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In Reversal, California Supreme Court Allows Assignment of Coverage for Liability Claims

By Robert L. Wallan

California's Supreme Court has reversed its own heavily criticized decision from 2003 in Henkel Corp. v. Hartford Accident & Indem. Co. *(2003) 29 Cal. 4th 934. In* Fluor Corp. v. Superior Court, *the Court announced that its rule against assignment as adopted in* Henkel *must be reversed because the earlier decision had failed to consider a 19th-century statute that dictates a rule favoring assignability. The decision brings California into line with the large majority of states, and it is especially relevant to corporate policyholders who have been through or face corporate spinoffs and other mergers and acquisition transactions.*

Virtually all insurance policies contain language to the effect that insurance policies may not be assigned without the prior written consent of the insurance company. In the context of property and other first party insurance, the Court has long recognized that a right to coverage may be assigned once a loss has taken place. The rationale is that the insurance company accepted a premium to assume a risk, and thus the insurance company should not be able to avoid coverage for the existing loss simply because of an assignment or other transfer of the right to recover insurance proceeds. While pre-loss policy transfers could increase risk for the insurer, once a loss has taken place, the insurer bears no added risk by assignment of the claim. California's Insurance Code section 520 codifies that it is against public policy for insurers to try to obtain windfalls by avoiding their obligations to pay for existing covered losses.

In the context of liability or "third party" insurance such as CGL policies, the insurance industry had obtained just such a windfall in the form of the 2003 *Henkel* decision. In last Thursday's decision, the court addressed an effort by Hartford Insurance to avoid coverage for long-tail asbestos exposure claims. The policyholder, Fluor, had gone through a reverse spinoff by which its existing long-term operations were placed into a newly formed corporate entity. Although the new entity continued Fluor's historic business and retained the associated liabilities, Hartford sought to score a windfall by arguing that the transaction freed the insurer of its obligation to defend and indemnify Fluor for what were otherwise covered claims.

The Supreme Court engaged in a detailed review of the legislative history of section 520, the predecessor of which was written before the advent of liability insurance in the 19th century. Relying on legislative history, insurance treatises from the last 100 years and numerous court decisions from other states, the Court concluded that its pro-insurer rule in *Henkel* could not withstand scrutiny under what the Court held is the controlling statute.

Companies going through mergers and spinoffs are necessarily concerned about indemnification, insurance and related concerns. While the general prohibition on assignment of policies for future injuries remains intact, the new decision allows for the assignment of insurance rights for past injuries, such as asbestos exposure and other personal injuries that typically take place over a period of years.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the author below.

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