

Client Alert

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Illinois Appellate Court Holds That Despite Anti-Assignment Clause, Insurers Must Defend Policy Assignees Where Loss Precedes Assignment

In *Illinois Tool Works Inc. v. Commerce and Industry Insurance Co.*, 2011 WL 6247399 (Ill. App. Ct. Dec. 12, 2011) (“*Illinois Tool*”), an Illinois appellate court reversed a trial court’s ruling that two insurers owed no coverage or defense to an assignee of insurance benefits following a pollution-related loss. In the underlying suit, a landlord sued its corporate tenant, Illinois Tool Works, Inc. (“Illinois Tool”), which had taken over the lease of the landlord’s property through an asset purchase that included stock in the former tenant, Binks Manufacturing (“Binks”), and certain insurance benefits under Binks’ general liability insurance contracts. Binks then went bankrupt and Illinois Tool sued Binks’ insurers for defense costs after becoming potentially responsible for the cleanup of environmental contamination previously caused by Binks. Although the insurers had neither consented to the benefits assignment nor were they even aware of the assignment, because they had agreed to insure Binks against certain risks, an assignment of policy benefits due Binks for Binks’ own liabilities did not alter the assumed risk, particularly where the damage at issue preceded the assignment.

Background

Commerce and Industry Insurance Company (“C&I”) and United States Fire Insurance Company (“U.S. Fire”) issued occurrence-based liability policies to Binks for the periods December 1976 to December 1981, and December 1981 to December 1984, respectively. Binks sold its assets and stock to Illinois Tool in 1998, dissolved in 1999, and filed for Chapter 7 bankruptcy in 2001. Illinois Tool was not a “corporate successor” to Binks; rather Binks had agreed to indemnify Illinois Tool against future liabilities and assigned to Illinois Tool certain rights to recovery under its liability insurance, but did not assign its policies in their entirety. Illinois Tool did not inform C&I or U.S. Fire of the assignment or obtain their consent.

The underlying plaintiffs (the “Enssles”) owned property in Colorado that had been leased to Binks since 1959. When Illinois Tool purchased Binks’ assets and stock in 1998, Illinois Tool also acquired Binks’ interest in the leased Enssle property. Binks continued to use the Enssles’ property through termination of the lease in 2003.

Some time prior to 1998, soil and groundwater contamination occurred at the leased property. In 1987, Binks reported its production of hazardous waste solvents to Colorado authorities. In 1990, Binks was directed to remediate the pollution. Binks failed to do so and the contamination continued unabated.

The Enssles sued Illinois Tool and Binks for breach of its lease and for damage to the leased property. The lease required Illinois Tool to indemnify the Enssles for loss arising out of the tenants’ illegal conduct. The Enssles alleged, among other things, that Illinois Tool failed to investigate and remediate the environmental contamination despite being ordered to do so and that it caused damage to the property. Illinois Tool cross-claimed, seeking indemnification from Binks.

C&I and U.S. Fire agreed to defend Binks in the underlying action, but refused to defend Illinois Tool. Following settlement of the underlying litigation, Illinois Tool brought suit against C&I and U.S. Fire,

seeking reimbursement of its defense costs. Illinois Tool argued that it was an insured, either as Binks' corporate successor or as an assignee of its insurance benefits. The parties cross-moved for summary judgment, and the trial court ruled in the insurers' favor. Illinois Tool appealed.

Holding

On appeal, the court rejected the carriers' argument that they owed no duties to the assignee of benefits where they had not previously consented to the assignment. Rather, siding with the insured, the court concluded that an "assignment of policy or benefits may be made without consent of the insurer after the loss covered by the policy has occurred."

The court reasoned that, under an occurrence policy, an insurer agrees to indemnify its insured against losses that occur during a specified time, even if the losses are not discovered until after (in some cases, many years after) they occur. The court further reasoned that although insurers agree to insure certain parties, where a loss occurs while the insured party is in control of the risk, a later assignment of benefits does nothing to alter that insured risk. The court also distinguished the instant case from one where an assignment might concern coverage for future risks, which clearly would alter the risk assumed. Likewise, the court distinguished the instant case from one where an insured might try to assign benefits to multiple parties, which would expand and likewise materially alter the bargained-for risk.

Moreover, the court found that it would be improper for the insured to both retain and assign benefits under the policy. Thus, the court found that although the insurers chose to defend Binks, they were not obligated to do so following the assignment to Illinois Tool. As the court explained, "that [the] insurer [chose] to defend Binks ha[d] absolutely no bearing on whether they had a duty to defend [the assignee]." Consequently, the appellate court concluded that absent a statute that specifically requires an insurer's consent to an assignment, an insured may assign policy benefits for losses that have already occurred, even if the insurance contracts contain anti-assignment or consent clauses.

Implications

Illinois Tool is a significant development with corporate transactional implications because the decision illustrates that policyholders may rely on matured policy benefits as an asset in corporate transactions without the need for insurer notification. The decision likewise is significant because it illustrates that policyholders need not wait for consent from their insurers before consummating corporate transactions that include a transfer of matured insurance benefits.

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