

INSURANCE LITIGATION™

Reporter

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by Allan Windt

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Agents & Brokers

Insured's Malpractice Claim against Intermediary for Placing Coverage with a Financially Unstable Insurer Is Assignable to Tort Plaintiff Suing Insured

Terms of Settlement Insured's Settlement with Assignee/Tort Plaintiff Are Not Binding on Intermediary

Garcia v. Associated Insurance Service, Inc., ___ S.W.3d ___, 2007 WL 4355198 (Ky. App. Dec. 14, 2007)

Case at a Glance

An insured may assign claims to tort victims that the insured had against its insurance agent and broker for negligently placing the insured's coverage with an unreliable carrier that became insolvent. Although tort claims were generally not assignable under Kentucky law, claims founded on contracts that grew out of the contractual relationships between the parties could be assigned.

Tort victims could pursue assigned claims against an agent and broker who allegedly negligently placed the tortfeasor's liability coverage with an unreliable carrier, but the plaintiffs would bear the burden of proving the damages from the assigned malpractice claims, including the fact that the tortfeasor was injured by the alleged malpractice. Neither the plaintiff's agreement not to seek execution against the tortfeasor nor an arbitrator's ruling against the tortfeasor was probative with respect to that injury.

Summary of Decision

Underlying Litigation & Settlement Assignment. Rita and Daniel Garcia suffered substantial injuries in a mishap aboard a pleasure craft owned by the Star of Louisville, Inc. (Star). The Garcias brought a personal injury action against Star, which was defended by its liability carrier, Casualty and General Insurance, Ltd. (HIH). While the litigation was pending the insurer declared bankruptcy, in effect repudiating coverage. Star negotiated a settlement with the Garcias in

exchange for their promise to “forbear” seeking enforcement against Star. Under the settlement agreement Star conceded liability for the accident, agreed to arbitrate the amount of damages, and agreed to assign to the Garcias claims that Star might have against its insurance agent and broker for insuring Star with an unreliable carrier. An arbitration order fixed the Garcias’ damages at \$742,193.

Suit Against Insurance Agency. In November 2002 the Garcias sued the retail insurance agency which served Star, namely, Associated Insurance Services, Inc. (Associated). Associated sued Aon Risk Services Inc. of Ohio (Aon), which must have been the wholesale broker. In December 2003, the Garcias amended their complaint and also sued Aon. “The Garcias allege[d] that Associated and Aon breached insurance procurement contracts with Star by negligently placing its coverage with HIH, and that this breach damaged. . . Star by exposing it to, and rendering it incapable of satisfying the Garcias’ claims for damages.”

Trial Court Declares Assignment Invalid. A trial-level court—in Kentucky called a “circuit court”—granted the defendants summary judgment “on the ground that th[e plaintiffs’] claims sound in tort rather than contract and thus were not assignable.” The court agreed with the defendants’ argument that no tort personal injury claims are assignable in Kentucky. See *State Farm Mutual Automobile Insurance Company v. Roark*, 517S.W2d 737 (Ky. 1974).

Reversed and Remanded: Assignment Valid. The court of appeals disagreed. The Kentucky Supreme Court has, it said, approved assignments by insureds that were tort defendants to plaintiffs of their claims against insurers. See *Terrell v. The Western Casualty & Surety Company*, 427 S.W2d 825 (Ky. 1968) and *Grundy v. Manchester Insurance & Indemnity Company*, 425 S.W2d 735 (Ky. 1968) (holding that tort claims, including even insurance bad-faith claims, based upon contract may be validly assigned). Permitting similar assignments to intermediaries is just a variation on this principle, when the insurer is insolvent, and[, now for the dicta,] “where an insured’s exposure is not attributable to the insurer[.]” This should be especially true when the assignment results from the settlement of an underlying case, since this practice is quite common where insurers are the target, and when only

economic damages are alleged.

Considerations of Public Policy. The trial court also tried to justify its position on public policy grounds. After all, it argued, negligent policy placement claims against intermediaries resemble legal malpractice claims, and they are not assignable in Kentucky, as in many other states. The court of appeals rejected this view for three reasons. First, most states had rejected the analogy to legal malpractice claims. Second, the insurance agency-insured relationship is not nearly as “uniquely [and ‘highly’] personal” as the lawyer-client relationship, and besides—whatever else is true—no privilege applies. The intermediary-insured relationship is “a simple commercial transaction” and therefore not really like an attorney client relationship.

Third, at least in litigation legal malpractice contexts, an assignment creates an odd and troubling switch of positions which juries may find confusing. Consider the situation in which there is plaintiff (P) and a defendant (D), and P wins the case, as a result of the errors of D’s lawyer. D has a malpractice against the lawyer, and now let us suppose that D assigns it to P as a way to get on with his life. When P sued the lawyer as the assignee of D, P will have to argue that he never should have won the first case and that D should have. This is not a picture of justice being done, and juries might find it confusing. Of course, nothing of the sort would apply to an action by assignment brought by an insured or even someone injured by an insured. “It may well be that insurance-agent malpractice claims should not be as freely assignable as claims for credit card debt or mortgages, but that does not imply that they should never be assignable.”

Settlement Assignments Not Self-Destructive. The defendants argued that an assignment running from a tortfeasor to the injured tort claimant that insulated the assignor from liability “left the insured without a viable claim to assign against the insurance agents.” After all, the insured tortfeasor will not now suffer a loss on the basis of which it could recover. According to the court of appeals, there is one case supporting this view, but there are several more recent cases rejecting this view. The insured’s cause of action is not made illusory by the assignment. See *Stateline Steel Erectors, Inc. v. Shields*, 837 A.2d 285 (N.H.2003), *Campione v. Wilson*, 661 N.E.2d 658 (Mass. 1996), and *Gray v. Grain Dealers Mutual Insurance Company*,

871 F.2d 1128 (D.C. Cir. 1989). Besides, this kind of assignment has been approved by the Kentucky Supreme Court, when used against an insurer. It is therefore reasonable to predict that the kind of assignment at issue here—one against the agent—would also be approved.

Assignment & the Risk of Collusion. At the same time, there is danger that the parties involved in the assignment will conspire to be pirates as to the new target defendant. The targets have no way to be sure that statements as to liability and especially as to damage will be correct. This is particularly true when a court is not involved in making the findings included in the settlement agreement that also contains the assignment. Hence “tort victim-assignees of claims against insurance agents bear the burden of proof on the assigned claims[.]” “[T]he insurance agents, ‘who were not parties to the settlement agreement, cannot be bound by its terms.’ To recover against the insurance agent/broker, furthermore, and assignee must prove the elements of its assigned malpractice claim, including the fact of the insured-assignor’s injury.” Thus, Garcia’s suit against the insurance intermediaries resembles a legal malpractice suit, because there is a case within a case.

Comment

Of course, the Garcia’s will now have to prove that a prudent insurance intermediary would not have arranged for a purchase by Star of insurance from HIH. That component of the proof was not discussed in the case, but that is the next-to-the-most interesting one. The most interesting one is why legal mal claims are not assignable. See Michael Sean Quinn, *On the Assignment of Legal Malpractice Claims*, 37 S. TEX. L. REV. 1203, 1243 (1996), and citations to it. // Quinn