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California Insurance Coverage Law Alert

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Liability Insurer's "No Assignment" Clause Enforced

In Fluor Corporation v. Superior Court (Hartford Acc. & Indem. Co.), decided August 30, 2012, the Court of Appeal, Fourth Appellate District, held that a liability insurer's "consent-to-assignment" clause was enforceable against an insured corporation that attempted to assign its rights to a related corporation as part of a complex corporate restructuring.

An almost identical "no assignment" issue was heavily litigated in Henkel Corp. v. Hartford Accident & Indemnity Co., 29 Cal.4th 934 (2003), in which the California Supreme Court upheld the validity and enforceability of the "consent-to-assignment" clause. Here, however, the Fluor Corporation argued that the Henkel decision was incorrectly decided because the Supreme Court was not apprised of the existence of a statute enacted in 1872 which
provides: "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…." That statute has been addressed in only one other published case.

The Court of Appeal found that the statute, although still valid, bears no legislative intention on the assignability of *liability* insurance because liability insurance did not exist in 1872.

The plaintiff in this case, "Fluor 2" was incorporated in 2000 as a result of a corporate restructuring on the Fluor Corporation ("Fluor 1") which was created in 1924. As part of the restructuring, Fluor 1 assigned its engineering and construction work to Fluor 2; it retained its coal mining and energy operations and was re-named Massey Energy Company. After the restructuring, the companies were independent, unrelated entities.

Hartford issued Fluor 1 comprehensive general liability policies between 1971 and 1986. Hartford defended and indemnified both Fluor 1 and Fluor 2 in asbestos-related lawsuits between 2001 and 2008. In 2006, Fluor 2 initiated this action to resolve a number of coverage issues.

Hartford asserted that the Fluor companies breached the consent-to-assignment clause in the policies, and thus, Fluor 2 was not entitled to defense or indemnity. Fluor 2 countered that the consent-to-assignment clause violated the 1872 statute (since recodified as Insurance Code section 520). Fluor 2 further argued that Henkel should not be applied because the Supreme Court failed to address the application of Section 520 and that Section 520 invalidates consent-to-assignment clauses after the insured "occurrence" has taken place.

The Court of Appeal found that the Henkel decision was properly decided and was controlling. It reasoned that Section 520 was originally enacted in 1872 as Civil Code section 2599, and was recodified as Section 520 when the Insurance Code was enacted in 1935. It is "an obscure" statute that is unmentioned in either treatise or commentary, and was mentioned only in passing in one 1965 first-party decision. In 1872, liability insurance did not exist; there was only first-party marine, fire and property insurance. Thus, the "loss" to which the statute refers is "easily identifiable" as first-party property damage coverage.

Fluor 2 argued that the statute became effective as to liability policies when it was made a part of the Insurance Code. The Court of Appeal disagreed, citing Insurance Code section 2: where the provisions of the Code are substantially the same as they existed as part of the Civil Code, they relate "to the same subject matter [and] shall be construed as restatements and continuations thereof, and not as new enactments."

Moreover, the Insurance Code defines "loss" as used in liability policies as the time when the insured becomes liable to an injured person, not when the person is injured (i.e., the "occurrence"). The "occurrence" as the time of "loss" argument was rejected by the Supreme Court in Henkel. Thus, the Court rejected Fluor's argument that Henkel was wrongly decided and that Section 520 invalidated the consent-to-assignment clause.

"If the rule of law in Henkel is to be vitiated, the Legislature in the 21st Century, not the Legislature in the 19th Century, must do it."

Alison Greene's practice encompasses insurance coverage analysis and advice, insurance coverage and bad faith litigation, as well as general business litigation. She can be reached at 510.835.6724 or agreene@burnhambrown.com.