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August 26, 2015

California Supreme Court Reverses Prior Ruling On Anti-Assignment Clauses

In *Fluor Corporation v. The Superior Court of Orange County* (Hartford Accident & Indemnity Co., real party in interest), 2015 Cal. LEXIS 5631 (Aug. 20, 2015), the California Supreme Court determined that California Insurance Code §520 applies to liability insurance policies, and in doing so, overruled *Henkel Corp. v. Hartford Accident & Indemnity Co*. (2003) 29 Cal.4th 934 ("*Henkel*"), one of the more prominent cases in the country addressing the issue of anti-assignment clauses.

The insured ("Fluor") created a new, separate entity ("Fluor-2") for the purposes of effecting a "reverse spinoff" for tax purposes. Fluor-2 was assigned all of Fluor's "Parent Assets and Parent Liabilities," which included insurance rights. Fluor notified its insurer ("Hartford") that it had created Fluor-2, and had additionally changed the name of Fluor to Massey Energy Company.

Fluor's historical operations made it a regular defendant in asbestos bodily injury lawsuits. Hartford had defended the asbestos suits without controversy, but "various ancillary questions" caused Fluor-2 to file a declaratory relief action against Hartford in 2006. Ultimately, Hartford alleged in a cross-complaint that "the reverse spinoff reflected a '*purported* assignment of insurance rights… to Fluor-2, and because this was done without Hartford's consent, no effective assignment of the right to invoke coverage under the policies occurred." (Italics added.)

Fluor-2 argued that California Insurance Code §520 precluded Hartford from claiming that Fluor-2 had no rights under the Fluor policies. This provision, noted Fluor-2, expressly restricts an insurer's ability to limit an insured's right to transfer or assign a claim for liability coverage, and states that, "[a]n 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 this code."

The trial court refused to apply §520 as argued by Fluor-2, instead applying the rule announced in *Henkel*; namely, that an insurer's consent-to-assignment clause is enforceable to preclude the right to invoke coverage even after the coverage triggering event had happened. The California Court of Appeal affirmed the trial court's summary judgment in favor of Hartford, reasoning that §520's history indicated the Legislature intended the statute only apply to first-party insurance policies, based on the concept of "loss."

On further appeal, however, the Supreme Court looked to the legislative and case law history of §520, and concluded that the phrase "after the loss has happened," as stated in §520, "should be interpreted as referring to a loss sustained by a third party that is covered by the insured's policy, and for which the insured may be liable." The Court further stated that "[s]pecifically, as applied to this case and similar circumstances, only such an interpretation protects the ability of an insured, in the course of transferring assets and liabilities to another business entity in connection with a corporate sale or reorganization, to assign rights to claim defense and indemnification coverage by prior and existing insurance policies concerning the business's previous conduct." The Court further observed that its decision in *Henkel* was inconsistent with the majority of courts throughout the country on the issue of assignment of policy rights. Accordingly, the Court concluded that because its decision in *Henkel* was inconsistent with §520 and therefore should be overruled.

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