

# OREGON LAW UPDATE

case in point...

## Anti-Assignment Clause in Policy Prevents Insured from Assigning Rights to Third Party

**From the desk of Jeff Eberhard:** Sometimes an insured will assign their potential claims and causes of actions against their insurer to another party as a part of a judgment or settlement agreement. However, an anti-assignment clause in an insurance policy may trump the assignment and prevent the beneficiary of the assignment from bringing a claim against the insurer.

**Claims Pointer:** When an insured is released from liability to the assignee, the insured is not legally obligated to his assignee, and the insurance company in turn is not obligated to its insured. For this rule to apply, the agreement between the insured and the assignee must unambiguously and unconditionally eliminate any liability for which insurance coverage might be triggered.

Leach v. Scottsdale Indemn. Co., 11C13379, 2014 WL 662324 (Or. Ct. App. Feb. 12, 2014)

Plaintiff Leach leased, designed, and operated a motocross course at the Fair and Expo Center in Salem, Oregon that was insured under a commercial general liability policy by Defendant Scottsdale. Leach routinely held both motocross practice sessions and motocross races at the track. During one practice session, a rider lost control of the motorcycle that he was riding, and entered Warberg's lane and collided with him. Warberg was seriously injured and sued Leach.

Warberg sought economic damages for medical expenses in an amount not less than \$100,000; economic damages for lost wages or salary in an amount not less than \$1,000,000; and noneconomic damages in the amount of \$5,000,000. Leach tendered the complaint to Scottsdale. Scottsdale denied coverage and refused to defend or indemnify Leach in connection with the suit, arguing that the 'Athletic Or Sports Participant' Exclusion barred coverage.

Warberg settled with Leach in the amount of \$1,500,000. After judgment was entered, Leach and Warberg entered into an "Assignment and Covenant Not to Execute" agreement. Under the agreement, Leach assigned all his rights of recovery and enforcement of obligations between himself and Leach's insurer, Scottsdale. In turn, Warberg agreed not to enforce the Judgment against Leach by execution or any other manner against Leach in exchange for the Assignment.

Warberg then sued Scottsdale for breach of contract alleging that Scottsdale had failed to defend and indemnify Leach in connection with Warberg's

original lawsuit in contravention of its obligation under the policy. Scottsdale moved for summary judgment on the grounds that it had no present duty to indemnify because, among other reasons, the policy had an anti-assignment clause that precluded assignment without written consent from Scottsdale. The trial court agreed with Scottsdale and granted the motion.

Leach then brought his own claim against Scottsdale reiterating the claims in Warberg's lawsuit against Scottsdale. Scottsdale moved for summary judgment, again asserting that Warberg's covenant not to execute against Leach eliminated any duty of Scottsdale to indemnify Leach under the rule of law announced in *Stubblefield*. The trial court granted the motion and entered a general judgment dismissing all of Leach's claims with prejudice. Leach appealed.

On appeal, Leach argued that *Stubblefield* does not establish as a matter of law that the covenant not to execute eliminated Scottsdale's duty to indemnify. By way of background, in *Stubblefield v. St. Paul Fire & Marine*, 267 Or 397 (1973), the Court held that in a situation where a plaintiff agrees not to execute a judgment against an insured, and the insured assigns its rights under the policy to the plaintiff, the insured is no longer "legally obligated to pay" the plaintiff. Consequently, the plaintiff acquires no rights it could enforce against the insurer, including payment of the stipulated judgment. This rule was severely limited by ORS 31.825 which allows an assignment by a defendant after a judgment has been entered. Therefore, Leach was permitted to assign his claim against Scottsdale to Warberg but in doing so, the assignment could extinguish any legal obligation to pay to Warberg under *Stubblefield*. Thus, if there is an anti-assignment



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provision in the policy, neither party can seek recovery from Scottsdale.

The Court stated that for the rule of *Stubblefield* to apply, the agreement between the insured (Leach) and the assignee (Warberg) must ‘unambiguously’ and ‘unconditionally’ eliminate any liability for which insurance coverage might be triggered. The Court noted that the summary judgment record did not permit them to conclude, as a matter of law, that the agreement between Leach and Warberg extinguished Leach’s liability to Warberg. The Court noted that the summary judgment record reflected that the agreement between Warberg and Leach had been invalidated to the extent that it assigned Leach’s rights against Scottsdale. That partial invalidation of the assignment creates a factual issue as to whether Leach’s liability to Warberg has been extinguished, because it creates a factual issue as to whether the covenant not to execute remains in force. The trial court erred by granting summary judgment in favor of Scottsdale. Accordingly, the Court reversed and remanded for further proceedings.



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