are limited to residential leases.[92]

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[91] Levin, *supra* note 61, at 113. *See also* Coskran, *supra* note 8, at 477–78.

> Residential tenants generally do not hire a lawyer to advise and negotiate concerning the terms of the residential tenancy. . . . [They are] typically unconcerned about transfer restrictions at the time entering into a lease . . . .
>
> [I]n a short-term residential tenancy, it is unlikely that a significant "bonus value" (difference between the agreed rent and the market rental value) will build up. Thus, it is unlikely that a short-term residential tenant will be concerned about the ability to reap the benefit of this bonus value by receiving consideration from a third party assignee or subtenant.

Id.

[92] The Alaska statute is part of the state's Uniform Residential Landlord and Tenant Act and provides that, when the right to sublease or assign is conditioned on the landlord's consent, such consent may be withheld only upon the grounds specified in the statute and "no further restrictions on sublease or assignment are enforceable." ALASKA STAT. § 34.03.060(b) (1974). Hawaii's statute governing the transfer of residential leaseholds provides in part that the lessor "shall not require payment of any money for the lessor's consent except the service charge, nor withhold such consent unreasonably." HAW. REV. STAT. § 516-63 (2018). Delaware's Residential Landlord-Tenant Code permits landlords to restrict the right to assign "in any manner," but it specifies that when the right to sublease is conditioned on the landlord's consent, "[s]uch consent shall not be unreasonably withheld." DEL. CODE ANN. tit. 25, § 5508(b) (2018). In New York, a tenant renting a residence in a dwelling having four or more residential units "shall have the right to sublease his premises subject to the written consent of the landlord in advance of the subletting [and s]uch consent shall not be unreasonably withheld." N.Y. REAL PROP. LAW § 226-b (McKinney 2018). *See also* Harvey S. Epstein, *Weisner Revisited: A Reappraisal of a Co-op's Power to Arbitrarily Prohibit the Transfer of its Shares*, 14 FORDHAM URBAN L.J. 477, 510 (1986) (describing the different treatment of subleases and assignments, and explaining that the amended statute provides that release from the lease is the tenant's sole remedy when a landlord unreasonably withholds consent to an assignment).

Texas prohibits tenants from assigning or subletting without the landlord's consent and the statutory requirement is incorporated into the terms of every lease by operation of law. *See* TEX. PROP. CODE ANN. § 91.005 (West 1984) ("During the term of a lease, the tenant may not rent the leasehold to any other person without the prior consent of the landlord."). The statute applies to both assignments and subleases and in order to displace the default rule, the parties to the commercial or residential lease must clearly express such intent. *See* Trinity Prof'l Plaza Assocs. v. Metrocrest Hosp. Auth., 987 S.W.2d 621, 624 (Tex. App.—Eastland 1999).

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II. IS THERE A RIGHT TO ARBITRARILY RESTRICT MINERAL LEASE TRANSFERS?

Mineral-owning landowners, like commercial and residential landlords, have reasons to control lease transfers, just as extraction companies—like tenants—have reasons to assign or otherwise transfer the leasehold interest. However, in contrast to the long line of cases interpreting occupancy lease transfer restrictions, there are unexpectedly few decisions involving consent-to-transfer clauses in oil and gas and other mineral leases.[93] As a consequence of the dearth of judicial authority, the right to arbitrarily restrict mineral lease transfers is not clearly established, even when it is set forth in an express "sole discretion" clause.[94]

Occupancy leases are characterized by property law as non-freehold estates, and they are increasingly viewed by courts as contracts. Oil and gas and other mineral leases—while containing numerous contractual agreements—are perceived differently and are considered in many states to convey a determinable fee freehold estate to the lessee.[95] Courts assessing

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It is noteworthy that England, the locus of property common law, abrogated the right to arbitrarily restrict the transfer of occupancy leases in the Landlord-Tenant Act of 1927. *See* Cotter, *supra* note 88, at 528 ("the English Parliament decided it could no longer countenance a landlord retaining arbitrary power over assignment and subletting under the guise of a seemingly innocuous leasehold provision requiring his consent. It therefore legislated an implied condition of reasonableness into every such lease."). *See also* Lewis B. Stadler, *Landlord-Tenant – Lessor's Rejection of Sublease Agreement, Pursuant to a Consent Clause, Must be Judged under a Reasonable Commercial Standard*, 9 CUMB. L. REV. 309, 316 (1978) ("No longer can a landlord in England arbitrarily deny consent to a transfer based upon an approval clause.").

[93] *See* Glasser & Humphrey, *supra* note 13, at 4 ("One might expect the validity and legal effect of these clauses to have been addressed numerous times by courts. They have not been."). "Remarkably, there are to date no reported Texas decisions in which a court has directly ruled upon the enforceability of a consent-to-assign clause in an oil and gas lease." *Id.* at 6.

[94] In light of infrequent past litigation, the validity of an oil and gas lease provision, which places a restraint on the alienation of the lessee's interest, has been described as "a theoretical question." *See* EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS 307–08 (Vol. 4 1990). The question, however, will likely not remain an abstract issue with increased oil and gas exploration in new areas (and at new depths) spurred by advances in hydraulic fracturing and horizontal drilling. *See* Meier & Ryan, *supra* note 14, at 305 (noting that restrictions on the ability to transfer lease rights to a third party is "starting to appear more frequently in oil and gas leases.").

[95] The distinction between freehold and non-freehold estates, although still relevant in terms of the policy against restraints on alienation, is based on medieval England's tenurial system of land ownership and possession:

> English law categorized estates in land according to the holders' tenurial relationships. Originally, a freehold estate was a free tenure,

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transfer restrictions in mineral leases have consequently placed more importance on the policy against unreasonable restraints against alienation. Whether a landowner-lessor has validly secured the right—constrained by reasonableness or otherwise—to restrict lease transfers may depend on the type of restraint utilized and the state's theory of mineral ownership.

A. Reasons why landowner-lessors object to mineral lease transfers.

Landowners want the power to veto transfers of their mineral leases for the same reasons that landlords desire to control occupancy lease transfers: (1) concerns about the transferee; (2) concerns regarding the transferee's business; and (3) to use the transfer request as an opportunity to extract concessions or otherwise improve one's economic position.[96] However, in one respect, the concerns diverge: whereas a sublessee or assignee of a

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> such as tenure by knight service or socage. Later, freehold estates included estates that were of uncertain duration, such as a fee simple or life estates, and those estates in which a real action could restore the property rather than enable mere recovery of money damages. . . .
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> Persons such as villeins, who held estates subjecting them to servile requirements, held by non-free tenures. Paradoxically, the non-free tenures, which were distinguished by uncertainty in the types of services required, later became distinguished by certainty in duration. A tenant who held under a lease for a definite period held by a non-free tenure. Even later, English courts determined that freehold estates, such as the fee simple, fee tail, and life estate, derived from seisin and therefore, should receive the aid and protection of certain real actions. According to English law, persons who held nonfreehold estates possessed those estates, but were not seised of them. For a time, the law extended no legal protection, such as the real action, to nonfreehold estates. Indeed, the law did not even consider nonfreehold estates, such as leaseholds, as real property. Instead, the nonfreehold estate received the hybrid classification as a "chattel real," an interest that was partly real and partly personal.
>
> The reforms of English land law in the 1920s focused first on tenures and then on estates. . . . Reformers changed the law governing estates by merging a variety of personal property rules with real property rules. Consequently, the differences between freehold and nonfreehold estates largely disappeared.

David A. Thomas, *Anglo-American Land Law: Diverging Developments From a Shared History – Part III: British and American Real Property Law and Practice – A Contemporary Comparison*, 34 REAL PROP., PROB. & TR. J. 443, 452–53 (1999). *But see* Pac. Sw. Realty Co. v. Cty. of L.A., 820 P.2d 1046, 1051 (Cal. 1991) ("Notwithstanding the fact that a lease is a present possessory interest in land, there is no question that as a nonfreehold estate it is a different species of interest from a freehold estate in fee simple.").

[96] *See* THE M&A PROCESS: A PRACTICAL GUIDE FOR THE BUSINESS LAWYER 72 (ABA ed. 2006).

commercial lease often engages in an entirely different, and perhaps objectionable, business, a mineral lease is focused on specific extraction rights and sets forth detailed requirements for exercising and preserving such rights.

Landowners are not likely to prohibit the transfer of a mineral lease based on doctrinal differences or personal animus. But they do often choose to lease their minerals to producers with reputations for honesty and reliability, and they would prefer that the lease not be subsequently acquired by a disreputable company.[97] The landowner is also concerned about fair treatment in terms of operational issues, such as surface disturbance and remediation, and with regard to royalty calculations and other financial issues.[98] Given the difficulties of oversight and auditing, "the landowner depends on the lessee to account accurately for profits" and

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[97] *See* Kuntz, *supra* note 94, at §51.2 ("A restraint on alienation of the lease is ordinarily included, if at all, in a lease in order for the lessor to be assured that the chosen lessee will be the one to operate the lease."). *See also* Bruce E. Cryder & R. Clay Larkin, *Consent Provisions in Natural Resources Agreements*, 30 ENERGY & MIN. L. INST. 3, 95–96 (2009) ("[I]t is reasonable to 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."); Glasser & Humphrey, *supra* note 13, at 35–36 ("[T]he lessor may have relied on the reputation, skill, and financial position of the original lessee and thus would want to ensure the same qualifications in any subsequent lessees.").

In *Heffington*, the owners of an oil and gas lease, who had contracted with third parties for the development and operation of the lease, unsuccessfully sued to prevent the assignment of the contract. *See generally* Heffington v. Hellums, 212 S.W.2d 245 (Tex. App. 1948). After noting that only contracts involving character, skill and confidence are non-assignable, the Texas Appellate Court held that "confidence, character or trust" are not reasons for the contract and that the lease operations did not require the personal skills of the contracting parties. *Id.* at 248. The contract did not have a consent-to-transfer clause. *Id.*

[98] *See* Allen D. Cummings, *Consent Asked For – But Not Received: The Enforceability of Consent to Assignment or Transfer Provisions*, 38 ANN. ERNEST E. SMITH OIL, GAS & MIN. L. INST., at 2 (March 30, 2012).

> The Lessor may want to ensure that the assignee is not one of those companies who have a reputation for treating its royalty owners badly. If the Lessor is also the surface owner, the Lessor may also want to ensure that the assignee is not one of those companies known for turning the surface estate into moonscape.

Id. *See also* JOHN LOWE ET AL., CASES AND MATERIALS ON OIL AND GAS LAW 1074 (7th ed. 2018) ("[T]he landowner . . . may have foregone attempts to negotiate extensive lease provisions dealing with surface damages because of prior dealings with the original lessee and confidence the lessee would be careful in its use of the surface or would fully compensate her for any injury to the surface.").

"must trust that the extractor is accounting accurately and honestly."[99] Lessor mistrust is not unwarranted as evidenced by the number of lawsuits alleging fraud and breach of contract for improper cost deductions and underpayment of royalties.[100]

Another critical factor is the financial and operational ability of the prospective transferee to develop the minerals and fulfill the other obligations set forth in the lease. With the power to withhold consent, landowners can ensure that they are dealing with a producer 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 . . . a history of legal compliance sufficient to . . . obtain necessary permits."[101] Some energy companies acquire existing oil and gas leases for speculative purposes and have "little or no desire to pay for the drilling of the well."[102] Landowners interested in immediate and extensive development will want

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[99] Meier & Ryan, *supra* note 14, at 329, 335.

[100] *See, e.g.*, Flanagan v. Access Midstream Partners, L.P., No. 17-CV-315-GKF-JFJ, 2017 WL 4324535, at *1 (N.D. Okla. Sept. 9, 2017) (procedural ruling in case alleging that affiliated energy companies artificially inflated cost-of-service deductions from royalty payments owed to Texas royalty owners); SEECO, Inc. v. Hales, 22 S.W.3d 157, 172–73 (Ark. 2000) (producer committed constructive fraud by failing to disclose that gas being offered to a new purchaser was previously dedicated to a related utility under an agreement that protected royalty owners against market declines); Samson Lone Star L.P. v. Hooks, 497 S.W.3d 1, 21 (Tex. App. 2016) (defendant fraudulently induced lessor to pool a portion of his lease into a unit that resulted in payment of lower royalties); Max B. Baker, *Chesapeake Energy Settles Royalty Lawsuits for $52.5 million*, FORT WORTH STAR-TELEGRAM (May 23, 2016), http://www.star-telegram.com/news/business/article79291012.html [https://perma.cc/B3EX-ZUD7]; Andrew Maykuth, *Chesapeake Energy agrees to pay $30M to settle shale royalty dispute, but there's a snag*, PITTSBURGH POST-GAZETTE (Dec. 26, 2017), http://www.post-gazette.com/powersource/companies/2017/12/26/Chesapeake-Energy-agrees-to-pay-30M-to-settle-marcellus-shale-royalty-dispute-but-there-s-a-snag/stories/201712260091 [https://perma.cc/M5W2-35BF].

[101] Cryder & Larkin, *supra* note 97, at 95. *See also* Meier & Ryan, *supra* note 14, at 337 ("[A] landowner who has entered into an agreement with an extractor, in which the extractor's skill in locating and extracting minerals is a basis of the agreement, will want to be able to preclude the extractor from transferring this interest to a less-skilled party.").

[102] Caleb A. Fielder, *Blood and Oil: Exploring Possible Remedies to Mineral Cotenancy Disputes in Texas*, 50 TEX. TECH L. REV. 173, 175 (2017). *See also* Jeff Goodell, *The Big Fracking Bubble: The Scam Behind Aubrey McClendon's Gas Boom*, ROLLING STONE (Mar. 1, 2012), https://www.rollingstone.com/politics/news/the-big-fracking-bubble-the-scam-behind-the-gas-boom-20120301 [https://perma.cc/Q34S-4ZDA] (quoting the former Chesapeake Energy Executive's statement that "buying leases for x and selling them for 5x or 10x is a lot more profitable than trying to produce gas at $5 or $6 per million cubic feet.").

to prevent transfers to "lease flippers,"[103] or companies that engage in minimum production in order to "hold" the lease. Mineral lessors may also wish to avoid lease transfers that increase the number of non-cost bearing interests, such as overriding royalties and production payments.[104]

Owners of mineral rights are not averse to using a proposed lease transfer as an opportunity to improve one's economic position. Oil and gas leases are "bought and sold like commodities,"[105] and a mineral lessor—like a commercial landlord—would like to share in the increased value of the leasehold. By requiring consent to lease transfers—or terminating leases for violating assignment restrictions—lessors can potentially negotiate increased royalties or otherwise obtain better financial terms.[106]

B. The right to arbitrarily restrict mineral lease transfers is not clearly established.

In 2011, two Texas oil and gas attorneys, Mark Glasser and Scott Humphrey, published a comprehensive study of consent-to-transfer restrictions in oil and gas leases, focusing on "the permissibility of a direct transfer of an oil and gas lease in cases where the lease purports to prohibit or limit the right of transfer."[107] Their findings are illuminating:

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[103] *See* Fielder, *supra* note 102, at 175 (describing companies that acquire and transfer oil and gas leases as "lease flippers").

[104] *See* Kuntz, *supra* note 94, at §51.2 (noting that retained overriding royalties and production payments "constitute a burden on the operating lease and discourage development," and suggesting that a consent-to-transfer restraint can "provide that the lessee cannot assign such nonoperating interests, except for purposes of obtaining funds or supplies for development of the lease.").

[105] *See* McFarland, *supra* note 15 ("In the Permian Basin last year, more than $25 billion of transactions took place transferring mineral leasehold interests.").

[106] *See* Cryder & Larkin, *supra* note 97, at 61–62 ("[W]here a lease is to be transferred in times of increasing prices, the lessor will not want to be shut out of any increase in any financial benefit that will accompany the assignment."). *See also* Complaint at 8, Koonce v. Chesapeake Expl., L.L.C., No. 4:12CV00736, 2012 WL 1642717 (N.D. Ohio Mar. 27, 2012) (complaint stating that "[f]rom 2008 through 2010, few Columbiana County landowners understood the significance of the Utica shale play. . . . [and signed] oil and gas leases in which they received less than 1% of the fair market value for the up-front Signing Bonus payments that are currently being paid . . . ."); Blake A. Watson, *Ohio Oil and Gas Litigation in the New Fracking Era*, 74 OHIO ST. L.J. 47, 63 (2013) (describing lawsuits in Ohio to terminate leases for failure to comply with assignment restrictions).

[107] Glasser & Humphrey, *supra* note 13, at 3. The study summarizes the relevant case law in twelve states (Arkansas, California, Colorado, Kansas, Louisiana, Montana, New York, Ohio, Oklahoma, Pennsylvania, Texas, and West Virginia) and discusses how consent-to-transfer restrictions in oil and gas leases would be addressed by the Restatement (Third) of Property: Servitudes.

