

Restructured Co. Has Right To \$500M Coverage: NJ Justices

By Jeannie O'Sullivan

Law360, New York (February 1, 2017, 8:56 PM EST) -- The New Jersey Supreme Court ruled Wednesday in a closely watched case that an insurance policy clause preventing assignments to other entities didn't bar coverage for a post-loss claim by an insured's corporate successor, affirming a victory for Givaudan Fragrances Corp. in a dispute over rights to more than \$500 million in insurance for environmental claims.

The justices' unanimous decision dealt a blow to Aetna Casualty & Surety Co., Allstate Corp., Continental Casualty Co. and a raft of other insurers who contended that the anti-assignment clause in the policies underwritten for Givaudan's corporate predecessor in the 1960s and 1980s let them off the hook for covering pollution claims stemming from contamination at the Switzerland-based company's Clifton, New Jersey site.

Although the clause in part required the insurers' consent for such assignments, which they didn't give in this case, it didn't relieve the insurers of the obligation to cover the claim, regardless of the company's corporate restructuring in the 1990s, the high court found.

"The majority rule in the United States is that a provision that prohibits the assignment of an insurance policy, or that requires the insurer's consent to such an assignment, is void as applied to an assignment made after a loss covered by the policy has occurred," wrote Justice Jaynee LaVecchia, authoring the opinion for the high court.

Looking to case law in which courts have grappled with the validity of insurance rights assignments, the justices cited the New Jersey Superior Court's decision in *Flint Frozen Foods Inc. v. Firemen's Insurance Co. of Newark* in 1951. In that case, a trial court noted that while the anti-assignment clauses aim to protect the insurer from increased and unpredictable liability, the insurer's obligation is already fixed and the claim can be transferred like a debt.

The justices also relied on *Elat Inc. v. Aetna Casualty & Surety Co.*, in which the Appellate Division reasoned in a 1995 decision that assigning the rights to collect under a policy only changes the identity of the entity, enforcing the insurer's obligation to cover the same risk.

The underlying principle is a "deeply rooted public policy" against the restraint of alienation of "choses in action," or rights that can only be enforced by legal action, the opinion said.

A Givaudan attorney said she was grateful for the justices' thoughtful opinion.

“The New Jersey Supreme Court has now made it clear that New Jersey policyholders throughout the state do not lose their insurance coverage simply due to a restructuring of their companies,” said Robin L. Cohen of McKool Smith PC.

An attorney representing American Home Assurance Co. and National Union Fire Insurance Co. of Pittsburgh declined to comment and representatives for the insurers didn’t immediately respond to requests for comment Wednesday.

The dispute was 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 its Garden State site 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.

In fighting the company’s lawsuit seeking a declaratory ruling it was entitled to coverage,, the insurers pointed to the fragrance corporate restructuring that split the empire into divisions in the 1990s. Givaudan Fragrances Corp.’s affiliate, Givaudan Roure Flavors Corp., is the corporate successor-in-interest to Givaudan Corp., the named insured under the policies, according to the opinion.

The Givaudan Fragrances and Givaudan flavors entities are owned by a corporate parent named Givaudan Flavors and Fragrances Inc., the opinion said. In March 2010, Givaudan Flavors assigned to Givaudan Fragrances all of its insurance rights under the policies.

The insurers initially defeated the lawsuit in December 2012 after arguing that Givaudan Corp., not Givaudan Fragrances Corp., was the holder of the policies and therefore the only entity that could collect under them.

The Appellate Division in August 2015 reversed the lower court's orders, granting the insurers' motion for summary judgment and dismissing Givaudan’s complaint. The panel found that Givaudan Fragrances Corp. 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.

Givaudan is represented by Robin L. Cohen and Kenneth H. Frenchman of McKool Smith PC 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 and Timothy P. Smith of Kinney Lisovicz Reilly & Wolff.

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., TIG Insurance Co. and Federal 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.

Hartford Accident & Indemnity Co. is represented by Stephen V. Gimigliano 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 Pamela Wilkinson.

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