S205889

COPY

IN THE SUPREME COURT OF CALIFORNIA

FLUOR CORPORATION,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE,
Respondent,

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Real Party in Interest.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE
CASE NO. G045579

FOLLOWING A GRANT OF REVIEW AND TRANSFER BY THE SUPREME COURT OF CALIFORNIA
CASE NO. S196592

PETITION FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE
CASE NO. 06CC00016, RONALD BAUER, JUDGE

ANSWER BRIEF ON THE MERITS

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ANSWER BRIEF ON THE MERITS

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Does Insurance Code section 520[1] prohibit an insurer from requiring an insured to obtain consent before transferring an interest in an insurance policy to a third party?

2. In circumstances where section 520 voids enforcement of an anti-assignment agreement barring the transfer of a claim of

[1] Insurance Code section 520 reads in full: "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 this code." All further references are to the Insurance Code unless otherwise indicated.

the insured against its insurer after a loss has occurred, at what point in time does the "loss" occur?

3. Did the Court of Appeal err in ruling alternatively that there are general issues of material fact on whether Fluor-1 ever intended to assign to Fluor-2 Fluor-1's rights to coverage under the third-party liability policies Hartford issued to Fluor-1?

INTRODUCTION

This case involves the right of an insurer to enforce policy language prohibiting the assignment of its insurance policy to a third party without the insurer's consent. In *Henkel Corp. v. Hartford Accident & Indemnity Co.* (2003) 29 Cal.4th 934 (*Henkel*), this court held that insurers are entitled to enforce such consent-to-assignment provisions in their policies as long as those provisions do not prohibit an insured from assigning a particular claim that has already been reduced to a sum certain. Now, a decade after the *Henkel* decision, Fluor Corporation (Fluor-2)—a company that never purchased an insurance policy from Hartford Accident and Indemnity Company (Hartford)—seeks to overturn *Henkel* and force Hartford to provide defense and coverage to Fluor-2 in ongoing asbestos litigation, even though Hartford never consented to cover Fluor-2 under any policy.[2]

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[2] In this brief, Hartford adopts the naming conventions that the Court of Appeal used to distinguish between the original "Fluor Corporation" to whom the Hartford policies were issued (Fluor-1, (continued...)

Fluor-2 claims that *Henkel* was wrongly decided because this court "ruled out of ignorance" in failing to address the effects of Insurance Code section 520, and that the Court of Appeal "engaged in faulty analysis," reaching the "unprecedented result" that section 520 applies only to first-party property policies. Fluor-2's criticisms of this court and the Court of Appeal are unfair.

Fluor-2 trumpets that section 520 "should have governed the debate" in *Henkel*—blaming the insurers for having never "informed the Court" of that statute. (OBOM 1.) But forty-two pages later, Fluor-2 more quietly acknowledges that section 520 "would not alter the result in *Henkel*." (OBOM 43.) Then, after accusing the Court of Appeal of reaching the "unprecedented result" of refusing to apply a general rule involving insurance to a third-party liability policy (OBOM 19), Fluor-2 quotes the actual language from the Court of Appeal's opinion demonstrating that the court was doing nothing more than making the obvious point that the Legislature in 1872 could not have pronounced a definition of "loss" in the context of liability insurance because liability insurance did not then exist. (OBOM 26.)

For several reasons, the Court of Appeal was correct in holding that section 520 does not alter this court's *Henkel* opinion and does not serve to prohibit Hartford from enforcing the assignment limitations of its insurance policies in this case.

(...continued)
now known as Massey Energy Company) and Plaintiff (and Petitioner) Fluor-2, which first came into existence in 2000.

First, by its terms, section 520 voids only "[a]n agreement not to transfer the *claim* of the insured against the insurer." (Ins. Code, § 520, emphasis added.) Section 520 has no application here because the Hartford policies did not prohibit the assignment of a "claim" from the insurer to the insured, they prohibited the transfer of a policy "interest" without consent. Fluor-2 does not assert that it holds a claim that the insured, Fluor-1, had against its insurer, Hartford. Rather, Fluor-2 claims that it was assigned all of the benefits of the insurance policies purchased by Fluor-1 from Hartford. In essence, Fluor-2 claims that it was substituted in place of Fluor-1 as the insured under the Hartford policies. But Fluor-2's attempt to substitute itself for the named insured is precisely the type of assignment of interests that the Hartford policies prohibit, and agreements to prohibit such nonconsensual assignments are enforceable under well-established law. Because nothing in section 520 prohibits policy language that prevents the transfer of an insured's *interest* in a policy to a third party, the decision of the Court of Appeal should be affirmed.

Second, the language of section 520 voids agreements not to transfer the claim of an insured against the insurer after a "loss" has happened. But section 520 does not provide any definition for when a loss occurs, and that is fatal to Fluor-2's argument here. In *Henkel*, this court found that under the common law, an insured's claim against its insurer may be transferred to a third party regardless of an agreement to the contrary when, at the time of the assignment, the benefit has been reduced to a claim for money due or to become due. (*Henkel*, *supra*, 29 Cal.4th at pp. 944-945.)