> One might expect the validity and legal effect of these clauses to have been addressed numerous times by courts. They have not been. There are surprisingly few reported decisions involving the effect of consent-to-assign clauses in oil and gas leases—even fewer in which the issue is conclusively resolved. Moreover, the approaches taken by courts, and their conclusions, vary widely depending upon the manner in which the interest conveyed under an oil and gas lease is classified under the applicable state's property law . . . .[108]

Although liberty of contract is honored in cases involving mineral leases, the public policy against restraints on alienation historically has been accorded an elevated importance. States, however, disagree on whether a mineral lease is a conveyance or a contract (or both), and whether the lessee holds a defeasible ownership interest or a limited and defined extraction right, such as a license or *profit a prendre*.[109] The extent to which restraints on transfer are disfavored—or permitted—may depend on the type of restriction utilized (disabling restraint, forfeiture restraint, or promissory restraint), and whether the agreement is considered to be a covenant or condition.[110] Consent-to-transfer provisions in mineral leases are infrequently challenged and almost never invalidated. Furthermore, scholars are challenging the long-held distinction between restraints on the transfer of occupancy leases and restraints on the transfer of other property rights, including mineral leases. In particular, Luke Meier and Rory Ryan persuasively argue that "the reason that restraints on fee simple estate are usually invalidated does not apply to the interest created in the typical oil and gas lease."[111] Express alienation restraints should be enforceable in mineral leases as well as occupancy leases and landowners or others who

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[108] *Id*. at 4. "Remarkably, there are to date no reported Texas decisions in which a court has directly ruled upon the enforceability of a consent-to-assign clause in an oil and gas lease." *Id.* at 6.

[109] *Id.* at 5.

[110] *See* Meier & Ryan, *supra* note 14, at 340–42.

[111] *Id.* at 312–13. *See also* Johnson, Jr., *supra* note 55, at 758 n.20.

> [C]ourts . . . justify the restraint by stating formalistically that a leasehold estate is a nonfreehold estate; hence, the quantum of restraint is limited. This sort of argument based on labelling the type of interest being restrained (as opposed to examining the nature of the interest being restrained) is not helpful in solving the problem.

Id.

clearly bargain for such rights should be able to arbitrarily restrict mineral lease transfers.

1. *Mineral lease transfer restrictions and the Restatements of Property.*

The default rule for mineral leases, as with occupancy leases, is that they are freely transferable. Restrictions on transfers, however, are common so the rule is inevitably qualified: "the lessee's interest is assignable *in the absence of an express provision in the lease restraining assignments by the lessee*."[112] This general statement assumes that it is possible to place restraints on the right to transfer mineral leases. On the other hand, a mineral lease is said to be different from a lease "in the traditional sense"[113] and is often considered to be a conveyance of a defeasible fee interest.[114] Consequently, it commonly held that "courts use

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[112] HOWARD R. WILLIAMS & CHARLES J. MEYERS, WILLIAMS & MEYERS OIL AND GAS LAW §402 (Patrick H. Martin & Bruce M. Kramer eds., Vol. 2 2010) (emphasis added). *See also* Kuntz, *supra* note 94, at §35.2.

[113] *See* Nat. Gas Pipeline Co. Am. v. Pool, 124 S.W.3d 188, 192 (Tex. 2003) ("In Texas it has long been recognized that an oil and gas lease is not a 'lease' in the traditional sense of a lease of the surface of real property.").

[114] *See, e.g.*, Rice v. Chesapeake Energy Corp., No. 2:12–cv–00392, 2012 WL 3144318, at *3 (W.D. Pa. Aug. 1, 2012) ("In Pennsylvania, an oil and gas lease is not presumed to carry with it principles of lease construction found in the landlord/tenant arena. . . . It is viewed as an interest in real property more akin to a fee simple determinable interest.").

> The term "lease," when used in an oil and gas context, is a misnomer. The estate created by the oil and gas lease is not the same as those interests created under a "lease" governed by the law of landlord and tenant.
>
> The common oil and gas lease creates a determinable fee. It vests the lessee with title to oil and gas in place. . . .
>
> The determinable fee created by an oil and gas lease will revert to the grantor upon the failure of the lessee to obtain production during the primary term, or failure to timely pay delay rentals.

Cherokee Water Co. v. Forderhause, 641 S.W.2d 522, 525 (Tex. 1982).

> The lease in this case grants the lessee an unequivocal and exclusive right to the mineral estate for a fixed term plus an indefinite extended term upon the happening of certain conditions, such as actual production of oil and gas or a prescribed payment to the lessor. Based on the vested nature of this grant, the oil and gas lease has been construed as transferring to the lessee a fee simple determinable in the mineral estate with a reversionary interest retained by the lessor that can be triggered by events or conditions specified in the lease.

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a different standard when applying consent to assignment provisions to real estate leases than to the fee simple determinable created by an oil and gas lease."[115] Courts are less willing to uphold a restriction on the alienation of a fee interest than a restriction on the transfer of a lesser interest, such as a leasehold.[116] In the same fashion, whereas restraints on alienation are generally disfavored and strictly construed, restraints on alienation of a fee interest are particularly disfavored and strict construction is deemed most appropriate.[117]

Chesapeake Expl., LLC v. Buell, 45 N.E.3d 185, 197 (Ohio 2015). In support of this statement, the Ohio Supreme Court cites *Harris v. Ohio Oil Company*, a case that does not use the "determinable" label. *See* 48 N.E. 502, 506 (Ohio 1897). Later, in its opinion, the Buell court clarifies that the status of an oil and gas lease—as a fee, lease, profit, or license—"is not a dispute presented to us for resolution." *Id.* at 504 n.5.

As discussed by Mark Glasser and Scott Humphrey, the fee simple determinable conveyance theory is associated with "ownership-in-place" states, whereas other states view a mineral lease as granting a right, in the nature of an easement or profit, to go onto another's property and extract resources:

> Texas, Pennsylvania, and several other states in shale oil and gas producing regions follow the "ownership-in-place" theory, which holds that the lessee under an oil and gas lease obtains a fee simple determinable estate in the minerals in place. In assessing the incidents of ownership of an oil and gas lease, courts in these states therefore rely on well-established real property precedents. Other states, including Kansas and Louisiana, follow the "exclusive-right-to-take" or "non-ownership" theory, which holds that an oil and gas lease conveys only a *profit a prendre*, that is, the exclusive right to extract the minerals but not a possessory interest in the minerals in place. In those states, the courts do not necessarily follow the law regarding the conveyance of fee simple estates when construing the provisions of oil and gas leases. They may instead draw upon general landlord-tenant principles and other facets of commercial contract law.

Glasser & Humphrey, *supra* note 13, at 5. *See also* Williams & Meyers, *supra* note 112, at §203; T. Ray Guy & Jason E. Wright, *The Enforceability of Consent-to-Assign Provisions in Texas Oil and Gas Leases*, 71 SMU L. REV. 477, 481–82 (2018).

[115] Cummings, *supra* note 98, at 3.

[116] *See* G. Brian Wells et al., *Restraints on Alienation in Coal Leases*, 33 ENERGY & MIN. L. INST. 16, at 541 (2012).

[117] *See, e.g.*, Coskran, *supra* note 8, at 500 ("Restraints on alienation, although permitted, are a disliked interference with commerce."). In *Godley v. Kentucky Resources Corporation*, a provision that prohibited any "modification" of the coal lease except by written agreement was held inapplicable to a lease assignment. 640 F.2d 831, 836 (6th Cir. 1981). While noting that restraints on alienation of property interests will be upheld "when not repugnant to a plain provision of law and not unreasonable," the Court held that such restraints are nonetheless "looked on with disfavor" and consequently "will not be extended

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A logical starting point in examining the right to arbitrarily restrict mineral lease transfers is the American Law Institute's Restatement of the Law. In particular, there are three relevant Restatements: the 1944 Restatement (First) of Property; the 1977 Restatement (Second) of Property: Landlord and Tenant; and the 2000 Restatement (Third) of Property: Servitudes.[118]

The 1944 Restatement (First) of Property does not specifically discuss mineral leases, but it does address restraints on alienation of both leaseholds and fee estates. The 1944 Restatement describes three types of restraints on alienation: disabling restraints, promissory restraints, and forfeiture restraints.[119] A restraint on alienation that attempts to cause a later conveyance to be void is a disabling restraint.[120] A restraint on alienation that attempts to impose contractual liability on the one who makes the later conveyance is a promissory restraint.[121] A restraint on

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to include anything not clearly expressed by the language of the instrument conveying the right." *Id.*

[118] *See also* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 4 (AM. LAW INST. 1983) (which also discusses restraints on alienation).

[119] RESTATEMENT (FIRST) OF PROP. § 404 (AM. LAW. INST. 1944).

[120] If the disabling restraint is valid, any attempt to transfer the property interest is null and void. *See* Lohmann v. Adams, 540 P.2d 552, 555 (Okla. 1975). Thus, if a mineral lease consent-to-transfer provision is upheld as a valid disabling restraint, the landowner can keep the lease in effect and prevent the transfer. *See* Coskran, *supra* note 8, at 431. If, on the other hand, the disabling restraint is invalid, the transfer will be upheld. *See* Wells, *supra* note 116, at 542–43.

[121] *See* Meier & Ryan, *supra* note 14, at 341 (Promissory restraints are covenants against transfer and are rooted in contract law. If a mineral lease consent-to-transfer provision is upheld as a valid promissory restraint, a lessee who break the promise not to assign or otherwise alienate the lease "is liable in contract damages to the promisee-grantor, but the transaction in violation of the promise is not affected."). Other breach of contract remedies may be available. If the breach can be remedied by either damages or forfeiture, the restraint is both a promissory restraint and a forfeiture restraint. *See* Wells, *supra* note 116, at 546 ("When forfeiture is imposed as a penalty, the restraint becomes a forfeiture restraint. If there are no express consequences for the breach in the lease, the court will confine the remedy to the least harsh option and will favor sustaining the transfer."). *See also* RESTATEMENT (FIRST) OF PROP. § 404 cmt. g (AM. LAW INST. 1944).

> The fact that a promissory restraint is held valid does not mean that all conceivable contractual remedies are available to the person entitled to enforce the restraint. Sometimes the only available remedy may be one for damages, and that even may be only a remedy for nominal damages. . . .
>
> The contractual liability "results from a breach of an agreement not to convey" not only when the promise not to convey is unqualified but

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alienation that attempts to terminate or subject to termination all or a part of the property interest conveyed is a forfeiture restraint.[122] Disabling restraints are held invalid to a greater extent than the other two types of restraints.[123] With regard to fee interests, the 1944 Restatement provides that promissory restraints and forfeiture restraints are only valid if the restraint "is qualified so as to permit alienation to some though not all possible alienees," the restraint is "reasonable under the circumstances," and there is no rule against perpetuities issue.[124] In contrast, the 1944

> also when it is qualified by permitting alienation with consent and the consent is not obtained . . . .

Id.

[122] Forfeiture restraints "allow for the divestiture of the property from the original transferee at the option of the original transferor if an attempt at alienation by the original transferee is made under specified circumstances . . . ." Wach, *supra* note 44, at 677 n.34. If a mineral lease consent-to-transfer provision is upheld as a valid forfeiture restraint, an attempt to transfer empowers the landowner-lessor to terminate the lease. *Id.*

[123] *See* RESTATEMENT (FIRST) OF PROP. § 404 cmt. c (AM. LAW INST. 1944). *See also id.* § 405 ("Disabling restraints, other than those imposed on equitable interests under a trust, are invalid."); RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 15.2(2) cmt. c (AM. LAW INST. 1977) ("The disabling restraint is more objectionable from a public policy standpoint because it imposes a complete freeze on the movement of ownership."); Meier & Ryan, *supra* note 14, at 342–43.

> Both forfeiture and promissory restraints are much more likely to be enforced than is a disabling restraint. . . .
>
> With a disabling restraint, the party who holds the restrained interest is flatly precluded from transferring the interest. . . .
>
> With a forfeiture or promissory restraint, however, there is some mechanism by which the restrained party can rid itself of the interest. With a promissory restraint, the restrained party can transfer the interest but must pay contractual damages to the original grantor (promisee), to whom the promise not to alienate was made. With a forfeiture restraint, the restrained party can attempt to alienate the interest, with the result of that interest being forfeited, usually back to the original grantor.

Id.

[124] RESTATEMENT (FIRST) OF PROP. § 406 (AM. LAW INST. 1944). The same factors apply if the fee interest is absolute or defeasible. *See id.* § 407 ("A restraint on the alienation of a legal possessory defeasible estate in fee simple is valid if, and only if, a similar restraint on a legal possessory estate in fee simple which is, or but for the restraint would be, indefeasible is valid under the rule stated in [§406]."). Whether a restraint is reasonable depends on several factors, including whether the one imposing the restraint has some interest in land which he is seeking to protect by the enforcement of the restraint, whether the restraint is limited in duration, whether the type of conveyances prohibited are ones not likely to be employed to any substantial degree by the one restrained, and whether the number of persons to whom alienation is prohibited is small. *Id.* § 406 cmt. i. *See also*

(*continued*)

Restatement upholds restraints on the alienation of leasehold interests when "the estate for years is created as the result of a business transaction . . . and the restraint is (i) imposed at the time the estate for years is created, or (ii) agreed to thereafter as a business transaction by the persons who are in the relationship of landlord and tenant . . . ."[125]

Section 15.2 of the 1977 Restatement endorses the right of a "*landlord*" to bargain for an absolute right to withhold consent "to an alienation by the *tenant*."[126] It does not, however, purport to address the validity of consent-to-transfer provisions in *mineral* leases.[127] While there is much authority for the proposition that landlord-tenant cases have no bearing on mineral lease disputes, there are also cogent dissenting views.[128]

The 2000 Restatement (Third) of Property focuses on servitudes, defined as "a legal device that creates a right or an obligation that runs with land or an interest in land."[129] The Restatement covers easements, profits, and covenants, but expressly states that—to the extent that "special rules and considerations apply"—lease covenants and "profits for the removal of timber, oil, gas, and minerals" are not covered.[130] To the extent that it is

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RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 4.2 (AM. LAW INST. 1983) (setting forth a similar list of factors for determining if a forfeiture restraint is reasonable).

[125] RESTATEMENT (FIRST) OF PROP. § 410(a) (AM. LAW INST. 1944). In such situations, "the objections which normally apply to restraints on alienation are absent and their validity is recognized . . . ." *Id.* cmt. a. It is evident that the type of lease under consideration was an occupancy lease. "The landlord naturally desires to have some control as to the person with whom he must deal to obtain performance of these obligations and hence the restraint on the alienation by the tenant is imposed." *Id.*

[126] RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 15.2(2) (AM. LAW INST. 1977) (emphasis added).

[127] *See* Meier & Ryan, *supra* note 14, at 306 n.3 ("Although all three Restatements of Property have devoted considerable attention to the legality of restraints on alienability, how this law applies in the context of an oil and gas lease has not been addressed."). In *Walls v. Petrohawk Properties, LP*, the Court of Appeals acknowledged Arkansas's adoption of §15.2 of the Restatement (Second) of Property in a dispute over the assignment of an oil and gas lease. 812 F.3d 621, 626 (8th Cir. 2015). The Court, however, did not discuss the applicability of §15.2 to mineral leases and assumed that the consent-to-transfer provision was valid. *Id.* The clause at issue stated that the lessor's consent would "not be unreasonably withheld," and the Court held that the lessor had unreasonably withheld consent. *Id.*

[128] *Compare* Kuntz, *supra* note 94, at §51.2 ("There is no question regarding the validity of a restraint on the assignment of an ordinary lease of land. This rule is of limited utility, however, for the reason that the oil and gas lease does not create a landlord-tenant relation . . . ."), *with* Meier & Ryan, *supra* note 14, at 330 ("The rationale supporting land-lease restraints applies to a mineral lease.").

[129] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.1 (AM. LAW INST. 2000).

[130] *Id.* *See also id.* cmt. e.

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relevant, the 2000 Restatement eschews labels and reduces the inquiry to a reasonableness inquiry: "A servitude that imposes a direct restraint on alienation of the burdened estate is invalid if the restraint is unreasonable. Reasonableness is determined by weighing the utility of the restraint against the injurious consequences of enforcing the restraint."[131] Determining reasonableness of a restraint on alienation requires balancing the utility of the purpose served by the restraint against the harm that is likely to flow from its enforcement. Servitudes accomplish a variety of

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> Servitudes are used in several specialized areas where the rules and considerations governing their operation are different from those ordinarily applied to the servitudes covered in this Restatement. Landlord-tenant law, real-property security law, oil and gas law, timber law, and the law governing extraction of other minerals are such specialized areas. No attempt has been made in this Restatement to take account of the special rules and considerations governing servitudes used in those contexts.

Id. In *Amoco Production Company v. Thunderhead Investment, Inc.*, the Court declined to adopt the 2000 Restatement's position on the location and dimensions of servitudes in a dispute of whether an oil and gas lessee reasonably accommodated the surface owner's use of the land as a pasture. 235 F.Supp.2d 1163, 1166 (D. Colo. 2002). "Application of this secondary authority would contradict the authors' clear intentions . . . ." *Id.* at 1171. A few courts have cited the 2000 Restatement in oil and gas cases, although not in cases involving lease transfers.

