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Wisconsin Supreme Court Affirms Court of Appeals Decision that Anti-Assignment Clause Does Not Prohibit Post-Loss Assignment of Insurance Rights

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Practice Area: Insurance Coverage and Risk Management

***Pepsi-Cola Metropolitan Bottling Company, Inc. v. Employers Insurance Company of Wausau*, 2023 WI 42**

In *Pepsi-Cola*, the Wisconsin Supreme Court issued a *per curiam* decision on May 24, 2023, affirming a court of appeals decision dated July 8, 2022, *Pepsi-Cola Metropolitan Bottling Company, Inc. v. Employers Insurance Company of Wausau*, 2022 WI App 45, 404 Wis. 2d 337, 979 N.W. 2d 627, because no three Supreme Court justices could reach agreement to either affirm, reverse, or affirm in part and reverse in part the court of appeals decision. Only 5 of the Supreme Court justices participated.

Pepsi-Cola, the alleged assignee of rights under several insurance policies issued to two foundries, brought an action for determination of the insurer's duties to defend and indemnify it against asbestos exposure claims related to a pump manufactured by the foundries. The trial court granted summary judgment to the insurer, based on anti-assignment provisions in the policies, and relying on *Red Arrow Products Co., Inc. v. Employers Insurance of Wausau*, 2000 WI App 36, 233 Wis. 2d 114, 607 N.W. 2d 294. On appeal, the court of appeals reversed, holding that the anti-assignment provisions in the policies were not enforceable because the assignments were "post-loss." The policies had been issued to the foundries during the time the asbestos exposure had allegedly occurred in the 1960s. The foundries went through a series of transfers that purported to assign the right to insurance with those transfers, even though the policies contained anti-assignment clauses, which provided that "Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon."

Relying on several Wisconsin cases that were decided in the late 1800s and early 1900s, the court held that anti-assignment clauses that prohibit an assignment after a loss has occurred are generally regarded as void as against public policy. The court distinguished *Red Arrow*, a case decided in 2000, wherein the court stated that without the insurer's permission, no assignee has any rights to any benefits under the subject policies. The *Pepsi-Cola* court indicated that in *Red Arrow*, it was not called upon to examine the enforceability of an anti-assignment clause, because both parties agreed that there had been no transfer of recovery rights under the policies to begin with, and therefore the court did not need to decide whether there was an assignment of the rights to recover under the policies. In fact, the court of appeals indicated that its statement in *Red Arrow* regarding the effect of the anti-assignment clause was dicta, and did not control the outcome of this case.

The court of appeals reaffirmed "Wisconsin's longstanding rule" that an anti-assignment clause is unenforceable when the assignment is made post-loss, noting that the foundry had already paid the premiums for the policies to protect against the claimed loss and the assignment did not increase the insurer's coverage risks because the alleged occurrences had already taken place. The court of appeals stated that even though the loss that took place during the policy periods may not be known for many years, it allegedly occurred during the policy periods and the right to make claims under the policies was assigned post-loss to subsequent entities.
