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EXPERT ANALYSIS

Tapping Corporate Predecessors' Liability Insurance Policies Just Became Easier Following *Fluor* Ruling

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In a landmark decision, the California Supreme Court on Aug. 20 held that an anti-assignment clause in a liability insurance policy does not bar coverage where the assignment occurred post-loss. *Fluor Corp. v. Super. Ct. (Hartford Accident & Indem. Co.)*.[1]

The court found that enforcing such a clause where the assignment occurred post-loss was contrary to California Ins. Code § 520, which provides that consent-to-assignment clauses are invalid if invoked after a loss has happened.

The opinion overruled the California Supreme Court's prior decision in *Henkel Corp. v. Hartford Accident & Indemnity Co.*[2] *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 California Supreme Court's overruling of *Henkel* stands to facilitate corporate transactions by making it easier for companies to rely on insurance policies issued to their corporate predecessors. The holding also eliminates a weapon used by insurers to avoid paying claims after their policyholders make changes to their corporate structure.

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 Accident & Indemnity Co. had provided Fluor-1 with liability insurance coverage through policies later transferred to Fluor-2. Flour entities invoked those policies after they were sued for injuries arising from asbestos-containing materials at Fluor-1 sites. Hartford, however, refused to provide coverage to Fluor-2, contending it had not consented to the transfer of insurance rights to the new corporation.

Fluor-2 initiated coverage litigation against Hartford. The insurer 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. Relying on *Henkel*, Hartford sought a declaration that it owed no duty to defend or indemnify Fluor-2 and 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 Section 520, and asserted that *Henkel* was not controlling because the California Supreme Court failed to consider Section 520.

An agreement not to transfer the claim of the insured against the insurer after a loss has happened is void if made before the loss except as otherwise provided in Article 2 of Chapter 1 of Part 2 of Division 2 of Section 520.

The California Court of Appeal sided with the insurer, finding that *Henkel* could not be distinguished, and upheld *Henkel*'s ruling that consent-to-assignment clauses are generally valid and enforceable up until the time that claims had been "reduced to a sum of money due."

The Court of Appeal further held that Section 520 could not invalidate the consent-to-assignment clause because Section 520 was never intended to apply to liability insurance policies. The appeals court noted that at the time the statute was adopted in 1872, liability insurance did not exist as a concept. Accordingly, "[i]n the absence of an express legislative directive," the Court of Appeal found itself bound by *Henkel*.

CALIFORNIA SUPREME COURT DECISION

The California Supreme Court's overruling of Henkel *stands to facilitate corporate transactions by making it easier for companies to rely on insurance policies issued to their corporate predecessors.*

The Supreme Court reversed the Court of Appeal and overruled its prior ruling in *Henkel*. The high court found that *Henkel* was improperly decided without considering the history and intent of Section 520. The Supreme Court thoroughly reviewed the legislative history of Section 520 and decisions leading up to its enactment, and determined the Legislature did not intend to exclude liability insurance policies from the scope of Section 520.

The Supreme Court further confirmed that Section 520's language permitting assignments of coverage "after a loss has happened" allows assignments of coverage after the damage or injurious event has occurred, as opposed to only after a loss has been reduced to a "perfected" claim or a final judgment. "The post-loss exception to the general rule of restricted insurance assignability is a venerable rule borne of experience and practicality."[3]

IMPLICATIONS

The California Supreme Court's decision in *Fluor* brings the state back in line with the majority of jurisdictions that prohibit insurers from invoking anti-assignment clauses to escape coverage for losses occurring prior to the assignment.

The court's highly anticipated decision and its overruling of *Henkel* is consistent with the economic realities of both insurance and corporate transactions. *Henkel* had allowed insurers to stymie corporate transactions where consent was sought, or avoid paying claims where it was not, giving insurers a windfall, as post-loss assignments do not actually increase the risk to the insurers. In comparison, the rule articulated in *Fluor* eliminates the need to seek consent to an assignment after a covered loss, and it will prevent insurers from avoiding payment of claims simply because consent to that assignment was not sought.

The *Fluor* opinion stands to facilitate corporate transactions and economic development by bolstering corporate policyholders' ability to assign their rights to insurance coverage to their corporate successors. As Chief Justice Tani Cantil-Sakuaye explained, the decision will "facilitat[e] the productive transformation of corporate entities and thereby foster ... economic activity."[4]

In light of the decision in *Fluor*, those policyholders who once considered *Henkel* to be an obstacle to corporate transactions or their recoupment of seemingly lost insurance coverage should reconsider their options. Counsel can assist policyholders in evaluating whether they now have available avenues to secure insurance benefits in the post-*Henkel* landscape.

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NOTES

[1] *Fluor Corp. v. Super. Ct.*, No. S205889, 191 Cal. Rptr. 3d 498, 2015 WL 4938295 (Cal. 2015).

[2] *Henkel Corp. v. Hartford Accident & Indem. Co.*, 29 Cal. 4th 934 (2003).

[3] *Fluor*, 191 Cal. Rptr. 3d 498, 2015 WL 4938295 at *25 (citing 1 STEMPEL ON INSURANCE CONTRACTS (3d ed. 2014) at 3-125 to 3-126).

[4] *Fluor*, 191 Cal. Rptr. 3d 498, 2015 WL 1938295 at *2.



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