See also Navasota Res., LP v. First Source Tex., Inc., 249 S.W.3d 526, 538–39 (Tex. App. 2008) (joint operating agreement's preferential-right provision did not constitute an unreasonable restraint on alienation); In re Barker, 327 P.3d 1036, 1040–41 (Kan. App. 2014) (dispute whether oil-and-gas lease executed by husband and his parents on parents' land was terminated by the doctrine of merger when husband and wife, as joint tenants, were devised his mother's ownership in the land that was burdened by the leasehold); Pennaco Energy, Inc. v. KD Co. LLC, 363 P.3d 18, 28–29 (Wyo. 2015) (surface damage agreements in oil and gas lease were contractual obligations that obligated lessee after assignment, rather than servitudes that the parties would not have expected lessee to fulfill after assignment).

Other courts have addressed restraints on alienation in oil and gas cases without reference to the Restatement. *See., e.g.*, Elick v. Champlin Petroleum Co., 697 S.W.2d 1, 4–5 (Tex. App. 1985) (reservation of executive rights did not constitute unlawful restraint on alienation of the mineral estate); Moffit v. Sederlund, 378 N.W.2d 491, 497–98 (Mich. App. 1985) (prohibition placed on trustee on disposing of a royalty interest was not an unreasonable restraint on alienation because it was necessary to effectuate the purpose of the trust); Flying Diamond Oil Corp. v. Newton Sheep Co., 776 P.2d 618, 626 (Utah 1989) (restraint on alienation in agreement exchanging easement rights and royalty rights was reasonable and minimized possibilities of conflict between the surface owner and mineral owner).

[131] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 (AM. LAW INST. 2000). "Direct restraints include absolute prohibitions on some or all types of transfers, including leases, and prohibitions on transfer without the consent of another . . . ." *Id.* cmt. b.

legitimate goals, including entry controls and the creation of investment opportunities, but it may impede free market transactions and land development, and it can have the harmful effect of placing "one person in a position to take unfair advantage of another's need or desire to transfer property."[132] The nature, extent, and duration of the restraint will impact its validity:

> Generally, greater restraints are justified on estates of lesser duration than on estates of longer duration, and on nonpossessory interests than on possessory estates. Permissible restraints on alienation of leaseholds are often greater than on fee-simple estates, and greater restraints on alienation of easements, profits, and covenant benefits are often permitted than on leaseholds.[133]

The Restatements do not provide a definitive answer to whether there is a right to arbitrarily restrict mineral lease transfers. Consent-to-transfer provisions can be worded as a disabling restraint, a promissory restraint, and/or a forfeiture restraint.[134] The 1944 Restatement posits that the

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[132] *Id.* cmt. c.

[133] *Id.* (In general, "[t]he greater the practical interference with the owner's ability to transfer, the stronger the purpose that is required to justify a direct restraint on alienation.").

[134] The 1944 Restatement states that a silent consent clause, in which the lessee covenants not to transfer the lease without the lessor's consent, constitutes a promissory restraint. *See* RESTATEMENT (FIRST) OF PROP. § 404 illus. 2 (AM. LAW INST. 1944). The 1977 Restatement suggests that such clauses are forfeiture restraints. *See* RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 15.2 cmt. b (AM. LAW INST. 1977) ("The most common type of restraint on alienation imposed . . . is a forfeiture restraint under which the landlord reserves the right to reenter and take possession of the leased property in the event the tenant transfers his interest in the leased property without the consent of the landlord.").

It is also arguable that—when consent is unconstrained by reasonableness—the clauses are disabling restraints because the fact that transfers can take place with consent does not preclude the possibility that the lessee will be "stuck" with the lease. *See* RESTATEMENT (FIRST) OF PROP. § 406 cmt. h (AM. LAW INST. 1944).

> The fact that alienation may be freely made if the consent of some other person is obtained does not remove to any extent the objection to the restraint imposed. The reason is that this element is normally present in connection with any restraint because by obtaining a release from the one who is entitled to enforce a restraint, alienation could always be freely made.

Id. *See also* Shields v. Moffitt, 683 P.2d 530, 534 (Okla. 1984) (oil and gas lease provision permitting assignments "only with the written consent of the lessors" held to be a disabling restraint and an unlawful restraint on alienation). *But see* Meier & Ryan, *supra* note 14, at 343.

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restraint must be "qualified so as to permit alienation to some though not all possible alienees," a limitation not imposed by the typical anti-assignment provision.[135] The 1977 Restatement, on the other hand, clearly endorses a right to arbitrarily restrict lease transfers, but is focused on occupancy leases. The 2000 Restatement focuses on the reasonableness of the restraint, which does not provide a bright-line rule, but rather directs the inquiry to an assessment of the beneficial and harmful consequences of the transfer restriction.[136] What is evident, however, is that under all three

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> No restraint that is imposed on an extractor's mineral interest will ever function like a disabling restraint, such that the extractor is "stuck" with an unwanted interest. The extractor will always be able to surrender this interest back to the landowner. In almost all oil and gas leases, the extractor will have explicitly reserved the right to surrender the lease through a surrender clause.

Id. To add another layer of complexity, the clause may be both a promissory restraint and a forfeiture restraint. *See* Wach, *supra* note 44, at 677 n.34 ("Consent clauses in leases are promissory restraints in that they are part of a contract; they also may be considered to be forfeiture restraints if as a consequence of an attempt to alienate without consent, the tenant loses possession of the property."). Courts that strictly construe such provisions may declare the clause to be a covenant and a limited remedy for damages, which are often nominal.

David Pierce points out that, with skillful drafting, a landowner can restrict the right to transfer mineral leases without creating an unlawful restraint. *See* David E. Pierce, *An Analytical Approach to Drafting Assignments*, 44 Sw. L.J. 943, 951 (1990) (suggesting, for example, that in states invalidating disabling restraints, the consent clause can be used instead as a forfeiture restraint by providing that the lease will automatically revert upon an unauthorized assignment).

[135] RESTATEMENT (FIRST) OF PROP. § 406(b) (AM. LAW. INST. 1944).

[136] As discussed below, landowners seek to control the mineral lessee's ability to alienate the lease because of concerns about transferees and their business operations, and the proliferation of non-cost bearing interests that could impede extraction of the resource. *See infra* note 196 and accompanying text. Landowners also want to avoid being "stuck" with a bad lease and they wish to share in enhanced economic returns made possible due to rising prices and/or improvements in drilling and production practices (such as hydraulic fracturing).

On the other hand, Mark Glass and Scott Humphrey argue that anti-assignment provisions in mineral leases impede the operation of a free market in land and limit prospects for development, which are two harmful effects that the 2000 Restatement associates with restraints on alienation:

> Especially in new prospects, leases are often accumulated by speculators who intend to re-convey the interests to parties who will actually develop the leases. Such transactions are a necessary part of the operation of the market in oil and gas interests and the development of new prospects. Restrictions on the free assignability of these leases can only impair this market. The prospects of developing the land may also

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Restatements, restraints on the alienation of both leasehold and fee interests are permitted in some circumstances.

2. Judicial authority on the right to restrict mineral lease transfers.

In the few cases that address the validity of consent-to-assign restrictions in mineral leases, courts have: (1) held the clause void as an undue restraint on alienation; (2) narrowly construed the clause to allow lessors to sue for damages but not to prevent transfers; (3) avoided the issue by strict construction or application of waiver or estoppel principles; (4) applied the clause without discussion; and (5) upheld the clause as a permissible restraint on alienation.

A 1984 decision by the Oklahoma Supreme Court, *Shields v. Moffitt*,[137] is the most prominent case—and possibly the only case—to invalidate an anti-assignment provision in a mineral lease. The silent consent clause at issue provided that the oil and gas lease "may be assigned only with the written consent of the lessors."[138] The Court held that the provision was void as an unlawful restraint on alienation.[139] Noting that the clause "provides neither penalty, forfeiture, termination, reversion or other consequences inuring to the lessors by reason of . . . breach of the purported prohibition against nonconsentual assignment," the Court held that "the intention of the parties was to create no more than a contingent remainder in plaintiffs/lessors, and that since no forfeiture was prescribed in consequence of the assignment by lessee without the consent of lessors, no forfeiture would follow."[140] Relying on a prior precedent involving a

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> be impeded by such clauses if the original lessee encounters financial difficulty and is unable to develop the minerals for several years. . . . Thus, while there may [be] valid financial reasons for including such clauses in a lease, there are also pronounced negative impacts that may harm the prospects for the development of the mineral interest.

Glasser & Humphrey, *supra* note 13, at 36–37. *See also* Cummings, *supra* note 98, at 5–6 (arguing that typical consent-to-assignment provisions would be held to be an unreasonable restraint on alienation because they "are not limited in duration, affect all potential transferees and, more often tha[n] not, decrease . . . both the marketability and value of the interest encumbered . . . .").

137 683 P.2d 530 (Okla. 1984).

138 *Id.* at 531.

139 *Id.* at 534–35. The Court of Appeals held that the clause was valid and that an attempted assignment empowered the lessor to terminate the lease. *Id.* at 531.

140 *Id.* at 533–34. The characterization of the lessor's retained mineral interest as a contingent remainder in fee simple is absolutely puzzling insofar as a contingent remainder is a nonpossessory interest created in favor of a person other than the transferor that vests, if at all, upon the termination of a possessory life estate or term interest. *See* RESTATEMENT (FIRST) OF PROP. § 156 (AM. LAW. INST. 1944). As discussed above, most courts view the

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fee simple conveyance, the Court held that, where there are no provisions for forfeiture or reversion, restraints upon alienation in mineral leases are "disabling restraints" and void.[141]

According to *Shields*, an unadorned silent consent or sole discretion clause, even if freely negotiated, is invalid and cannot confer the right to arbitrarily restrict mineral transfers.[142] The case, however, is a limited authority for two reasons. First, the Court construed the veto power to belong "only to the plaintiffs/lessors personally and not to their successors, grantees, heirs or assigns."[143] Second, the Court emphasized that there was no forfeiture or penalty provision attached to the clause and it was careful to "express no view . . . as to what effect a forfeiture or penalty clause might have . . . ."[144] If the anti-assignment provision in *Shields* had been worded as a covenant that runs with the land, and if the provision had expressly provided for forfeiture or damages, it may have been upheld and enforced.[145]

possessory mineral interest as an indefinite fee simple determinable and consequently, the retained nonpossessory future interest as a possibility of reverter in fee simple absolute. *See supra* note 115 and accompanying text. In any event, what is of particular concern to the Oklahoma Supreme Court is not the characterization of the mineral interests granted and retained, but rather the fact that the minerals leased were subject to an absolute right of the lessor to prohibit transfer.

[141] *Shields*, 683 P.2d at 534 (citing Lohmann v. Adams, 540 P.2d 552 (Okla. 1975)). The Court in *Lohmann*, which involved the conveyance of a fee simple estate, adopted the position of the 1944 Restatement that disabling restraints (other than those imposed on equitable interests under a trust) are invalid. *Lohmann*, 540 P.2d at 556 (citing RESTATEMENT (FIRST) OF PROP. § 405 (AM. LAW. INST. 1944)). The position taken in *Shields*—to invalidate clauses that prohibit non-consensual mineral lease transfers but provide no remedy for breach—is consistent with cases involving similar restrictions placed on fee estates. In *Bouldin v. Miller*, the Court declared unenforceable a deed provision requiring land conveyed to grandsons to remain "unsold until the youngest of said boys shall become of age." 28 S.W. 940, 941–42 (Tex. 1894). The Court held that lack of a forfeiture or damages remedy meant "there is no person who can enforce the attempted limitation on the power to sell" and consequently, the disabling restraint was deemed "ineffectual in law." *Id.* at 942.

[142] *Shields*, 683 P.2d at 534.

[143] *Id.* at 534 (According to the Court, the personal nature of the right to restrict lease transfers meant that, "in the event of plaintiffs' conveyance of their estate in the lands, they would become third parties having the power to give or withhold consent to alienation of property belonging to others than themselves.").

[144] *Id.*

[145] *See* ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL AND GAS §4.9[C][2] (2015) (recommending drafting the transfer restriction to make clear it is a covenant running with the land and/or a forfeiture restraint). Luke Meier and Rory Ryan criticize *Shields v. Moffitt* and argue that—even when a consent-to-transfer provision in a mineral lease is drafted as a disabling restraint—it is not an impermissible restraint on

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Of equal importance is *Outlaw v. Bowen*,[146] a case from Texas which involved the conveyance of a mineral interest. In contrast to the oil and gas lease in *Shields*, the mineral deed in *Outlaw* expressly provided a penalty of forfeiture for breach of a prohibition against assignment.[147] Nevertheless, the Court described the clause as "unenforcible and void."[148] Other cases from Texas—not involving oil and gas leases—also lend support to the view that consent-to-transfer provisions in mineral leases that are worded as forfeiture restraints may be declared void as unreasonable restraints on alienation.[149]

Rather than invalidate consent-to-transfer restrictions as impermissible restraints on alienation, other cases have upheld such provisions but limited the lessor to damages for breach of covenant.[150] In a nineteenth

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alienation in light of the fact that the lessee will almost always "have explicitly reserved the right to surrender the lease through a surrender clause." Meier & Ryan, *supra* note 14, at 343.

[146] 285 S.W.2d 280 (Tex. App. 1955).

[147] *Id.* at 283.

> This mineral deed is accepted with the understanding that no conveyance or assignment of such royalty shall ever be made except in whole and that any attempt to convey or assign any portion less than the whole thereof, either by grantee, her heirs or assigns shall operate to forfeit the entire royalty hereby conveyed to the grantor herein, and any such conveyance or a portion thereof shall be null and void.

Id.

[148] *Id.* The Court stated that "a restraint on alienation imposed on a fee simple title is unenforcible unless the instrument in which the restraint is imposed provides for an enforceable penalty in the event of violation." *Id.* (citing Bouldin v. Miller, 28 S.W. 940 (Tex. 1894)). The Court further stated that "[t]here is no enforcible penalty provided for in the event of violation of the foregoing provision." *Id.* *See also* Guy & Wright, *supra* note 114, at 481–82.

[149] *See* Glasser & Humphrey, *supra* note 13, at 14–17 (citing cases striking forfeiture restraints in deeds as support for the proposition that "Texas courts will not enforce consent-to-assign clauses of any nature in the context of an oil and gas lease."). *See also* Cummings, *supra* note 98, at 6 ("We should expect Texas courts, when confronted with consent to assign provisions containing disabling restraints and/or forfeiture restraints, to hold that such clauses are unenforceable as unreasonable restraints on alienation.").

[150] Consequently, the transfer is still permitted. *See* Guy & Wright, *supra* note 114, at 490.

> [A] promissory restraint in a Texas oil and gas lease providing that no assignment may occur without lessor consent is, in effect, not much of a prohibition on assignment at all. It would most likely subject the assignor to damages, which in many instances would be nonexistent with a simple change in identity of the lessee.

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century decision, the United States Court of Appeals for the Third Circuit allowed the assignment of an oil and gas lease despite the fact it was "not to be sold, assigned, or transferred without the written consent of the [lessor]."[151] In contrast to *Shields*, the Federal Court in *Hague v. Ahrens* did not invalidate the clause as an impermissible disabling restraint, but rather interpreted the restriction to be a promissory restraint and limited the remedy to damages: "The terms . . . convey no suggestion even that the lease may be lost by such transfer. They express simply an agreement by the lessee, who alone could make the transfer, that he will not do it."[152] Other courts have taken a similar approach, both in cases involving mineral leases and other property conveyances.[153] One recent example involving an oil and gas lease is *Stricklin v. Fortuna Energy Inc.*, where West Virginia landowners sought to terminate leases that had been assigned without consent.[154] The assignees argued that the anti-assignment provision was void as an impermissible restraint on alienation, but they also contended that—if the consent clause was valid—the landowners should be limited to monetary damages.[155] The Federal District Court held that forfeiture was not appropriate, noting that West Virginia law requires

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Id.

[151] Hague v. Ahrens, 53 F. 58, 58 (3rd Cir. 1892) (applying Pennsylvania law).

[152] *Id.* at 60 ("If the lessor was not satisfied with the [damages] remedy which the law affords for breaches of such agreements he should have stipulated for another by adding terms of condition or forfeiture.").

