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Policyholder Challenges Henkel's Ruling on Enforceability of Anti-Assignment Clause

In a ruling likely to be reviewed by California's Supreme Court, a state appeals court rejected a policyholder's argument that *Henkel Corp. v. Hartford Accident & Indemnity Co.*, 29 Cal.4th 934 (2003) was contrary to California Insurance Code Section 520, which provides that consent-to-assignment clauses are invalid. *SeeFluor Corp. v. Superior Court*, 2012 WL 3741979 (Cal.App. 4 Dist. Aug. 30, 2012). *Henkel* held that corporate successors were not entitled to recovery under an insurance policy assigned without the insurer's consent, even if the assignment was post-loss and therefore imposed no additional obligations on the insurer. The decision can complicate corporate transactions, making it necessary, for example, to evaluate whether an asset acquisition may impact the continuity of insurance.

Background

In *Fluor*, a successor corporation, Fluor-2, was formed as part of a "reverse spinoff" from its predecessor, Fluor-1. In the transaction, Fluor-1 retained its coal mining and energy operations and transferred its engineering, procurement, construction and project management services to Fluor-2. Between 1971 and 1986, Hartford had provided Fluor-1 with liability insurance coverage through policies that were invoked when Fluor entities were sued for injuries arising out of asbestos-containing materials at Fluor-1 sites that had been transferred to Fluor-2. Hartford, however, refused to provide coverage to Fluor-2, contending that it had not consented to the transfer of insurance rights to the new corporation.

Fluor-2 initiated coverage litigation against Hartford. Hartford argued that the policies issued to Fluor-1 as the named insured contained consent-to-assignment provisions prohibiting any assignment of any interest under the policy without Hartford's written consent, which was never sought or obtained. Hartford sought a declaration that it owed no duty to defend or indemnify Fluor-2 and that it had no duty to reimburse defense costs or indemnity payments.

Fluor-2 moved for summary adjudication, arguing that the relevant "losses" occurred 15 years before the reverse spinoff transaction and therefore the assignment was after the "loss." Fluor-2 argued that the consent-to-assignment clauses are invalid under California Insurance Code Section 520. Hartford opposed relying on *Henkel*'s holding that such clauses are enforceable until the loss matures to a liquidated sum.

The lower court refused to disregard *Henkel* based upon Section 520. Fluor-2 filed a writ of mandate, which was initially denied by an appellate court. The California Supreme Court vacated that order and an appeal to the intermediate appellate court resulted.

The Decision of the California Court of Appeal

Fluor-2 argued that *Henkel* was inconsistent with California Insurance Code Section 520. According to Fluor-2, Section 520, a 130-year-standing California statute, invalidates consent-to-assignment clauses in liability insurance policies after the insured "occurrence" has taken place. Thus, Fluor argued, *Henkel* should be disregarded because the California Supreme Court failed to consider Section 520 in deciding

the case. Fluor also argued that *Henkel*'s controversial ruling impedes corporate transactions and results in a forfeiture of insurance rights.

The court of appeal, however, found that *Henkel* could not be distinguished and followed *Henkel*'s ruling that consent-to-assignment clauses are generally valid and enforceable until the time that claims had been "reduced to a sum of money due." The court of appeals further held that Section 520 did not apply to liability insurance policies. It noted that at the time the statute was adopted in 1872, liability insurance did not exist as a concept, as insurance provided protection against only first-party marine, fire and property damage loss. As the court reasoned, after a first-party loss, an insurer's need to consent dissipates, because any assignment is only of money already due under the contract, whereas under third-party liability policies there are "definitional questions" of "loss," such as whether it is sustained at the time an insured becomes subjected to a judgment for money damages or when the victim of the insured's conduct sustains bodily injury or property damage.

The court of appeals therefore concluded that the 1872 legislature made no controlling pronouncements about liability insurance or how "loss" in the context of such policies is to be defined. "In the absence of an express legislative directive," the court of appeals found itself bound by *Henkel*.

Implications

The decision in *Fluor Corp. v. Superior Court* will likely be addressed by the California Supreme Court, which very well may hold that Section 520 should control. The issue was apparently not put before the court when *Henkel* was decided. Moreover, the rule in Insurance Code Section 520 that anti-assignment clauses should not prevent the assignment of claims under insurance policies after a "loss" seems more consistent with the economic realities of both insurance and corporate transactions. Until *Henkel* is overruled, however, corporate transactions involving insurance policies governed by California law may need to be evaluated for their impact on available insurance coverage.

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