New Jersey Law Journal
STATEWIDE LEGAL AUTHORITY SINCE 1878
An ALM Publication
VOL. 223 NO. 27 MONDAY, JULY 3, 2017 NJLJ.COM

INSURANCE LAW

NJ Applies Majority Rule Allowing Free Assignability of Insurance

By Pamela D. Hans and Bruce Strong

For years, lawyers have structured corporate transactions around the assumption that valuable insurance assets were freely assignable without the consent of insurance companies. For decades, that assumption proved largely true in most jurisdictions.

In 2003, in *Henkel Corp. v. Hartford Accident & Indemnity Co.*, 29 Cal. 4th 934 (Cal. 2003), California departed from the well-established rule that insurance companies could not restrict the transfer of insurance assets after a loss. The fear was that other jurisdictions would follow *Henkel* and prevent policyholders from freely assigning their insurance assets. In 2015, however, in *Fluor Corp. v. Superior Court*, 61 Cal. 4th 1175 (Cal. 2015), the California Supreme Court reversed itself, joining the majority of jurisdictions which held that the right to insurance proceeds for post-loss claims are freely assignable.

With heavy reliance on this 2015 California opinion, in *Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co.*, 227 N.J. 322 (2017), New Jersey joined the majority of jurisdictions in allowing post-loss assignment notwithstanding any anti-assignment clause contained in the insurance policy. More recently, in *Haskell Props. v. Am. Ins. Co.*, 2017 N.J. LEXIS 524 (N.J. May 16, 2017), the New Jersey Supreme Court returned to the rule of free assignability and summarily remanded a case that had allowed assignment.

Occurrence-Based Policies Mitigate Risk

The rulings in *Givaudan* and *Haskell* will have a positive effect on businesses in the state by preserving valuable insurance assets that can provide coverage for a business's long-tail claims. When a company purchases liability insurance, it generally has the option of purchasing either "occurrence-based" or "claims-made" policies. While "claims-made" policies tend to be cheaper, they are generally triggered only when an

"occurrence," claim, *and* reporting of the occurrence take place during the policy period. Occurrence-based policies, while more expensive, provide coverage for an occurrence that happens during a given policy period regardless of when a claim is alleged or when a loss or claim is reported.

Occurrence-based liability insurance policies effectively never expire. A business can purchase such a policy when it engages in a potentially risky operation, where the effects might not be truly appreciated until after the policy period ends, and still be assured that the business will have insurance

Pamela D. Hans (phans@andersonkill.com) is the managing shareholder of Anderson Kill's Philadelphia office and Bruce Strong (bstrong@andersonkill.com) is an attorney in the office. Both are members of the firm's Insurance Recovery Group.

against future claims relating to that activity, even if the claims are reported outside the policy period.

Without the pro-policyholder rule adopted in *Givaudan*, businesses seeking to restructure, merge, or sell their assets would be held hostage by their insurance companies and the anti-assignment clauses contained in most occurrence-based policies. An insurance company could withhold consent from a business to assign an insurance policy, even after a loss had occurred, forcing the business either to forgo a profitable restructuring, merger, or acquisition, or go forward with the transaction notwithstanding that it would potentially forfeit millions of dollars in insurance assets that it had already paid for.

Free assignability of these occurrence-based policies is necessary to facilitate the profit-generating restructurings that have become integral to modern businesses' survival and growth. With free assignability assured, a company considering whether to purchase another company may be less concerned about the acquisition's liabilities if that company has maintained a robust insurance program covering its historic risk.

The Recent 'Givaudan' Decision

Recognizing these pro-business principles in *Givaudan*, the New Jersey Supreme Court held that once an insured loss has occurred, an anti-assignment clause in an occurrence-based policy may not provide a basis for an insurance company to decline coverage.

In this case, Givaudan Fragrances Corporation ("Fragrances") faced liability as a result of environmental contamination from a manufacturing site that a related corporate entity operated in Clifton, New Jersey, from the 1960s through 1990. Fragrances sued its insurance companies for coverage of environmental claims, initiated by the New Jersey State Department of Environmental Protection and, later, the United States Environmental Protection Agency, concerning discharges that occurred during this time.

Fragrances claimed that the defendant insurance companies wrote liability policies for Givaudan Corporation during the relevant years, arguing that it was entitled to coverage by operation of an assignment of rights.

The rulings in 'Givaudan' and 'Haskell' will have a positive effect on businesses by preserving valuable insurance assets that can provide coverage for a business's long-tail claims.

The insurance companies asserted that any assignment to Fragrances was invalid because they did not consent to the assignment.

Givaudan Corporation was the named insured under the policies at issue. Givaudan Corporation and its corporate predecessors were manufacturers of flavors, fragrances, and other chemicals. From the 1960s through the 1980s, the corporation purchased occurrence-based insurance policies from the defendant insurance companies.