Because section 520 provides no other definition for the word "loss," this court should continue to use the definition provided under the common law as expressed by this court in *Henkel.*

Fluor-2 argues that the definition of "loss" in section 520 is not provided by this court in *Henkel*, but is instead provided by this court's opinion in *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645 (*Montrose*)—a case that does not involve consent-to-assignment provisions and was not decided until more than a century after section 520 was enacted. Just as section 520 did not define when "loss" happens under third-party liability policies, this court in *Montrose* did not define when "loss" happens under section 520. Cannons of statutory construction dictate that this court should affirm the conclusion in *Henkel* that "loss," for purposes of the enforcement of anti-assignment provisions in third-party liability policies, occurs when the insured's claim against the insurer has been reduced to a chose in action.

Moreover, strong public policy concerns support that conclusion, which this court reached in *Henkel.* Notwithstanding Fluor-2's contentions to the contrary, there is no windfall to an insurer under the *Henkel* ruling. Hartford continues to provide coverage to the party it contracted to insure, namely Fluor-1, which continues its business operations to this day. It would be inequitable (not to mention inefficient), on the other hand, to require insurers to cover strangers to the insurance contract, particularly when (as *Henkel* demonstrates) such a rule could require an insurer to defend a multitude of entities it did not

contemplate when underwriting the covered risk. Yet the rule that Fluor-2 proposes would allow precisely that.

Third, by its terms section 520 does not apply to void an anti-assignment agreement unless that agreement is made "before the loss." Even under the definition of "loss" provided by *Montrose*—the definition advocated by Fluor-2—the "loss" occurred when the plaintiffs in the underlying lawsuits were *first* exposed to asbestos. Here, most, if not all, of the asbestos exposures to the plaintiffs first occurred before the Hartford policies were issued in 1971. Therefore, if *Montrose* were to provide the definition of loss under section 520, that very definition permits the enforcement of the consent-to-assignment provisions in the Hartford policies here.

Fourth and finally, even if Fluor-2 were correct that the consent-to-assignment clause is void, the Court of Appeal properly concluded that several disputed factual issues would preclude summary adjudication in favor of Fluor-2. There is no evidence in the record that Fluor-1 ever assigned or transferred its policies to Fluor-2. In the Superior Court, Fluor-2 argued that it was a "mere continuation" of Fluor-1, and thus "retained" the rights under the Hartford policies, a puzzling argument in view of the fact that the Hartford policies were effective from May 1, 1971 to July 1, 1986, and Fluor-2 did not come into existence until September 11, 2000. On appeal, however, it abandoned that "mere continuation" argument in favor of its current "assignment" argument. The Court of Appeal thus correctly found that even if Fluor-2 were correct that section 520 would in theory have permitted Fluor-1 to assign the policies to Fluor-2, whether such an assignment occurred is a

disputed fact that renders the case inappropriate for summary adjudication.

STATEMENT OF FACTS

A. Hartford insures and defends Fluor-1.

Hartford issued a series of eleven primary liability insurance policies (the Hartford Policies) to Fluor-1 for periods from May 1, 1971 to July 1, 1986. (Exh. 2, pp. 28-1338.)[3] At the time the Hartford Policies were issued, Fluor-1 was a diversified company that included not only engineering, procurement and construction management services (collectively the EPC businesses) (Exh. 22, pp. 10214-10222), but also coal, energy and mining businesses (Exh. 22, pp. 9961-9964). The "Named Insured" under the Hartford Policies is identified as "FLUOR CORPORATION and any subsidiary or affiliated companies, corporations, organizations or other entities as may exist or may be formed or acquired hereafter," with the exception of a few subsidiaries that were subject to express exclusions in the policies. (See, e.g., Exh. 2, pp. 107, 908-909.) This is the entity that is now being referred to as Fluor-1.

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[3] The term Exh. __, p. __ refers to the consecutively paginated exhibits submitted to the Court of Appeal with Fluor-2's Petition for Peremptory Writ of Mandate (Aug. 1, 2011) (Writ Petition) and Hartford's Answer to Petition for Peremptory Writ of Mandate (Feb. 8, 2012).

Each of the Hartford Policies contains a consent-to-assignment condition. The condition does not require Hartford's consent to an assignment of proceeds that Fluor-1 is entitled to recover from Hartford or that Hartford may otherwise be obligated to pay, but it does require Hartford's consent to an assignment of an interest in the policy:

> J. Assignment. Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon.

(Exh. 2, p. 120.) Accordingly, the insured cannot substitute another entity for itself, nor add additional insureds beyond those identified in the policies, without Hartford's consent.

Beginning in the mid-1980's, Fluor-1 and a number of its subsidiaries began to be named as defendants in asbestos-related bodily injury actions. Fluor-1 tendered these suits to Hartford and Fluor-1's other liability insurers, which accepted the defense of those claims. (Exh. 24, pp. 10651-10652 [No. 57].) Hartford took the lead, working with Fluor-1 in the handling and management of those actions for years and paying millions of dollars of defense and indemnity on Fluor-1's behalf. (Exh. 22, pp. 10029-10106.)

B. Fluor-2 is formed and asserts rights under the guise of Fluor-1.

On or about September 11, 2000, plaintiff Fluor-2 was incorporated as a newly-formed entity under the laws of Delaware. (Exh. 22, pp. 10004, 10005, 10027.) Fluor-2 had no corporate existence prior to that date. On or about November 30, 2000,

Fluor-1 changed its name to Massey Energy Company (Massey). On the same date, Fluor-1 transferred certain businesses to Fluor-2, which Fluor-2 refers to as "EPC" businesses, while retaining its coal- and energy-related businesses.

