[J-112-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ.

PATRICIA M. EGGER, ADMINISTRATRIX OF THE ESTATE OF CHARLES EGGER, DECEASED AND NATIONAL UNION FIRE INSURANCE COMPANY	:	No. 27 EAP 2005
v.	:	Appeal from the Judgment of Superior Court entered on 12/22/04 at 1001 EDA 2004 affirming the Order entered on 8/11/03 in the Court of Common Pleas, Philadelphia County, Civil Division at 1908 May Term, 2001
GULF INSURANCE COMPANY, BROWNYARD GROUP, INC., W.H. BROWNYARD CORPORATION AND/OR BROWNYARD BROTHERS, INC. AND AON RISK SERVICES, INC. OF PENNSYLVANIA AND BROKERAGE PROFESSIONALS, INC.	:	ARGUED: October 17, 2005
APPEAL OF: GULF INSURANCE COMPANY	:	

DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: August 23, 2006**

I respectfully differ with the majority's decision to invoke public policy to preclude the enforcement of a contractual provision restricting the assignment of the insured's rights under an excess liability insurance policy that occurred prior to the entry of an actual judgment in the underlying tort litigation.

In the first instance, I note that public policy determinations are usually better suited to the legislative, rather than the judicial forum. Thus, a high threshold must be met prerequisite to judicial intervention into private contractual affairs on public policy

grounds. In this regard, this Court has explained that avoidance of unambiguous contractual terms on public policy grounds requires the demonstration of an overriding public policy deriving from the laws and legal precedents, long governmental practice, or obvious ethical or moral standards. See Hall v. Amica Mut. Ins. Co., 538 Pa. 337, 347-48, 648 A.2d 755, 760 (1994) (citing Muschany v. United States, 324 U.S. 49, 66-67, 65 S. Ct. 442, 451 (1945)). Further, it is only in cases in which there is a near unanimity of opinion concerning the applicability and importance of the salient policy that action is to be taken. See id. at 348, 648 A.2d at 760 (quoting Mamlin v. Genoe, 340 Pa. 320, 325, 17 A.2d 407, 409 (1941)).

I agree with the majority that this threshold is met relative to the disapproval of anti-assignment clauses pertaining to life and casualty insurance policies upon the accrual of a loss contemplated under the policy, for the reasons that the majority describes. See Majority Opinion, slip op. at 9-10 (citing, inter alia, National Mem'l Servs., Inc. v. Metro. Life Ins. Co., 355 Pa. 155, 49 A.2d 382 (1946)). As the majority highlights, in the life and casualty insurance cases, there is a prevailing sentiment that the indemnity provided in the policy becomes sufficiently fixed and vested upon the accrual of a loss (the death of the insured or damage to his property), such that there is no longer any legitimate function of an anti-assignment provision. See National Mem'l Servs., 355 Pa. at 155, 49 A.2d at 383. I do not believe, however, that this reasoning is readily transportable to the present setting involving a pre-judgment assignment of rights and interests under a policy of excess liability insurance.

Cases involving liability insurance are more complex than the life and casualty cases, due to the substantial and direct involvement of a third-party interest, namely, that of the plaintiff in the underlying suit (here, Appellee), thus creating an additional layer of uncertainty concerning the liability insurer's obligation to make payments under

the policy, particularly in the context of an excess insurer. Further, as the majority recognizes, there is a potential for manipulation in connection with a pre-judgment assignment to the plaintiff of a defendant's rights and interests under an excess liability insurance policy. See Majority Opinion, slip op. at 18 n.6. Such potential represents a form of increased risk, affording the insurer a legitimate reason to guard against it by means of a contractual provision requiring its consent as a prerequisite to assignment, at least prior to the entry of a judgment or the effectuation of a comprehensive settlement of the underlying tort litigation.[1] I believe that this dynamic distinguishes the National Memorial Services line of cases, in which no such legitimate reasons were found.[2]

In summary, since I do not believe that the circumstances of this case present the kind of extraordinary situation in which the courts should act to void a private contractual undertaking on public policy grounds, I would reverse the order of the Superior Court affirming the judgment against Gulf.

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[1] The majority's explanation that the insurer has a full array of affirmative defenses in the event of manipulation does not negate the risk, in that manipulation is inherently a covert activity and, therefore, it may be difficult to prove. Further, even if proof is available, the insurer will incur additional expense (the subject of an increased risk) in establishing it.

[2] I also have difficulty with the majority's decision to fault Gulf for its decision to deny coverage, see Majority Opinion, slip op. at 17-18, since the Court declined to consider the validity of Gulf's reasons for that denial. Notably, in addition to the issue on which this appeal was allowed, Gulf also sought to raise the following question: "If the assignee has standing and the assignment is effective, whether the negligent medical services provided by the insured were covered under the insurance policy?" The Court, however, issued a limited grant order, which had the effect of denying review on that issue. See Egger v. Gulf Ins. Co., 583 Pa. 427, 879 A.2d 155 (2005) (per curiam). Further, as noted by the majority, the trial court determined that Gulf's denial of coverage was not made in bad faith. See Majority Opinion, slip op. at 5.