[153] *See, e.g.*, Rose v. Lanyon Zinc Co., 74 P. 625, 627 (Kan. 1903) (despite non-compliance with silent consent clause, the Court refused to cancel the oil and gas lease holding that when parties do not provide for a forfeiture remedy, the court will limit the lessor to a claim for damages); Knight v. Chi. Corp., 183 S.W.2d 666, 671 (Tex. App. 1944), *aff'd*, 188 S.W.2d 564 (Tex. 1945) (observing, in a case involving an oil and gas lease assignment, that "a construction of the provision as a covenant is to be preferred over its construction as a condition subsequent."); Gips v. Red Robin Corp., 366 S.W.2d 853, 857 (Tex. App. 1963) (real estate purchase contract); Palmer v. Liles, 677 S.W.2d 661, 665 (Tex. App. 1984) (plaintiff was limited a claim for damages for breach of a silent consent clause in a contract regarding pending litigation); Haskins v. First City Nat'l Bank of Lufkin, 698 S.W.2d 754, 756 (Tex. App. 1985) (restrictive clause in deed was a covenant and promissory restraint and did not prevent a subsequent transfer); Sherwood v. Panhandle E. Pipeline Co., No. 96–1331–WEB, 1997 WL 18180, at *7 (D. Kan. Jan. 8, 1997) ("Because there was no forfeiture provision in the [commercial] lease . . . the assignment did not have the effect of terminating the lease."). *See also* Terry I. Cross, *The Ties That Bind: Preemptive Rights and Restraints on Alienation That Commonly Burden Oil and Gas Properties*, 5 TEX. WESLEYAN L. REV. 193, 223–24 (1999) (discussing *Palmer* and *Haskins*).

[154] No. 5:12CV8, 2012 WL 1805305, at *1 (N.D. W. Va. May 17, 2012).

[155] *Id.* at *5.

that covenants should not be construed to support forfeiture unless there is no other possible interpretation.[156]

In a third group of cases, courts have avoided addressing the validity of consent clauses by narrowly construing their scope or applying principles of estoppel and waiver.[157] The validity of a consent-to-assign clause in an oil and gas lease was litigated in *Knight v. Chicago Corporation*,[158] but the Texas Court of Appeals and the Texas Supreme Court both held that the clause did not apply to the unitization transaction at issue.[159] In *Godley v. Kentucky Resources Corporation*,[160] the United States Court of Appeals for the Sixth Circuit proceeded in a similar fashion with regard to a coal lease that barred any "modification" except by written agreement. Rather than address whether the clause constituted an invalid restraint on alienation, the Court held that the restriction did not apply to assignments.[161]

Most cases involve disputes where the parties challeng the application—but not the validity—of mineral lease transfer restrictions. In *Valer Oil Company v. Souza*,[162] the Trial Court held that the oil and gas leases expired by virtue of transfers that were made without the consent of the lessors and in violation of the covenants against assignment.[163] On appeal, the lessees did not contend that the transfer restrictions were void as impermissible restraints on alienation, but they instead argued

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[156] *Id.*

[157] *See* Guy & Wright, *supra* note 114, at 481–82.

[158] 183 S.W.2d 666, 671 (Tex. App. 1944), *aff'd*, 188 S.W.2d 564 (Tex. 1945).

[159] *Knight*, 188 S.W.2d at 566 ("Of the several questions exhaustively briefed, none is more abstractly interesting than that of whether paragraph 8 should be construed as a special limitation or as a condition subsequent, but under our views expressed below that question is not reached."). The Court of Appeals, in dicta, stated that forfeiture provisions are disfavored. *Knight*, 183 S.W.2d at 671. The Texas Supreme Court agreed but observed that "[i]f the parties to the lease bound themselves by language which can be given no other reasonable construction than one which works such result [i.e., a forfeiture], it is the court's duty to give effect thereto by declaring a termination . . . ." *Knight*, 188 S.W.2d at 566.

[160] 640 F.2d 831 (6th Cir. 1981).

[161] *Id.* at 836.

> While restraints on the alienation of property interests are looked on with disfavor, they may nonetheless be upheld when not repugnant to a plain provision of law and not unreasonable. . . . However, because they are disfavored, a restrictive covenant in derogation of a property right will not be extended to include anything not clearly expressed by the language of the instrument conveying the right.

Id.

[162] 6 Cal. Rptr. 301 (Cal. App. 1960).

[163] *Id.* at 302.

(unsuccessfully) that the lessor was prevented from seeking termination due to non-compliance with separate notice-of-violation provisions.[164] The validity of consent clauses in mineral leases was also assumed in cases from Arkansas,[165] Kansas,[166] Louisiana,[167] Ohio,[168] Pennsylvania,[169] and Texas.[170]

A few courts have expressly upheld the right to veto mineral lease transfers. In *Stanolind Oil & Gas Company v. Guertzgen*,[171] the United States Court of Appeals for the Ninth Circuit rejected the argument that a

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[164] *Id.* at 306 ("[T]he only argument on appeal is that the trial court erred in concluding that each of the leases had terminated because no notice was given pursuant to paragraph 21 of the leases.").

[165] *See* Walls v. Petrohawk Props., LP, 812 F.3d 621, 625–26 (8th Cir. 2015) (transfer of oil and gas lease upheld not because restraint was void, but because lessor unreasonably withheld consent).

[166] *See* Moherman v. Anthony, 175 P. 676, 677 (Kan. 1918) (on appeal from a jury verdict based on an unauthorized transfer of an oil and gas lease, lessee did not challenge the validity of the restraint but argued instead that the damages were excessive).

[167] *See* Phx. Assocs. Land Syndicate Inc. v. E.H. Mitchell & Co., LLC, 970 So.2d 605, 607–16 (La. Ct. App. 2007) (instead of challenging the validity of a prohibition against subleasing a sand and gravel lease, putative sublessor unsuccessfully argued that "operating agreements" were not subleases and therefore permitted). *See also* Cedyco Corp. v. Petroquest Energy, LLC, 497 F.3d 485, 487–90 (5th Cir. 2007) (validity of a consent-to-assign provision in Louisiana oil and gas sublease assumed in dispute over whether the sublessee must accept the sublessor's conditions in order to secure its consent).

[168] *See* Curtis v. Am. Energy Dev., Inc., No. 2000-L-133, 2002 WL 1357726, at *5 (Ohio App. June 21, 2002) (without addressing the validity of the consent-to-assign clause, the Court of Appeals upheld the termination of the oil and gas lease due to assignments made without the consent of the lessor).

[169] *See* Rice v. Chesapeake Energy Corp., No. 2:12-cv-00392, 2012 WL 3144318, at *3 (W.D. Pa. Aug. 1, 2012) (in a dispute over a lessee's continuing obligations following assignment of an oil and gas lease, the Court notes that "[o]f course, if a lessor desires to restrict the right of assignment at the time of the execution of the original lease, a lessor can mandate that no assignment occur without its express consent.").

[170] *See* Clayton Williams Energy, Inc. v. BMT O & G TX, LP, 473 S.W.3d 341, 345–50 (Tex. App. 2015) (farmout agreement not within scope of anti-assignment provision in oil and gas lease); Carrizo Oil & Gas, Inc. v. Barrow-Shaver Res. Co., 516 S.W.3d 89, 96 (Tex. App. 2017), *petition for review filed*, No. 17-0332 (May 1, 2018) (rather than challenge a consent clause in a farmout agreement as an impermissible restraint on alienation, putative transferor unsuccessfully argues that industry custom requires that consent cannot be unreasonably withheld). *See also* Mitchell E. Ayer & David Cias, *Consents to Assignment in Oil and Gas Leases*, 34TH ANN. TXCLE ADVANCED OIL, GAS & ENERGY RES. L. 19.I (2016) ("Even though there is almost no Texas case law indicating that the breach . . . would either void a lease assignment or lead to forfeiture of the lease itself, Hard Consents are almost universally respected (and obtained) by parties to Texas oil and gas asset sales.").

[171] 100 F.2d 299 (9th Cir. 1938).

silent consent clause in an oil and gas lease did not authorize the lessors to terminate the lease:

> Appellant's counsel argues vigorously that the stipulation relative to assignment was not a condition but a covenant, and that the breach of the stipulation did not give rise to a right of reentry but only to a cause of action in damages. However, in the light of the Montana decisions bearing on the question, we are constrained to hold the contrary.
>
> When an assignment, to which [the landowner] does not consent, has been effected, he has the present right of treating the assignee as an interloper and of declaring the lease at an end.[172]

In *Teltow v. Tiger Development, LLC*,[173] a Michigan Trial Court held that, as a matter of law, a consent clause in an oil and gas lease was void and unenforceable as an unreasonable restraint on alienation.[174] The Court of Appeals disagreed and held that such restraints are not *per se* invalid:

> Whether a restraint on alienation may occur is contingent upon the type of interest at issue and whether the restraint is reasonable. . . . If the lessee's property interest is absolute, restriction on the right of alienation is void. . . . However, if the lessor retains an interest in the property, the reversionary interest generally supports imposing a restriction on alienation. . . .
>
> In the transaction in this case . . . plaintiff held title to the property and merely granted defendants permission to remove oil and gas. . . . Accordingly, the trial court erred in applying the law of land contracts to this transaction where plaintiff retains title to the property and defendant

[172] *Id.* at 300–01. The dissenting judge did not dispute the validity of the consent clause but instead argued that the clause was a covenant and—as a promissory restraint—limited the remedy for unauthorized assignments to the recovery of damages suffered. *Id.* at 303 (Wilbur, Cir. J., dissenting). *See also* Midland Oil Co. v. Turner, 179 F. 74, 76 (8th Cir. 1910) (rejecting the argument that a court should not decree a forfeiture and holding that the "assignment of the lease was contrary to the express prohibition contained in it, and . . . conferred no rights whatever on the assignees."); Cryder & Larkin, *supra* note 97, at 108 (citing *Midland Oil* for the proposition that "explicit language indicating an intent to void any transfer made without consent will be enforced.").

[173] No. 223070, 2001 WL 1699711 (Mich. App. Dec. 28, 2001).

[174] *Id.* at *2.

> holds only removal rights pursuant to the lease agreement.[175]

The validity of a consent-to-transfer provisions in an oil and gas lease was also litigated in *Harding v. Viking International Resources Company, Inc.*,[176] although the assignee's primary argument was that the lessors had ratified the assignments by their conduct and were estopped from seeking cancellation of the leases.[177] Without directly addressing the question of whether transfer restrictions in mineral leases are impermissible restraints on alienation, the Court of Appeals held that "Ohio enforces anti-assignment clauses where there is clear contractual language prohibiting an assignment."[178] As discussed in Part V of this article, the Trial Court in *Love v. Beck Energy Corporation*[179] also found that the consent to assign clause was not an unreasonable restraint on alienation.[180]

3. Scholarship on the right to restrict mineral lease transfers.

Commentary by Texas lawyers on the authority to veto the transfer of mineral leases and related agreements includes elements of prognostication and advocacy. In 2011, Mark Glasser and Scott Humphrey predicted that

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[175] *Id.* at **2–3. After concluding that "a restraint on alienation is permissible under the facts at issue," the Court of Appeals remanded the matter for a factual inquiry as to whether the restraint on alienation is reasonable. *Id.* at *3.

[176] 1 N.E.3d 872, 873–74 (Ohio Ct. App. 2013).

[177] *Id.* at 876–77.

> Appellant's motion for summary judgment sought an order by the trial court . . . that the anti-assignment provisions contained in the leases were void as an impermissible restraint on alienation. . . . Appellant also argued that even assuming the leases had been breached by failing to obtain Appellees' consent to the assignment of the leases, Appellees had ratified the assignments by their conduct and were therefore estopped from denying the validity of the assignments. Appellant further argued that Appellees had waived any breach associated with the assignment of the leases without their consent.

Id.

[178] *Id.* at 876 (citing J.G. Wentworth LLC v. Christian, No. 07 MA 113, 2008 WL 2486552, at *8 (Ohio Ct. App. June 17, 2008)). The case cited in support of this proposition states that express anti-assignment clauses are enforceable when involved in the assignment on an annuity contract. *See Wentworth*, 2008 WL 2486552, at *1.

[179] No. 14 NO 415, 2015 WL 1453338 (Ohio Ct. App. Mar. 31, 2015).

[180] The lessors sought a declaratory that the assignment of deep drilling rights was void. *Id.* at *1. The parties to the assignment argued that the consent to assign clause was an unreasonable restraint upon alienation and, alternatively, that it could not be the basis for terminating the assignment. *Id.* at *2. The Trial Court found that the consent to assign clause was not a restraint on alienation. *Id.* at *3. The appeal focused on the scope and applicability—rather than the validity—of the consent clause. *See id.* at *5.

courts in Texas "will not enforce consent-to-assign clauses *of any nature* in the context of an oil and gas lease."[181] In their view, this result is appropriate as "the common justifications for restrictions on the assignability of an oil and gas lease do not outweigh the public and private harm resulting from the enforcement of such clauses."[182] A year later, Alan Cummings also argued that Texas courts will invalidate consent-to-assign provisions containing disabling restraints and/or forfeiture restraints.[183] Since that time, however, Texas courts have interpreted transfer restrictions in oil and gas farmout agreements without questioning whether such restrictions are void as unreasonable restraints on alienation.[184]

T. Ray Guy and Jason Wright do not believe a landowner in Texas can bargain for an unqualified right to veto mineral lease transfers.[185] In their view, all consent-to-transfer provisions worded as disabling restraints are void, and consent-to-transfer provisions worded as forfeiture restraints are also void unless the class of prohibited transferees is limited.[186] An unadorned silent consent clause ("*this lease shall not be assigned without lessor consent*") is considered to be a promissory restraint and "likely

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[181] Glasser & Humphrey, *supra* note 13, at 130 (emphasis added). *See also id.* at 143–44 ("While Texas and Oklahoma courts have not directly addressed whether a consent-to-assign clause that provides a forfeiture provision or other 'enforcible penalties' in an oil and gas lease is valid, there is enough guidance to suggest that such provisions will not and probably should not be enforced."). In their view, states that follow a "non-ownership" theory and view an oil and gas lease as an extraction right are more likely to uphold consent-to-assign clauses in oil and gas leases. *See id.* at 122. *See also* Teltow v. Tiger Dev., LLC, No. 223070, 2001 WL 1699711, at *3 (Mich. Ct. App. Dec. 28, 2001) (upholding restriction on transfer of an oil and gas lease because "plaintiff retains title to the property and defendant holds only removal rights pursuant to the lease agreement.").

[182] Glasser & Humphrey, *supra* note 13, at 144.

[183] Cummings, *supra* note 98, at 7.

[184] *See, e.g.*, Clayton Williams Energy, Inc. v. BMT O & G TX, LP, 473 S.W.3d 341 (Tex. App 2015); Carrizo Oil & Gas, Inc. v. Barrow-Shaver Res. Co., 516 S.W.3d 89 (Tex. App. 2017), *petition for review filed*, No. 17-0332 (May 1, 2018).

[185] Guy & Wright, *supra* note 114, at 480.

> [A]lthough Texas courts have rarely addressed consent-to-assign provisions in the context of an oil and gas lease, all indications are that, except for limited types of forfeiture clauses that should be handled with caution, the contractual right to withhold consent to an assignment will most often yield to the objective of ensuring free alienability of property rights (or have such a trivial impact as to be effectively inconsequential).

Id.

[186] *Id.* at 491–92.

invalid" since it restricts alienation without qualification.[187] In contrast, a reasonable consent clause worded as a promissory restraint ("*this lease shall not be assigned without lessor consent, such consent not to be unreasonably withheld*") is "likely valid"—since it does permit alienation in some circumstances—but is only enforceable by proof of damages.[188]

An opposing view, however, has emerged. Two professors at Baylor Law School, Luke Meier and Rory Ryan, contend that alienation restraints in mineral leases should generally be enforced.[189] Their argument is based on five main points: (1) "fee" and "lease" labels should not dictate whether a restraint on alienation is reasonable; (2) an oil and gas lease creates an on-going relationship; (3) as a commercial transaction, an oil and gas lease is best viewed from a contract perspective; (4) the finite amount of producible minerals limits the duration of an oil and gas lease; and (5) the reason that disabling restraints are usually problematic do not apply to the typical oil and gas lease.[190] At its core, this persuasive argument for upholding consent-to-transfer provisions in mineral leases is predicated on the notion that a "mineral extraction" fee simple determinable should not be equated to a "surface ownership" fee simple determinable.[191] For purposes of determining whether a restraint on alienation is unreasonable, mineral leases should be treated in the same fashion as commercial occupancy leases.

Meier and Ryan's first point—that feudal-based distinctions between freehold and non-freehold estates "should not be mechanically applied to resolve the validity of restraints in an oil and gas lease"—appears irrefutable.[192] The remaining points focus on the dual property and contract nature of an oil and gas lease, and demonstrate that it is fallacious reasoning to conclude that consent-to-transfer restrictions are invalid restraints "simply because the label 'fee' has sometimes been used by the

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[187] *Id.* at 497–99. Guy and Wright correctly note that, without an implied reasonableness standard, there is no functional difference between "this lease shall not be assigned" and "this lease shall not be assigned without lessor consent." *Id.* at 498.

[188] *Id.* at 497–500.

[189] Meier & Ryan, *supra* note 14, at 308.

[190] *See generally id.*

[191] *Id.* at 339 (Given the finite amount of mineral resources, there is a durational difference between ownership "so long as minerals can be produced in paying quantities" and ownership "so long as the land is farmed.").