The transaction was a reverse spin-off. Massey (Fluor-1) was not the company spun off, but the company that remained in place. In this unusual maneuver, a new company was formed that switched names with the old one, and the old company took a new name. In connection with this transaction, neither Fluor-1 nor Fluor-2 ever sought (much less obtained) Hartford's consent to any transfer of rights or interests under the Hartford Policies, and therefore no such transfer was ever recorded or endorsed on the Policies. Without informing Hartford that it was a newly formed entity, and not the "Fluor Corporation" to which Hartford issued the Hartford Policies, Fluor-2 (as Fluor Corporation) began to tender claims to Hartford. Hartford continued to respond to these suits, as it believed "Fluor Corporation" to be Fluor-1, the entity to which the Hartford Policies were issued.[4]

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[4] The evidence that Fluor-2 provided to Hartford was ambiguous as to whether it was a newly-incorporated entity. Alan Oxx, Hartford's claims handler, made contemporaneous notes reflecting his understanding that Fluor was the same company it had always been, and that "[i]n November 2000 Massey split off from Fluor and formed its own corporation." (Exh. 22, p. 10228.) He later confirmed at his deposition that he "believe[d] that the Fluor Corporation I was dealing with was the Fluor Corporation that were [*sic*] on the policies." (Exh. 12, pp. 4457-4458 [302:24-303:10].) That testimony was uncontroverted.

C. Hartford learns that "Fluor" is Fluor-2.

Unaware that it was receiving tenders of claims from Fluor-2, not Fluor-1, Hartford continued to defend and indemnify Fluor-2 from late 2000 until October 2008. In October 2008, Fluor-2, as purported indemnitor, tendered to Hartford an asbestos suit that named Fluor-1, i.e., Massey, as a defendant but not Fluor-2. (Exh. 2, p. 23 [¶¶ 14-15]; Exh. 21, p. 9937 [¶ 36]; Exh. 24, pp. 10731-10733 [112:19-114:17].) When Hartford inquired as to why this suit had been tendered for defense to Hartford, Fluor-2 provided Hartford with executed transactional documents revealing that the entity that had been tendering claims to Hartford since 2000 was not the same "Fluor Corporation" to which the Hartford Policies were issued, but was instead a distinct corporate entity created years after the policies terminated. (Exh. 24, pp. 10731-10733 [112:19-114:17].)

Hartford immediately sought to amend its pleadings to include causes of action based on this discovery, including a declaration that Hartford has no duty to provide coverage to Fluor-2. (Exh. 24, p. 10738.) The court entered a stipulation allowing for amended pleadings, and Hartford in turn submitted its second amended cross-complaint on August 10, 2009. (Exh. 1, pp. 1-19.) There, Hartford asserted that, to the extent Fluor-1 and Fluor-2 intended Fluor-2 to receive the Hartford Policies from Fluor-1, they failed to comply with the consent-to-assignment provisions of the Policies. (Exh. 1, p. 8 [¶ 44].) Fluor-2 issued a general denial of

all the facts alleged by Hartford, including that there had been any attempt to assign any policy interests from Fluor-1 to Fluor-2.

D. Fluor-2 moves for summary adjudication.

Fluor-2 moved for summary adjudication on Hartford's causes of action that Hartford has no duty to provide coverage to Fluor-2, relying on the alternative ground that section 520 precludes enforcement of the consent-to-assignment provision in the Hartford Policies.[5] (See, generally, Exhs. 4-19, pp. 1413-9893.) The trial court denied Fluor-2's summary adjudication motion in a minute order dated June 27, 2011. (Exh. 37, p. 10941.) In response, Fluor-2 filed its writ petition.

In response to Fluor-2's writ petition, the Court of Appeal requested an informal response from Hartford. Hartford responded, Fluor-2 replied, and shortly thereafter the Court of Appeal summarily denied the petition. (Exh. 44, p. 11063.) Fluor-2 then sought review from this court, which, in an order dated November 16, 2011, granted the petition and transferred the matter to the Court of Appeal with directions to vacate its summary denial and to issue an order directing the superior court to show cause why the relief sought should not be granted. On December 9, 2011, the Court of Appeal issued such an order and requested full briefing from petitioner and Hartford, as real party-in-interest.

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[5] Fluor-2's lead argument was statute of limitations, which the trial court rejected. (Exh. 37, p. 10941.) Fluor-2 did not seek review of that ruling.

On August 30, 2012, the Court of Appeal issued an 18-page opinion denying the petition on two grounds. First, the Court of Appeal rejected Fluor-2's contention that section 520 contradicted this court's decision in *Henkel*. (Typed opn., 18.) Finding that the facts of this case were on all fours with *Henkel* and that "*Henkel* directly applies to the Hartford policies," the Court of Appeal agreed that Fluor-2 could not unilaterally substitute itself as an insured under the Hartford Policies. (Typed opn., 8, 9-10.) Second, and independently, the Court of Appeal found that there was a " 'fact intensive inquiry' " as to whether Fluor-1 ever intended to assign the Hartford Policies to Fluor-2, making "issuance of a peremptory writ [ ] premature." (Typed opn., 18.)

