

Assignment of insurance policies and claims in insolvency

Produced in partnership with David Steinberg and Matthew Padian of Stevens & Bolton LLP

Duties of an office-holder to realise property

Insolvency procedures (such as administration, liquidation or bankruptcy) involve the appointment of an insolvency office-holder whose primary duty is to get in the property of the insolvent company or individual bankrupt, and realise the value of that property for the benefit of creditors (see Practice Notes: [Roles, powers, functions and duties of an administrator](#), [Role, powers, functions and duties of a liquidator](#) and [Roles, powers, functions and duties of a trustee in bankruptcy](#)).

In this context, insurance claims (being choses in action) fall within the definition of property that is capable of realisation.

This Practice Note considers the circumstances in which an office-holder may wish to assign insurance claims and the practical considerations which may be relevant when doing so. For general details on contracts of insurance, see Practice Note: [General principles of insurance contract law](#).

References:
[IA 1986, ss 305-335](#)

References:
[Insolvency Act 1986, s 436\(1\)](#)

Why might an office-holder assign an insurance claim

An office-holder may seek to assign the benefit of an insurance claim for a number of reasons. These may include the following:

- an assignment may represent an effective way to realise value for the insolvent estate
- the office-holder may have inadequate funds to pursue the claim on behalf of the estate
- the office holder may not consider it to be a worthwhile exercise to pursue the claim, given the prospects of success or recovery, the factual complexity involved or the time, cost or expertise required to pursue the claim to its conclusion; and
- the relevant claim may be contingent in nature with a long tail, ie one where the contingency is not expected to crystallise until after the office-holder vacates office

Relevant to the last of the above points is the office-holder's desire to discharge their responsibilities as soon as reasonably practicable. In particular, an office-holder who remains in office over an extended period of time will inevitably come under pressure to wind-up the estate sooner rather than later. As such they will not wish to sit around in office pending the conclusion of an insurance claim which is unlikely to crystallise in the immediate future.

Conversely, if the claim is a straightforward one which is relatively easy to prove, then there may be little point in seeking to assign it and an office-holder may resolve to pursue the claim to its conclusion in-stead.

Which office-holders can assign an insurance claim in insolvency?

In principle an insurance claim or right to recover under an insurance policy may be assigned by any of the following persons:

- an administrator who acts as agent of the company and has the power to sell or dispose of property of the company
- a liquidator, who acts as agent of the company
- an administrative receiver appointed under a debenture who is deemed to have the same powers as an administrator; and
- a trustee in bankruptcy. The trustee has the power to sell any part of the property comprised in the bankruptcy estate and to make any arrangement as may be thought expedient with respect to any claim arising out of or incidental to the bankrupt's estate

References:
[IA 1986, Sch B1, para 69](#)

References:
[Knowles v Scott \[1891\] 1 Ch 717](#)
[IA 1986, ss 165, 167\(4\)](#)

References:
[IA 1986, s 42](#)

References:
[IA 1986, s 314](#)
[IA 1986, Sch 5](#)

Transfer or assignment?

When seeking to assign an interest in an insurance policy, there are generally two possibilities to consider:

- first, an assignment of the policy itself; and
- second, an assignment of the right to recover under the policy

The first of the above options is unlikely to be appropriate, except where perhaps the subject matter of the insurance is also being transferred to the same person to whom the office-holder is seeking to assign the related insurance policy. An example might include an assignment of the land and buildings insurance in respect of a property being sold out of the insolvent estate. In this instance, particularly where the insurer's consent to the assignment is obtained, and the insurer acknowledges the assignee's interest in the policy, the assignment is more akin to a novation. If the insurer accepts the assignee's status as an insured party, agrees that the proceeds of any future insurance claims are to be paid directly to the assignee and the assignee assumes responsibility (if not, liability) for the payment of any premiums, the policy is effectively being novated.

