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What Wis. Anti-Assignment Ruling Means For Policyholders

By **Brian Scarbrough and Daniel Ergas** (August 3, 2022, 6:47 PM EDT)

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Since the mid-19th century, anti-assignment clauses have been a mainstay of general liability insurance policies, barring a policyholder from transferring their rights to a chosen assignee.[1] While many courts have limited the application of such clauses, open questions remain and new case law continues to be made.

Recently, in Pepsi-Cola Metropolitan Bottling Co. Inc. v. Employers Insurance Co. of Wausau,[2] the Wisconsin Court of Appeals, District II, held that one such provision — preventing the "[a]ssignment of interest under this policy" without the "consent ... endorsed hereon" of the insurer — only barred the preloss assignment of coverage, rather than the post-loss assignment of claims.[3]

Pepsi-Cola aligns Wisconsin with the prevailing majority rule and thus makes pivotal the question of when a loss occurs. Policyholders subject to an anti-assignment clause should take care to consider these issues of judicial construction, rather than relying on the plain contractual language alone.

Summary of Pepsi-Cola

From 1963 to 1971, the Employers Insurance Co. of Wausau issued general liability insurance to the Waukesha Foundry Co. and its subsidiary.[4]

Under the policy, Wausau was required to "pay on behalf of [Waukesha] all sums which [it] shall become legally obligated to pay as damages because of ... bodily injury or ... property damage ... caused by an occurrence" and defend Waukesha against any such suit.[5]

The policy defined an "occurrence" to be "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured."[6]

In a series of transactions, Waukesha assigned and transferred its assets and liabilities to a series of successor companies.[7] Waukesha's eventual successor in interest was Pneumo Abex LLC, with which it merged in 2004.[8]

In 2017, Pneumo found itself in hot water when Roger Huff — along with hundreds of other plaintiffs — filed suit, claiming that Waukesha's pump products contained asbestos and contributed to his mesothelioma.[9]

Wausau denied coverage for defense of Huff's lawsuit on the basis that Pneumo was being sued not for any liabilities related to Waukesha, but for unrelated historical liabilities, and, instead, Pepsi-Cola Metropolitan Bottling Co. Inc., picked up the tab.[10]

In 2019, Pneumo assigned to Pepsi the right to pursue and keep insurance proceeds for the Waukesha asbestos lawsuits under the Wausau policies — which Pepsi promptly did, filing suit against Wausau in Wisconsin state court.[11]

On cross-motions for summary judgment, the court ruled for Wausau.[12] In its view, the 2000 case Red Arrow Products Co. Inc. v. Employers Insurance of Wausau[13] squarely controlled this case.[14]

Under Red Arrow, it held, an anti-assignment provision bars an assignee from having any rights to any benefits under a particular policy — and, as such, Pepsi cannot make any claim on Pneumo's behalf.[15]

The Court of Appeals of Wisconsin reversed.[16] Writing for a split panel, Judge Lori Kornblum[17] held that consistent with long-standing Wisconsin law, an anti-assignment provision is not enforceable when an assignment is made post-loss.[18]

Because the loss in this case accrued upon Huff's exposure to asbestos prior to 1971, the assignment — made in 2019 — was by definition post-loss.[19] Not only does the post-loss exception have a venerable status in precedent — having applied in Wisconsin since 1880 — but it "contribut[es] to the efficiency of business by minimizing transaction costs and facilitating economic activity and wealth enhancement."[20]

Red Arrow, the court explained, does not counsel a contrary result.

The appellate court explained that, as a preliminary matter, there are relevant factual and legal distinctions between Pepsi-Cola and Red Arrow.