Fluor-2 sought review in this court, which this court granted on December 12, 2012. (*Fluor Corp. v. Superior Court* (2012) 208 Cal.App.4th 1506 [146 Cal.Rptr.3d 527], review granted Dec. 12, 2012 (S205889).)

LEGAL ARGUMENT

I. INSURANCE CODE SECTION 520 NEITHER ALTERS THE RESULT IN *HENKEL* NOR PROHIBITS THE ENFORCEMENT OF THE CONSENT-TO-ASSIGNMENT PROVISIONS IN THE HARTFORD POLICIES.

A. Section 520 prohibits post-loss assignments of claims by the insured against the insurer, and does not apply to transfers of policy "interests."

In its opening brief, Fluor-2 contends that section 520, not *Henkel*, determines the point at which assignment conditions become unenforceable. (OBOM 19.) Hartford does not dispute that section 520 potentially limits assignment conditions that restrict post-"loss" assignments. But that is beside the point, because section 520 does not fashion a rule that is different from the rule that this court announced in *Henkel*. In 1872, the California Legislature enacted the code provision that, in essence, has become Insurance Code section 520. That provision prohibits restrictions on the assignment of claims by an insured against its insurer, if agreed to before the "loss" has occurred:

> 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.

(Ins. Code, § 520.) The statute does not affect the consent-to-assignment condition in the Hartford Policies, because the policy condition does not restrict the transfer of any claim by Fluor-1

against Hartford, i.e., a right to money that is or will become due. Instead, the consent-to-assignment condition in the Hartford Policies applies only to the transfer of "interests" under the policies:

> J. Assignment. Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon.

(Exh. 2, p. 120.)

Hartford does not dispute that Fluor-1, as an insured, could freely transfer its claims (if any) against Hartford under the Policies to any other entity, including Fluor-2. But that is not what Fluor-2 seeks to accomplish in this writ proceeding. Hartford continues to provide coverage to Fluor-1. Fluor-2 is not seeking to acquire any claims that Fluor-1 might have against Hartford on account of underlying claims asserted by Fluor-1. Fluor-2's argument is that section 520 permits Fluor-2 to substitute itself as an insured under the relevant insurance contracts and receive benefits for claims asserted against Fluor-2, even though Hartford never agreed to insure Fluor-2 (and, indeed, Fluor-2 did not exist until fifteen years after the Hartford Policies were issued).

This court has long recognized the difference between an assignment conferring an "interest" in an insurance policy from an assignment of the right to recover on a claim against the insurer. (See *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 661-662 [condition requiring insurer's consent to assignment of interest "does not preclude the transfer of a cause of action for damages for breach of contract"].) Indeed the majority and dissent in *Henkel* agreed that an insurer was entitled to prohibit the transfer of the policy itself. (Compare *Henkel, supra,* 29 Cal.4th at

p. 943 [assignment conditions in liability policies are "generally valid and enforceable," including conditions that prohibit the transfer of policy interests, citing *Bergson v. Builders' Ins. Co.* (1869) 38 Cal. 541, 545 (*Bergson*) and *Greco v. Oregon Mut. Fire Ins. Co.* (1961) 191 Cal.App.2d 674, 682 (*Greco*)] with *Henkel*, at pp. 946-947 (dis. opn. of Moreno, J.), quoting 2 Couch on Insurance (3d ed. 1997) § 34:25 ["assignment is valid following occurrence of the loss insured against and is then regarded as chose in action *rather than transfer of actual policy*" (emphasis added)].)

Indeed, this flows directly from the cases that *Henkel* cites, including *Bergson*. In *Bergson*, this court held that an insurer is entitled to measure the risk of whom is being insured, and is not required to insure those with whom he is not in contractual privity. The reason for this rule is that, until a claim for benefits against the insurer materializes, a change in the identity of the insured may amount to a change in risk:

> The insurer has a right to know, and an interest in knowing, for whom he stands as an insurer. He may be willing to insure one person and unwilling to insure another, while the owner of a particular parcel of property. He may have confidence in the honesty and prudence of the one in protecting the property and thereby lessening the risk, and may have no confidence in the other. But these considerations have no application to the assignee of the policy, for it makes no difference to the insurer to whom he pays the insurance in case of a loss.

(*Bergson*, *supra*, 38 Cal. at p. 545.) *Bergson*, in other words, recognized a clear distinction between, on the one hand, the

assignment of a claim for *policy proceeds*, that is, a claim against the insurer or a debt of the insurer and, on the other hand, the assignment of an interest in the *policy itself*, that is, the status of being an insured under a policy or "coverage." The *proceeds* of a policy may be assigned regardless of what the policy says, but an *interest* in the policy—i.e., who is insured under the policy—is a matter of contractual privity, and a change in the identity of the insured may increase the risk to the insurer beyond what was agreed upon at the time of contracting.

