
Agents & Brokers

Professional Negligence Claim against an Insurance Intermediary Is Assignable to Judgment Creditor of Intermediary's Customer

Cigars International Ltd. v. Farmer-Buller-Leavitt Ins. Agency, 96 P.3d 555 (Ariz. App. 2004) Rejected

Webb v. Gittlen, 174 P.3d 275 (Ariz. 2008)

Case at a Glance

A liquor store sold beer to a minor. That event allegedly led to a one car collision that caused a death. The store had no liquor liability insurance coverage, and the CGL carrier denied coverage. The owners of the store settled the wrongful death case for \$3 million and avoided further loss by assigning whatever claim they had against the intermediary to the plaintiff in the underlying tort case. The owners unequivocally claimed that the insurance agent did not discuss with them the availability of liquor liability insurance. The validity of this type of assignment was the issue before the court, and it decided that customer-or-client claims against insurance intermediaries are assignable. The opinion contains a useful, brief legal history regarding the assignability of legal claims.

Summary of Decision

Facts. In 2000, a couple bought a liquor store and then bought CGL and umbrella policies through Victoria Gittlen. The couple alleged that Gittlen did not tell them about liquor liability coverage. In 2001, the store sold beer to a minor who gave it to someone else. The boy that received it drove into a cement barrier and killed his passenger. The father, D. Jere' Webb, of the decedent sued, and the couple's liability carrier refused to defend since they did not have liquor liability coverage.

Procedure. The store owning couple settled the wrongful death claim, by stipulating to the entry of a \$3 million judgment, assigning their rights against the

insurer and the insurance agent, and accepting a promise that they not be collection targets. Webb then sued Gittlen and others, including the liability insurer. Only the claims against the intermediary were at issue in this decision.

The trial court dismissed the lawsuit on the basis of the rule in the *Premium Cigars* decision, mentioned above, that professional negligence claims against insurance agents are not assignable. The intermediate appellate court affirmed in a memorandum opinion, which also rested on *Premium Cigars*. The Arizona Supreme Court granted review to consider "whether insureds may assign claims against their insurance agent[s]." The court held that they could. The court's reasoning is historically grounded.

Background. Arizona law has followed the evolution of the common law. Traditionally, "choses in action" could not be assigned, except to the Crown. Legal claims are one category of chose in action. The common law's broad prohibition of the assignment of legal claims exemplified its view that "litigation was vexatious or otherwise socially undesirable." As litigation became more socially acceptable as a way to settle controversies, the strict prohibition became less an independent rule than an exception to quite the opposite principle. Equity courts were the first to permit assignment as a method of debt collection, then common law courts followed suit, as it were. American courts then followed English courts, and the United States Supreme court authorized the practice in 1816, although it denied preclusive effect to collusive judgments between the debtor and the assignee. Arizona courts permitted assignment in breach of contract cases by 1925, which was—however—a relatively late date. It has never approved assignment of claims involving personal injury.

Since Roman times personal injury claims have been regarded as *personal* and therefore not assignable. For this reason, personal injury claims were not considered passable on to heirs or an estate, absent a specific statute. This "survivability test" did not itself survive in Arizona law after 1955, that is, after a relevant statute was promulgated. "Under the modern survivability statute, the only claims that do not survive are those for damages for breach of promise to marry, seduction, libel, slander, maintenance, alimony loss of consortium, and invasion of privacy." Arizona courts, however, continued to rule that genuine personal injury claims were unassign-

able. The explicitly given argument deployed was that permitting this would create a market for trafficking in lawsuits for pain and suffering. This judicial rule has not changed, although—of course—the courts acknowledge that the rule could be changed by the legislature.

Public policy has also led the courts to reject the assignability of legal malpractice claims. The rationale here is guardianship of the attorney-client relationship, however, and not concern about trafficking in claims. One way to look at the issue before the court, then, is to ask whether, or to what extent, the intermediary-customer relationship resembles the attorney-client relationship.

