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Indiana Supreme Court holds assignment of insurance policy rights invalid due to 'consent to assignment' clause in policy

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Charles W. Browning
(248) 594-6247
cbrowning@plunkettcooney.com

Kenneth C. Newa
(248) 594-6968
knewa@plunkettcooney.com

In an opinion and order dated October 15, 2008, the Indiana Supreme Court held that an insurance policy that contains a provision requiring the insurer's consent before the policy may be assigned prohibits assignments, but does not prohibit the assignment of a chose in action that is known to the insured at the time of the assignment.

Travelers Cas. & Sur. Co. v. U.S. Filter Corp., Indiana Supreme Court Case No. 49S02-0712-CV-596 (Ind. October 15, 2008), involved at least two unrelated corporations, U.S. Filter and Waste Management, that sought coverage under a number of different occurrence-based liability insurance policies issued to their predecessors. U.S. Filter and Waste Management sought coverage for underlying claims involving exposure to silica from a Wheelabrator blast machine and claimed that they were entitled to coverage under the subject insurance policies as the result of various corporate transactions and assignments.

The subject policies each contained a provision prohibiting assignment without consent of the insurer. The insurers asserted that these provisions precluded U.S. Filter and Waste Management from obtaining rights under the policies through assignment, as their consent was never sought. U.S. Filter and Waste Management claimed that the consent to assignment provisions did not apply because the assignment involved choses in action arising from pre-transfer losses.

The trial court ruled in favor of U.S. Filter, but denied summary judgment to Waste Management. The Indiana Court of Appeals affirmed the trial court's ruling as to U.S. Filter and reversed as to Waste Management. The Court of Appeals held that a chose in action arose under the policies at the moment of loss and was freely transferable regardless of the consent to assignment provisions.

The Indiana Supreme Court examined whether the corporate transaction documents in fact attempted to transfer rights under the insurance policies. As to one transaction that included a general assignment provision, the court ruled that the insurance policies were not transferred because the policies were not specifically identified as an asset to be transferred. Conversely, the court found that Waste Management clearly intended to transfer rights under the insurance policies to U.S. Filter in a subsequent transaction.

However, the Indiana Supreme Court, while acknowledging that some courts have created an exception for assignments that take place after the loss has occurred, held that "for the transfers to succeed, the predecessors must have complied with those policy provisions governing assignment." The court found that consent to assignment provisions serve a legitimate business purpose because they "protect [insurers] from a material increase in risk for which they did not bargain, specifically because of a change in the nature of the insured." Following *Henkel Corp. v. Hartford Acc. & Indem. Co.*, 62 P.3d 69 (Cal. 2003), the Indiana Supreme Court held that a chose in action is assignable only after a claim has been made:

This rule draws as much from the law on choses in action as from the law on insurance policies. A right not currently held is not a chose in action assignable at law. It follows that a chose in action only transfers in these circumstances if it is assigned at a moment when the policyholder could have brought its own action against the insurer for coverage. Under the liability policies implicated here, that moment does not arrive until a claim is made against the insured. Put another way, at a minimum the losses must have been reported to give rise to a chose in action.

Thus, to the extent that the loss had occurred but had not been reported at the time of the attempted transfer of insurance rights, it did not constitute an assignable chose in action. The court further indicated that corporate managers involved in such transactions have other means available to insure against future losses, including indemnification provisions or price negotiations. However, "the assignment of a pre-loss claim, or set of claims, can be just as risky for the insurer as assignment of an entire policy."

The impact of this decision is significant. In corporate mergers or acquisitions, corporations often attempt to assign insurance policies, or rights under those policies, to successors of the corporation. The *U.S. Filter* decision adopts the bright line rule that, where a policy contains a provision prohibiting assignment, the assignment of a chose in action is prohibited where a claim has not been made against the insured. Thus, if an insured attempts to assign rights under a policy before a claim has been made against it, even if the "loss" that may give rise to a claim has already occurred, coverage for that unknown claim is not available to the assignee under Indiana law where the policy contains a consent to assignment provision. This decision also represents the most recent in the line of cases that have followed *Henkel* and provides the insurer with more certainty and control with respect to the entities to which they may owe coverage.

Plunkett Cooney represented Travelers in this matter with Mary Massaron Ross handling the appeal. Should you have any questions about *U.S. Filter*, or about the application of consent to assignment clauses in general, please feel free to contact any member of Plunkett Cooney's Insurance Practice Group. A practice group directory can be found at www.plunkettcooney.com or call Chuck Browning at (248) 594-6247.

Click here to review the *Travelers v. U.S. Filter Corp.* opinion.