In the years since *Bergson* (and the enactment of section 520), California courts have continued to recognize this distinction between a non-transferrable interest in a policy and an assignable claim for proceeds. In *Greco*, cited by both the majority and dissent in *Henkel*, the Court of Appeal reiterated the distinction:

> The policy by its own terms, insofar as it involved the substitution of one insured for another, was not assignable without the consent of the insurer. Any purported assignment of such a policy without consent is ineffective . . . On the other hand, it is settled that the right to recover thereon after loss has occurred is assignable without company consent . . . The former situation involves the obligation of the insurance company to indemnify a particular person against loss; *the selection of its indemnitee properly is a matter of its own choice.* The latter situation involves only the payment of a claim founded upon a loss against which the policy indemnifies, and the designation of a payee of such claim properly is a matter left solely to the discretion of the indemnitee, viz., the insured.

(*Greco, supra,* 191 Cal.App.2d at p. 682, emphasis added, citations omitted; see also *Quemetco Inc. v. Pacific Automobile Ins. Co.* (1994) 24 Cal.App.4th 494, 503 ["as recognized in *Greco*, the policies, as opposed to the proceeds, were not assignable without [the insurer's] consent"].) These decisions demonstrate that the court's holding in *Henkel* is not an outlier, but rather follows well-established precedent.

Here, there is no question that Fluor-2 alleges a transfer of policies rather than transfer of a claim for proceeds; Fluor-2 alleges that as part of its reverse spinoff, the "liability and the accompanying insurance" were transferred to it from Fluor-1. (OBOM 44.) But even the authorities that the *Henkel* dissent cites do not permit such a transfer, and nothing in section 520 requires an insurer to insure an entity that has no relationship to the parties' insurance contract for claims asserted against that entity. Because the Hartford Policies prohibit the assignment of a policy "interest" and do not prohibit the assignment of a "claim of the insured against the insurer," section 520 does nothing to prevent the enforcement of the consent-to-assignment provisions in the Hartford Policies.

B. *Henkel*, not section 520, supplies the answer of when loss occurs in the context of third-party insurance.

Even assuming this case concerned an attempted transfer of Fluor-1's "claim" against Hartford to Fluor-2, section 520 does not answer the critical question of when a claim against the insurer

may be transferred in the third-party liability insurance context. Fluor-2 mischaracterizes the Court of Appeal as having held that section 520 applies "only to the limited category of first-party property policies and does not apply to third-party liability policies." (OBOM 18.) The Court of Appeal did no such thing. Rather, the court made the commonsense (and correct) observation that a Legislature acting in 1872—decades before the advent of third-party liability insurance—could not have had in mind an understanding of "loss" that would trigger the right to transfer a claim of the insured against the insurer for purposes of liability coverage.[6]

As a result, Fluor-2's citation to section 533 of the Insurance Code adds nothing. (See OBOM 27-30.) Section 533 prohibits insurance for loss caused by the willful acts of the insured. (See Ins. Code, § 533.) The application of this rule applies equally to first- or third-party insurance, i.e., an insured is not entitled to insurance for loss caused by its own willful act, irrespective of whether the loss at issue is to the insured or its own property (first-party) or results from liability to a third party or its property (third-party). In other words, section 533 does not depend on context.

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[6] Fluor-2 attempts to seize on the fact that the provisions of the Insurance Code were reenacted as the "singular" Insurance Code in 1935. (See OBOM 20, 27-28; see also OBOM 38, fn. 33.) That reenactment, however, does not affect any substantive change in the meaning of the provisions of the Code. (See Ins. Code, § 2 ["The provisions of this code in so far as they are substantially the same as existing statutory provisions relating to the same subject matter shall be construed as restatements and continuations thereof, and not as new enactments"].)

Section 520 is different. The application of its rule—invalidating agreements not to transfer a claim of the insured against the insurer after loss if those agreements are made before the loss—depends on the definition of the word "loss," which is not defined in the statute and differs in the context of first- and third-party policies. In the first-party context—the only type of insurance the California Legislature could have contemplated when it enacted section 520—the policyholder's loss happens at the time of the injury. Thus, it is hardly surprising that only one court in California had ever cited section 520 prior to this litigation; section 520 simply does not answer the question of when a "loss" occurs in the context of third-party liability coverage.

But as this court explained in *Henkel*, in the third-party context, a "loss" occurs for purposes of permitting the enforcement of an anti-assignment provision at the time the liability is reduced to a chose in action, not at the time of the injury. Fluor-2 cites no language of section 520 that compels a different result. Because section 520 does not define when a loss occurs under a third-party policy, the Court of Appeal correctly concluded that there is nothing in the statute that conflicts with this court's controlling decision in *Henkel*: "We see nothing in Insurance Code section 520 or in *Henkel* to support Fluor-2's assumption that the Supreme Court would have reached a different result had the parties in that appeal briefed or argued the statute's applicability." (Typed opn., 17.)[7]

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[7] Even if that were not the case, the result would not change because, as shown at pages 23-29, *post*, the weight of authority unequivocally shows that—consistent with *Henkel*—"loss" refers to (continued...)

C. *Henkel* was correctly decided.

1. The majority correctly held that a cognizable claim against the insurer is the point at which benefits can be assigned.

Henkel, like this case, involved a corporation (Amchem No. 2) that voluntarily assumed the liabilities of another, similarly named, company (Amchem No. 1). Amchem No. 2 argued that it was entitled to receive Amchem No. 1's insurance rights via assignment even without the insurers' consent because the "event giving rise to liability," the allegedly injurious exposure, occurred prior to the assignment. (*Henkel, supra*, 29 Cal.4th at pp. 944-945.)

