

ALERT

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Texas Federal Court Enforces Anti-Assignment Clause to Preclude Assignment of Insurance Policy and \$4.7 Million Hurricane Ike Claim

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On January 10, 2012 Judge Vanessa Gilmore of the Southern District of Texas, Houston Division, issued an important opinion concerning the purported assignment of an insurance policy and a \$4.7 million Hurricane Ike property damage claim. Judge Gilmore granted Certain Underwriters at Lloyd's, London's cross-motion for summary judgment and held that the policy's anti-assignment clause prohibited the assignment of all rights and duties stemming from the policy, including the right to post-loss proceeds, absent the consent of the insurer. Judge Gilmore also denied the purported assignee's cross-motion for summary judgment and dismissed the case with a final judgment, including the purported assignee's counterclaims for alleged breach of contract, bad faith, and violations of the Texas Insurance Code. Certain Underwriters were represented by Ronald E. Tigner and Karl A. Schulz of Cozen O'Connor's Houston office.

Hurricane Ike allegedly damaged properties owned by Certain Underwriters' insured, Aleritas Capital, Inc. (Aleritas). Following the hurricane, Aleritas submitted a claim for the alleged damages to its properties. Thereafter, Aleritas sold the properties and transferred the claim to PVN Holdings, LLC. Certain Underwriters authorized this transfer. PVN Holdings, however, then purportedly transferred the properties, the insurance policy, and the claim to PV Housing Group, L.P. without Certain Underwriters' consent, despite the fact that the policy contained an anti-assignment clause, as follows:

5. Assignment. This Certificate shall not be assigned either in whole or in part without the written consent of the Correspondent endorsed hereon.

The parties stipulated that PV Housing never sought or obtained written consent to any assignment concerning the policy or the claim from PVN Holdings to PV Housing. The parties filed cross-motions for summary judgment based on their joint stipulations of fact.

PV Housing's argument focused primarily on which state's law should govern the dispute. Aleritas had certain ties to Kansas and PV Housing argued that Kansas law, which does not enforce anti-assignment clauses, should apply. Certain Underwriters argued that Texas law should apply. Certain Underwriters cited case law and treatises that held that the principal location of the insured risk is the state whose law applies. Since the insured properties were only in Texas, Certain Underwriters argued that Texas law should apply. The court agreed and held that Texas had the most significant relationship with the case.

The court then turned to an analysis of the anti-assignment clause. The court cited numerous authorities that held Texas law enforces anti-assignment clauses to prohibit the assignment of post-loss claims without a showing of prejudice. The court rejected the purported assignee's argument that the clause was narrow and applied only to the policy itself, not an assignment of the rights and duties occurring under the policy:

On review, the Court concludes that the plain and ordinary meaning of this policy provision precludes assignment of all rights and duties under the Policy absent the consent of the Correspondent. On its face, the provision states that the Certificate — i.e., the Policy — cannot be assigned in whole or in part without the written consent of [Certain Underwriters]. This language contemplates that neither the Policy in its entirety (whole assignment) or any right or duty which stems from the Policy (partial assignment) may be assigned without the written consent of Certain Underwriters. Thus, since a claim for post-loss proceeds is a right that accrues from the Policy, such a right cannot be assigned without [Certain Underwriters'] consent. The [purported assignee's] contrary proffered construction is untenable because [the purported assignee] posits that the assignment provision only bars the assignment of the

Policy in whole, but such a reading would effectively excise the words “in part” from the provision. When construing a contract, however, the Court strives “to give meaning to every sentence, clause, and word to avoid rendering any portion inoperative.”

Order at 10-11 (citing authorities).

The court also rejected the purported assignee’s argument that Certain Underwriters waived enforcement of the anti-assignment clause by approving the transfer from Aleritas to PVN Holdings. The court held that when Certain Underwriters allowed one assignment they did not waive their right to assert the anti-assignment clause against future purported assignees. The court noted that the purported assignee’s construction of the anti-assignment clause would effectively rewrite it such that Certain Underwriters would only be able to invoke the anti-assignment clause against the original party to the contract, but not against future purported assignees. The court held that “This is in clear contravention of the language of the contract, the intent of the contract, and would expose the underwriter to counterparty risks without their consent. This of course is fatal to the [purported assignee’s] position, because under Texas law ‘the doctrines of waiver and estoppel cannot create a contract covering a risk not assumed by the insurer.’” Order at 12-13 (citing authorities).

In addition, the court rejected the purported assignee’s theory that Certain Underwriters’ actions constituted a form of quasi-estoppel to subsequent assertion of the anti-assignment clause. The court cited authorities that held that quasi-estoppel arises to prohibit a party to take a position that is inconsistent with its past positions to the prejudice of another. However, the court

noted that the purported assignee offered no evidence of any conduct by Certain Underwriters that indicated their consent was not necessary to effectuate a valid assignment. The court held Certain Underwriters were not estopped to assert the anti-assignment clause.

In summary, the court held that the anti-assignment clause was valid, that Certain Underwriters had not waived and were not estopped to assert it, and that the purported assignment between PVN Holdings and PV Housing was ineffective because there was no consent to the assignment. From an insurance coverage standpoint, this opinion is important because it rejected numerous creative challenges to the assertion and enforcement of a typical anti-assignment clause that is found in many insurance policies. Insurers rely upon such clauses to limit risk. Parties sometimes try to assign insurance policies and claims as sweeteners to unrelated business transactions, as part of a settlement, or to create leverage in negotiations. However, this opinion makes it clear that Texas courts will strictly enforce anti-assignment clauses to negate such purported assignments where there is no consent from the insurer.

To discuss any questions you may have regarding the issues discussed in this alert, or how they may apply to your particular circumstances, please contact:

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[Read the court’s opinion here.](#)