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Travelers v. U.S. Filter: Indiana Supreme Court Tackles Successor Rights Under Liability Policies

On October 15, 2008, the Indiana Supreme Court issued its ruling in Travelers v. U.S. Filter, finding in favor of several insurance companies and reversing earlier rulings of the trial court and Court of Appeals. While Indiana courts generally have been a hostile environment to insurers, the U.S. Filter decision is part of a recent trend indicating a moderation in the Indiana courts' attitude to the arguments made by insurance companies in complex coverage disputes.

The question in U.S. Filter was whether rights under the insurers' original policies passed through various transactions to successor companies, even though the insurers did not have the opportunity to review the purported assignments under their "consent to assignment" clauses. The successor companies were seeking coverage for bodily injury claims allegedly caused by the underlying claimants' exposure to silica from working with a particular type of blast machine. None of the subject claims had been brought prior to the corporate transactions that allegedly assigned the insurance rights, although much of the harmful exposure predated the transactions.

The Court initially reiterated the general rule that "consent to assignment" clauses are enforced against attempted transfers of a policy since such transfers could mean a material increase in risk for which the insurer did not bargain. However, the court noted the "widely recognized" exception for assignments *after* a loss has incurred. The policy then is no longer an "executory" contract but a vested claim against the insurer which can be freely assigned like any "chase in action." This distinction is straightforward in situations with a single – and obvious – date of loss, like an explosion. But the claims in U.S. Filter "occurred" and then

went unrealized for years. While some courts have found that such "inchoate" matters can be assigned, the Indiana Supreme Court instead agreed with its California counterpart in Henkel Corp. v. Hartford (2003) that certain latent claims were not assignable because they had not been reduced to a sum. As the Indiana Supreme Court stated, "At a minimum, for an insured loss to generate an assignable coverage benefit, the loss must be identifiable with some precision." The blast machine injuries, which had occurred but were not reported at the time of the relevant transactions, did not constitute assignable "choses in action."

U.S. Filter follows other recent Indiana opinions favorable to insurers: Cinergy v. AEGIS (2007) (no coverage for cost of installing equipment intended to reduce future emissions of pollutants); Cinergy v. St. Paul (2007) (no coverage for defense costs in underlying lawsuit because there was no potential occurrence); Allianz v. Guidant (2008) (no duty to defend based on mere "potential" of SIR exhaustion; policy's "Batch Clause" did not exhaust SIR); PSI Energy v. The Home (2004) (insurers entitled to assert fortuity-based defenses regardless of whether such language is expressly stated in policies; insured bore burden of proving that property damage was neither expected nor intended). HWW lawyers were involved in each of the preceding cases, at both the trial and appellate court levels.

In sum, while Indiana still should not be the "first choice" forum for insurers if alternatives exist, the case law pendulum in complex insurance disputes appears to have begun swinging back in their direction.