ASSIGNMENT: HOW IT WORKS

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A. Assignment Generally

An assignment is "a transfer of property or some other right from one person to another, which confers a complete and present right in the subject matter to the assignee."[1] Assignment of one's rights (assignor) to another (assignee) is a longstanding concept in law and has generally been utilized in the areas of contract and property.[2] An assignee can receive no rights greater or lesser than those of the assignor.[3] While the common law favors assignment, torts may not be assigned generally, except as discussed below.[4] However, assignment will be permitted usually unless expressly prohibited.[5] This prohibition may be explicitly stated as a provision of the contract or may be barred by some other operation of law. The effect of the assignment is to extinguish the contractual relationship between the assignor and the other party to the contract and create privity between the third-party assignee and the other party to the contract.[6] Again, the assignee does not receive rights greater than those of the assignor and the other party to the contract does need to agree to the assignment.[7] In essence, the assignee steps into the shoes of the assignor and obtains the same rights and privileges held by the assignor, not more or less.

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[1] 6 Am. Jur. 2d *Assignments* § 1 (2012).

[2] *See generally Gayler v. Wilder*, 51 U.S. 477 (1850); *see also Burck v. Taylor*, 152 U.S. 634 (1894).

[3] *See, e.g.,* 29 Williston on Contracts § 74:56 (4th ed.) ("[a]n assignee of a nonnegotiable chose in action ordinarily has no better title and no greater rights than the assignor"); *see also, e.g., Int'l Ribbon Mills, Ltd. v. Arjan Ribbons, Inc.*, 325 N.E.2d 137, 139 (N.Y. 1975) (reiterating the principle that "[i]t is elementary ancient law that an assignee never stands in any better position than his assignor. He is subject to all the equities and burdens which attach to the property assigned because he receives no more and can do no more than his assignor").

[4] *See* R.D. Hursh, Annotation, *Assignability of Claim for Personal Injury or Death*, 40 A.L.R.2d 500 (originally published in 1955) ("[i]t seems that few legal principles are as well settled, and as universally agreed upon, as the rule that the common law does not permit assignments of causes of action to recover for personal injuries"), *superseded in part* by Andrea G. Nadel, Annotation, *Assignability of Proceeds of Claim for Personal Injury or Death*, 33 A.L.R.4th 82 (1984).

[5] *See, e.g., Puget Sound Nat. Bank v. State Dept. of Revenue*, 868 P.2d 127, 130 (Wash. 1994) ("all contracts are assignable unless such assignment is expressly prohibited by statute or is in contravention of public policy"); *see also L.V. McClendon Kennels, Inc. v. Inv. Corp. of S. Fla.*, 490 So.2d 1374, 1375 (Fla. 3d DCA 1986).

[6] *Moore v. Weinberg*, 644 S.E.2d 740 (S.C. Ct. App. 2007) (*citing Black's Law Dictionary* 119 (6th ed. 1992) ("[a]n assignment is the act of transferring to another all or part of one's property, interest, or rights").

[7] *Condren, Walker & Co., Inc. v. Portnoy*, 48 A.D.3d 331, 331-32 (N.Y. App. Div. 2008) (the assignee's rights are as if the "assignee [were] standing in the shoes of its assignor"); *Smith v. Cumberland Grp., Ltd.*, 687 A.2d 1167, 1172 (Pa. Super. Ct. 1997) ("[a]bsent an express condition against assignment, the rights and duties under an executory bilateral contract…may be assigned without the consent of the other party so long as it does not materially alter the other party's duties and responsibilities").

Assignment is not generally applied to torts as it is deemed against public policy.[8] However, it is recognized that if a right of action arising out of tort would survive in statute to the injured party's personal representative, it may be assigned; or in simpler terms "survival is the test of assignability of a right."[9] Therefore, in the context of the insurance claim, when a plaintiff believes that the defendant may have causes of action against his insurance company for the insurer's failure to defend its insured and properly protect his interests in an underlying action, the plaintiff may seek an assignment of that claim. South Carolina has long recognized that causes of action in tort "survive both to and against the personal or real representative [of the injured party or tortfeasor]…any law or rule to the contrary notwithstanding."[10] Thus, while assignability of tort claims generally is limited, states permit assignability of such tort actions as bad faith claims against the insurer because such a claim would survive to the personal representative should the plaintiff die.