[192] *Id.* at 307–08. *See also id.* at 308 ("The resolution to this question is too important for such a superficial analysis. Instead, the practical realities of the relationship created between the landowner and the oil and gas company should determine whether transfer restrictions should be upheld and enforced by the courts.").

courts to describe the duration of the interest created."[193] As in the case of many commercial occupancy leases, an oil and gas lease creates an on-going relationship that is typically defined by numerous negotiated agreements.[194] Given the default rule of free transferability, a landowner must bargain for the power to prevent lease transfers to individuals or entities deemed less experienced, trustworthy, skillful, or financially capable.[195] Absent fraud, adhesion, or unfair dealing, the mutually agreed upon contract provisions in a mineral lease should be enforced.[196]

This contract-based argument does not ignore the rule that unreasonable restraints on alienation of property interests are void and unenforceable. Meier and Ryan argue, however, that transfer restraints in mineral leases are not unreasonable for two reasons: first, even if an oil and gas lease is a defeasible fee conveyance, the right granted is necessarily limited in duration and consequently, restraints on its alienation should be treated in the same (favorable) manner as similar restraints in occupancy leases;[197] second, "the reason that restraints on fee simple estate are usually invalidated does not apply to the interest created in the typical oil and gas lease."[198] When a fee simple estate is subject to a disabling restraint, the owner cannot take unilateral action to divest ownership whereas a lessee subject to a similar restraint will usually have the right, pursuant to a "surrender" clause, to end the lease.[199]

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[193] *Id.* at 313.

[194] *See id.* at 316 ("With a lease, the landowner's financial success depends on the success of the extractor. In a practical (but not a legal) sense, then, a lease creates a partnership between the landowner and extractor.").

[195] *Id.* at 334–37 (discussing potential concerns with transferees with respect to surface disturbances, royalty calculations, and operational skills).

[196] *See id.* at 325 ("An oil and gas lease . . . is a quintessential commercial transaction. The entire arrangement is designed to secure economic profit for both the landowner and extractor. . . . Thus, a contractual perspective seems particularly appropriate when thinking about the relationship created by an oil and gas lease."). *See also id.* at 308 ("The extractor should not be able to agree to the clause, presumably pay less because of the restrictions imposed by the clause, and then avoid the clause as an unreasonable restraint on alienability.").

[197] *Id.* at 337–40. Although "the inexhaustible gravel pit" is a concern under the common law Rule Against Perpetuities, it has not been replicated in the "real" world. W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 642–43 (1938).

[198] Meier & Ryan, *supra* note 14, at 312–13.

[199] *Id.* at 342–45. A surrender clause "is a lease clause authorizing the lessee to surrender all or part of the leased premises and thereafter be relieved of all obligations as to the acreage surrendered." Sohio Petroleum Co. v. Grynberg, 757 P.2d 1125, 1126 (Col. App. 1988). Meier and Ryan also point out that "if an extractor truly wants to rid himself of the extraction right, all that needs to be done is to stop exploring or producing. The

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The argument for invalidating all (or virtually all) transfer restrictions in mineral leases is based on the previously unchallenged assumption that the more relaxed view of restraints against the alienation of occupancy leases has no relevance because a mineral lease is a conveyance of a fee simple estate. But a mineral lease is also considered a contract.[200] A lease transaction is increasingly viewed as a contract for occupancy and a property transfer of a mineral interest should likewise be viewed as a contract for extraction rights. When a landowner affirmatively displaces the default rule by bargaining for the right to veto mineral lease transfers, the bargain should be honored.[201]

III. MUST THE RIGHT TO ARBITRARILY RESTRICT OCCUPANCY LEASE TRANSFERS BE EXPRESSLY PROVIDED?

When freely and fairly negotiated, residential and commercial leases containing sole discretion clauses are consistently enforced unless prohibited by statute. In contrast, there is a split of authority as to whether an occupancy lease containing a silent consent clause likewise confers an absolute power to withhold consent. A silent consent clause—stating that a lease "may not be assigned, subleased, or otherwise transferred without the consent of the lessor"—does not explicitly require the lessor to act reasonably, yet the duty to act reasonably is now implied in many states.[202]

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landowner will be entitled to any damages that he incurs because of the extractor's broken promise." Meier & Ryan, *supra* note 14, at 344.

[200] *See* Alford v. Collins–McGregor Operating Co., 95 N.E.3d 382, 385 (Ohio 2018) ("Oil and gas leases are contracts . . . .").

[201] Guy and Wright warn that landowners may use consent provisions "to extract fees or concessions that were never part of the original bargain." Guy & Wright, *supra* note 114, at 489. But the right to restrict mineral lease transfers *was* part of the bargain. If the default rule permits lease transfer, and the default rule is displaced by the inclusion of an agreed upon consent-to-transfer provision, is it "extortion" to prohibit the transfer of the lease? And if the parties to the lease have agreed that the landowner can withhold assent for any reason, is it "extortion" to condition assent on economic concessions? Meier and Ryan respond by arguing that the lessee "should not be able to agree to the clause, presumably pay less because of the restrictions imposed by the clause, and then avoid the clause as an unreasonable restraint on alienability." Meier & Ryan, *supra* note 14, at 308. *See also id.* at 326 ("Holding an oil and gas producer to the express terms of the deal it negotiated with a landowner is intuitive. Conversely, allowing a producer to escape enforcement of such a clause (after agreeing to such a clause when signing the lease) is objectionable.").

[202] *See, e.g.*, Gamble v. New Orleans Hous. Mart, Inc., 154 So.2d 625 (La. Ct. App. 1963); Arrington v. Walter E. Heller Int'l Corp., 333 N.E.2d 50 (Ill. Ct. App. 1975); Homa-Goff Interiors, Inc. v. Cowden, 350 So.2d 1035 (Ala. 1977); Hendrickson v. Freericks, 620 P.2d 205 (Alaska 1980); Fernandez v. Vazquez, 397 So.2d 1171 (Fla. Dist. Ct. App. 1981); Funk v. Funk, 633 P.2d 586 (Idaho 1981); Warmack v. Merchs. Nat'l Bank of Fort Smith, 612 S.W.2d 733 (Ark. 1981); Boss Barbara, Inc. v. Newbill, 638 P.2d 1084 (N.M. 1982);

(*continued*)

In such states, a silent consent clause is no longer the functional equivalent of a sole discretion clause and therefore, the right of a lessor to arbitrarily restrict occupancy lease transfers must be expressly set forth in the lease (or otherwise made clear).

Why have an increasing number of states rejected the traditional view that a silent consent clause grants the right to arbitrarily restrict occupancy lease transfers? The three justifications for interpreting silent consent clauses, to require the lessor to be reasonable, are the probable expectations of the parties, the contract principle of good faith and fair dealing, and the property policy disfavoring restraints on alienation.[203] As discussed below, the arguments in favor of attaching a reasonable standard to a silent consent clause in an occupancy lease are compelling.

A. Silent consent clauses do not clearly confer the right to arbitrarily restrict occupancy lease transfers.

The critical question is whether silent consent clauses unequivocally empower lessors to veto lease transfers for any reason, whether arbitrary or otherwise. If a court believes that the lessor clearly reserved an absolute power to withhold consent to transfer requests, the duty of good faith and fair dealing should not apply. On the other hand, if the right to arbitrarily veto assignments and subleases is not clearly provided, the duty of good faith and fair dealing "militates against the arbitrary or unreasonable withholding of consent to an assignment."[204]

Under the traditional view, a silent consent clause authorizes a lessor to act in an arbitrary manner because no limit is placed on the power to withhold consent. In *White v. Huber Drug Company*,[205] which involved a lease prohibiting transfers "without the written assent of the lessor," the Michigan Supreme Court held that "[t]he purpose of such a stipulation is to reserve to the lessor the right to say who shall occupy the premises; and where the right is *clearly reserved* to the lessor, he may insist upon it, if he

Basnett v. Vista Vill. Mobile Home Park, 699 P.2d 1343 (Colo. Ct. App. 1984), *rev'd on other grounds*, 731 P.2d 700 (Colo. 1987); Campbell v. Westdahl, 715 P.2d 288 (Ariz. Ct. App. 1985); Kendall v. Ernest Pestana, Inc., 709 P.2d 837 (Cal. 1985); Newman v. Hinky Dinky Omaha–Lincoln, Inc., 427 N.W.2d 50 (Neb. 1988); Warner v. Konover, 553 A.2d 1138 (Conn. 1989); Julian v. Christopher, 575 A.2d 735 (Md. Ct. App. 1990); Dick Broad. Co., Inc. of Tenn. v. Oak Ridge FM, Inc., 395 S.W.3d 653 (Tenn. 2013); De Stefano v. Apts. Downtown, Inc., 879 N.W.2d 155 (Iowa 2016).

[203] *See supra* note 84 and accompanying text.

[204] Cohen v. Ratinoff, 195 Cal. Rptr. 84, 89 (Ct. App. 1983).

[205] 157 N.W. 60 (Mich. 1916).

wishes to, without regard to the qualifications of the proposed assignee."[206] More recently, in *Dobyns v. South Carolina Department of Parks, Recreation and Tourism*,[207] the South Carolina Supreme Court likewise concluded that a silent consent clause is an unambiguous grant of an absolute veto power:

> Here, the contract clearly provides that the leases may be transferred "upon consent of the lessor." There is no stated reasonableness requirement and this Court declines to read one into the contract. *If the parties had chosen to limit Lessor's ability to deny consent, they could have so stated in the contract*.[208]

Other jurists, however, have adopted the opposite approach: if lessors want an unlimited power to withhold consent to transfers, they must so provide in the lease agreement.[209] This view was first followed in *Gamble v. New Orleans Housing Mart, Inc.*,[210] which held that a silent consent

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[206] *Id.* at 61 (emphasis added).

[207] 480 S.E.2d 81 (S.C. 1997).

[208] *Id.* at 84 (emphasis added). *See also* Gruman v. Inv'rs Diversified Servs., 78 N.W.2d 377, 382 (Minn. 1956).

> Should a lessee desire the right to assign or sublet to a suitable tenant, a clause might readily be inserted in the lease . . . to the effect that the lessor's written consent to the assignment or subletting of the leased premises should not be unreasonably withheld. There being no clause in the present lease to such effect, we are compelled to give its terms their full force and effect . . . .

Id. *See also* Segre v. Ring, 170 A.2d 265, 266 (N.H. 1961) (characterizing a silent consent clause as "an unequivocal and unqualified restriction against assignment . . . ."); Shaker Bldg. Co. v. Fed. Lime & Stone Co., No. 31451, 1972 WL 20379, at *1 (Ohio Ct. App. Mar. 2, 1972) ("If the parties intended to prohibit the landlord arbitrarily from refusing consent, the lease should have so provided."); B & R Oil Co., Inc. v. Ray's Mobile Homes, Inc., 422 A.2d 1267, 1268 (Vt. 1980) ("We will not attempt to rewrite the clear unambiguous language of the lease agreement."); First Fed. Sav. Bank of Ind. v. Key Mkts., Inc., 559 N.E.2d 600, 604 (Ind. 1990) ("The language in the lease was clear in its meaning, subject to but one interpretation . . . .").

[209] *See* Granite Tr. Bldg. Corp. v. Great Atl. & Pac. Tea Co., 36 F.Supp. 77, 78 (Mass. Dist. Ct. 1940) (stating, in *dicta*, "that when a lease restricts a lessee's rights by requiring consent before these rights can be exercised, it must have been in the contemplation of the parties that the lessor be required to give some reason for withholding consent."). *See also* F & L Ctr. Co. v. Cunningham Drug Stores, Inc., 482 N.E.2d 1296, 1301 (Ohio Ct. App. 1984) (Nahra, J., dissenting) ("Had the parties intended to give the landlord an arbitrary, unfettered right to refuse consent to an assignment of the lease, they could have expressed it clearly.").

[210] 154 So.2d 625 (La. Ct. App. 1963), *writ refused*, 156 So.2d 229 (La. 1963).

clause is subject to an implied reasonableness standard because the clause "suggests or connotes that, when the lessee obtains a subtenant acceptable or satisfactory to the lessor, he may sublet."[211] As noted by a Maryland court:

> Most tenants probably would not understand that a clause stating "this lease may not be assigned or sublet without the landlord's written consent" means the same as a clause stating "the tenant shall have no right to assign or sublease." Some landlords may have chosen the former wording rather than the latter because it vaguely implies, but does not grant to the tenant, the right to assign or sublet.[212]

Because contracting parties "expect each other to act reasonably,"[213] an increasing number of courts have rejected the traditional view that a silent consent clause clearly confers the right to arbitrarily veto occupancy lease

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[211] *Id.* at 627. *See also* Fernandez v. Vazquez, 397 So.2d 1171, 1174 (Fla. Dist. Ct. App. 1981) ("Where a lessee is entitled to sublet under common law, but has agreed to limit that right by first acquiring the consent of the landlord, we believe the lessee has a right to expect that consent will not be unreasonably withheld."); Shaker Bldg. Co. v. Fed. Lime & Stone Co., 277 N.E.2d 584, 587 (Ohio Mun. Ct. 1971), *rev'd*, No. 31451, 1972 WL 20379 (Ohio Ct. App. Mar. 2, 1972).

> While the lease before the court clearly states that no assignment may take place without prior consent, inherent, however, in that provision is the representation that an assignment is possible. This court is of the opinion that equally inherent in that provision is the representation that such prior consent will not be withheld under any and all circumstances, reasonable or unreasonable.

Id.

[212] Julian v. Christopher, 575 A.2d 735, 738 (Md. Ct. App. 1990). *See also* Cotter, *supra* note 88, at 522.

> Why is it that leases provide that "the lessee agrees not to assign without first securing the lessor's written consent," rather than "the lessee agrees that he will not assign under any circumstances"? . . . Could it be that one is chosen over the other because it is more pleasant sounding, allowing the landlord to more easily dupe the legally ignorant prospective tenant?

Id.

[213] Homa-Goff Interiors, Inc. v. Cowden, 350 So.2d 1035, 1039 (Ala. 1977) (Beatty, J., concurring).

transfers.[214] The occupancy leases set forth at the beginning of this article demonstrate the misleading nature of silent consent clauses.[215] A tenant desiring the right to assign or sublease would reject the sole discretion clause in Lease 2 ("This lease may not be assigned, subleased, or otherwise transferred without the consent of the lessor, which the lessor may withhold in its sole discretion") and instead opt for Lease 3 ("This lease may not be assigned, subleased, or otherwise transferred without the consent of the lessor") or the more positively worded Lease 4 ("This lease may be assigned, subleased, or otherwise transferred with the consent of the lessor"). In contrast to the sole discretion clause in Lease 2, the silent consent clauses in Leases 3 and 4 do not clearly communicate the intention of the lessor to reserve the right to arbitrarily restrict occupancy lease transfers.

B. Good faith and fair dealing require that lessors clearly reserve the right to arbitrarily restrict occupancy lease transfers.

Although not universally accepted,[216] most jurisdictions have endorsed the view that "a lease is a contract and, as such, should be governed by the general contract principles of good faith and commercial

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[214] *See, e.g.*, Kendall v. Ernest Pestana, Inc., 709 P.2d 837, 847 (Cal. 1985) ("the assertion that [a silent consent] clause 'clearly and unambiguously' grants the lessor absolute discretion over assignments is untenable."). The California Supreme Court also argued that the trend of attaching a reasonable standard to a silent consent clause is consistent with another trend: implying the duty of landlords to act reasonably to mitigate damages due to the tenant's breach of the lease agreement. *Id.* at 846.

> A lessor's freedom at common law to look to no one but the lessee for the rent has, however, been undermined by the adoption in California of a rule that lessors—like all other contracting parties—have a duty to mitigate damages upon the lessee's abandonment of the property by seeking a substitute lessee.

Id. See also Johnson, Jr., *supra* note 55 at 799 ("by implying a reasonableness requirement into the lessor's decision to consent to alienation . . . some courts are harmonizing the rules that govern the alienability of premises with those that require the lessor to mitigate damages upon breach by the lessee.").

[215] *See supra* at 27.

[216] *See, e.g.*, Trinity Prof'l Plaza Assocs. v. Metrocrest Hosp. Auth., 987 S.W.2d 621, 625–26 (Tex. App. 1999) ("[O]ur Supreme Court has specifically rejected the implication of a general duty of good faith and fair dealing in all contracts.") (citing Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 823 S.W.2d 591 (Tex. 1992)); English v. Fischer, 660 S.W.2d 521 (Tex. 1983)). *See also* Texaco Ref. & Mktg., Inc. v. Crown Plaza Grp., 845 S.W.2d 340, 342 (Tex. App. 1992) (holding that there is no duty to act in good faith "in an ordinary commercial contract where there was no special relationship between the parties.").

reasonableness."[217] This default rule—that contracting parties will act reasonably—governs the relationship unless the parties use language that displaces the presumed reasonableness standard.[218] Because an occupancy lease is a contract, many states have relied on the duty of good faith and fair dealing to attach a reasonableness standard to silent consent clauses.[219]

The two leading cases are from California and Tennessee. In *Kendall v. Ernest Pestana, Inc.*, the California Supreme Court relied in part on the implied contractual duty of good faith and fair dealing to hold that a silent consent clause empowers a lessor to withhold consent only "where the lessor has a commercially reasonable objection to the assignee or the proposed use."[220] Rather than require lessees to include language that affirmatively limits the ability to withhold consent, California in 1985

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[217] Fernandez v. Vazquez, 397 So.2d 1171, 1173–74 (Fla. Dist. Ct. App. 1981). *See also* W. Farms Assocs. v. Sofro Fabrics, Inc., No. SPH-8501-26555, 1986 WL 296347, at *4 (Conn. Super. Ct. July 2, 1986) ("As a contractual relationship, the assignment clause, even in a lease, has a built-in covenant of good faith and fair dealing."); *Julian*, 575 A.2d at 739.