Assigning rights under an insurance policy

If, by contrast, it is solely the right to recover or claim certain proceeds under an insurance policy that is intended to be assigned, then in principle this should be possible. However care still needs to be taken to ensure that:

- the insurance is not personal to the insured but rather benefits successors in title
- there is no express prohibition or restriction on the assignment of any right or interest in respect of the insurance under the terms of the policy; and
- there is no prior ranking interest in the policy proceeds which will 'trump' the interest of an assignee—for example, the holder of a charge over the policy or a third party with 'cut-through' rights under the **Third Parties (Rights Against Insurers) Act 2010 (TP(RAI)A 2010)** (see Practice Note: **Third Parties (Rights Against Insurers) Act 2010**)

The personal nature of insurance policies

Personal rights cannot as a general rule be assigned. However certain contracts that are not personal in nature may be assignable 'where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it'. Contracts of insurance can be problematic in this context and may be incapable of being transferred where the identity of the insured is material to the risk undertaken by the insurer. An office-holder should, therefore, identify any rights under any insurance policies which are personal to the insured before contemplating any assignment of the same.

A good example of a personal insurance contract is a motor insurance policy, which involves personal considerations and is not assignable. The same could likely be said of a personal accident insurance policy.

Is the policy or claim capable of assignment?

Before seeking to assign any right in respect of an insurance policy, the office-holder should review the underlying insurance policy to see if there are any limits or prohibitions on assigning any rights under the policy. To the extent that the insurer's consent is required for any such assignment, then such consent should be obtained prior to effecting any such assignment. A purported assignment in breach of a non-assignment restriction will still be valid as between the assignor and assignee (thus entitling the assign-ee to sue for breach of contract against the assignor or pursue other remedies under the assignment) but will as a general principle be ineffective as against the non-assigning party.

Another relevant factor to consider is whether the rights under the relevant insurance policy are subject to any third-party rights that might impede any assignment. This may be the case where there are se-cured creditors with interests in the relevant insurance policies which are subject to security in favour of such creditors.

To whom can an office-holder assign rights under an insurance policy?

Subject to any limitations under the terms of an insurance policy, an office-holder has a wide discretion as to whom it might assign rights under an insurance policy. Examples of persons to whom office-holders can assign rights to recover under insurance policies include a shareholder of the claimant or potential claimant as well as a creditor of an insolvent company that is a potential claimant. An office-holder can assign a cause of action without approval from any creditors' committee or, subject to the terms of the underlying insurance policy, the consent of the insurer. In addition, liquidators and trustees in bankrupt-cy no longer need to seek the sanction of the court to any such assignment, bringing their powers into line with those enjoyed by administrators (see Practice Notes: **Roles, powers, functions and duties of an administrator**, **Role, powers, functions and duties of a liquidator** and **Roles, powers, functions and duties of a trustee in bankruptcy**).

Moreover, various provisions of the **Insolvency Act 1986 (IA 1986)** authorise an office-holder to assign a cause of action vested in an insolvent company or individual at the onset of insolvency. These provisions effectively operate as a statutory exception to the rules on maintenance and champerty, which have traditionally prevented assignments of causes of action to those with no legitimate interest in the relevant action. Maintenance is directed against 'wanton and officious intermeddling with the disputes of others', whilst champerty is concerned with agreements under which a third party might maintain an action in return for a share of the spoils of litigation.

References:

[Tolhurst v Associated Portland Cement Manufacturers Ltd \[1902\] 2 KB 660](#)
[Peters v General Accident Fire & Life Assurance Corporation Ltd \[1938\] 2 ALL ER 267](#)

References:

[Peters v General Accident \[1938\] 2 ALL ER 267](#)

References:

[Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd and others; and another appeal - \[1993\] 3 All ER 417](#)
[Helstan Securities Ltd v Hertfordshire County Council \[1978\] 3 ALL ER 262](#)

References:

[Massai Aviation Services and another v Attorney General and another \[2007\] UKPC 12](#)
[Small Business, Enterprise and Employment Act 2015, ss 120-121](#)

[References: Norglen Ltd v Reeds Rains Prudential Ltd \[1999\] 2 AC 1](#)
[British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd \[1908\] 1 KB 1006](#)

Risks associated with declining to assign rights under an insurance policy

In the case of liquidators or trustees in bankruptcy, a potential assignee who is entitled to have assigned to it a right in relation to an insurance policy can apply for a court order requiring the liquidator or trustee to assign it. As part of any such assignment, the assignee may be required to indemnify the office-holder for any costs incurred. The court has declined to compel a trustee in bankruptcy to assign a claim where the proposed assignee failed to offer the trustee an indemnity against any liability for costs.

