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Assignments of Insurance Rights: Kentucky Issues the Most Recent Policyholder Victory

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Introduction

In a recent decision, the Supreme Court of Kentucky has held that an anti-assignment clause in an insurance policy that requires the insured to obtain the insurer's prior written consent before assigning a claim for an insured loss was neither applicable nor enforceable with respect to a claim for a covered loss that had already occurred at the time of assignment. *In re Wehr Constructors, Inc. v. Assurance Company of America*, --- S.W.3d ---, 2012-SC-0002221, 2012 WL 5285774, at *1 (Ken. Oct. 25, 2012).

In a victory for policyholders (and their assignees), Kentucky has now adopted the majority rule on this issue, joining courts in states such as New York, Illinois, Ohio and Delaware in holding that anti-assignment clauses would not be enforced against post-loss assignments. *Id*. at *4-8. Following the reasoning of many courts before it, the Kentucky court held that enforcement of an anti-assignment clause under such circumstances constitutes an undue restraint on the alienation of a property right (i.e., policyholder's chose in action) in violation of long-standing public policy. *Id*. at *6-8.

The *Wehr Constructors* Decision

In *Wehr Constructors*, Murray Calloway County Hospital ("Hospital") had purchased a builder's risk insurance policy from Assurance Company of America ("Assurance") in connection with a planned addition to its facilities. The builder's risk policy included the following anti-assignment clause:

> F. **Transfer of Your Rights and Duties Under This Policy**
>
> Your rights and duties under this policy may not be transferred without [Assurance's] written consent except in the case of death of an individual named insured.

The Hospital hired Wehr Constructors, Inc. ("Wehr") to install a floor and subfloor as part of the project. Following installation, the floors were damaged, and the Hospital made a claim for $75,000 under the builder's risk policy. Assurance denied the claim.

Meanwhile, Wehr brought suit against the Hospital, claiming that the Hospital had failed to pay all that was owed under its contract. As part of a settlement between Wehr and the Hospital, the Hospital assigned to Wehr any claim that the Hospital may have against Assurance under the builder's risk policy. It was undisputed that this assignment was made *after* the damage to the floor had occurred.

Following the assignment, Wehr sued Assurance in the United States District Court for the Western District of Kentucky seeking recovery for payment due under the builder's risk policy. Because there was no controlling Kentucky precedent on the issue, the District Court certified to the Kentucky Supreme Court the following question:

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> Whether an anti-assignment clause in an insurance policy that requires an insured to obtain the insurer's prior written consent before assigning a claim under the policy is enforceable or applicable when the claimed loss occurs before the assignment, or whether such a clause would, under those circumstances, be void as against public policy.

The Supreme Court examined the majority view on this question, which favored Wehr, and the minority view, which favored Assurance.

With respect to the majority rule, the Court recognized that anti-assignment clauses are unenforceable with respect to post-loss assignments because, at that point in the action, the policyholder's right to recover is a "chose in action," which is a property right. Because an anti-assignment clause "amounts to a restraint upon the alienation of this property right," it is against public policy. Courts in the majority recognize that the purpose of an anti-assignment clause is to protect the insurer from an unforeseen exposure and increased liability if the policy is assigned to an entity that the insurer did not intend to insure. Such a risk is not at issue after an insured loss has already occurred. The *Wehr* Court also recognized that the majority rule also encourages settlements, which is consistent with Kentucky public policy.

The principal justification for the minority rule, the Court noted, is that the language of an anti-assignment clause, such as the one at issue in the *Wehr* case, is unambiguous and therefore should be enforced as written under fundamental rules of contract law. Although this simple approach is facially appealing, the Court concluded that it was overly simplistic, as it would require the Court to ignore the long-standing public policy considerations recognized by the majority of courts.

Conclusion

With the *Wehr Constructors* case, Kentucky joins the great majority of jurisdictions in holding that standard anti-assignment clauses may not be enforced with respect to post-loss assignments. Nevertheless, in some states, such as California, *Henkel Corp. v. Hartford Accident & Indemnity Co*., 62 P.3d 69 (Cal. 2003), and Indiana, *Travelers Casualty & Surety Co. v. U.S. Filter Corp*., 895 N.E.2d 1172 (Ind. 2008), courts have reached the opposite conclusion.[1] Accordingly, in considering actions to enforce coverage rights that have been the subject of a post-loss assignment, whether through a settlement of the nature at issue in *Wehr Constructors* or through corporate transactions such as those at issue in *Henkel* and *U.S. Filter*, policyholders should give careful attention to potentially applicable governing law.

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[1] In *Henkel*, the Supreme Court of California held that consent-to-assignment provisions could be enforced even though the assignment of coverage rights (through a series of corporate transactions) took place after the underlying plaintiffs' alleged exposure to toxic chemicals, because no assignable chose in action existed at the date of the alleged assignment. The assignment of coverage rights occurred before any of the underlying claims were filed, and thus before the insurers' obligation to defend and indemnify had arisen. 62 P.3d at 75. In *U.S. Filter*, the Supreme Court of Indiana followed *Henkel's* reasoning and enforced consent-to-assignment provisions where no chose in action existed at the time of the corporate transactions that were alleged to have transferred insurance rights. 895 N.E.2d at 1178-8.

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