After all, according to the court, both parties in Red Arrow agreed that there had been no transfer of the recovery rights under the insurance, so the case did not even present the issue of what rights would have accrued had an assignment occurred.[21]

And second, at most, Red Arrow's observation was merely dicta and thus did not "implicitly overrul[e] a century of Wisconsin law."[22]

In dissent, Judge Shelley Grogan rejected the majority's effort to disregard Red Arrow.[23] The competing line of precedent, she explained, involves only first-party claims, rather than third-party claims that include a duty to defend, like in Red Arrow.[24]

Judge Grogan stated that unlike "indemnity, which is absolute — and fixed — at the moment of the loss in a first-party claim," the duty to defend depends on a variety of contingent factors, such as the plaintiff's complaint, their litigation choices and so on.[25] She criticized the court for refusing to apply the plain text of the contract and for failing to follow existing Wisconsin law.[26]

Analysis of Pepsi-Cola

There are a few important takeaways from Pepsi-Cola for policyholders.

First, the decision aligns Wisconsin with the vast majority of jurisdictions that do not enforce anti-assignment contractual language when the assignment is made post-loss.

On the one hand, this should come as no surprise — the proposition that anti-assignment clauses do not bar assignment of accrued claims has been considered a universally accepted rule since the early 20th century.[27] And almost all states — with a few notable exceptions, including Texas[28] — continue to follow this approach.

But on the other hand, up until just a few years ago, the tide seemed to be turning against this consensus — that is, to enforcing anti-assignment clauses in almost all instances.

In 2003, in Henkel Corp. v. Hartford Accident & Indemnity Co.,[29] the California Supreme Court held that anti-assignment clauses permitted only the transfer of claims "reduced to a sum of money due."[30] Some state courts quickly followed suit.[31]

But the California Supreme Court then changed course in 2015, unanimously overruling Henkel in Fluor Corp. v. Hartford Accident & Indemnity Co.,[32] and holding that there need not be a money judgment or approved settlement before a post-loss claim can be assigned.[33] To enforce such clauses, the court explained, would exert "unjust and oppressive pressure on the insured."[34]

Although Wisconsin has adopted the majority rule, this conflict does not seem likely to dissipate any time soon.[35] As a result, policyholders should be on notice that the issue of post-loss assignment may raise coverage issues, even if the policy language looks clear, and that the result may vary state-by-state.

Second, under Pepsi-Cola, the dispositive question is no longer whether an anti-assignment clause categorically bars assignment — it doesn't — but the question of when a given loss occurred.

Take the facts of Pepsi-Cola, for instance.

In that case, coverage was sought based on historical exposure to asbestos. Even though the injured party there had not asserted a claim for such injury during the policy period, his alleged exposure was the occurrence that triggered coverage — rather than the onset of symptoms, for example.[36] Because that exposure took place during the relevant coverage periods, the loss had already occurred prior to any transfer.[37]

Most general liability policies, like the one at issue in Pepsi-Cola, are occurrence-based policies — that is, they apply when an occurrence, or the bodily injury or property damage caused by that occurrence, takes place during the policy period, even if no claim is made until years or decades later.[38]

A loss could occur without the policyholder knowing it, the policyholder could then assign the policy, and a claim could be made after that assignment. But so long as the loss occurred before the assignment, the anti-assignment language should not be enforceable.

As such, policyholders should be aware that even if their jurisdiction adopts Pepsi-Cola, they will need to carefully consider the particular claim at issue and the relevant contractual language to determine coverage — and would do well to keep such considerations in mind before making any assignment.

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[1] See, e.g., Goit v. Nat'l Prot. Ins. Co., 25 Barb. 189, 193 (N.Y. Gen. Term. 1855) (describing "[c]onditions against the assignment of [insurance] policies" as "long in use").

[2] Pepsi-Cola Metropolitan Bottling Co., Inc. v. Employers Insurance Co. of Wausau, No. 2021AP635, 2022 WL 2542321 (Wis. Ct. App. July 8, 2022).

[3] See id. at *9.

[4] Id. at *1.

[5] Id.

[6] Id.

[7] See id. at *2.

[8] Id.; see PepsiAmericas, Inc. v. Federal-Mogul Global, Inc., 526 B.R. 567, 570–74 (Bankr. D. Del. 2015) (offering a capsule history of Pneumo's predecessor companies and their presence in asbestos-related litigation).

[9] Pepsi-Cola, 2022 WL 2542321, at *3.

[10] Id.

[11] Id.

[12] Id.