We turn now to the specific assignment of the bad faith claim. It is important to understand the treatment and availability of a bad faith action in South Carolina in order to determine whether it can be assigned.

B. Assignment of Bad Faith Claims

Bad faith claims can be brought as either a contract action or a tort action, or both, but recovery is limited to either contract or tort, but not both. South Carolina permits the plaintiff to bring the bad faith action in both contract and tort contemporaneously and then elect as between the two in which claim, contract or tort, the plaintiff wishes to receive damages.[11]

The concept of assignment of a bad faith claim can be described as where in lieu of seizing the first-party insured/defendant's personal assets to satisfy a judgment obtained in the underlying action, the third-party plaintiff may offer to accept an assignment of these claims in exchange for entering into a covenant not to execute the judgment against the defendant personally.[12] Although this settlement appears to be in the best interest of both parties because it allows the third party

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[8] *Charlotte-Mecklenburg Hosp. Authority v. First of Ga. Ins. Co.*, 455 S.E.2d 655, 657 (N.C. 1995) ("[a]ssignment of claim for personal injury, as opposed to mere assignment of proceeds of such claim, gives assignee control over claim and promotes champerty, and is for that reason void as against public policy"); *Schweiss v. Sisters of Mercy, St. Louis, Inc.*, 950 S.W.2d 537, 538 (Mo. Ct. App. E.D. 1997) ("Missouri law prohibits the assignment of bodily injury claims for reasons of public policy").

[9] *Doremus v. Atl. Coast Line R. Co.*, 130 S.E.2d 370, 376 (S.C. 1963) (*citing* 6 C.J.S. *Assignments* § 32, p. 1080); *see also* 6 Am. Jur. 2d *Assignments* § 49 (2012) ("choses in action that survive as assets or continue as liabilities can be assigned").

[10] S.C. Code Ann. § 15-5-90 (1976), *previously* § 10-209, South Carolina Code of Laws, 1952; *Bultman v. Atl. Coast Line R. Co.*, 88 S.E. 279, 280 (S.C. 1916); *Doremus*, 130 S.E.2d at 378.

[11] *See id.*; *see also Comunale v. Traders & Gen. Ins. Co.*, 328 P.2d 198, 203 (Cal. 1958) ("where a case sounds both in contract and tort the plaintiff will ordinarily have freedom of election between an action of tort and one of contract").

[12] George J. Kefalos, R. Davis Howser, Hon. William Howard, Warren Moise, *Bad-Faith Insurance Litigation in the South Carolina Practice Manual,* South Carolina Lawyer, Aug. 13, 2001.

an opportunity to step into the shoes of the insured and proceed to bring an action against the insurer for failing to promptly and fairly settle the underlying tort action as well as offering the insured relief of the potential for execution against his personal assets, assignment does not always occur. For example, while the third-party plaintiff and the first-party insured/defendant might both benefit from such an assignment, the insured/defendant's attorney(s) may be unable or unwilling to communicate this offer to the defendant because the insured is unavailable or the attorney's interest (and that of the insurer) is not in alignment with those of the insured regarding assignment of a claim against the insurer. Thus, when the attorney is unable or unwilling to gain the permission of the insured to agree to the assignment, although it would be in the insured's best interest, the assignment will not occur.

Generally, by permitting assignment, states provide protection for third-party plaintiffs who successfully pursue tort actions against judgment-proof insureds. Further, assignment of bad faith claims may incentivize an insurer against committing bad faith in negotiating the settlement of the tort action and provide protections to the third-party claimant, even though the third party lacks privity of contract with the insurer. However, there are concerns associated with permitting assignment. The primary concern in many cases involving an assignment of the first-party insured's actions against his insurer is the risk of collusion between the third-party plaintiff and the insured. This is especially true when the insured is protected against tort liability by an agreement not to execute a potential judgment prior to the entry of the judgment in the underlying tort action.[13] Courts are concerned that when the insured faces no threat of satisfaction of the judgment against him, he has little incentive to challenge the third-party plaintiff and may even collude with the plaintiff to obtain that judgment in consideration of facing no risk. In *Fowler v. Hunter*,[14] the South Carolina Supreme Court considered this concern and while acknowledging the risk of collusion, the court recognized the public policy consideration of facilitating settlement agreements between parties and permitting assignment of certain claims, such as bad faith.[15] Specifically, the court noted when considering assignment and concerns about collusion, "…the existence of conflicting approaches to this issue throughout the country [which] reflects a balancing of policy considerations."[16] Thus the court reasoned, that absent some evidence of collusion between the parties, the public policy in favor of settlement outweighs these concerns.[17]

