NEW JERSEY – ENVIRONMENTAL & TOXIC TORTS NEW JERSEY APPELLATE COURT APPROVES INSURANCE POLICY ASSIGNMENTS TO FUND POLLUTION CLAIMS

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KEY POINTS

- Assignment of insurance policies was allowed despite the fact that there were "no assignment" clauses in the policies and the insurers did not consent.
- Once a loss occurs, a policy may be assigned without an insurer's consent.

In *Givaudan Fragrances Corp. v. Aetna Casualty & Surety Co., et al,* 120 A.3d 959 (App. Div. 2015), the New Jersey Appellate Division held that an assignment of rights under numerous insurance policies issued between 1964 and 1986 was enforceable and valid. The court reasoned that the insurer defendant's obligations to insure the risk under the policies was not altered by the assignment to a successor company.

The New Jersey Appellate Division was faced with a complicated corporate history. Incorporated in 1924, Burton T. Bush, Inc. manufactured flavors, fragrances and other chemicals in Clifton, New Jersey and other locations. On September 15, 1965, the company was renamed the Givaudan Corporation. During the 1960s and 1980s, the Givaudan Corporation purchased insurance policies from the defendants. These policies, which identified the Givaudan Corporation as the named insured, provided primary, umbrella and excess coverage. The policy periods ranged from November 16, 1964,to January 1, 1986.

In 1987, the New Jersey Department of Environmental Protection determined that the Guivadan Corporation's manufacturing activities at the Clifton site contaminated the soils and groundwater with hazardous materials. The Guivadan Corporation and the NJDEP entered into various Administrative Consent Orders in 1987 and 1988, which directed the company, among other things, to remediate damages caused by the contamination and to pay certain costs. These Administrative Consent Orders stated that they were binding upon not only the Guivadan Corporation, but also its successors and assigns.

Later in the 1990s, a series of very complex corporate mergers, transfers and re-formations began. The Guivadan Corporation merged with another company and became known as the Guivadan Roure Corporation. Separate and apart from that 1997 merger, the Guivadan Roure Fragrance Corporation was formed.

The Guivadan Roure Corporation decided to close its plant in Clifton, New Jersey in 1997. As part of its obligations under the Industrial Site Recovery Act, N.J.S.A. 13:1K-6T0-14, the Guivadan Roure Corporation and the NJDEP entered into a remediation agreement effective January 1, 1988. That agreement required

both the Guivadan Roure Corporation and the Guivadan Roure Fragrance Corporation to continue their efforts to fulfill the terms of the Administrative Consent Orders, as well as to maintain a remediation funding source. The facility was closed in July 1998.

The Guivadan Roure Corporation transferred the assets and liabilities of its fragrances division to the Guivadan Roure Fragrance Corporation on January 1, 1998. The liabilities the latter corporation assumed did not exclude the Guivadan Roure Corporation's environmental liabilities. Also, none of the assets transferred included the insurance policies issued by the defendants to the Guivadan Corporation.

Also in 1998, the Guivadan Roure Fragrance Corporation changed its name and in 2000 merged into the newly formed Guivadan Fragrances Corporation. There was no dispute that the Guivadan Fragrances Corporation (Fragrances) was the successor-by-merger to the Guivadan Roure Fragrance Corporation.

In January 1998, the Guivadan Roure Corporation merged into what is now known as the Guivadan Flavors Corporation (Flavors). It was undisputed that Guivadan Flavors Corporation was the successor-by-merger to the Guivadan Corporation. It was undisputed that Fragrances and Flavors were affiliated companies and each was owned by the same parent company, Guivadan Flavors and Fragrances, Inc.

The United States Environmental Protection Agency in August 2004 notified Fragrances that it was potentially liable under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. 9601-9675, for hazardous discharges that had emanated from the Clifton site. In January 2006, the NJDEP also filed suit against Fragrances for damages caused by discharges from the Clifton site.

The NJDEP commenced an action in 2005 against several companies that had operated sites within a contaminated area known as the Newark Bay Complex. On February 4, 2009, two of the defendants in the NJDEP action, Maxus Energy Corporation and Tierra Solution, Inc., filed third-party contribution claims against more than 300 entities that had also conducted activities in the area. Fragrances was one of the 300 third-party defendants named.

Fragrances claimed that it was an insured under the insurance policies the defendants had issued to the Guivadan Corporation between 1964 and 1986. The defendants took the position that Fragrances was not an insured under any of their policies. Thereafter, Fragrances filed a declaratory judgment action in 2009. In that declaratory judgment action, Fragrances sought a ruling that it was an insured under the defendants' policies and that they were obligated to defend and indemnify Fragrances in the third-party contribution action, as well as the related EPA and NJDEP cost recovery actions.