This court properly rejected Amchem No. 2's argument. The majority and dissent agreed that assignment conditions in liability policies are "generally valid and enforceable" and that there is no prohibition on clauses in insurance contracts that restrict the transfer of policies. The disagreement between the majority and the dissent was whether benefits could be assigned without the insurer's consent once the event potentially giving rise to the insured's liability had taken place.

Fluor-2 attempts to recast this disagreement as one of whether transferability arises "when the coverage-triggering 'loss'

(...continued)
the insured's loss (giving rise directly to a claim against the insurer) and not to the alleged injury to an underlying claimant, as Fluor-2 contends.

happens, or later when the policyholder's claim against the insurer" is reduced to a chose in action. (OBOM 21.) That assertion misapprehends the dispute in *Henkel*. The majority and dissent *agreed* that a claim for insurance benefits is freely transferrable once the operative loss occurs, giving rise to a chose in action. (Compare *Henkel*, *supra*, 29 Cal.4th at p. 944 [finding assignment not valid because policy benefits "had not become an assignable chose in action"] with *id.* at p. 948 (dis. opn. of Moreno, J.) [" 'assignment is valid' " once claim " 'is then regarded as chose in action' "].) The disagreement, in other words, was over the point at which the transferable loss happens, giving rise to a chose in action.

Henkel acknowledged previous case law analyzing transferability of claims following a "loss," then appropriately focused on the central question of the point at which the purposes of the post-loss exception to restrictions on assignment are served. *Bergson* and *Greco* (as well as other cases cited in *Henkel*) both reflect the view that consent-to-assignment conditions are a valid means for insurers to protect against an increased risk beyond what was agreed upon at the time of the contract. Looking to that question, and analyzing the point at which the risk that the insurer had agreed to assume becomes fixed, *Henkel* held that policy benefits are assignable, without restriction, once reduced to a concrete claim against the insurer:

> [T]he duty of defendant insurers to defend and indemnify Amchem No. 1 from the claims of the Lockheed plaintiffs had not become an assignable chose in action. Those claims had not been reduced to a sum of money due or to become due under the policy.

> Defendants had not breached any duty to defend or indemnify Amchem No. 1, so Amchem No. 1 could not assign any *cause of action for breach* of such duty.

(*Henkel, supra*, 29 Cal.4th at p. 944, emphasis added.) *Henkel*'s conclusion is neither arbitrary nor a departure from long-standing legal principles, as the dissent suggested. On the contrary, the court's ruling reflects well-established jurisprudence that insurers are entitled to enforce assignment clauses up until the point where a potential risk becomes fixed.

This court did not "reject the common law rule" and invent its own standard, as Fluor-2 now suggests. (OBOM 22.) Nor does the application of *Henkel* result in an unfair windfall for the insurer. Hartford remains obligated to provide coverage for underlying asbestos claims asserted against Fluor-1 (as well as former subsidiaries of Fluor-1 that qualified as insureds during the operative policy periods), just as the insurers in *Henkel* remained obligated to cover suits against Amchem No. 1. Hartford and Fluor-1 were free to enter into insurance agreements and California law enforces those agreements, including the clauses that prohibit Fluor-1 from substituting another entity as the insured. (See, e.g., *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 75 (*Aerojet*) [insurer and insured are "generally free to contract as they please[d]"].) Read in its entirety, *Henkel* correctly applied well-established California law regarding assignment of insurance benefits.

2. Fluor's reliance on *Montrose* and other California authorities to support the argument that "loss" happens at the time of the underlying injury is unavailing in this case, just as it was in *Henkel*.

Stripped of its rhetoric criticizing the Court of Appeal, the thrust of Fluor-2's petition is that section 520 "trumps" *Henkel* and replaces the majority's analysis of when a chose in action arises. (See OBOM 30-31.) And although it phrases its arguments in terms of section 520, Fluor-2's main arguments echo the dissent in *Henkel*, which is based not in statute, but the common law. The arguments that Fluor-2 offers in its brief were unavailing when *Henkel* was argued; they should fail here as well.

Taking a page from the *Henkel* dissent, Fluor-2 relies heavily on this court's decision in *Montrose*. That reliance is misplaced because *Montrose* has nothing to do with an interpretation of section 520. *Montrose* neither cites section 520 nor addresses the *subject matter* of section 520, namely, when an insured may freely transfer a claim it has against the insurer. The *Montrose* opinion thus never defines "loss" or discusses the concept of loss.

In *Montrose*, this court determined the trigger of coverage applicable to the duty to defend claims of environmental damage alleged to have occurred continuously over multiple policy periods. In holding that each policy period in which damage was alleged had a "potential coverage" obligation, and therefore a duty to defend, the court in *Montrose* did sometimes use "loss" as shorthand for

environmental damage.[8] (See OBOM 31.) But at most, *Montrose* suggests that environmental damage is one type of "loss." The critical question here, however, is whether the type of "loss" that Fluor-2 cites from *Montrose*—the underlying property damage—is the same "loss" that governs section 520 and that was at issue in *Henkel*.[9] The meaning of words depends on their context. (See *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 659 ["words must be construed in context"].) *Montrose* could hardly be more removed from the context of section 520 and the assignability of policy interests.