> When the lease gives the landlord the right to exercise discretion, the discretion should be exercised in good faith, and in accordance with fair dealing; if the lease does not spell out any standard for withholding consent, then the implied covenant of good faith and fair dealing should imply a reasonableness standard.

Id.

[218] *See* Shoney's LLC v. MAC E., LLC, 27 So.3d 1216, 1223 (Ala. 2009).

[219] *See, e.g.*, Boss Barbara, Inc. v. Newbill, 638 P.2d 1084, 1085–86 (N.M. 1982) ("The rationale for requiring a landlord to act reasonably when withholding consent to a subleasing agreement under a provision such as in the case at bar is that a lease, being a contract, should be governed by general contract principles of good faith and commercial reasonableness."); Cheney v. Jemmett, 693 P.2d 1031, 1034 (Idaho 1984) ("In our view, the interpretation of a non-assignment clause conditioned on the consent of the seller . . . necessarily implies that the seller will act reasonably and in good faith in exercising his right of approval."); Newman v. Hinky Dinky Omaha–Lincoln, Inc., 427 N.W.2d 50, 55 (Neb. 1988).

> [W]here a commercial lease does not expressly permit a lessor to withhold consent to an assignment or subletting and contains an approval clause, such as a provision that there can be no assignment of the lease or subletting without the lessor's prior consent, a lessor may withhold consent only when the lessor has a good faith and reasonable objection to assignment of the lease or subletting, even in the absence of a lease provision that the lessor's consent will not be unreasonably withheld.

Id. *See also* McLoughlin, *supra* note 62.

[220] 709 P.2d 837, 849 (Cal. 1985).

joined a "steady attack"[221] on the traditional interpretation of silent consent clauses, and held that lessors must make clear their intention to hold an unconstrained right of refusal. Because lessors can assert the right to an absolute veto by insisting on sole discretion clauses, when they fail to do so, "[i]t is not a rewriting of a contract . . . to recognize the obligations imposed by the duty of good faith and fair dealing, which duty is implied by law in every contract."[222]

The Tennessee Supreme Court in 2013 likewise addressed the issue of "whether the implied covenant of good faith and fair dealing applies to the non-assigning party's conduct in refusing to consent to an assignment when the agreement does not specify a standard of conduct."[223] The Court, in *Dick Broadcasting Company, Inc. of Tennessee v. Oak Ridge FM, Inc.*, held that in such circumstances "an implied covenant of good faith and fair dealing applies and requires the non-assigning party to act with good faith and in a commercially reasonable manner in deciding whether to consent to the assignment."[224] In support of its holding, the Court cited decisions from other jurisdictions that reached the same result[225] and concluded that "the former 'majority rule' approach has steadily eroded over time and is now a minority position among the courts that have considered the issue."[226] Rejecting the traditional default rule, the Court held that "[t]o avoid the imposition of the implied covenant of good faith and fair dealing, the parties must explicitly state their intention to do so."[227] By requiring the lessor to clearly reserve the right to act in an arbitrary and unreasonable manner, the Court's interpretation of the silent consent clause promotes full disclosure while upholding freedom of contract.[228]

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[221] *Id.* at 841.

[222] *Id.* at 847.

[223] Dick Broad. Co., Inc. of Tenn. v. Oak Ridge FM, Inc., 395 S.W.3d 653, 656 (Tenn. 2013). The issue was presented by a silent consent clause in a right of first refusal agreement that stated that "[n]o party may assign its rights, interests or obligations hereunder without the prior written consent of the other party . . . ." *Id.* at 666.

[224] *Id.* at 656–57.

[225] *Id.* at 662–64. The Court noted that most of the cited cases involve subleases, but it held that "the pertinent considerations are the same in the case of the construction of a silent consent clause in an assignment provision in a lease agreement . . . ." *Id.* at 664.

[226] *Id.* at 665.

[227] *Id.* at 669.

[228] *See id.* The decision to adopt a new interpretive default rule for silent consent clauses is not without precedent. For example, if Pam conveys Blackacre "to Anna and Ben," the classification of the estate granted depends on the operative default rule which has changed over time. *See* JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 133 (2d ed. 2007)

(*continued*)

C. The policy disfavoring restraints on alienation supports the view that lessors must clearly reserve the right to arbitrarily restrict occupancy lease transfers.

Requiring lessors to clearly reserve an absolute veto power is consistent with the expectation that contracting parties will act reasonably and in good faith. The requirement is also consistent with the policy disfavoring restraints on alienation of property rights. Restraints are not prohibited and have been permitted to a greater degree when a leasehold, rather than a fee interest, is involved. Nevertheless, as discussed in Part I of this article, the 1977 Restatement (Second) of Property takes the position that a lessor may arbitrarily withhold consent to a proposed transfer of an occupancy lease only if the lease expressly provides for an absolute veto power and only if the lease was "freely negotiated."[229] While restraints on the alienation of leases are not prohibited, they are disfavored and should be strictly construed. Free transferability is the default position and, as noted by the Idaho Supreme Court, "The imposition of a reasonableness standard . . . gives greater credence to the doctrine that restraints on alienation of leased property are looked upon with disfavor and are strictly construed against the lessor."[230] Interpreting silent consent clauses to require that the lessor act reasonably is "the interpretation imposing the least restraint on alienation and most in accord with public policy."[231]

> At common law, the joint tenancy was the law's "default" setting; absent clear contrary language, any concurrent estate was presumed to be a joint tenancy as long as the four unities were present. By contrast, today in most states a concurrent estate is considered a tenancy in common unless the intent to create another estate is clearly expressed.

Id.

[229] RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 15.2(2) (AM. LAW INST. 1977).

[230] Funk v. Funk, 633 P.2d 586, 589 (Idaho 1981). *See also* Cohen v. Ratinoff, 195 Cal. Rptr. 84, 88 (Cal. Ct. App. 1983) ("[I]f such an assignment provision is implemented in such a manner that its underlying purpose is perverted by the arbitrary or unreasonable withholding of consent, an unreasonable restraint on alienation is established."); Kendall v. Ernest Pestana, Inc., 709 P.2d 837, 843–44 (Cal. 1985).

[231] Julian v. Christopher, 575 A.2d 735, 739 (Md. Ct. App. 1990).

IV. MUST THE RIGHT TO ARBITRARILY RESTRICT MINERAL LEASE TRANSFERS BE EXPRESSLY PROVIDED?

As discussed in Part II of this article, the right to arbitrarily restrict mineral lease transfers is not clearly established. The American Law Institute's Restatements of Property do not provide a definitive answer and scholars disagree on whether mineral lease transfer restrictions are impermissible restraints on alienation. The Oklahoma Supreme Court has invalidated an anti-assignment in an oil and gas lease, but courts from other jurisdictions have upheld the right of landowners to bargain for the right to veto mineral lease transfers.[232]

Under the most aggressive view of the restraints against alienation doctrine, a landowner's right to withhold consent to the transfer of a mineral lease will be invalidated regardless of whether the right is set forth in a silent consent clause, a reasonable consent clause, or a sole discretion clause. If this is the case, there is no point to negotiationing such as those described at the beginning of this article between the landowner and two prospective lessees.[233] Yet landowners frequently do bargain for the right to veto assignments of oil and gas leases and related agreements, and in most instances, courts assume that the transfer restrictions are valid.

If a transfer restriction in a mineral lease is enforceable as a permissible restraint against alienation, it should be strictly construed. Landowners who want the right to arbitrarily restrict mineral lease transfers should include an express sole discretion clause or otherwise make clear that they intend to reserve an absolute power to withhold consent. The three arguments for an "implied reasonableness" interpretation of silent consent clauses apply to mineral leases, as well as occupancy leases. In fact, in light of the stronger policy against restraints on the alienation of fee interests, courts should be even more reluctant to equate a silent consent clause with a sole discretion clause in a mineral lease.

[232] *Compare* Shields v. Moffitt, 683 P.2d 530 (Okla. 1984), *with* Stanolind Oil & Gas Co. v. Guertzgen, 100 F.2d 299 (9th Cir. 1938) (applying Montana law); Teltow v. Tiger Dev., LLC, No. 223070, 2001 WL 1699711 (Mich. App. Dec. 28, 2001); Harding v. Viking Int'l Res. Co., Inc., 1 N.E.3d 872 (Ohio App. 2013); Love v. Beck Energy Corp., No. 14 NO 415, 2015 WL 1453338 (Ohio App. Mar. 31 2015).

[233] *See supra* at 27.

A. *Silent consent clauses do not clearly confer the right to arbitrarily restrict mineral lease transfers.*

A silent consent clause in a mineral lease is worded exactly the same as a silent consent clause in an occupancy lease. Consequently, the same interpretive issue arises: whether a lease that "may not be assigned, subleased, or otherwise transferred without the consent of the lessor" requires the lessor to act reasonably. The language of a silent consent clause suggests that reasonable transfer requests by the lessee will be granted.[234] As in the case of occupancy leases, requiring the lessor to clearly reserve the right to act in an arbitrary and unreasonable manner promotes full disclosure while upholding freedom of contract. The most effective way to provide for an unrestricted veto right is to do so expressly, but it is also possible—as discussed in Part V of this Comment—to establish the right by demonstrating that the parties otherwise addressed the issue and intended to create an absolute power to withhold consent.

B. *Good faith and fair dealing require that landowners clearly reserve the right to arbitrarily restrict mineral lease transfers.*

Because an oil and gas lease is a contract, it is appropriate in states that recognize the duty of good faith and fair dealing to attach a reasonableness standard to silent consent clauses in mineral leases. Oil and gas leases are already subject to a number of implied covenants that are grounded "upon both the reasonable expectations of the parties when they enter into an agreement and ethical concepts of conduct."[235] Although implied covenants in oil and gas leases are imposed on lessees, their underlying rationale also supports the imposition of an implied duty of good faith and fair dealing on lessors:

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[234] *See* Shaker Bldg. Co. v. Fed. Lime & Stone Co., 277 N.E.2d 584, 587 (Ohio Mun. Ct. 1971), *rev'd*, No. 31451, 1972 WL 20379 (Ohio App. Mar. 2, 1972).

> While the lease before the court clearly states that no assignment may take place without prior consent, inherent, however, in that provision is the representation that an assignment is possible. This court is of the opinion that equally inherent in that provision is the representation that such prior consent will not be withheld under any and all circumstances, reasonable or unreasonable. If that were the intent of the scrivener, such a provision should have been unequivocally stated . . . .

Id.

[235] Williams & Meyers, *supra* note 112, at §802.1.

> [T]he standard implied into oil and gas leases by the courts is clearly the same as that implied into non-oil and gas relational contracts. The only difference is the terminology utilized [in the contexts of relational contracts], *viz.*, the double duty of "good faith" and "best efforts."
>
> In sum, in oil and gas leases, as in other relational contracts, the performing party is subject to two standards of conduct: he cannot act in bad faith and he must use his best efforts.[236]

In *Lutz v. Chesapeake Appalachia, L.L.C.*, the Supreme Court of Ohio held that "an oil and gas lease is a contract that is subject to the traditional rules of contract construction."[237] One such rule of contract construction is that, "[a]bsent an express disavowal by the parties, every contract . . . generally contains an implied covenant or duty of good faith and fair dealing in its performance and enforcement."[238] Courts require lessees to expressly displace implied covenants in oil and gas agreements,[239] and lessors should likewise be required to expressly displace the implied duty of good faith and fair dealing by clearly reserving the right to arbitrarily withhold consent to the transfer of mineral leases and related agreements.[240]

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236 Charles J. Meyers & Steven M. Crafton, *The Covenant of Further Exploration – Thirty Years Later*, 32 ROCKY MOUNTAIN MIN. L. INST. 1-1, 1-22, 1-24 (1986).

237 71 N.E.3d 1010, 1013 (Ohio 2016).

238 17A C.J.S. *Contracts* § 437 (2011).

239 *See, e.g.*, Kachelmacher v. Laird, 110 N.E. 933, 934 (Ohio 1915) ("There can be no implied covenants in a contract in relation to any matter that is specifically covered by the written terms of the contract itself.") (paragraph one of syllabus); Alford v. Collins–McGregor Operating Co., 95 N.E.3d 382, 386 (Ohio 2018) ("The parties can prevent application of the implied covenant of reasonable development by including in the lease 'express provisions to the contrary.'") (quoting Beer v. Griffith, 399 N.E.2d 1227, 1229 (Ohio 1980) (paragraph two of syllabus)).

240 One possible argument for treating mineral leases differently from occupancy leases with regard to silent consent clauses is that silent consent (or "hard consent") clauses in oil and gas leases have a well-understood meaning in the industry and they do *not* suggest to lessees that reasonable transfer requests will be granted. However, in *Carrizo Oil and Gas, Inc. v. Barrow-Shaver Resources Co*mpany, the party seeking to attach a reasonableness standard to a silent consent clause made the opposite argument: that a non-literal interpretation is appropriate because the "custom in the industry" is for lessors to be reasonable and grant consent absent legitimate concerns about the assignee. 516 S.W.2d 89 (Tex. App. 2017), *petition for review filed*, No. 17-0032 (May 1, 2018). It is noteworthy that, while the Texas oil and gas lawyers representing Barrow-Shaver Resources argue that the custom in the industry is to equate a silent consent clause with a reasonable consent clause, other experts on Texas oil and gas law contend that all mineral lease transfer (*continued*)

C. The policy disfavoring restraints on alienation strongly supports the view that lessors must clearly reserve the right to arbitrarily restrict mineral lease transfers.

As noted in Part II of this article, whereas restraints on alienation are generally disfavored and strictly construed, restraints on the alienation of a fee interest are particularly disfavored and strict construction is deemed especially appropriate. The policy against restraints on the alienation of leasehold interests supports the view that lessors must clearly reserve the right to arbitrarily restrict occupancy lease transfers. Because the leasing of oil, gas, and other minerals is viewed as the transfer of a defeasible fee property interest, the argument that a silent consent clause should be equated with a reasonable consent clause, as opposed to a sole discretion clause, is even stronger for the transfer of mineral leases.[241]

V. THE RIGHT TO RESTRICT THE TRANSFER OF OCCUPANCY AND MINERAL LEASES IN TEXAS AND OHIO

The right to restrict the transfer of mineral leases and related agreements in the absence of a sole discretion clause has been the subject of recent litigation in Texas and Ohio. In *Carrizo Oil and Gas, Inc. v. Barrow-Shaver Resources Company*, the Texas Court of Appeals held that Carrizo reserved an absolute veto power based on a silent consent clause that replaced an unacceptably drafted reasonable consent clause.[242] In *Love v. Beck Energy Corporation*, the Ohio Court of Appeals held that the lessor had an absolute veto power based on a handwritten silent consent

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restrictions—whether worded as sole discretion clauses, reasonable consent clauses, or silent consent clauses—are invalid as impermissible restraints on alienation.

[241] *See* Meier & Ryan, *supra* note 14, at 330 ("The rationale supporting land-lease restraints applies to a mineral lease. In fact, . . . these reasons apply with even *more* force to an oil and gas lease than they do to a land lease.") (emphasis in original). Meier and Ryan also point out that a silent consent clause treated as a reasonable consent clause does not prohibit transfers in all instances and is therefore more likely to be treated as a permissible partial restraint on alienation instead of an impermissible disabling restraint. *See id.* at 311 n.22.

> Under the "emerging rule," a landlord's refusal to give consent under [a silent consent] clause must be commercially reasonable. . . . In this sense, then, a consent-to-transfer clause does not prohibit transfers to all third parties, even without the landlord's consent. The rule generally prohibiting disabling restraints does not apply with as much force to this type of partial restraint.

Id.

[242] 516 S.W.2d at 96.

clause that superseded printed language expressly providing the right to transfer the lease.[243] The negotiations in *Carrizo* demonstrated that the parties to the farmout agreement understood that the silent consent clause was intended to provide the right to arbitrarily restrict transfers. In contrast, there was no indication in *Love* that the parties to the oil and gas lease understood that the silent consent clause gave the lessor the right to arbitrarily restrict lease transfers.

The *Carrizo* decision has been appealed to the Texas Supreme Court. The facts of the case, however, do *not* raise the issue of whether reasonableness should be implied when there is no standard governing the consent decision. Because the negotiations established that the parties were rejecting a reasonableness standard for proposed transfers of the farmout agreement, the Appellate Court correctly held that the silent consent clause was understood by the parties to be the equivalent of a sole discretion clause.

