FEBRUARY 2017

COMMENTARY

New Jersey High Court Finds "Anti-Assignment" Provisions Inapplicable to Post-Loss Insurance Assignments

The assignment of insurance policy rights is an essential feature of many corporate asset transfers and restructurings. By guarding purchasers and successors against future liabilities arising out of prior business operations, the assignment of insurance policy rights provides an efficient mechanism by which to address those risks.

Commercial insurance policies, however, frequently contain so-called "anti-assignment" or "consent-to-assignment" conditions, which purport to restrict a policyholder's ability to effect such assignments without insurance company consent. Among other controversial issues surrounding these insurance policy provisions, whether insurance company consent is required for the *post-loss* assignment of insurance rights is a question that insurance companies may argue has recently left courts divided.

As a matter of first impression and in a unanimous decision welcomed by policyholders (and their assignees), the Supreme Court of New Jersey ruled this month, in *Givaudan Fragrances Corporation v. Aetna Casualty & Surety Company*, No. 076523, 2017 WL 429476 (N.J. Feb. 1, 2017) ("*Givaudan*"), that the answer under New Jersey law is decidedly *no*.

Factual Background

Givaudan involved an insurance coverage dispute concerning more than $500 million in environmental contamination damages caused by the Clifton, New Jersey, operations of Givaudan Corporation, a Swiss manufacturer of flavors, fragrances and other chemicals.

Through a series of mergers, transfers, and reformations between 1991 and 2000, Givaudan Roure Flavors Corporation ("Givaudan Flavors") became the corporate successor-in-interest to Givaudan Corporation, and an additional affiliate, plaintiff Givaudan Fragrances Corporation ("Givaudan Fragrances"), was formed.

In 2006, state and federal environmental protection agencies brought claims against Givaudan Fragrances for the costs to remediate hazardous discharges that had been emitted decades earlier by Givaudan Corporation's operations at its Clifton facility. Givaudan Fragrances provided notice to the

defendant insurance companies—a group of primary, excess, and umbrella liability insurance companies that had sold policies to Givaudan Corporation during the relevant time period from 1964 to 1986. Each insurance company, in turn, denied coverage, claiming that Givaudan Fragrances was not an insured entity under the subject insurance policies.

Thereafter, Givaudan Fragrances commenced a lawsuit, seeking a declaratory judgment as to its entitlement to coverage under the policies. While the declaratory judgment action was pending, and despite the defendant insurance companies' refusal to provide their consent, Givaudan Flavors (as the successor-in-interest of Givaudan Corporation) assigned its post-loss rights under the policies to Givaudan Fragrances. Citing the policies' "anti-assignment" provisions, the defendant insurance companies maintained that their refusal to consent invalidated the assignment and that Givaudan Fragrances accordingly had no right to pursue coverage under the policies.

The Supreme Court of New Jersey's Decision

Following a trial court ruling in favor of the defendant insurance companies, and reversal by the intermediate appellate court, the Supreme Court of New Jersey granted the defendant insurance companies' petition for certification on the issue of whether anti-assignment provisions void post-loss claim assignments for which insurance company consent has not been obtained.

In a unanimous decision grounded in both the contractual purpose of anti-assignment provisions and the established public policy of New Jersey, the Supreme Court of New Jersey held that once an insured loss has occurred, anti-assignment provisions "may not be applied to bar the post-loss claim assignment."

Recognizing that "anti-assignment" provisions are intended to protect insurance companies from insuring different risks than those initially contracted for, New Jersey's highest court correctly determined that "post-loss assignments do not further the purpose of the anti-assignment clause," because "once a loss occurs, an assignment of the policyholder's rights regarding that loss in no way materially increases the risk to the insurer."

The Court further reasoned that because the right to sue for amounts owed under an insurance policy (a "chose in action") constitutes a personal property right, upholding anti-assignment provisions as a bar to post-claim assignments would contravene New Jersey's recognized public policy disfavoring restraints on the alienation of property rights.

Applied to the instant facts, the Court found that the risk of environmental contamination originally insured by the defendant insurance companies had occurred prior to the assignment and due to the actions of the entity originally named as the insured, Givaudan Corporation. Accordingly, the Court concluded that the assignment under the insurance policies to Givaudan Fragrances constituted "an assignment of a post-loss claim" that was not subject to the policies' anti-assignment provisions.

Implications for Policyholders

With *Givaudan*, New Jersey joins the majority of states to refuse to enforce anti-assignment provisions as a bar to *post-loss* claim assignments.[1] As the Supreme Court of New Jersey in *Givaudan* appropriately recognized, the majority rule honors the reasonable expectations of policyholders by preventing insurance companies from unfairly avoiding their coverage obligations where no change in the risks they originally agreed to underwrite has taken place.

While a victory for policyholders, *Givaudan* also underscores the importance of the question of which state's law applies to an assignment of rights under an insurance policy. Given the continued variation across jurisdictions on this issue[2] (and the fact that insurance companies may continue to invoke anti-assignment provisions as a basis to disclaim coverage for transferred or assumed liabilities), commercial policyholders considering an assignment of rights under their insurance programs should carefully analyze both the terms of their insurance policies and the potentially applicable governing law.

Lawyer Contacts

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Endnotes

1 *See, e.g.*, *In re Viking Pump, Inc.*, 148 A.3d 633 (Del. 2016); *Fluor Corp.*, 61 Cal. 4th 1175 (2015); *Narruhn v. Alea London Ltd.*, 404 S.C. 337 (2013); *Wehr Constructors, Inc. v. Assurance Co. of Am.*, 384 S.W.3d 68 687 (Ky. 2012); *In re Ambassador Ins. Co.*, 965 A.2d 486 (Vt. 2008); *Egger v. Gulf Ins. Co.*, 903 A.2d 1219 (Pa. 2006); *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 861 N.E.2d 121 (Ohio 2006); *Conrad Bros. v. John Deere Ins. Co.*, 640 N.W.2d 231 (Iowa 2001); *Antal's Rest., Inc. v. Lumbermen's Mut. Cas. Co.*, 680 A.2d 1386 (D.C. 1996).

2 Notwithstanding the majority of states addressing the issue to have done so (*see supra fn.1*), courts in certain jurisdictions have declined to void the application of anti-assignment provisions to post-loss claim assignments. *See, e.g.*, *In re Katrina Canal Breaches Litig.*, 63 So.3d 955 (La. 2011); *Keller Founds., Inc. v. Wausau Underwriters Ins. Co.*, 626 F.3d 871 (5th Cir. 2010) (Texas); *Travelers Cas. & Sur. Co. v. U.S. Filter Corp.*, 895 N.E.2d 1172 (Ind. 2008); *Del Monte Fresh Produce, Inc. v. Fireman's Fund Ins. Co.*, 183 P.3d 734 (Haw. 2007); *Holloway v. Republic Indem. Co. of America*, 147 P.3d 329 (Or. 2006).