Nor would it make sense in any event to equate "loss" as the court used that term in *Montrose* with "loss" under section 520. The

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[8] The dissent in *Henkel* asserts that the beginning of the occurrence—the point at which injury happens—is the "loss" because that is when liability is "fixed." (See, e.g., *Henkel, supra,* 29 Cal.4th at pp. 948-949 (dis. opn. of Moreno, J.).) Not so. It is doubtful that the occurrence necessarily signifies the time at which the *fact* of liability is fixed, but even if it is, it certainly does not fix the quantum of liability, or the degree of risk of loss to the insured, and therefore, the potential financial consequences to the insurer. (See Part II.A, *post.*)

[9] Fluor-2's citation of Justice Baxter's concurrence in *Montrose* illustrates this point: " '[i]n the third party context, the relevant risk is the insured's act or omission, and the resulting damage, injury, or *loss to another*, which together form the basis of legal liability against the insured.' " (OBOM 31, emphasis added, quoting *Montrose, supra,* 10 Cal.4th at p. 697 (conc. opn. of Baxter, J.).) If "loss" simply meant "loss to the third party," then it would have been unnecessary for Justice Baxter to clarify the issue. That Justice Baxter added the phrase "to another" indicates that the term "loss" can, and often does, refer to the loss by the insured. Loss to another "forms the basis of legal liability against the insured," which in turn results in "loss" to the insured.

crux of the dissent in *Henkel* was that "an insurer's coverage liability under an occurrence-based policy is determined as of the date of the claimant's loss or injury." (*Henkel, supra,* 29 Cal.4th at p. 949 (dis. opn. of Moreno, J.).) That is not the holding of *Montrose,* which states that the occurrence "triggers *potential* coverage under the policies in question." (*Montrose, supra,* 10 Cal.4th at p. 669, emphasis added.) The occurrence that gives rise to the "loss" in *Montrose* (underlying property damage) establishes the point at which the third party suffers legal injury for which the insurer may eventually be required to defend and/or indemnify its insured. But that is a far cry from "fixing" the insurer's liability, which Fluor-2 (like the dissent in *Henkel*) concedes is the legitimate purpose of the assignment clause. (See *Henkel,* at p. 950 (dis. opn. of Moreno, J.).)

The court in *Montrose* repeatedly uses the word "potential" to describe the coverage obligation, which makes clear that the insurer's liability to its insured is anything but determined. It is not clear, for example, that that there will ever be a tangible injury or "loss" to that third party. In the case of property damage, the source of contamination may abate, leaving the third party with no noticeable damage; in the case of an asbestos claim, future exposure may be limited, and the claimant may never develop an asbestos-related injury. Even if a tangible injury does develop, it is far from certain (i) whether a claim will be brought against the insured, or (ii) if such a claim is successful, what measure of defense and indemnity the insurer will be called on to provide. And the transfer of insurance from the purchaser to another entity, which the insurer had no opportunity to examine, may also materially affect that risk,

particularly if the putative new "insured" has a higher tort liability profile or is less able to assist in the defense of underlying claims. It is the insured's liability, not a mere "potential for coverage" that fixes the insurer's risk and, therefore, the "loss," for the purposes of enforcing assignment provisions such as those at issue here. Accordingly, *Montrose* does not support Fluor-2's arguments on section 520 or the common law.

Nor are Fluor-2's other cases on point. Fluor-2 cites the court's decision in *State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186 (*Continental*) as further evidence that "loss" means "third-party injury." However, as was the case in *Montrose*, *Continental* arises in a context having nothing to do with interpreting the definition of loss in section 520. Instead *Continental* was concerned with whether an insured was entitled to coverage from all of its insurers who covered the time period when property damage occurred, and whether the insured could "stack" policies from multiple policy years. The court did use the term "loss" as a placeholder for underlying injury in some places, but there was no equivalence between the two, nor was there any attempt to define "loss" in the way that Fluor-2 attempts to ascribe to the decision.[10] In fact, the *Continental* decision frequently uses terms other than "loss" to describe third-party injury, including

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[10] Fluor-2's block citation to *Continental* (OBOM 32) is disingenuous—the paragraph from which Fluor-2 quotes does not mention "long-tail loss" at all, and merely states that the continuous trigger and "all sums" rule were applicable in that case. (*Continental*, *supra*, 55 Cal.4th at p. 191.) As was the case with *Montrose*, the court never defined "loss" in the *Continental* decision.

damage. (See, e.g., *Continental*, at p. 196 ["Long-tail injuries produce progressive *damage* that takes place slowly over years or even decades" (emphasis added)].) Most importantly, there is no dispute that, in *Continental* (just as was the case for *Montrose*), the court did not have section 520 in mind and could not have been intending to interpret the statute or otherwise define when insurance claims can be assigned after a "loss."

