ALERT
JULY 31, 2008

GLOBAL INSURANCE GROUP
News Concerning
Recent Insurance Coverage Issues

COZEN O'CONNOR
www.cozen.com

HAWAII SUPREME COURT CONCLUDES LIABILITY INSURERS HAVE NO DUTY TO INDEMNIFY OR DEFEND SUCCESSOR COMPANY WHERE THE NAMED INSURED ASSIGNED POLICIES WITHOUT INSURERS' CONSENT

Peter J. Mintzer, Esquire • 206.373.7243 • *pmintzer@cozen.com*
Laura J. Hawes, Esquire • 206.373.7202 • *lhawes@cozen.com*

OVERVIEW

The Hawaii Supreme Court recently held that an assignment of rights and liabilities under a liability insurance policy is not effective to transfer policy rights if it was accomplished in violation of the policy's "no assignment" condition. When a policy has a clear and unambiguous condition requiring the consent of the insurer prior to an assignment, a purported assignment does not transfer the right to a defense or indemnity if it was done without the insurer's consent in violation of the terms of the policy. *Del Monte Fresh Produce (Hawaii), Inc. v. Fireman's Fund Ins. Co.,* 2007 Haw. LEXIS 380 (Haw. Dec. 27, 2007), reconsideration denied, *Del Monte Fresh Produce (Hawaii), Inc. v. Fireman's Fund Ins. Co.,* 2008 Haw. LEXIS 38 (Haw., Feb. 20, 2008).

BACKGROUND

Del Monte Fresh, Inc. started its pineapple-growing operations as California Packing Corporation in the 1940s. In 1967, California Packing Corporation was renamed to Del Monte Corporation. Del Monte Corporation later merged with R. J. Reynolds Merger Corp. and was again renamed Del Monte Corporation ("Del Monte Corp.") in February 1979. In August 1989, Del Monte Corp. arranged a stock and asset purchase with Profwheel B.V., selling various subsidiary fruit companies and its Hawaii operations. PPI-Del Monte Fresh, Inc. was incorporated in Delaware on October 11, 1989. Del Monte Corp. transferred the assets and liabilities associated with its Hawaii operations to PPI-Del Monte Fresh through a Bill of Sale and Assumption Agreement dated October 17, 1989. On October 14, 1992, PPI-Del Monte Fresh removed "PPI" and became Del Monte Fresh Produce (Hawaii), Inc. ("Del Monte Fresh").

Del Monte Corp. owned and operated a pineapple plantation in Kunia on the island of Oahu, Hawaii from the early 1940s until 1978. At the time the lawsuit, Del Monte Fresh operated the land. The U.S. Environmental Protection Agency ("EPA") began to investigate the property and, in 1994, placed the site on its Superfund National Priorities List of contaminated sites after investigation revealed the land to be contaminated with fumigants. The contamination stemmed, at least in part, from a spill in 1977 during the transfer of the fumigant ethylene dibromide to on-site storage. The EPA estimated hundreds of gallons of the fumigant seeped into the soil of the plantation in the vicinity of a drinking water well. In addition, the EPA concluded additional releases were believed to have occurred over time during the transfer of fumigants to on-site bulk storage.

Testing of the soil and groundwater indicated water and soil contained fumigant at contaminant levels in excess of federal and state limits, which required the water well be disconnected from the potable water system. On April 28, 1995, the EPA issued separate "special notice letters" to Del Monte Fresh and Del Monte Corp. identifying them as "potentially responsible parties" under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). EPA asserted Del Monte Fresh was liable for cleanup of the site, reimbursement of the EPA investigation costs, and conducting a remedial investigation and feasibility study. Del Monte Fresh tendered the defense of the EPA claim to its liability insurers from 1940 to present. The insurers denied coverage, based on various grounds, including the pollution exclusion, that the "PRP letter was not a "suit," and "named insured" issues, since the claim was tendered by Del Monte Fresh, and the insurers' policies had been issued to Del Monte Corp.

