New Jersey Appellate Division Finds Anti-Assignment Clauses Inapplicable Because Loss Occurred Prior to the Transfer of Insurance Rights

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On April 13, 2018, the New Jersey Appellate Division affirmed that, not only did a 1986 Bill of Sale include the transfer of insurance rights to the successor plaintiff company, but the 1986 transfer constituted a valid post-loss assignment of the insurance rights. *See Cooper Industries v. Columbia Casualty Company, et al.*, No. A-0593-15T1, 2018 N.J. Super. Unpub. LEXIS 868 (App. Div. Apr. 13, 2018). At issue were policies issued to McGraw-Edison Company from 1971-1980, each of which contained an anti-assignment clause, barring assignment of the policies without the insurers' consent. After a series of corporate transactions, McGraw-Edison Company's insurance rights transferred to CI Acquisition through merger. CI Acquisition then distributed its assets to "New McGraw" effectuated by a Bill of Sale. Thereafter, in 2011, plaintiff notified appellants of potential environmental claims.

The lower court found that the language used in a 1986 Bill of Sale transferring all rights and assets was ambiguous because it did not specifically reference insurance rights. To resolve the ambiguity the court relied on deposition testimony from three of plaintiff's employees submitted by plaintiff in support of its motion to determine that the 1986 Bill of Sale included the insurance rights under McGraw-Edison Company's policies, and that those rights transferred to plaintiff pursuant to a 2004 merger. Based on *Rule* 4:14-2, which provides that a corporation may be deposed through a corporate designee, the Appellate Division rejected the appellants' challenge that the deposition testimony was inadmissible hearsay because none of the three deponents participated in drafting the Bill of Sale and therefore had no personal knowledge of the drafter's intent.

The Appellate Division next examined whether the transfer violated the anti-assignment clause contained in the insurance policies. The Court found that because the pollution at the site in Kearny for which coverage under the policies was sought had occurred in the 1970s and early 1980s, McGraw-Edison Company's liability for the contamination attached before the 1986 asset sale. Relying on *Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co.*, 442 N.J. Super. 28 (2015), the Appellate Division affirmed that the anti-assignment clauses were inapplicable because the sale constituted a post-loss assignment of a claim to McGraw-Edison Company's successors, rather than an assignment of the policies themselves. The Appellate Division stated that although it was undisputed that the subject policies required the insurers' consent in order to assign the policies to a third party, "once a loss occurs, an insured's claim under a policy may be assigned without the insured's consent." (quoting *Givaudan*, 441 N.J. Super. at 36). The Appellate Division focused on the timing of when the loss (the pollution) occurred, rather that when the environmental claim was made to the insured. This decision makes clear that the New Jersey courts have left little room for debate about the applicability of the assignment when it is made post loss.