The *Love* decision was not appealed. When the silent consent clause issue eventually comes before the Ohio Supreme Court, it should reject the traditional interpretation and imply a reasonableness standard in both occupancy and mineral leases when the parties fail to make clear that an absolute power to withhold consent is reserved. This approach is consistent with the implied duty of good faith and fair dealing as well as the policy disfavoring restraints on alienation.

A. The Texas Supreme Court should hold that the silent consent provision in Carrizo was understood by the parties to be the equivalent of a "sole discretion" clause.

While there is currently a split of authority among the appellate courts in Ohio regarding the interpretation of silent consent clauses,[244] Texas appellate courts uniformly endorse the traditional view that "there is no implied covenant by the lessor to act reasonably in withholding his consent."[245] The Texas Supreme Court, like its counterpart in Ohio, has

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[243] No. 14 NO 415, 2015 WL 1453338 (Ohio App. Mar. 31, 2015).

[244] *Compare* F & L Ctr. Co. v. Cunningham Drug Stores, Inc., 482 N.E.2d 1296, 1300 (Ohio App. 1984) (endorsing the traditional view that a silent consent clause is the functional equivalent of a sole discretion clause), *with* Littlejohn v. Parrish, 839 N.E.2d 49, 52–54 (Ohio App. 2005) (interpreting a silent consent clause to be the functional equivalent of a reasonable consent clause).

[245] Reynolds v. McCullough, 739 S.W.2d 424, 429 (Tex. App. 1987). *See also* Trinity Prof'l Plaza Assocs. v. Metrocrest Hosp. Auth., 987 S.W.2d 621, 625 (Tex. App. 1999) (because the lessee did not contract for a reasonableness provision in the ground lease, the lessor has "the absolute right to withhold consent.").

not addressed the issue. When the question is presented, the two states may reach contrary results. One of the driving forces behind the modern interpretation of silent consent clauses is the implied duty of good faith and fair dealing (which Ohio courts have applied to both occupancy and mineral leases). Texas, on the other hand, is "a rare exception to the general consensus in favor of a general common-law duty of good faith and fair dealing."[246] So long as Texas continues to reject the duty of good faith and fair dealing, it is doubtful that its supreme court will attach an implied reasonableness standard to a silent consent clause.[247] The issue may be addressed in *Carrizo Oil and Gas, Inc. v. Barrow-Shaver Resources Company*,[248] currently pending before the Texas Supreme Court. However, although the disputed farmout agreement includes a silent consent clause, *Carrizo* does not raise the issue of whether reasonableness should be implied when there is no standard governing the consent decision. In light of the negotiations between the parties, the Court of Appeals correctly concluded that the silent consent clause was intended to operate as the equivalent of a "sole discretion" clause.

The facts of *Carrizo* are important. In 2011 Carrizo Oil & Gas, Inc. (COG) entered into negotiations regarding one of its oil and gas leases with Barrow–Shaver Resources Company (BSR).[249] Rather than transfer the

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[246] Paul MacMahon, *Good Faith and Fair Dealing as an Underenforced Legal Norm*, 99 MINN. L. REV. 2051, 2051 n.2 (2015). *See also* Formosa Plastics Corp. v. Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41, 52 (Tex. 1998) ("There is no general duty of good faith and fair dealing in ordinary, arms-length commercial transactions."); Tregellas v. Archer, 507 S.W.3d 423, 435 (Tex. App. 2016) ("[O]ur state's law does not imply in every contract a duty to perform in good faith."). Texas also provides by statute that "[d]uring the term of a lease, the tenant may not rent the leasehold to any other person without the prior consent of the landlord." TEX. PROP. CODE ANN. § 91.005 (West 1995).

[247] When the Texas Supreme Court first rejected the implied covenant of good faith and fair dealing in 1983, it described it as "a novel theory of law enunciated only by California courts" and further stated that the novel concept "would abolish our system of government according to settled rules of law and let each case be decided upon what might seem 'fair and in good faith' by each fact finder." English v. Fischer, 660 S.W.2d 521, 522 (Texas 1983). Today, however, the principle "is well established in most American jurisdictions." MacMahon, *supra* note 246, at 2051. *See also* Mark Gergen, *A Cautionary Tale About Contractual Good Faith in Texas*, 72 TEX. L. REV. 1235, 1237 (1994) (criticizing the Texas Supreme Court's limited application of good faith). With regard to a related issue, Texas has rejected the common law rule that a lessor has no obligation to mitigate damages when a lessee abandons the leasehold. *See* Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc., 948 S.W.2d 293, 299 (Tex. 1997). It should likewise reconsider its position on good faith and fair dealing and reject the traditional interpretation of silent consent clauses.

[248] 516 S.W.2d 89 (Tex. App. 2017), *petition for review filed*, No. 17-0332 (May 1, 2018).

[249] *Id.* at 93.

lease, COG proposed a "farmout" agreement that would enable BSR to drill on the leased land.[250] The first draft, which was offered by BSR, did not contain a restriction on the right of transfer.[251] The second draft, submitted by COG, stated that the rights provided to BSR "may not be assigned, subleased or otherwise transferred in whole or in part, without the express written consent of Carrizo *which consent shall not be unreasonably withheld*."[252] BSR's third draft differed on other terms but retained the reasonable consent clause.[253] In response, COG offered a fourth draft that removed the reasonable consent clause and replaced it with a silent consent clause that declared that the rights provided to BSR "may not be assigned, subleased or otherwise transferred in whole or in part, without the express written consent of Carrizo."[254] BSR "vehemently object[ed]" to the removal of the reasonable consent clause, but COG's lawyers insisted that the reasonableness language be deleted.[255] BSR yielded and signed the agreement with the silent consent clause.[256] According to BSR, it received verbal assurances that COG would consent to the assignment of the farmout agreement.[257]

After BSR spent $22 million drilling wells on the lease (with no tangible results), Raptor Petroleum II, LLC, offered over $27 million for the farmout agreement.[258] COG, however, conditioned its consent to the proposed assignment on being paid $5 million for its lease.[259] BSR refused and after Raptor withdrew its offer, BSR sued COG for breach of contract, fraud, and tortious interference with a contract.[260] COG argued that the Trial Court should find, as a matter of law, that the negotiations and prior drafts established that it had reserved the right to withhold consent for any reason.[261] The Court, however, submitted the issue to a jury, refused to admit any evidence of the contract negotiations, and allowed BSR's expert to testify that the custom in the oil and gas industry is that consent will not be withheld absent a reasonable concern about the potential assignee's

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[250] *Id.*
[251] *Id.*
[252] *Id.* (emphasis added).
[253] *Id.*
[254] *Id.*
[255] *Id.* In other words, the inclusion of a reasonable consent clause was now viewed by COG as a "deal-breaker."
[256] *Id.*
[257] *Id.*
[258] *Id.*
[259] *Id.*
[260] *Id.*
[261] *Id.* at 94.

capabilities.[262] COG was found to be liable for breach of contract, fraud, and tortious interference with contract, and BSR was awarded $27,690,466.86 plus prejudgment interest and attorney's fees.[263]

The Court of Appeals reversed.[264] It held that the parol evidence rule does not prohibit the consideration of "the facts and circumstances surrounding a contract, including the commercial or other setting in which the contract was negotiated and other objectively determinable factors that give context to the parties' transaction."[265] With regard to the silent consent clause, the Court held that the parties understood that COG was reserving the right to arbitrarily restrict the transfer of the agreement:

> We hold that the consent-to-assignment provision of the farmout agreement was not silent when we are informed by its surrounding circumstances. . . . In light of the consent provision in the farmout agreement and the evidence of the circumstances surrounding its execution, there is a complete absence of evidence supporting the jury's finding that COG breached the agreement.[266]

With respect to the oral assurances that consent would be given, the Appellate Court held that—in light of "the unambiguous term in the written contract that directly contradicts the oral representation"—there is no evidence to support the justifiable reliance element of BSR's fraud claim.[267]

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[262] *Id.* at 93–94 (The Trial Court's refusal to permit the jury to learn about the negotiations and prior draft agreements was based on the parol evidence rule).

[263] *Id.* at 94.

[264] *Id.* at 98.

[265] *Id.* at 95–96 (the parol evidence rule "does not prohibit consideration of surrounding circumstances that inform, rather than vary from or contradict, the contract text.") (quoting Hous. Expl. Co. v. Wellington Underwriting Agencies, Ltd., 352 S.W.3d 462, 469 (Tex. 2011)).

[266] *Id.* at 97. Judge Brian Hoyle concurred in part and dissented in part. He agreed that the Trial Court erred in excluding evidence of the prior drafts and negotiations involving COG and BSR, but he disagreed that the negotiations established that COG could withhold consent arbitrarily. *Id.* at 100 ("Based on the wording of the farmout agreement and the evidence presented at trial, I would hold that BSR raised a fact issue regarding whether custom and usage limited the circumstances under which COG could withhold consent to an assignment.").

[267] *Id.* at 97–98. In *Stith v. Hudson City Savings Institution*, the mortgage bond contained a "due-on-sale" clause that required that consent be provided to the sale of the secured property. 313 N.Y.S.2d 804, 806 (N.Y. Sup. Ct. 1970). The landowner alleged that he was given assurances that consent would not be unreasonably withheld and argued that it was the custom and usage of lending institutions to act reasonably. *Id.* The Court disagreed,

(*continued*)

The most basic question in *Carrizo* is whether it is possible to reserve the right to arbitrarily restrict the transfer of a farmout agreement. The right to reserve an absolute veto power has been upheld by Texas appellate courts in cases involving commercial leases, but some Texas lawyers have argued that any restriction on the right to transfer an oil and gas lease is an invalid restraint on alienation. The issue, however, was not argued in *Carrizo* and thus is not presented to the Texas Supreme Court. BSR does not contend that COG cannot restrict the right of transfer, but instead asserts that COG must act reasonably when exercising its right to withhold consent.[268]

Assuming that it is possible to bargain for the right to veto a transfer of the farmout agreement for any reason, the question remains: did COG in fact reserve the right to arbitrarily restrict transfers? BSR argues that the customs of the oil and gas industry should control and that one such custom is that consent to proposed transfers will not be unreasonably withheld. Insofar as the particular custom at issue is the custom of acting reasonably, this argument looks remarkably like an assertion that Texas courts should recognize an implied duty of good faith and fair dealing in the oil and gas industry. In light of the fact that Texas has rejected the implied duty of good faith and fair dealing, BSR is in effect arguing that a silent consent clause is the equivalent of a reasonable consent clause for the oil and gas industry, but not otherwise.

In any event, the custom argument fails if the parties clearly intended that the consent decision would not be governed by a reasonableness standard. It is very difficult to see how BSR can argue that the parties understood that COG must act reasonably when: (1) COG removed the reasonableness standard from the agreement; (2) BSR vehemently objected to its removal; (3) COG explained that it acted at the insistence of its lawyers; and (4) BSR acquiesced and signed the agreement. The *Carrizo* case is different from the *Love* decision in Ohio, which—arguably incorrectly—held that the silent consent clause in a mineral lease was the

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holding that the clause was "clear and unambiguous" and that oral assurances "may not be considered to vary or add to terms so clearly expressed." *Id.* at 807–08.

[268] *Carrizo*, 516 S.W.2d at 96. The argument that the right to transfer an oil and gas lease cannot be restricted is based on the view that mineral leases are conveyances of property interests and therefore trigger the strong policy disfavoring restraints on the alienation of fee interests. On the other hand, restrictions on the right to transfer occupancy leases have been upheld in part due to the weaker policy disfavoring restraints on the alienation of non-freehold interests. It is not clear what policy would apply to a farmout agreement—a contract relating to a mineral lease rather than a conveyance of a mineral lease.

equivalent of a sole discretion clause. In *Love*, the printed form gave the lessee the right to transfer the lease, but the superseding handwritten provision stated that the lessee could transfer the lease only with the consent of the lessor. Significantly, there was no indication in *Love* whether the silent consent clause was intended to be the equivalent of a reasonable consent clause or a sole discretion clause. In the absence of clear contrary intent, the implied duty of good faith and fair dealing, and the policy disfavoring restraints on alienation, should have caused the Ohio Court of Appeals to attach a reasonableness standard to the silent consent clause.

In contrast, the negotiations in *Carrizo* established that the silent consent clause was not intended to be the equivalent of a reasonable consent clause—which it replaced—but rather was intended to be the equivalent of a sole discretion clause. If the parties thought the silent consent clause was to be the equivalent of a reasonable consent clause, why did COG insist that the reasonableness language be removed and why did BSR vehemently object to its removal? Since the silent consent clause in *Carrizo* was viewed by the parties as the equivalent of a sole discretion clause—and since the issue of the validity of sole discretion clauses in farmout agreements was not litigated—the Court of Appeals' decision should be affirmed.

The Texas Supreme Court will no doubt be influenced by the fact that COG conditioned its consent on a request that BSR pay $5 million for the lease. In the *amicus curiae* letters filed on behalf of BSR, various oil and gas companies stress that: (1) consent requirements are common in leases and farmout agreements; (2) consent is customarily withheld only if there is a reasonable concern regarding the proposed assignee; and (3) withholding consent for other reasons—such as a demand for money—is unfair and should not be permitted.[269] In effect, the *amici* urge the Texas Supreme Court to imply a duty of good faith and fair dealing and attach a reasonableness standard to silent consent clauses. It is unlikely, however, that the Court will do so.

There are three more likely courses of action. First, the state supreme court could hold that the parol evidence rule bars consideration of the underlying negotiations and then find that the silent consent clause in the farmout agreement is the equivalent of a reasonable consent clause in light

[269] *See* Amicus Curiae Letter of Middleton Oil Co. (May 24, 2018), Amicus Curiae Letter of U.S. Operating, Inc. (May 24, 2018), Amicus Curiae Letter of Lake Ronel Oil Co. (Feb. 6, 2018), Barrow-Shaver Res. Co. v. Carrizo Oil & Gas Inc., *petition for review filed*, No. 17-0332 (May 1, 2018).

of industry custom. If it takes this course of action, however, it must address the fact that Texas courts have heretofore equated silent consent clauses with sole discretion clauses. Second, the court could hold that the parol evidence rule does not bar consideration of the negotiations, but nevertheless conclude that COG must act reasonably in withholding consent because of industry custom. If it takes this course of action, it must explain why BSR vehemently objected when COG removed the reasonable consent clause in a prior draft and insisted instead on a silent consent clause. Third, the court could hold that the parol evidence rule does not bar consideration of the negotiations and conclude that COG need not act reasonably in withholding consent—despite industry custom—because COG bargained for the right to act arbitrarily in restricting transfers. In other words, the court could find that a party can reserve the right to arbitrarily restrict transfers either by including a sole discretion clause, or by demonstrating that the parties otherwise addressed the issue and intended to create an absolute power to withhold consent.

B. *Ohio should reject the traditional view of silent consent clauses and imply a reasonableness standard in both occupancy and mineral leases.*

As in other states, Ohio follows the default rule that leases may be subleased or assigned.[270] It also subscribes to the universally held view that restrictions on lease transfers, while permitted, are "a restraint against alienation [and] are not looked upon with favor."[271] The right to arbitrarily restrict lease transfers has also been upheld by Ohio courts.[272] What is not clear, however, is whether the right to arbitrarily restrict lease transfers must be expressly provided. The interpretation of silent consent clauses has received inconsistent and inconclusive treatment, and the state supreme court has not yet addressed the issue.

Ohio is one of the first states to hold that silent consent clauses do not authorize lessors to arbitrarily veto lease transfers. In *Shaker Building*

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[270] *See* Crowe v. Riley, 57 N.E. 956, 956 (Ohio 1900) ("The lease contained no restriction against assignment thereof, and it was therefore assignable.").

[271] Fairbanks v. Power Oil Co. of Ohio, 77 N.E.2d 499, 503 (Ohio App. 1945). *See also* Norris v. Sara Lee Corp., No. 13946, 1989 WL 73816, at *1 (Ohio App. July 5, 1989) ("Ohio courts have held that a provision against assignment in a lease is to be strictly construed.").

[272] *See* Zhou v. Franchise Fin. Corp. of Am., No. CA2001-02-041, 2001 WL 1402843, at *3 (Ohio App. Nov. 13, 2001) (holding that an occupancy lease with a sole discretion clause unambiguously empowers the landlord to veto a proposed assignment for any reason). *See also* Harding v. Viking Int'l Res. Co., Inc., 1 N.E.3d 872, 876 (Ohio App. 2013) (affirming the determination that the anti-assignment provision in an oil and gas lease was not an impermissible restraint on alienation).