The courts are, generally speaking, reluctant to interfere with an office-holder's commercial decisions and, in the case of liquidation, will tend to do so only where the office-holder's decision is unreasonable to the point of perversity. However there is the potential for an administrator to be ordered by a court to assign a cause of action on the basis that their failure to do so might cause unfair harm.

Equitable or legal assignment

The rules which govern whether an assignment is a legal or equitable assignment apply equally when seeking to assign the right to recover or claim under an insurance policy. In particular, a legal or statutory assignment is one which satisfies the requirements set out in [section 136](#) of the Law of Property Act 1925 ([LPA 1925](#)). A legal assignment properly executed results in the assignee being the sole owner of the claim assigned and being able to pursue the claim in their own name. Any other assignment that fails to meet the requirements for a legal assignment will represent an equitable assignment.

Drafting an assignment of rights under an insurance policy

When drafting an assignment of rights under an insurance policy, the parties will typically want to address the following matters:

- **What consideration is payable?**

Strictly speaking, consideration is not required for a legal assignment but is likely required for an equitable assignment if one takes the view that one is assigning the benefit of a future claim. In practice, given that an office-holder has a duty to obtain the best price reasonably obtainable when disposing of assets, the more appropriate view is that consideration should always be sought. The fact that consideration is paid to the assignor (whether nominal or otherwise), does not it seems extinguish the loss suffered so as to prevent the assignee from pursuing a claim to recover damages under the relevant policy.

Determining what represents the best price reasonably obtainable in the context of an insurance claim is not necessarily a straightforward task, particularly where a potential assignee seeks a discount on that claim. If in doubt, there is always the option for the office-holder to seek directions from the court as to whether to proceed with a proposed assignment.

- **Representations as to the availability to the insurer of any defences.**

An assignee takes a cause of action subject to any rights of set-off that have accrued before notice of assignment. In practical terms, this means that the assignee cannot be in a better position than the assignor and the value of an insurance claim might be severely impaired if the insurer has an available defence. As such, a well-advised assignee will likely seek to obtain confirmation that there are no defences available to the insurer and that the claim is capable of being sold, exchanged or assigned by the office-holder on behalf of the insured. An office-holder will likely seek to resist giving any such representations or, to the extent required, will qualify them as appropriate.

References: [IA 1986, ss 168\(4\), 303](#)
[Osborne v Cole \[1999\]](#)
[BPIR 251](#)

References: [Re Hans Place Ltd \(in liquidation\) \[1993\]](#)
[BCLC 768](#)
[IA 1986, Sch B1, para 74](#)
[Hockin and Hockin v Marsden and Bloom \[2014\]](#)
[EWHC 763 \(Ch\)](#)

References:
[Law of Property Act 1925, s 136](#)

References:
[Harding v Harding \(1886\) 17 QBD 442](#)
[Glegg v Bromley \[1912\] 3 KB 474](#)
[Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd and others; and another appeal \[1993\] 3 All ER 417](#)

References:
[IA 1986, Schedule B1 paragraph 63](#)

- **Covenants from the insured/assignor.**

The assignee may seek certain covenants from the insured, for example:

- o an undertaking to participate in any litigation against the insurer, or otherwise assist the assignee in pursuing any claim
- o an undertaking to provide witness statements where required or comment on any evidence produced by the insurer
- o an undertaking to preserve evidence or to provide further information as may be required by the assignee from time to time
- o covenants on the part of the insured not to do anything that might cause the right to recover under a policy to become void

Depending upon the nature and scope of covenants sought from the office-holder, an office-holder may reluctantly resolve that there is little advantage to be attained from selling the claim and may resolve to retain the claim and pursue its recovery directly instead.

- **Indemnities against costs.**

The assignee may request certain indemnities from the assignor to protect against any unforeseen or adverse costs incurred in pursuing the assigned claim. Conversely, it may in certain circumstances be appropriate for the assignor to seek indemnities from the assignee, particularly where litigation results from the assignee pursuing any claim and the court exercises its discretion to award costs against a non-party, such as an assignor who is not a party to proceedings.