On March 25, 2010, Flavors assigned to Fragrances all of Flavor's insurance rights under various policies the defendants had issued to the Guivadan Corporation from November 16, 1964, to January 1, 1986. The assignment stated that Flavors "sells, transfers, assigns, conveys, grants, sets over and deliveries to Guivadan Fragrances Corporation ('Assignee') all rights to insurance coverage under the insurance policies described on Schedule A hereto for all occurrences, accidents, events, laws, injuries, damages, and liabilities arising out of the conduct of the business of Assignor, Assignee or any affiliate or predecessor of Assignor or Assignee prior to January 1, 1998, and relating to liabilities and/or assets transferred from Assignor to Assignee on or about January 1, 1998, including but not limited to any environmental liabilities."

None of the insurer defendants consented to the assignment. In addition, the defendants refused to recognize the assignment on the basis that their respective insurance policies prohibited policy assignments without the insurer's consent. The defendants also argued that Fragrances was not an insured or an additional insured or included within the definition of insured in any of the policies.

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Fragrances argued that the assignment was valid and binding upon the defendants. Fragrances also argued that it was an insured under those policies that defined the named insured as "Guivadan Corporation and any subsidiary or affiliated companies which may now exist or hereafter be created." Fragrances contended that it was an affiliate of Flavors (the successor-by-merger to the Guivadan Corporation) because Fragrances and Flavors were both owned and controlled by the same parent, Guivadan Flavors and Fragrances, Inc.

Thereafter, Fragrances moved for partial summary judgment, and the defendants cross-moved for summary judgment. The trial court denied Fragrances' motion, granted the defendants' motions and dismissed Fragrances' complaint with prejudice. The court found the assignment invalid because there was assignment of more than a single claim and single insurance rights.

> ....[T]his assignment is not simply [an] assignment of a particular claim or even limited claim – insurance claims. It seems to be a rather global assignment. And I think there's no other way that I can read that assignment, even though it doesn't say it's the assignment of a policy. For all intents and purposes, it is [an] assignment of policies.... it's simply not the assignment of a [chose in] action.

It was also held that Fragrances was not an affiliate of Guivadan Corporation and, therefore, not an insured, even though the definition of an insured under most of the policies included "affiliated companies which may now exist or hereafter be created." The court interpreted this language to mean that only those affiliates that were created during a policy period could be an insured. The trial court also indicated that Fragrances was not an insured affiliate because of the corporate structure involved.

On appeal, Fragrances contended the trial court erred when it concluded that the assignment from Flavors to Fragrances was invalid. It was not disputed that the subject policies at issue required the insurer's consent in order for the insured to assign the policy to a third person, citing *Kase v. Hartford Fire Ins. Co.,* 32 A. 1057 (N.J. 1895) (holding that an insurance policy cannot be transferred to a third person without the insurer's consent). However, the Appellate Division noted that once a loss occurs, an insured's claim under a policy may be assigned without the insurer's consent, citing *Flint Frozen Foods v. Fireman's Ins. Co.,* 79 A.2d 739, 741 (Law Div. 1951), rev'd on other grounds, 86 A.2d 673 (N.J. 1952). The trial court in *Flint* noted that, after a loss covered by a policy has happened, "the prohibition of assignments without the consent of the insurer [ceases]. Its liability [has] become fixed and like any other chose in action [is] assignable regardless of the conditions of the policy in question."

The Appellate Court noted that the purpose behind a no-assignment clause is to protect the insurer from having to provide coverage for a risk different from what the insurer had intended. The court noted that a no-assignment clause guards an insurer against any unforeseen exposure that may result from the unauthorized assignment of a policy before a loss. But if there has been an assignment of the right to collect or to enforce the right to proceed under a policy after a loss has occurred, the insurer's risk is the same because the liability of the insurer becomes fixed at the time of the loss. The court held that, thereafter, the insurer's risk is not increased merely because there has been a change in the identity of the party to whom a claim is to be paid.

In *Guivadan Fragrances,* Flavors assigned to Fragrances all of its rights to the coverage provided by specific insurance policies, all of which were clearly identified in a schedule attached to the assigning document. The schedule showed that the last of these policies expired on January 1, 1986. If any loss occurred during the policy period of any of these policies, the loss clearly occurred long before the assignment in 2010. Therefore, the court held that Flavors did not require the insurer's consent to assign its rights under the policies. Furthermore, the court held that the assignment of the rights to the policies specified in the assigning document could not have increased the risk to any of the defendant insurers because all losses occurred before the assignment.

The defendants argued that the assignment obligated them to provide coverage for both Fragrances and Flavors and, thus, improperly increased their risk. The Appellate Division disagreed, noting that the assignment itself disproved this premise. According to the court, Flavors assigned to Fragrances all of its rights to insurance coverage under the specific insurance policies listed in the schedule for all occurrences, accidents, events, losses, injuries, damages and liabilities arising out of the conduct of Flavors, Fragrances or an affiliate or predecessor of Flavors or Fragrances before January 1, 1998.

Therefore, the Appellate Division reversed the trial court's grant of summary judgment to the carriers. The court found that once a loss occurs, an insured's claim under a policy may be assigned without the carrier's consent. Based upon the valid assignment, the Appellate Division reversed and remanded for further proceedings.

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