Company v. Federal Lime & Stone Company, the occupancy lease at issue prohibited the lessee, without prior written consent of the lessor, from assigning or otherwise conveying the lease.[273] The Municipal Court for Shaker Heights held that "inherent in that provision is the representation that such prior consent will not be withheld under any and all circumstances, reasonable or unreasonable."[274] Consequently, the Court held that when transfers are limited only by the requirement of prior consent of the lessor, "such consent may not be withheld unless the prospective assignee is unacceptable, using the same standards applied in the acceptance of the original lessee."[275]

The Ohio Eighth District Court of Appeals, however, reversed and reaffirmed the traditional view of silent consent clauses, describing the provision at issue as "unambiguous and unqualified," and further stating that "[i]f the parties intended to prohibit the landlord arbitrarily from refusing consent, the lease should have so provided."[276] Without referring to the unpublished *Shaker Building Company* decision, the Third District Court of Appeals in 1982 also endorsed the traditional interpretation of silent consent clauses.[277] Two years later, the Eighth District Court of Appeals reaffirmed its prior position, noting in *F & L Center Company v. Cunningham Drug Stores, Inc.*, that "the majority of authority in this country supports the view that where the consent of the lessor to an assignment is required, that consent may be withheld for any reason absent express language in the lease that it may not be unreasonably withheld."[278] Judge Joseph Nahra dissented, arguing that silent consent clauses are misleading and should be narrowly construed in view of the property-based policy disfavoring restraints against alienation and the contract-based principle of good faith and fair dealing.[279] With little discussion, the Sixth

[273] 277 N.E.2d 584, 585 (Shaker Heights, Ohio Mun. Ct. 1971), *rev'd*, No. 31451, 1972 WL 20379 (Ohio App. Mar. 2, 1972).

[274] *Id.* at 587.

[275] *Id.*

[276] *Shaker Bldg.*, 1972 WL 20379, at *1.

[277] *See* Henry Conklin & Sons, Inc. v. Conklin, No. 14-80-19, 1982 WL 6741, at *5 (Ohio App. Mar. 1, 1982) (The Court rejected the contrary view of the Shaker Heights Municipal Court and held that when reading into the lease, "an implied provision that such consent would not be unreasonably withheld would in effect be rewriting an otherwise unambigious contract . . . ." Ohio is divided into twelve appellate districts).

[278] 482 N.E.2d 1296, 1300 (Ohio App. 1984).

[279] *Id.* Judge Nahra observed that "if the lessor is permitted to arbitrarily refuse consent to an assignment, the right of the lessee to assign would be virtually nullified" and that if "the parties intended to give the landlord an arbitrary, unfettered right to refuse consent to an assignment of the lease, they could have expressed it clearly." *Id.* at 1301.

District Court of Appeals and the Ninth District Court of Appeals have also endorsed the traditional interpretation of a silent consent clause.[280]

In contrast, the First District Court of Appeals in 2005 chose to follow "the trend of recent cases which have held that a lessor must act reasonably in withholding consent under a lease provision requiring the lessor's consent to the lessee's assignment."[281] The silent consent clause at issue in *Littlejohn v. Parrish* concerned the right of a lender to withhold consent for any reason to a borrower's request to prepay a loan.[282] The Appellate Court disagreed with the Trial Court's conclusion that the prepayment clause was unambiguous, and the Court invoked the two leading rationales for attaching a reasonable standard to a silent consent clause:

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[280] In *McKenna v. Reilly*, the issue was presented in the context of the right to assign a land installment contract. No. L-84-078, 1985 WL 8368, at *2 (Ohio App. Jan. 11, 1985). The Sixth District Court of Appeals found that the contract prohibited assignment without consent and held that "the good-faith of appellee, as vendor, had nothing to do with the exercise of his absolute contract right to withhold consent to any assignment by appellants to any third-party of which appellee did not approve." *Id.* In *Bender v. Ratener*, the Ninth District Court of Appeals held that "[w]here the consent of the lessor is required, consent may be withheld for any reason, absent language in the lease that it may not unreasonably be withheld." No. 12915, 1987 WL 13633, at *2 (Ohio App. June 17, 1987) (citing *F & L Ctr.*, 482 N.E.2d 1296) (The Tenth and Twelth District Court of Appeals also cited *F & L Center Company* for the proposition that a lessor can withhold consent to a proposed transfer for any reason when the lessor has unambiguously retained the right to do so in the lease). *See also* Shoney's, Inc. v. Winthan Prop., Inc., No. 01AP-145, 2001 WL 1586534, at *6 (Ohio App. Dec. 13, 2001); Zhou v. Franchise Fin. Corp. of Am., No. CA2001-02-041, 2001 WL 1402843, at *2 (Ohio App. Nov. 13, 2001) (The leases at issue, however, contained a sole discretion clause rather than a silent consent clause. *Zhou*, 2001 WL 1402843, at *3); Carrols Corp. v. Canton Joint Venture, No. 88-2115-1, 1990 WL 99047, at *7 (Ohio Ct. Com. Pl. June 27, 1990) (citing *F & L Center Co.* in a case involving a sole discretion clause).

[281] Littlejohn v. Parrish, 839 N.E.2d 49, 52 (Ohio App. 2005). This trend, which Judge Nahra notes in his dissent in *F & L Center Company*, continued thereafter with several states rejecting the traditional view of silent consent clauses. *See, e.g.*, Campbell v. Westdahl, 715 P.2d 288 (Ariz. App. 1985); Kendall v. Ernest Pestana, Inc., 709 P.3d 837 (Cal. 1985); Newman v. Hinky Dinky Omaha–Lincoln, Inc., 427 N.W.2d 50 (Neb. 1988); Warner v. Konover, 553 A.2d 1138 (Conn. 1989); Julian v. Christopher, 575 A.2d 735 (Md. App. 1990). In 2013, the Tennessee Supreme Court concluded that "the former 'majority rule' approach has steadily eroded over time and is now a minority position among the courts that have considered the issue." Dick Broad. Co., Inc. of Tenn. v. Oak Ridge FM, Inc., 395 S.W.3d 653, 665 (Tenn. 2013).

[282] The promissory note originally stated "[t]here shall be no prepayment penalty of any nature against the maker for early payment of principal and simple interest shall only apply to the unpaid balance." *Littlejohn*, 839 N.E.2d at 50. The lenders added a clause that provides that "[a]ny prepayment shall be subject to approval of holder(s) hereof." *Id.* The clause did not state whether the noteholder must act reasonably in withholding consent to prepayment. *Id.* at 51.

> Many jurisdictions . . . have adopted Section 15.2(2) of the Restatement Second of Property: "A restraint on alienation without the consent of the landlord of the tenant's interest in the leased property is valid, but the landlord's consent to an alienation by the tenant cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent."
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> Some courts have relied on the Restatement Second of Contracts, which states, "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." . . . .
>
> Ohio law also supports that there is an implied duty of good faith in almost every contract. . . .
>
> [W]e hold that the Littlejohns and the Parrishes were required to deal reasonably with each other.[283]

The most recent Ohio case to address the rights of a lessor under a silent consent clause is *Love v. Beck Energy Corporation*, which for the first time raised the issue in the context of a mineral lease.[284] While acknowledging the 2005 *Littlejohn* decision and the corresponding trend in other states, the Seventh District Court of Appeals in *Love* held that—because the oil and gas lease was signed in 1988—it was "compelled" to follow the 1984 *F & L Center Company* decision and its endorsement of the traditional interpretation of silent consent clauses.[285] As discussed below, the Court of Appeals was not required to abide by the decision of an appellate court from another district.

While it is true that no Ohio appellate court had yet rejected the traditional view of silent consent clauses when the oil and gas lease in *Love* was executed in 1984, the Seventh District Court of Appeals was not "compelled" to follow the 1984 *F & L Center Company* decision of the Eighth District Court of Appeals.[286] By 1984, several courts had adopted

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[283] *Id.* at 52–54. The unanimous opinion, authored by Judge Mark Painter, includes numerous citations to cases from other jurisdictions, as well as a detailed analysis of Ohio cases applying the implied duty of good faith and fair dealing in contract disputes.

[284] No. 14 NO 415, 2015 WL 1453338, at *5 (Ohio App. Mar. 31, 2015).

[285] *Id.* at *8.

[286] *See, e.g.*, Phillips v. Phillips, 25 N.E.3d 371, 376 (Ohio App. 2014) ("[D]ecisions of other appellate districts are not controlling authority for this Court."); Hogan v. Hogan, 278

(*continued*)

the alternative view—set forth in the 1977 Restatement (Second) of Property—that a lessor may arbitrarily withhold consent to a proposed transfer of an occupancy lease only if the lease expressly provides for an absolute veto power and only if the lease was "freely negotiated."[287] In any event, if presented with the opportunity, the Ohio Supreme Court should reject the traditional view of silent consent clauses and imply a reasonableness standard when the parties have not otherwise made their intention clear that the veto power is absolute.

As previously noted, the critical question is whether silent consent clauses unequivocally empower lessors to veto lease transfers for any reason. There is no question that Ohio recognizes the implied covenant of good faith and fair dealing.[288] It is likewise well-settled that the duty of good faith and fair dealing "does not apply where a party to the contract has the absolute and exclusive authority to make the decision at issue."[289] Thus, as held by the Ohio Supreme Court, "if there is *clear* contractual language prohibiting assignment, an assignment will not be enforced."[290] But does a silent consent clause clearly communicate that the parties agree that consent to the proposed lease transfer can be withheld for any reason? In other words, do the silent consent clauses in Leases 3 and 4 at the beginning of this article clearly communicate that they are the functional equivalent of the sole discretion clause in Lease 2?[291] The negotiations surrounding the anti-assignment clause in the oil and gas lease in *Love* are similar to the negotiations over the prepayment clause in the loan at issue in *Littlejohn*. In the latter case, the promissory note originally stated that the borrower could prepay the loan without penalty, but was changed to

N.E.2d 367, 372 (Ohio App. 1972) ("We are not . . . bound by the decisions of our sister Courts of Appeals, although they are entitled to due consideration and respect.").

287 *See* RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 15.2(2) cmt. i (AM. LAW INST. 1977).

288 *See, e.g.*, Lucarell v. Nationwide Mut. Ins. Co., 97 N.E.3d 458, 469 (Ohio 2018) ("In addition to a contract's express terms, every contract imposes an implied duty of good faith and fair dealing in its performance and enforcement.").

289 DavCo. Acquisition Holding, Inc. v. Wendy's Int'l, Inc., No. 2:07-CV-1064, 2008 WL 755283, at *7 (S.D. Ohio Mar. 19, 2008) (quoted in Great Water Cap. Partners, LLC v. Down-Lite Int'l, Inc., Nos. C-150015, C-150023, 2015 WL 7459284, at *3 (Ohio App. Nov. 18, 2015)).

290 Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co., 861 N.E.2d 121, 128 (Ohio 2006) (emphasis added). The *Pilkington* decision was quoted in *Harding v. Viking International Resources Company*, in support of the proposition that the anti-assignment provision in the oil and gas lease at issue was valid and enforceable. *See* 1 N.E.3d 872, 876 (Ohio App. 2013).

291 *See supra* at 27.

say that the borrower could prepay with the consent of the noteholder.[292] In *Love*, the printed language provided that the oil and gas lease could be assigned, but the inserted handwritten language stated that the lease could not be assigned without the consent of the landowner-lessor.[293] In both instances, there was no indication that the parties to the agreement understood that the bargained-for right included the right to arbitrarily withhold consent.[294] In *Littlejohn*, the First District Court of Appeals held that both the contract principle of good faith and fair dealing, and the property policy of disfavoring restraints on alienation, supported the modern view that—in the absence of clear contractual language—the noteholder must act reasonably.[295] The Seventh District Court of Appeals should have likewise held in *Love* that—because the oil and gas lease did not clearly reserve the right to arbitrarily restrict lease transfers—the landowner-lessor must act reasonably. In fact, the argument that a silent consent clause should be equated with a reasonable consent clause, as opposed to a sole discretion clause, is even stronger for the transfer of mineral leases, which are viewed in Ohio as the transfer of a fee simple property interest as well as a contractual agreement.[296]

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[292] Littlejohn v. Parrish, 839 N.E.2d 49, 50 (Ohio App. 2005).

[293] Love v. Beck Energy Corp., No. 14 NO 415, 2015 WL 1453338, at *4 (Ohio App. Mar. 31, 2015).

[294] *Id.* at *8; *Littlejohn*, 839 N.E.2d at 51.

[295] *Littlejohn*, 839 N.E.2d at 54.

[296] In Ohio, oil and gas leases "are contracts, and the terms of the contract with the law applicable to such terms must govern the rights and remedies of the parties." Harris v. Ohio Oil Co., 48 N.E. 502, 506 (Ohio 1897). *See also* Lutz v. Chesapeake Appalachia, LLC, 71 N.E.3d 1010, 1011 (Ohio 2016) ("Under Ohio law, an oil and gas lease is a contract that is subject to the traditional rules of contract construction."); Alford v. Collins–McGregor Operating Co., 95 N.E.3d 382, 385–86 (Ohio 2018) (oil and gas leases are contracts and are subject to the implied covenant to reasonably develop the land, but the parties to a lease can displace the covenant by including express provisions to the contrary). In *Yoder v. Artex Oil Company*, the Fifth District Court of Appeals held that the implied covenant of good faith and fair dealing apply to the interpretation of oil and gas leases. No. 14 CA 4, 2014 WL 6467477, at *7–8 (Ohio App. Nov. 13, 2014). *See also id.* at *9 (holding, however, that the implied covenant of good faith and fair dealing cannot overcome the plan and unambiguous contractual language of the lease regarding unitization); Summitcrest, Inc. v. Eric Petroleum Corp., 60 N.E.3d 807, 820 (Ohio App. 2016) ("[T]he plain language of the Lease here permits the unitization and therefore there can be no breach of the implied covenant of good faith and fair dealing.").

On the other hand, an oil and gas lease in Ohio is also a property transaction. The General Assembly has provided by statute that leases and licenses of natural gas and oil lands "create an interest in real estate . . . ." OHIO REV. CODE. ANN. § 5301.09 (West 2015). *See also* Dundics v. Eric Petroleum Corp., 79 N.E.3d 569, 575 (Ohio App. 2017) (mineral rights, such as rights to coal, oil, and gas, are "real estate" and therefore individuals who engage in the brokering of oil and gas leases must be licensed real estate brokers); Rudolph

(*continued*)

The Ohio Supreme Court in 2003 rejected the common law rule that a lessor has no obligation to mitigate damages when a lessee abandons the leasehold. [297] In so doing, the Court noted that "modern leases are more than simply property-interest transfers; rather, leases possess contractual qualities that often include myriad covenants and duties and arise from a bargained-for relationship."[298] The Ohio Supreme Court should likewise abandon the traditional interpretation of silent consent clauses and hold that lessors must clearly reserve the right to restrict the transfer of both occupancy and mineral leases.[299]

VI. CONCLUSION

Historically, a silent consent clause was considered to be the equivalent of a sole discretion clause, and the default rule was that a lessor need not be reasonable in withholding consent to a proposed lease transfer unless the lease expressly required reasonable behavior. Default rules, however, change over time. In most jurisdictions today, the default rule with respect to occupancy leases is that a silent consent clause is considered to be the equivalent of a reasonable consent clause, and a lessor must be reasonable in withholding consent to a proposed lease transfer unless the lease expressly permits unreasonable behavior (or it can be otherwise established that the parties intended to give the lessor an absolute power to withhold consent). As shown by the leases set forth at

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v. Viking Int'l Res. Co., 84 N.E.3d 1066, 1077–78 (Ohio App. 2017) (the landowner's claim that the lease expired due to lack of production "has the nature of an action to recover title to or possession of real property because oil and gas leases are unique and create a determinable fee interest . . . ."); Chesapeake Expl., LLC v. Buell, 45 N.E.3d 185, 197 (Ohio 2015).

> The lease in this case grants the lessee an unequivocal and exclusive right to the mineral estate for a fixed term plus an indefinite extended term upon the happening of certain conditions, such as actual production of oil and gas or a prescribed payment to the lessor. Based on the vested nature of this grant, the oil and gas lease has been construed as transferring to the lessee a fee simple determinable in the mineral estate with a reversionary interest retained by the lessor that can be triggered by events or conditions specified in the lease.

Id. (citing *Harris*, 48 N.E. 502).

[297] Frenchtown Square P'ship v. Lemstone, Inc., 791 N.E.2d 417, 421 (Ohio 2003).

[298] *Id.* at 285.

[299] As noted in footnote 214, the trend of attaching a reasonable standard to a silent consent clause is consistent with the trend of implying the duty of landlords to act reasonably to mitigate damages due to the tenant's breach of the lease agreement. *See, e.g.*, Kendall v. Ernest Pestana, Inc., 709 P.3d 837, 846 (Cal. 1985).

the beginning of this article,[300] a silent consent clause suggests that consent will not be unreasonably withheld and the attachment of a reasonableness standard to a silent consent clause is supported by the contract principle of good faith and fair dealing, and the property policy of disfavoring restraints on alienation. Lessors do not have to be reasonable, but they do have to clearly reserve the right to arbitrarily restrict the transfer of occupancy and mineral leases.

[300] *See supra* at 27.