In September 1995, Del Monte Fresh, the EPA, and the State of Hawaii entered into an "Administrative Consent Order" with Del Monte Fresh taking responsibility for the remedial investigation and feasibility study at the site.

LIABILITY INSURANCE POLICIES

Del Monte Corp. was the named insured on the contested policies. Fireman's Fund provided continuous primary liability insurance to Del Monte Corp. from May 31, 1969, until May 31, 1978. American Home Assurance Company ("American Home") provided primary liability insurance to Del Monte Corp. from March 1, 1982, until May 1, 1986. American Home and the other named defendants provided excess liability insurance to Del Monte Corp. from 1967 until 1985.

ASSIGNMENT OF RIGHTS AND LIABILITIES UNDER THE INSURANCE POLICIES

In reversing the circuit court's order granting summary judgment to Del Monte Fresh on the issue of the insurers' duty to defend and indemnify, the Hawaii Supreme Court, applying Hawaii law, held that assignment of rights and liabilities under an insurance policy by operation of law is not consistent with Hawaii's rules governing construction of insurance policies. The court noted Hawaii follows the doctrine of "reasonable expectations" and will construe insurance policies liberally in favor of the insured in the event of an ambiguity. *Id.* at *33. These concepts comport with governing Hawaii Revised Statute as well which provides:

> Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy, and as amplified, extended, restricted, or modified by any rider, endorsement or application attached to and made a part of the policy.

HRS § 431:10-237.

In addition, while courts in Hawaii permit assignability generally, assignment of an insurance policy is governed by HRS § 431: 10-228(a): "[a] policy may be assignable or not assignable, as provided by its terms." Thus, the court concluded "an assignment by operation of law is merely an extension of the common law tort rule of successor liability … [and] the circuit court erred when it concluded an assignment by operation of law was consistent with Hawaii's rules governing construction of insurance policies." *Id.* at *33-34.

In this case, the court determined the assignment to be invalid because, while the Bill of Sale transferred Del Monte Corp.'s rights under the policy to Del Monte Fresh, an insurer's duty to defend or indemnify its insured is not separable from the terms of the insurance policy itself and are not assignable if accomplished in violation of a clear and unambiguous "no assignment" provision within a policy. *Id.* at *39-40. The court rejected Del Monte Fresh's argument that when Del Monte Corp. transferred all its assets and liabilities to Del Monte Fresh, it also transferred or assigned its rights to claim and recover under the insurance policies issued to Del Monte Corp. prior to the 1989 sale. *Id.* at *39.

The court disagreed, stating "the duties to defend and indemnify arise under the terms of the insurance policy, and it is through an interpretation of the terms of the policy that such duties are deemed to be owed." *Id.* An insurer may impose a condition of consent to assignability provided the condition does not contravene statutory inhibitions or public policy. *Id.* at 40. The court found no such problems with the consent provisions in the policies at issue. It was undisputed the policies contained provisions requiring the insurer to consent to the assignment made by any named insured. *Id.* at *41. Moreover, it was undisputed that Del Monte Corp. did not obtain such consent prior to the assignment in 1989. *Id.* As a result, the court concluded Del Monte Fresh was not an insured under the Del Monte Corp. policies and was owed no duties to defend or indemnify for the remediation costs. *Id.*

CONCLUSION

The *Del Monte Fresh* opinion exemplifies the Hawaii courts' willingness to literally apply clear and unambiguous policy language and to require an insured to comply with the terms and conditions set forth in the policy. The opinion also provides clarity as to the enforceability of policy "no assignment" clauses under Hawaii law. Given the prevalence of purported assignments of policy rights, whether arising in the corporate mergers and acquisitions context, or in the claim settlement (e.g., stipulated judgment) context, the *Del Monte Fresh* decision will have a significant impact on the handling of complex insurance claims under Hawaii law going forward.

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact Peter Mintzer in Seattle at 206.373.7243 or pmintzer@cozen.com. Peter is admitted to practice in Hawaii, as well as the states of Washington, Oregon, Idaho and Alaska.