

**TRANSFER OF COVERAGE
UNDER THE
PREDECESSOR'S LIABILITY POLICIES**

or

**CORPORATE TRANSACTIONS -
WHAT HAPPENED TO THE INSURANCE POLICY?**

ABA Insurance Coverage Litigation Committee CLE Seminar

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THE TYPICAL FACT PATTERN, AS RECITED IN MOST CASE LAW

- A successor company buys a predecessor company, or two companies merge.
- The successor is sued for something the predecessor allegedly did (*e.g.*, pollute, sell a defective product, cause bodily injury to employees, perhaps by asbestos exposure).
- The successor seeks coverage under the insurance policies issued to the predecessor.

THE BACK STORY

- Transfer of insurance policies is often an insignificant issue for companies negotiating a merger or acquisition.
- Depending on records retention practices, the companies may not have, or may not be able to locate, their policies.
- If the predecessor dissolves, it may be impossible for the successor to get insurance information – even basic information such as who the insurer and broker were.

SELECTED POLICY PROVISIONS

- Most liability policies contain a “consent to assignment” provision. For example:
 - “Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured.” ISO Form IL 00 17 11 98.
 - Many 1960s and 1970s policies provide: “Assignment of interest under this policy shall not bind the insurer until its consent is endorsed hereon.” *Cf. Travelers Cas. & Sur. Co. v. United States Filter Corp.*, 895 N.E.2d 1172 (Ind. 2008).
- Many liability policies contain an “after-acquired” clause in the “who is an insured” provisions.
 - “The word insured shall include as named insured any organization which is acquired or formed by the named insured and over which the named insured maintains ownership or majority interest, other than a joint venture [unless the new organization has its own insurance]. The insurance afforded hereby shall terminate 90 days from the date any such organization is acquired or formed by the named insured.” *Total Waste Mgmt. Corp. v. Commercial Union Ins. Co.*, 857 F. Supp. 140 (D. N.H. 1994).

THE BROADER ISSUES

- Successors may decide not to request the insurer's consent to assign. They may reason that the insurer might withhold consent. Some successors hope to avoid paying extra premium.
- Successors argue that an assignable chose in action arises whenever injury occurs during the policy period, so permitting assignment does not increase the insurer's risk, because the insurer's obligation should run to the successor only.
- Insurers are deprived of the right to decide which risks they will insure. Courts ruling that policies are assigned by operation of law force insurers to cover risks that were unforeseeable when the policy was issued, and for which the insurer charged no premium.
- Long tail claims are a particular problem. For example, a successor that never polluted might acquire a predecessor that has significant pollution exposures from decades ago.

SELECTED STATUTES

- Haw. Rev. Stat. § 431:10-228(a) ("A policy may be assignable or not assignable, as provided by its terms.").
- N.Y. Bus. Corp. Law § 906(b)(3) (successor is deemed to assume both the liabilities and assets of the predecessor).
- Tex. Bus. Corp. Act Art. 5.06(A)(3) (merging companies' agreement controls whether the successor assumes the liabilities and assets of the predecessor).

SELECTED CASE LAW

- Two trends:
 - Enforce policy's "consent to assignment provision."
- and/or -
 - Deem policy to be assigned to successor by operation of law.
- *Henkel Corp. v. Hartford Accident & Indem. Co.*, 29 Cal.4th 934 (2003) is regarded as the landmark case. It holds that while assignment provisions in an insurance policy are generally enforced, under certain circumstances, a predecessor's policy rights are deemed to be transferred to the successor. These circumstances are where:
 1. The transaction amounts to a consolidation or merger of the two corporations;
 2. The successor is a mere continuation of the predecessor; or
 3. The transfer of assets to the successor is for the fraudulent purpose of escaping liability for the predecessor's debts.

