HUNTON& WILLIAMS

# Client Alert

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## You Can't Make Claims Disappear, But You Can Assign Them: Court Grants Assignment of Environmental Policies Regardless of Anti-Assignment Clauses

The New Jersey Appellate Division recently affirmed its Supreme Court's holding that, in "occurrence" policies, an insured can assign its policies *after* a loss even if the policy has an anti-assignment provision. In *Haskell Prop., LLC v. Am. Ins. Co., et al.*, No. A-1452-14T2 (N.J. Super. Ct. App. Div. June 29, 2017), the appellate division confirmed its prior holding that a policyholder could freely assign its "occurrence" policies after environmental cleanup claims were brought against it because liability was fixed, which obviated any risk of unforeseen exposure. The appellate division's opinion reinforces, and extends, the general rule that an insurer cannot enforce an anti-assignment clause to bar coverage when the assignment occurred post-loss to coverage for environmental claims.

**Background**

General Ceramics, Inc. (GCI), purchased insurance for environmental liabilities from the American Insurance Company and other insurers (the Insurers) that provided coverage for remediating contaminated real property it owned in Haskell, New Jersey (the property). GCI notified the Insurers of environmental claims arising from the property's contamination, and began remediating the property before filing a petition for Chapter 11 relief in the United States Bankruptcy Court.

While the petition for bankruptcy was pending, GCI entered into an authorized asset purchase agreement (APA) with Haskell Properties for the property. Specifically, the APA transferred all of GCI's agreements related to the property to Haskell Properties. Neither GCI nor Haskell Properties requested or received consent to assign the Insurers' policies, which contained a "consent-to-assignment" clause. Pursuant to its obligations under the APA, Haskell Properties entered into an administrative consent order with the New Jersey Department of Environmental Protection to remediate the property. After beginning cleanup efforts, Haskell Properties, as GCI's assignee, sought coverage under the Insurers' policies insuring environmental liabilities, which the Insurers then denied.

Haskell Properties filed a complaint against the Insurers, claiming breaches of contract and the duty of good faith and fair dealing. The Insurers moved to dismiss the complaint for failure to state a claim on the grounds that the Insurers did not assign the policies to Haskell Properties and the Insurers never consented to assignment of its policies. The lower court agreed with the Insurers and dismissed the complaint, reasoning that the APA's assignment provision was not enforceable absent the Insurers' consent "and failure to plead this consent renders [Haskell Properties'] cause of action insufficient as a matter of law."

**The Appellate Court's Decision**

On appeal, the court reversed the lower court's dismissal of the complaint concerning whether GCI could assign the policies without the Insurers' consent. The appellate court held that GCI could freely assign the policies *after* the occurrence because the policies insured the "occurrence itself," and thus provide coverage after a loss even if a claim is not brought until later. Therefore, the assignment was proper because GCI transferred the policies to Haskell Properties after the loss had arisen.

The court emphasized that non-assignment provisions prohibit assigning a policy before a loss occurs because doing so involves the transfer of a contractual relationship whereas an assignment after a loss merely involves assigning a right to a money claim. The appellate court explained 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 … [b]ut if there has been an assignment of the right to collect or enforce the right to proceed under a policy *after a loss has occurred*, the insured's risk is the same because the liability of the insurer becomes fixed at the time of the loss."

In a May 2017 order, the Supreme Court of New Jersey directed the appellate division to review its prior order in light of the Court's recent decision in *Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co.*, 151 A.3d 576 (N.J. 2017). *Givaudan Fragrances* adopted the rule that "once an insured loss has occurred, an anti-assignment clause in an occurrence policy may not provide a basis for an insurer's declination of coverage based on the insured's assignment of the right to invoke policy coverage for that loss." The appellate division reaffirmed because its prior opinion was consistent with the Supreme Court's decision in *Givaudan Fragrances*.

**Insurance Implications**

The New Jersey Appellate Division's ruling extends to policies insuring environmental liabilities the rule followed by the majority of jurisdictions that prohibits insurers from invoking anti-assignment clauses to escape coverage for losses that occur prior to the assignment. This ruling stands for the proposition that post-loss assignment of coverage for environmental claims should be treated no differently from the assignment of any other chose in action. Therefore, under "occurrence" policies insuring environmental liabilities, where exposure to financial liability may be substantial, policyholders maintain the right to assign coverage post-loss without the insurer's consent even if the policy has an anti-assignment provision.

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