# NJ APPELLATE COURT APPROVES INSURANCE POLICY ASSIGNMENTS TO FUND POLLUTION CLAIMS

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Many owners and operators of contaminated sites may be surprised to learn that there can be insurance coverage available to cover their environmental liabilities even though they were never insureds under the policies in question. In a determination that will more readily allow current owners and operators of contaminated properties to utilize liability policies issued to prior owners and operators of the site, a New Jersey appellate court has issued a decision that confirms there can be an assignment of the proceeds of these policies by the original insured even though the policies have "no assignment" clauses. Givaudan Fragrances v. Aetna Casualty and Surety Company (A-2270-12T4, August 12, 2015).

This ruling makes it critical for any party purchasing commercial property from a party who owned the property prior to 1986, when the "absolute pollution exclusion" generally went into effect and ended most pollution coverage in standard commercial liability policies, to make efforts to obtain an assignment of policies owned by the seller as part of the purchase. Likewise, the purchaser should also seek to include in the agreement of sale a provision obligating the former owner to cooperate in any effort to access the coverage as carriers may still resist or contest any such assignment, or the applicability of the coverage



to the environmental discharge that must be remediated. Moreover, in situations where a sale has already occurred without a policy assignment having been obtained, efforts should be considered by the current owner to obtain an assignment after the fact, although that may require providing additional contractual consideration to the seller. Obtaining such coverage can protect a buyer and provide protection for discharges of contaminants that occurred during or prior to the term of the policies.

Under both state and federal statutes, purchasers of property containing contaminants that were discharged or released on the site before the present owner acquired the property are usually held strictly liable for cleaning up those contaminants, even if the purchasers did not cause the contamination. Even where documentation exists to show that a previously contaminated property has already been cleaned up, a purchaser can still find itself in a position of having to further address that contamination. One reason for this is that remediation standards change over time and if the change makes the standard more restrictive by an order of magnitude or more, additional cleanup of previously remediated property may still be required. Another reason is that areas of concern may not have been investigated, or even identified, during a previous assessment, and having now been tested, could show exceedances from current standards. As a result, owners who had no role in causing the contamination may find themselves called upon to pay large sums merely because they currently own the site.

The court in the Givaudan case commented upon the specificity required for policy assignments and determined that the assignment involved, which was prepared after a claim had been asserted, passed muster. In many instances, evidence of coverage issued before 1986 can be found, but the policies are unlikely to be used so many years later without an assignment. It is, therefore, recommended that owners of sites where hazardous substances have been utilized act promptly to try to obtain assignments and agreements to cooperate from former owners so that they can benefit from the existing coverage, and that new buyers try to make sure that such assignments and cooperation agreements are contained in the contract for purchase.

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