- Pre-Henkel Cases

- *Chatham Corp. v. Argonaut Ins. Co.*, 70 Misc.2d 1028, 334 N.Y.S.2d 959 (1972)
 - Successor may be entitled to coverage under policies issued to the predecessor for claims arising out of the predecessor's pre-acquisition activities.
- *North American Land Corp. v. Boutte*, 604 S.W.2d 245 (Tex. Civ. App. - Houston 1980, writ ref'd n.r.e.)
 - If merging parties' agreement is silent, then successor is deemed to assume both the liabilities and assets of the predecessor.
- *Northern Ins. Co. of New York v. Allied Mut. Ins. Co.*, 955 F.2d 1353 (9th Cir. 1992) (California and Washington State law)
 - Benefits of policy transfer by operation of law to successor.
 - Despite transfer, insurer still covered only those risks it evaluated when it wrote the policy.
- *Total Waste Mgmt. Corp. v. Commercial Union Ins. Co.*, 857 F. Supp. 140 (D. N.H. 1994)
 - Insurers are not obligated to provide coverage for an entity which was acquired by the insured after the expiration of policies.
 - The predecessor's insurer was obligated to provide coverage to the successor for damages allegedly caused by the predecessor.
- *Knoll Pharmaceutical Co. v. Auto. Ins. Co. of Hartford*, 167 F. Supp. 2d 1004 (N.D. Ill. 2001)
 - Insurance policies transfer as a matter of law when two corporations merge.
 - After merger, surviving corporation took on obligations, debts and liabilities of the predecessor, including the insurance policies, as if they had been originally contracted to by the surviving corporation.

- Post-Henkel Cases

- *Century Indem. Co. v. Aero-Motive Co.*, 318 F. Supp. 2d 530 (W.D. Mich. 2003)
 - Consent from insurer for assignment was required.
- *Atlanta Gas Light Co. v. UGI Utilities, Inc.*, 2005 WL 5660476, No. 3:03-CV-614-J-20MMH (M.D. Fla. Mar. 22, 2005)
 - Insurance policies did not transfer by operation of law for transactions involving asset sales.
 - Successor succeeded to predecessor's rights to coverage under statutory merger.

- *Globecon Group, LLC v. Hartford Fire Ins. Co.*, 434 F.3d 165 (2d Cir. 2006) (New York law)
 - Acknowledges “majority rule”: no transfer provision valid for transfers made prior to, but not after, the insured-against loss has occurred.
- *Elliot Co. v. Liberty Mut. Ins. Co.*, 434 F. Supp. 2d 483 (N.D. Ohio 2006) (Ohio, Pennsylvania, Connecticut, New York and Delaware law)
 - Insurance coverage cannot transfer by operation of law.
- *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 861 N.E.2d 121 (Ohio 2006)
 - Chose in action arises under occurrence-based policy when loss occurs.
 - Chose in action as to duty to indemnify is unaffected by anti-assignment provision when covered loss has already occurred.
 - When injury occurs before liability is transferred to successor, coverage does not arise by operation of law when liability assumed by contract.
- *Del Monte Fresh Produce (Hawaii), Inc. v. Fireman’s Fund Ins. Co.*, 117 Haw. 357, 183 P.3d 734 (2007)
 - 1977: Fumigants released into soil at Kunia Plantation operated by Del Monte Corp.
 - 1989: Del Monte Corp. transferred assets and liabilities to Del Monte Fresh by way of Bill of Sale and Assumption Agreement. The Bill of Sale also purported to transfer Del Monte Corp.’s insurance policies to Del Monte Fresh.
 - 1994: EPA designated Kunia Plantation as Superfund Site, and Del Monte Fresh (the successor) agreed to remediate contamination.
 - Del Monte Corp.’s insurers refused to cover Del Monte Fresh based on policy’s “no assignment” clause.
 - Hawaii Supreme Court holds that transfer of policies by operation of law is inconsistent with rules governing construction of policy. Thus, the Bill of Sale did not effect an assignment, because insurers never consented.
- *Travelers Cas. & Sur. Co. v. United States Filter Corp.*, 895 N.E.2d 1172 (Ind. 2008)
 - “The insurer’s consent is required for any assignment of policy rights, unless the assignment occurs after an identifiable loss, in which case the right to receive payment on that claim may be transferred without consent.”

A NOTE ON LOST POLICIES

Corporate transition issues may overlap with lost policy issues, because the predecessor’s policies may not be available. Many states allow the (purported) insured to prove the existence and terms of a policy by way of testimony, such as a broker’s testimony. The insurer can likewise offer testimony as to what exclusions the policy would have contained. *See, e.g., Dart Industries, Inc. v. Commercial Union Ins. Co.*, 28 Cal.4th 1059 (2002).

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