[13] 607 N.W.2d 294 (Wis. Ct. App. 2000).

[14] Pepsi-Cola, 2022 WL 2542321, at *3.

[15] Id. (quoting Red Arrow, 607 N.W.2d at 229).

[16] Id. at *1.

[17] Judge Kornblun was joined by Judge Neubauer.

[18] Pepsi-Cola, 2022 WL 2542321, at *4.

[19] Id.

[20] Id. at *6 (quoting Fluor Corp. v. Superior Ct., 354 P.3d 302, 329 (Cal. 2015)).

[21] Id.

[22] Id. at *7–8.

[23] Id. at *7–8.

[24] Id. at *13 (Grogan, J., dissenting).

[25] Id.

[26] Id. at *15.

[27] Annotation, Claim Under Contract of Property Insurance as Assignable After Loss, 56 A.L.R. 1391 (1928); see, e.g., Dadmum Mfg. Co. v. Worcester Mut. Fire Ins. Co., 52 Mass. (11 Met.) 429, 435 (1846) ("[A]fter a loss, the rights and duties of the parties are changed. The policy is then a mere chose in action, and may be assigned, like any other chose in action ... ."). A similar view predominates in early treatises. See, e.g., 1 Willard Phillips, A Treatise on the Law of Insurance 69 (5th ed. 1867) ("The clause against assignment without the consent of the underwriters[] does not prevent the assured from making a valid assignment of his claim ... after a loss has happened, and the risk has terminated ... .")

[28] See Keller Foundations, Inc. v. Wausau Underwriters Ins. Co., 626 F.3d 871 (5th Cir. 2010) (explaining that "Texas courts ... diverge" from the "majority" and "enforce non-assignment clauses even for assignments made post-loss"). Three other states — Hawaii, Oregon, and Louisiana — also follow this approach. See Monte Del Monte Fresh Produce (Haw.), Inc. v. Fireman's Fund Ins. Co., 183 P.3d 734, 737 (Haw. 2007); Holloway v. Republic Indem. Co. of Am., 147 P.3d 329 (Or. 2006); In re Katrina Canal Breaches Litigation, 63 So. 3d 955 (La. 2011).

[29] 62 P.3d 69 (Cal. 2003).

[30] Id. at 76.

[31] See, e.g., Travelers Cas. & Sur. Co. v. U.S. Filter Corp., 895 N.E.2d 1172 (Ind. 2008) (describing Henkel as "about right" and holding that "an insured loss" must be "fixed" to "generate an assignable coverage benefit").

[32] 354 P.3d 302 (Cal. 2015).

[33] Id. at 330.

[34] Id.

[35] Of course, as one post-Fluor commentary notes, the "Henkel-like decisions" in other states — such as Texas — will likely face new challenges as the weight of authority (evident in Fluor and now Pepsi-Cola) continues to forcefully reject Henkel's underlying rationale. See Joseph Thacker, Andrew Miller,

Stephen Brown & Seymour Nayer, Transfer of Insurance Rights under Liability Policies as the Result of the Sale of a Business (Revisited), 52 Tort Trial & Ins. Prac. L.J. 103, 114 (2016).

[36] Pepsi-Cola, 2022 WL 2542321, at *4. Other state courts agree with this rule — that is, that a "loss" accrues at the time of the event that triggers liability, even if the amount is uncertain or unknowable. See, e.g., Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co., 861 N.E.2d 121, 129 (Oh. 2006) ("The losses are fixed at the time of the occurrence."); Egger v. Gulf Ins. Co., 903 A.2d 1219, 1224 (Pa. 2006) (describing a "loss" as "the occurrence of the event" that triggers "the liability of the insurer"); In re Ambassador Ins. Co., Inc., 965 A.2d 486, 491 (Vt. 2008) (describing a "loss" as the "event ... that triggers an insurer's liability").

[37] Id. at *4-5.

[38] But as the Pepsi-Cola court noted, there is nothing inevitable about this particular contractual form — parties are free to sign a "claims-made-and-reported policy," for instance, which "only provides coverage" if a claim is made "during the policy period." Id. at *4 n.2.