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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Insurance Assignment Rights Not Valid, NJ Justices Told

By Jeannie O'Sullivan

Law360, New York (November 9, 2016, 4:41 PM EST) -- Insurers sued by a company seeking coverage for \$500 million it paid to settle environmental contamination claims urged the New Jersey Supreme Court on Wednesday to invalidate the company's insurance rights because the policies were drafted for a corporate predecessor.

Continental Insurance Co., Travelers Casualty & Surety Co., Hartford Accident & Indemnity Co. and others want the justices to overturn an Appellate Division panel's decision that Givaudan Fragrances Corp., the corporate successor of an enterprise that held policies drafted between the 1960s and 1980s, had been validly assigned the policy rights after the enterprise split into divisions in the 1990s. In March 2010, Givaudan Flavors assigned to Givaudan Fragrances all of its insurance rights under the policies.

During oral arguments in Trenton, the insurers said the appeals court's decision went against the state's well-settled law that assignment of policy rights was prohibited without an insurer's consent, and blasted Givaudan Fragrances' argument that policyholder rights can be conveyed to a corporate affiliate after a loss has occurred. The contamination that spurred the claims predated the formation of Givaudan Fragrances.

"[Givaudan] Fragrances was not in existence when the policies were written, so it cannot be an affiliate," said Patrick F. Hofer of Troutman Sanders LLP, representing Continental Insurance Co., adding that the appeals decision was "fundamentally inconsistent" with New Jersey's jurisprudence on the topic.

Further, the assignment of the rights without consent effectively doubled the insurers' obligations to indemnify and defend because both of the Givaudan entities retained their joint and several liability under the New Jersey Spill Compensation & Control Act and the federal Comprehensive Environmental Response, Compensation and Liability Act, the insurers argued.

"If [assignment of policy rights without the insurer's consent] were upheld, they would be able to assign [rights] to a complete stranger," Daren S. McNally of Clyde & Co., representing Travelers, told the justices.

That scenario would give rise to a "morass or chaos" of insurance claims being brought by strangers with assigned policy rights, said attorney Stephen V. Gimigliano of Graham Curtain, representing Hartford Accident & Indemnity Co. He answered affirmatively when Justice Anne M. Patterson asked if he was describing a situation in which assigned insurance claims became "a commodity."

The dispute is rooted in the New Jersey Department of Environmental Protection's 1987

finding that the original Givaudan's manufacturing activities had contaminated the soil and groundwater at a site in Clifton, New Jersey, with hazardous materials. Givaudan and the agency entered into several consent orders calling for the company to remediate the damage, and the orders were binding on Givaudan and any of its successors and affiliates, according to court documents.

The fact that the company reorganized itself shouldn't allow the insurers to essentially "wipe out" a \$500 million coverage obligation, said attorney Robin L. Cohen of McKool Smith, representing Givaudan Fragrances.

Cohen disputed the insurers' double obligation theory, saying the policies' "clear" terms assigned the policy rights solely to Givaudan Fragrances, and Givaudan Flavors had no rights under the agreement.

"If you have a pie and you split that pie in half, it's the same pie," Cohen said.

Before the Appellate Division **handed Givaudan Fragrances its victory** in August 2015, a trial court had ruled the assignment of rights was invalid because there was assignment of more than "a single claim and single insurance rights." The court further determined that Givaudan Fragrances was not an affiliate of the original Givaudan.

Attorney William E. McGrath Jr. representing Munich Reinsurance America Inc., agreed Givaudan Fragrances can't be considered an affiliate of Givaudan for insurance purposes and further noted that the policies generally do not include the term "affiliate" in the definition of the insured.

Also, the language of the assignment agreement was too broad, said Tanya M. Mascarich of Windels Marx Lane & Mittendorf LLP, representing Allstate Insurance Co. Instead of identifying a loss that's being assigned, the agreement assigns the rights of all policies of all occurrences prior to 1998, Mascarich said.

"There's a fundamental problem with trying to take the language of the assignment on its face and say it's an assignment of a chosen action," Mascarich said.

Givaudan is represented by Robin L. Cohen and Kenneth H. Frenchman of McKool Smith and by Robert B. Woodruff of the Law Office of Robert B. Woodruff PC.

Travelers Casualty & Surety Co. is represented by Daren S. McNally, Barbara M. Almeida and Meghan C. Goodwin of Clyde & Co. US LLP.

Continental Casualty Co. is represented by Patrick F. Hofer of Troutman Sanders LLP and Suzanne C. Midlige and Christopher S. Franges of Coughlin Duffy LLP.

Allstate Insurance Co. is represented by Tanya M. Mascarich and Stefano V. Calogero of Windels Marx Lane & Mittendorf LLP.

American Home Assurance Co. and National Union Fire Insurance Co. of Pittsburgh are represented by Gregory S. Thomas of LeClairRyan.

Ace Property & Casualty Co., Century Indemnity Co. and TIG Insurance Co. are represented by Martin F. Siegal and Seth G. Park of Siegal & Park.

Everest Reinsurance Co. is represented by John S. Favate of Hardin Kundla McKeon & Poletto.

Federal Insurance Co. is represented by Brian R. Ade of Rivkin Radler LLP.

Hartford Accident & Indemnity Co. is represented by Dennis P. Monaghan of Graham Curtin PA.

Munich is represented by William E. McGrath Jr. of Smith Stratton Wise Heher & Brennan LLP.

National Surety Corp. is represented by Jeffrey N. German.

The case is Givaudan Fragrances Corp. v. Aetna Casualty & Surety Co. et al., case number 076523 before the New Jersey Supreme Court.

--Additional reporting by Jeff Sistrunk. Editing by Orlando Lorenzo.

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