The court describes the current, relevant principles of Arizona law on the assignability of unliquidated claims his way: "(1) claims generally are assignable except for those involving personal injury; (2) the legislature may specify whether particular claims are assignable; and (3) absent legislative direction, public policy considerations should guide courts in determining whether to depart from the general rule."

Against this background, the agent in this case argued (1) that insurance agent-customer relations resemble attorney-client relations, so that if the latter are not assignable, then the former should not be; (2) that the decision in *Premium Cigar* was sound and should control; and (3) allowing the assignment of actions against insurance intermediaries is contrary to sound public policy. The court held that all three arguments were mistaken.

Attorney-Client Argument. The Arizona Supreme Court has not decided whether client claims against attorneys are assignable. The court in this case assumes that they are not, for the sake of argument. The agent-customer relation is not analogous to the attorney-client relationship, however. The latter type of relationship is "uniquely personal," and actions arising out of this relationship should not be relegated to the market place. The court lists five differences, starting from the well established proposition that "[a]ttorneys are fiduciaries with duties of loyalty, care, and obedience, whose relationship with must be one of 'utmost trust.'" First, insurance agents and brokers are not fiduciaries, but owe only a duty of "reasonable care, skill, and diligence" in serving their customers. Second, relations more similar to the agent-customer relationship than is the attorney-client relationship do

not require unassignability, e.g., the auditor-customer relationship. Third, even some fiduciary relationships permit assignability, e.g., the trustee-beneficiary relationship. Fourth, customers of agents share far less personal information with insurance agents that they do with attorneys. Fifth, "attorney-client confidentiality protects broader interests than does insurance agent-client confidentiality." In the legal arena, disclosures running from clients to attorneys may be necessary, and that is not true in the insurance arena, although some disclosures may be important, and there should be some protection of customer privacy.

Public Policy Arguments. The insurance agent and her amici set up four public policy reasons why the law should forbid the assignment of customer-or-client claims against insurance agents. The court rejects each of them.

First, the insurance agent is concerned that assignability would "commercialize" the relationship and undermine its personal nature. The court's response is that the relationship is commercial by its nature and that any personal component in the relationship is for the client's benefit.

Second, Gitlen argues insurance agents do not owe duties to third parties to sell the right insurance to their customers. Thus, insurance agents are not obligated to paying passengers in taxis to make sure that the taxi company has purchased uninsured motorist insurance. Assignability has nothing to do with this rule, of course, said the court. The assignability-to-X of some claim belonging to Y does not presuppose the antecedent existence of a legal duty running the second target defendant and the assignee, X.

Third, the assignability of claims will give rise to collusive judgments, as happened in this very case. The court rejected this view. Sometimes "collusive" judgment bind liability insurers that violate their duty to defend obligations running to insureds. This problem does not arise when agents are involved, since they have no duty to defend. Hence, if they have not been involved in the underlying litigation, they are not bound by its finding or agreement as to damages. Thus, in this case the fault of the driver and the amount of damages arising from the death of young Webb will have to be litigated against the agent.

Fourth, the agents express concern that permitting assignment will "flood the courts with

unwarranted litigation.” The court doubts that this will happen, but it acknowledges that if litigation actually rose, that may be a good thing, since the function of litigation is to compensate those who have suffered losses.

For these reasons, court reversed the decision and judgment of the lower courts and remanded the case for trial, if necessary.

Comment

One doubts that Webb will win this case and that the agent will lose it.

Why would an insurance intermediary who is paid on commission fail to mention to a liquor store owner that liquor liability coverage is available? It is not a hard concept to grasp; it is not hard to explain; it is widely purchased; and it is irrational for the agent not to mention it, assuming the agent knows she is selling to a liquor store, as the application for insurance would have to disclose. Of course, this could happen, if the agent were aware that the customer did not have enough money to buy the liquor liability coverage, but if that happened, this type of case would fail anyway, for lack of causation. The purchases could not have bought the coverage anyway, for lack of funds. // Quinn