Another State Court Limits the Enforceability of Anti-Assignment Clauses

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We recently wrote about the California Supreme Court’s decision in Fluor Corporation v. Superior Court to limit the enforceability of clauses in third party liability insurance policies that prohibit the policyholder from assigning its interests in the policy without the insurer’s prior consent. The court held that these so-called anti-assignment clauses are not enforceable after a third party has suffered personal injury or property damage covered under the policy and for which the insured may be liable. A New Jersey appellate court has reached the same conclusion in Givaudan Fragrances Corp. v. Aetna Casualty & Surety Co. There, Givaudan Fragrances Corporation sought coverage under a corporate affiliate’s insurance policies for numerous claims brought against Givaudan for environmental contamination. The appellate court concluded that the policies’ anti-assignment clause was no longer enforceable as to the losses that had occurred before the assignment.

Although both the New Jersey and California courts reached the same result, it is worth noting that the Givaudan court did not rely upon a state statute prohibiting the post-loss enforcement of an anti-assignment clause, as California’s high court did. Instead, the New Jersey court based its decision on judicial precedent, from New Jersey and other states, holding that the purpose behind an anti-assignment clause to protect the insurer from “any unforeseen exposure that may result from the unauthorized assignment of a policy before a loss” does not apply after a loss. The insurer’s risk becomes fixed once a loss occurs, and the risk is not increased merely by the change in identity of the person who is paid under the claim. Additionally, under this precedent, a post-loss assignment is a transfer of a right to a claim for money, or chose in action, not a transfer of the actual policy.

Most jurisdictions that have addressed this issue have adopted the general common law rule applied in Givaudan. Courts applying the laws of Indiana, Hawaii, and Oregon, as well as the Fifth Circuit applying Texas law, have not been receptive to the rule. The Louisiana Supreme Court has been similarly skeptical, though that decision relied upon a state statute interpreted to strictly bar assignments. Companies with policies governed by the laws of any of those states may yet face obstacles in accessing coverage under policies assigned to them by a corporate predecessor.

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