

By its terms, the transaction appeared to attempt to transfer all prior policies and, at a minimum, all policies since the 1986 transaction.

However, the policies at issue all contained the boilerplate clauses requiring insurer consent to assignment. The claimants admitted that such consent had neither been sought nor obtained. On this basis, the court ruled—in spite of the clear intent of the parties and language of the transfer documents—that none of the insurance policies at issue had been transferred in the transactions. In enforcing the anti-assignment clause, the court recognized the insurer’s “legitimate business interest in restraining assignment” as protection from a material increase in risk because of the nature of the insured.¹⁰

Next, the court turned to the successors’ argument, successful before the lower court, that even if the policies themselves had not transferred as part of the corporate transactions, the claim was a chose in action that transferred, notwithstanding the absence of the insurers’ consent. The successors attempted thus to apply the widely held “exception to the enforcement of consent-to-assignment clauses for assignments made after a loss has occurred.”¹¹ As Williston & Lord observe, “[O]nce a loss occurs . . . [it] is now a vested claim against the insurer and can be freely assigned or sold like any other chose in action or piece of property.”¹²

The key question is when the loss occurred, and whether it had truly occurred before the corporate succession. The rub here comes from the nature of the injury triggering coverage. The claims were made under these occurrence-based policies for injuries that apparently occurred years before the transaction, but were not yet manifest and thus not yet reported. Do such “occurred but not yet reported losses” form the basis of a chose in action that would have transferred through succession?¹³

In answering these questions, the Indiana supreme court followed the California supreme court’s seminal *Henkel* decision, where it ruled in a similar context that the claim would only rise to a chose-in-action status if it had been asserted prior to the transfer. As the Indiana court

explained, “At a minimum, for an insured loss to generate an assignable coverage benefit, the loss must be identifiable with some precision. It must be fixed, not speculative.”¹⁴ The California supreme court had held similarly in *Henkel* that a claim is not an assignable chose in action until it is “reduced to a sum of money due or to become due under the policy.”¹⁵ Here, the Indiana supreme court added:

A right not currently held is not a chose in action assignable at law. It follows that a chose in action only transfers in these circumstances if it is assigned at the moment when the policyholder could have brought its own action against the insurer for coverage. Under the liability policies implicated here, that moment does not arrive until a claim is made against the insured. Put another way, at a minimum the losses must have been reported to give rise to a chose in action.¹⁶

Thus, because the blast machine injuries at issue had not yet been reported at the time of the transactions, they did not constitute an assignable chose in action, and the claimants were held to have no right to coverage under their predecessors’ insurance policies.

The Indiana supreme court justified this result with the argument that to hold otherwise would unfairly increase the risk to the carrier, given the change in the nature of the insured that may occur through succession. Thus, the court rejected the rationale, set forth by the Ninth Circuit in *Northern Insurance Co. v. Allied Mutual Insurance Co.*,¹⁷ that there would seem to be little increased risk to the carrier associated with the assignment of a policy, years after any damage could have been done. The *Northern Insurance* court observed that either an injury will manifest itself or not; that is, the current state of the holder of the policy could not possibly affect the nature of the indemnity risk.¹⁸ Notwithstanding this apparent reality as to indemnification, however, the Indiana supreme court observed that about the duty to defend, “the risk of being called to court to defend more than

just the underlying claims seems substantial, as this dispute soundly demonstrates.”¹⁹ Indeed.

The Indiana court reached this ruling with the acknowledgment that, as the amici curiae had pointed out, “The free flow of capital and assets between business entities is important for the vitality of national and international markets.”²⁰ The court noted that the parties to transfer of assets or merger can address “occurred-but-not-yet-reported” losses in other ways. For example, “the asset purchaser could negotiate for indemnification of losses that have occurred up to the moment of exchange.”²¹ Under those circumstances, the predecessor corporation, while indemnifying its successor, could itself assert a direct claim for coverage under its own old policy. Unfortunately, that avenue had not been negotiated for the coverage claimants in the *Travelers v. U.S. Filter* case. ♻️

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Endnotes

1. See, e.g., *Northern Ins. Co. v. Allied Mut. Ins. Co.*, 955 F.2d 1353 (9th Cir. 1992).
2. See *Conrad Bros. v. John Deere Ins. Co.*, 640 N.W.2d 231 (Iowa 2001).
3. 62 P.3d 69 (Cal. 2003).
4. 183 P.3d 734 (Haw. 2007).
5. *Id.* at 743.
6. *Id.* at 745 (footnote omitted).
7. *Id.* at 747.
8. 895 N.E.2d 1172 (Ind. 2008).
9. *Id.* at 1178.
10. *Id.*
11. *Id.* at 1178–79, citing *Conrad Bros. v. John Deere Ins. Co.*, *supra* note 2.
12. Williston & Lord, *A TREATISE ON THE LAW OF CONTRACTS* § 49:126 (4th ed. 2000).
13. *Travelers v. U.S. Filter*, 895 N.E.2d at 1179.
14. *Id.* at 1180 (citation omitted).
15. 62 P.3d at 75.
16. 895 N.E.2d at 1180.
17. 955 F.2d 1353 (9th Cir. 1992).
18. *Id.* at 1358.
19. 895 N.E.2d at 1180.
20. *Id.* at 1177.
21. *Id.* at 1180.