References:
[Aiden Shipping Co Ltd v Interbulk Ltd; The Vimeira \[1986\] 2 All ER 409](#)

- **Notice of the assignment should be given to the insurer in order to effect a legal assignment.**

This serves to meet the requirements of a legal assignment as discussed further above. There is no prescribed time limit by when notice must be given to the insurer, although in the event that the assignee makes any claim before notice of the assignment is given, then the assignee will only be able to pursue that claim on an equitable assignment basis; in other words, by joining the assignor in that process.

Assignments of rights under certain insurance contracts subject to specific statutory regimes

The assignment of rights under certain contracts of insurance are now regulated by specific statutory regimes. Examples include:

- policies of life insurance
- policies of marine insurance; and
- those other situations where the third-party rights legislation applies

References:
[Policies of Assurance Act 1867, s 1](#)

References:
[Marine Insurance Act 1906, s 50\(2\)](#)

We consider the third of the above regimes in more detail below.

Impact of the Third Parties (Rights against Insurers) Act 2010

The common law rule of privity of contract prevents a person who is not party to a contract from enforcing that contract. However there are some important exceptions to this principle where either:

- the **Contracts (Rights of Third Parties) Act 1999 (C(RTP)A 1999)** applies; or
- the insured under a liability insurance policy becomes insolvent and the **Third Parties (Rights Against Insurers) Act 1930 (TP(RAI)A 1930)** or the **TP(RAI)A 2010** applies (see Practice Note: **Third Parties (Rights Against Insurers) Act 2010**)

Contracts (Rights of Third Parties) Act 1999

Under the **C(RTP)A 1999**, third parties may benefit from contractual terms where they are identified by name or class in the relevant insurance contract. Examples might include the following:

- a construction all risks insurance policy where the insured is the building contractor but which confers rights on a subcontractor (see Practice Note: **Construction insolvency—the Third Parties (Rights Against Insurers) Acts**)
- an insurance policy taken out by a bailee to cover goods but which covers the interests of the owner of those goods; and
- personal accident insurance policies taken out by employers for the benefit of individual employees

In essence, the **C(RTP)A 1999** regime may obviate any requirement to assign an insurance claim which is properly to be regarded as for the benefit of a third party. However the circumstances in which it applies are not always obvious. Whilst a policy may 'note' the interest of a third party, it may not necessarily follow that the third party is entitled to enforce any claim under that policy. Similarly, a third party's claim may be defeated by any defence which the insurer might have against the insured (for example, misrepresentation or breach of warranty and non-disclosure). Outside of certain limited exceptions such as construction all risks policies, third parties do not tend to be specifically identified as intended beneficiaries of insurance and more often than not the **C(RTP)A 1999** is expressly excluded in its entirety under the terms of insurance.

Third Parties (Rights against Insurers) Act 2010

The **Third Parties (Rights against Insurers) Act 2010** entered into force on 1 August 2016. The Act re-places the regime previously provided for by the **TP(RAI)A 1930** except in certain limited cases where the insured incurs liability to a third party and its insolvency occurred before the date on which the Act came into force. The overall scheme of **TP(RAI)A 1930** is maintained and allows a third party to claim compensation for losses caused by an insolvent person or company who has liability insurance (meaning insurance covering the risk of liability to third parties such as professional liability insurance). The legislation allows a third party to claim directly against the insurer provided certain conditions are met. They apply to all types of liability insurance including legal professional indemnity insurance and health insurance but do not apply to contracts of reinsurance (for further details, see Practice Note: **Third Parties (Rights Against Insurers) Act 2010**).

It would seem that, based on the **TP(RAI)A 2010**, any attempt by an office-holder to subsequently assign a liability insurance policy the rights in respect of which have vested in a third party, will take effect subject to the rights of the relevant third party. That being said, it is difficult to see why a potential assignee would be interested in taking an assignment of such a policy in these circumstances.

References:
[Third Parties \(Rights against Insurers\) Act 2010 \(Commencement\) Order 2016, SI 2016/550](#)

If you would like to contribute to Lexis®PSL Restructuring and Insolvency please contact:

Amy Himsworth
LexisNexis
Lexis House
30 Farringdon Street
EC4A 4HH

amy.himsworth@lexisnexis.co.uk
+44 (0)207 400 2934

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