Givaudan Roure Corporation was formed in 1991 and became the successor in interest to Givaudan Corporation. In 1997, "Givaudan Roure Fragrance Corporation" incorporated as a wholly owned subsidiary of Givaudan Roure Corporation. Effective Jan. 1, 1998, Givaudan Roure Corporation transferred the assets and liabilities of the fragrances part of its business to Givaudan Roure Fragrance Corporation. That transfer excluded Givaudan Roure Corporation's insurance policies.

In 2000, plaintiff Givaudan Fragrances was incorporated, and Givaudan Roure Fragrance was merged into Givaudan Fragrances. The flavors aspect of the business also was restructured at that time and was merged into "Givaudan Roure Flavors Corporation" (Flavors).

The dispute between Fragrances and defendants began in earnest when Fragrances was sued on the environmental contamination claims. Fragrances notified the insurance companies of the environmental claims, but they declined to provide coverage.

In February 2010, Fragrances notified the insurance companies that Flavors intended to assign its post-loss rights under the insurance policies to Fragrances. Defendants refused to consent to the assignment. Nevertheless, Flavors executed the assignment to Fragrances, which Fragrances maintains transferred its rights with respect

to coverage for claims related to the fragrances operations at the Clifton site.

After Fragrances sued the insurance companies seeking coverage, both parties moved for summary judgment on the issue of whether the assignment of the policies was valid. Flavors argued that the assignment should be valid because it did not change any of the insured risk since the losses had already occurred. The insurance companies argued that the assignment increased their potential liability by requiring them to essentially cover two policyholders, and because the amount of liability had not yet been reduced to a judgment. The insurance companies also argued that the duty to defend could not be assigned, but Flavors countered that the cooperation clause in the policies protected the insurance companies from defending a recalcitrant assignee.

The trial court sided with the insurance companies, and the appellate court reversed. The New Jersey Supreme Court granted certification and affirmed the appellate court. Relying heavily on *Fluor*, the court accepted Flavors' arguments that the losses were already set in stone and that there was no change in the risk for the insurance companies by reason of the assignment. It rejected the insurance companies' arguments that the mere fact that the loss had not been reduced to a judgment was grounds to negate the assignment because the occurrence, i.e., the discharge to the environment, had already occurred during the policy period, and that occurrence, was what the policies insured, not the resulting judgment. For similar reasons, the court found that the substitution of insureds was of no moment, since the insurance policies insured losses caused by occurrences. The court further rejected the insurance companies' argument that now they would be required to defend and indemnify two policyholders because Flavors chose to forgo its rights under the insurance policies by assigning them to Fragrance.

The New Jersey Supreme Court decided *Givaudan* in February. Since that time, a new case with remarkably similar facts made its way to the Supreme Court. In the new case, *Haskell Props. v. Am. Ins. Co*., 2017 N.J. LEXIS 524 (N.J. May 16, 2017), a seller in bankruptcy sold contaminated property and transferred "all contracts" relating to the property to Haskell. The insurance companies refused to cover Haskell for the contaminated property. The trial court found in favor of the insurance companies and the appellate court reversed, finding that Haskell could maintain a breach of contract cause of action against the insurance companies for refusing to cover the contaminated property. On certification to the New Jersey Supreme Court, the court, by summary order, remanded the case to the appellate court.

What both *Givaudan* and now *Haskell* show is the pro-business effect of the majority rule allowing post-loss assignments of occurrence-based insurance policies. In both cases, the Supreme Court's rulings preserved insurance assets that were already paid for in order to allow net-positive business transactions to go forward.

Important Considerations Going Forward

Although *Givaudan* established the majority rule regarding assignment of policies in New Jersey, there are still a handful of states, such as Indiana, Hawaii, Oregon, Texas, and Louisiana, that do not clearly follow the majority pro-policyholder rule. For example, Indiana requires a loss to be reduced to a sum-certain before a policyholder can assign rights under a policy covering that loss (a position that has not been adopted in any other jurisdiction). The other jurisdictions do not recognize *any* post-loss exception to anti-assignment clauses notwithstanding the clear economic and societal benefit to recognizing such an exception. That said, risk managers and corporate counsel should keep these jurisdictions in mind when they structure corporate transactions, or they may run the risk of forfeiting millions of dollars of insurance assets.

Notwithstanding the rule in the minority of jurisdictions, the majority rule permitting the assignment of post-loss occurrence-based insurance policies makes those policies all the more valuable and may influence the decision of whether to purchase insurance policies that are triggered by an occurrence versus those that are triggered by a claim.■

Reprinted with permission from the July 3, 2017 edition of the NEW JERSEY LAW JOURNAL. © 2017 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877.257.3382, reprints@alm.com or visit www.almreprints.com. # 151-07-17-01