Assignment of Insurance Rights in Business Transactions

by Ken White

The business world is replete with mergers and acquisitions where the liabilities of a predecessor entity are visited upon a successor entity. State merger statutes purport to transfer, "as a matter of law"', both assets and liabilities from predecessor to successor. Acquisition transactions often transfer assets and liabilities "as a matter of contract".

Suppose, in one of these transactions, that the predecessor had in place a series of "occurrence based" commercial general liability (CGL) policies, and that the nature of the predecessor's business was such that personal injury or property damage claims, due to lengthy statutes of limitations, can be asserted several years after an "occurrence". Now, after the transaction, liability for such claims belongs to the successor.

Questions arise as to whether and how, under Ohio law, the successor can access the insurance rights of the predecessor for the transferred liabilities that otherwise would be covered under the predecessor's "occurrence based" CGL policies. And what about the effect of the ubiquitous "anti-assignment" clause contained in most CGL policies prohibiting the assignment of any interest under the policies without the insurer's consent? To a large extent, the answers to these questions are found in *Pilkington North America, Inc. v. Travelers Casualty Surety Company*, 112 Ohio St.3d 482, 2006-Ohio-6551.

In *Pilkington*, the Ohio Supreme Court first decided that a "chose in action" ("the right to bring an action to recover a debt, money or other thing") arises under an "occurrence based" policy at the time of the covered loss, i.e. when the bodily injury or property damage "occurs", often years before a claim is made or a law suit is filed.

The Supreme Court then concluded that an anti-assignment provision in such a policy does not preclude the assignment to the successor entity of the predecessor's "chose in action" for indemnity coverage under the policy. The reason being that the risks insured under the policy were not increased by the assignment because the loss was fixed—had "occurred"—before the assignment. Thus, the chose in action for indemnity coverage was not subject to any anti-assignment clause since the covered loss had already taken place.

Of importance, however, the court narrowed its decision in *Pilkington*, and specifically held that the insurance rights of the predecessor are not automatically transferred to the successor when the liabilities are assumed by contract and when the contract is otherwise silent as to the transfer of insurance rights. In addition, the court specifically stated that it was not deciding whether insurance rights transfer "as a matter of law" in a merger, although the overall rationale of the decision would seem to support such a transfer.

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In Ohio, how best then to enhance the prospect of a successor entity acquiring the predecessor's "occurrence based" CGL coverage rights when liabilities are assumed by the successor through contract or merger? The apparent answer is to create a very specific written assignment to the successor of any "chose in action" the predecessor has to coverage. In short, make it clear that the predecessor's rights to coverage for existing "occurrences" are being transferred to the successor—not simply that the policy of insurance is being transferred or assigned as such could run afoul of an anti-assignment clause. By the way, in transactions or coverage matters governed by the laws of another state, a careful review of that state's law on these issues should be undertaken as there is some divergence of opinion on these matters.

One additional caveat regarding *Pilkington*. The court carefully distinguished the duty to defend from the duty to indemnify, and stated that it was unable to "definitively" answer whether, in the face of an anti-assignment provision, a chose in action is transferable as to the duty to defend. Again, the overall rationale of the court's reasoning in *Pilkington* would seem to support the assignability of such a chose in action. But implicit in the court's deferral on the duty to defend was a concern that an insurer could end up having to defend both the predecessor and successor entities, and that in doing so, the insurer's risks under the policy could be increased. One recent article has pointed out, however, that a "joint defense agreement" between the predecessor and successor entities would go a long way in addressing this issue. Thacker, et al., *Transfer Of Insurance Rights Under Liability Policies As The Result Of the Sale Of A Business (Revisited),* The Trial & Insurance Practice Law Journal, Fall 2016, 103, 116.

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