

Court Finds Pre-Loss Assignment of Policies Invalid

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The United States District Court for the Eastern District of Pennsylvania, applying Pennsylvania law, has denied a title insurance underwriter's motion to intervene as of right into an insurance coverage action involving policies issued to another entity, holding that the underwriter had no legal interest in the policies because the other entity's purported pre-loss assignment of "sums[,] claims, demands and causes of action" under the policies was invalidated by the policies' anti-assignment provisions. *Seneca Ins. Co. v. Lexington & Concord Search & Abstract, LLC*, 2007 WL 1246456 (E.D. Pa. Apr. 26, 2007). The court also denied the underwriter's motion for permissive intervention.

In 2003, the title insurance underwriter entered into an agreement with an agency to issue title insurance policies. The terms of the agreement required the agent to obtain E&O insurance coverage and to assign to the underwriter "all sums[,] claims, demands and causes of action of whatsoever kind" that it "may have" against the E&O insurer. In 2006, the underwriter terminated the agreement and filed suit against the agent for improper conduct, including misappropriation and commingling of funds. The E&O insurer filed a declaratory judgment action against the agent seeking to rescind the policies. The underwriter sought to intervene in the declaratory judgment action: (1) "as of right" under Federal Rule of Civil Procedure 24(a)(2), or (2) permissibly, under Rule 24(b)(2).

The court denied the underwriter's motion in both respects. With respect to intervention as of right, the court held that the underwriter did not have a sufficient "legal interest" in the coverage action, finding instead that it had only an "economic interest" in the policies that was "contingent on a successful outcome" in its underlying lawsuit. Moreover, the court concluded that the purported policy assignment did not give the underwriter a legal interest in the policies because it was a pre-loss assignment that violated the policies' anti-assignment provisions. The court found the underwriter's contention that the pre-loss assignment did not change the insurer's risk of loss unavailing in the face of the Pennsylvania Supreme Court's "bright-line rule" of applying anti-assignment clauses to invalidate pre-loss transfers. The court also distinguished the facts from *Conrad Brothers v. John Deere Insurance Co.*, 640 N.W.2d 231 (Iowa 2001), "the only case in which a court upheld an anti-assignment that pre-existed a covered loss notwithstanding the inclusion of an anti-assignment clause," because *Conrad Brothers* involved a pre-loss "agreement to assign" that was not effective until after the loss occurred, whereas here the purported assignment took place when the agency agreement was executed.

The court declined to allow the underwriter to intervene permissibly because its claims in the underlying lawsuit did not involve common questions of law or fact. The court observed that "whether [the agent] made misrepresentations and omissions to [the insurer] when procuring the . . . Policies . . . involves issues distinct from the issue of whether the [agent] breached its contractual obligations to [the underwriter] under the Agency Agreement."