South Carolina permits assignment. Assignment in South Carolina has been upheld even when the policy itself conditions assignment of any interest under the policy only on consent of the insurer.[18] Policy language restricting an insured's right to assign his/her claims is not unusual. South Carolina courts considered the permissibility of these restrictions through policy language against

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[13] *Fowler v. Hunter*, 697 S.E.2d 531, 535 (S.C. 2010).

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Smith v. Md. Cas. Co.*, 742 F.2d 167, 168 (4th Cir. 1984); *see Tyger River Pine Co. v. Md. Cas. Ins. Co.*, 170 S.E. 346 (S.C. 1933).

the public policy in favor of assignment of these claims.[19] In other words, the court determined that assignment was permitted where insurers attempted to circumvent tort law by restricting an insured's right to bring or assign a bad faith action through policy language that stated that the plaintiff, with the consent of the insurer, can only bring the action. The insurer attempted to restrict not only who could bring the action, only the insured, but also when an action could be brought, only with the consent of the insurer. South Carolina courts struck down such provisions as against public policy recognizing that limiting a plaintiff's claims to be available only with the consent of the proposed defendant is no right at all.[20] However, South Carolina courts imposed the limitation that only the claim for the excess judgment over policy limits is assignable, as opposed to any claim for other damages including those for emotional distress or punitive damages.[21] Thus, assignment in South Carolina is permissible, but only after the third-party plaintiff has obtained an excess judgment.

1. Assignment in the Automobile Insurance Context

a. Assignment of Bad Faith Claims to Third Parties

In the automobile insurance context, the third party may make a claim for bad faith when a third party sues an insured defendant, including the tortfeasor in an automobile accident context, and receives a judgment in excess of the insured defendant's policy limits. Generally, to bring an action to recover the excess liability, there must be: (1) a statutory cause of action,[22] (2) an assignment from the insured to the injured party of the insured's rights against the insurer;[23] or (3) a policy provision authorizing the suit.[24] Where the third party takes an assignment of the insured defendant's potential bad faith claim, the third party typically conveys consideration in the form of agreeing not to levy against the insured's personal assets.[25] The third party then steps into the "shoes" of the insured as the plaintiff and sues the defendant insurance company for bad faith.[26] Generally, to succeed, the third party must show: (1) the insurer must have had an opportunity to settle the case against the insured for an amount within the policy limits; (2) the insurer must have acted in bad faith in failing to settle, (3) an excess verdict obtained by the plaintiff/third party.[27] These judicially created doctrines offer another alternative route to provide aggrieved third parties an opportunity to seek recovery for delays or failures in the settling of claims for their treatment or against insurers.

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[19] *Id.*

[20] *Smith*, 742 F.2d 167 at 168; *see Tyger River*, 170 S.E. 346.

[21] *Smith*, 742 F.2d 167; *see Tyger River*, 170 S.E. 346.

[22] *Greer v. Mid-West Nat. Fire & Cas. Ins. Co.*, 434 F.2d 215, 217 (8th Cir. 1970).

[23] *Moutsopoulos v. Am. Mut. Ins. Co. of Boston*, 607 F.2d 1185, 1189 (7th Cir. 1979).

[24] *Vaughn v. Vaughn*, 597 P.2d 932, 934 (Wash. App. Div. 2 1979).

[25] *See, e.g.*, *Phillips v. Bacon*, 245 Ga. 814, 816, 267 S.E.2d 249, 250-51 (1980).

[26] *See generally Murphy v. Allstate Ins. Co.*, 17 Cal. 3d 937, 942-46 (1976).

[27] *See generally Tyger River Pine Co. v. Md. Cas. Co.*, 170 S.C. 286 (1933).