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LANDMARK CALIFORNIA SUPREME COURT DECISION EXPANDS CIRCUMSTANCES UNDER WHICH POLICYHOLDERS MAY ASSIGN POLICY RIGHTS UNDER THIRD PARTY LIABILITY POLICIES WITHOUT INSURER CONSENT

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Third party liability insurance policies often contain "consent to assignment" clauses which purport to bar insureds from assigning policies without insurer consent. In the case of *Henkel Corp. v. Hartford Accident & Indemnity Co*., 29 Cal.4th 934 (2003), the California Supreme Court determined, under the specific facts of that case, that such clauses barred the insured from assigning policy rights without the insurer's consent until there exists a "chose in action" against the insured, which occurs when the claims against the insured have "been reduced to a sum of money due or to become due under the policy." In *Fluor Corporation v. Superior Court of Orange County*, the California Supreme Court granted review to consider whether Section 520 of the California Insurance Code—an 1872 provision which bars an insurer, "after a loss has happened," from refusing to honor an insured's assignment of the right to invoke the insurance policy's coverage for such a loss—mandated reversal of the *Henkel* decision. In *Fluor*, a result of a reverse spinoff, the insurance rights of a corporate insured has been assigned to another entity without the insurer's consent. Prior to the assignment, the insurer had been defending the insured from ongoing asbestos-related litigation. After the assignment, the insurer belatedly sought a declaration that it had no further duties to defend and/or indemnify the assignee in connection with ongoing litigation. The California Supreme Court began its analysis by noting that "[t]he recognized rationale for enforcing a consent-to-assignment clause is to protect an insurer from bearing a risk or burden relating to a loss that is greater than what it agreed to undertake when issuing a policy." The court also recognized, however, a longstanding "postloss" exception to the general rule restricting assignability which precluded an insurer, after a loss has occurred, from refusing to honor an insured's assignment of the right to invoke policy coverage for such a loss. Such rule, the court noted, "has been described as a venerable one, borne of experience and practice, facilitating the productive transformation of corporate entities, and thereby fostering economic activity." The court also recognized that the "postloss rule prevents an insurer from engaging in unfair or oppressive conduct — namely, precluding assignment of an insured's right to invoke coverage under a policy attributable to past time periods for which the insured had paid premiums." Based on the language of Section 520 and

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the foregoing considerations, the court held that “after personal injury (or property damage) resulting in loss occurs within the time limits of the policy, an insurer is precluded from refusing to honor an insured’s assignment of the right to invoke defense or indemnification coverage regarding that loss…. This result obtains even without consent by the insurer — and even though the dollar amount of the loss remains unknown or undetermined until established later by a judgment or approved settlement” as long as a claim has already been made prior to the assignment. The court reversed *Henkel* to the extent inconsistent with its ruling. The *Fluor* decision has important implications for corporate policyholders. After *Henkel* and before *Fluor*, in the course of transferring assets and liabilities to another business entity in connection with a corporate sale or reorganization, a purported assignment of rights to claim defense and indemnification coverage provided by prior and existing insurance policies concerning the business’ previous conduct may not have been enforceable depending on the facts of the case. In light of *Fluor*, however, the surviving business entity may be able to seek insurance coverage to the extent the assignment takes place after a loss has occurred and claim made, even without the consent of the insurer.