Fluor-2's citations to *Westoil Terminals Co. v. Harbor Ins. Co.* (1999) 73 Cal.App.4th 634, 641-642 and *Employers Ins. Co. v. Travelers Indemnity Co.* (2006) 141 Cal.App.4th 398, 405 (*Employers*) are similarly inapposite. (OBOM 33-34.) *Westoil* involved unique facts, including a de facto merger, that are not present here. Moreover, *Westoil* cites to the critical passage from *Greco* which makes clear that the insured cannot substitute another entity as the insured without the insurer's consent, and " '[a]ny purported assignment of such a policy without consent is ineffective.' " (*Westoil*, at p. 641, quoting *Greco*, *supra*, 191 Cal.App.2d at p. 682.) That, of course, is precisely what Fluor-2 attempts to accomplish here.

Employers is even less relevant; it concerned whether an insurer's settlement with its insured cut off a non-settling insurer's contribution rights for claims involving an occurrence in predating the settlement. In holding that the insurer remained liable for contribution, the Court of Appeal held only that the insurer's potential coverage obligation arose at the time of the alleged underlying injury—it certainly did not hold that the injury to the underlying claimant marked when "loss" takes place for the purpose

of the right to assign a claim. (See *Employers*, *supra*, 141 Cal.App.4th at p. 405.)

3. Fluor's authorities from other jurisdictions are also unavailing.

Fluor-2 suggests that *Henkel* is out of step with the legal mainstream. But *Henkel* is virtually the only decision to explore the purpose of the rule against enforcing consent-to-assignment clauses, and several state supreme courts have agreed with it. In *Travelers v. United States Filter Corp.* (Ind. 2008) 895 N.E.2d 1172, 1179-1180, the Supreme Court of Indiana unanimously endorsed *Henkel* and followed its reasoning on the assignability issue. In *Del Monte v. Fireman's Fund Ins. Co.* (2007) 117 Hawai'i 357, 366 [183 P.3d 734, 743], the Supreme Court of Hawaii, also in line with *Henkel*, unanimously rejected the insured's right to assign coverage without the insurer's consent.

Fluor-2 relies on *Egger v. Gulf Ins. Co.* (2006) 588 Pa. 287, 303-304 [903 A.2d 1219, 1228-1229], which fails to cite *Henkel* and which (in contrast to California law) makes no distinction between first- and third-party coverage, and on *Pilkington N. Am. v. Travelers Cas. & Sur.* (2006) 112 Ohio St. 3d 482 [861 N.E.2d 121] (*Pilkington*). But *Pilkington* does not support Fluor-2's position. There, the Ohio Supreme Court split four to three on the assignability issue, with the dissenters firmly endorsing *Henkel*. (*Id.* at pp. 137-138 (conc. & dis. opn. of Lanzinger, J.).) The majority could not agree among themselves as to the extent of the insured's

right to assign its coverage rights; two of the four justices declined to allow the assignment of rights to defense, giving the insurer half a victory. (*Id.* at pp. 131-132 (sep. opn. of Mayer, C.J. & O'Connor, J.).) Only two of the court's seven justices agreed that policy rights are assignable once the third-party injury occurs. (*Id.* at p. 131.)

Moreover, although the *Pilkington* majority recognized that the concept of "loss" is "an easier concept" in the context of first-party policies rather than third-party policies (*Pilkington, supra,* 861 N.E.2d at pp. 128-129), it did not fully analyze that distinction. Rather, the opinion for the court simply assumed that "loss" is loss to a third party, and that "[t]he losses are fixed at the time of the occurrence." (*Id.* at p. 129) But when loss occurs is the point in dispute, and the amount the plaintiff will recover from insured or insurer, which was the focal point for the majority, is not fixed by any means, but rather depends on the defense of the case. Fluor-2 offers no reason for why this court should abandon well-established principles set forth in *Bergson, Greco* and *Henkel* in favor of what is essentially a minority view from Ohio.

D. Cannons of statutory interpretation support the conclusion that section 520 should be interpreted to define "loss" as set forth in the common law and *Henkel*.

1. The legislative history demonstrates that the outcome in *Henkel* is consistent with the purpose of section 520.

Section 520 was originally enacted in 1872 as former Civil Code section 2599 and was re-enacted in 1935 as part of the then-new Insurance Code. In ascertaining the intent of the Legislature in adopting the 1872 Civil Code, this court's fundamental task is to ascertain the intent of the Legislature, giving substantial weight to the comments of the California Code Commission. (See *Mays v. City of Los Angeles* (2008) 43 Cal.4th 313, 321; *Gomez v. Superior Court* (2005) 35 Cal.4th 1125, 1143-1144.)

The Code Commissioners' note to the predecessor of section 520 (section 2599) cites a New York case, *Goit v. National Protection Ins. Co.* (N.Y. Gen. Term 1855) 25 Barb. 189 (*Goit*), which explains the purpose of the statute's rule.[11] An insurer is entitled to prohibit

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[11] See Petitioner Fluor Corporation's RJN in Support of Reply to Answer of Real Party in Interest Hartford Accident and Indemnity Company's answer to Petn. for Peremptory Writ of Mandate or Other Appropriate Relief, Exh. A [former Civil Code section 2599 (repealed by stats. 1935, ch. 145, § 13001, p. 778); Code c., note foll., Ann. Civ. Code, § 2599 (1st ed. 1872, Haymond & Burch, Code c. annotators) Vol. II, at p. 152]. Section 2599 was closely modeled on (continued...)

assignments of interest in insurance policies, *Goit* holds, because the insurer has a right to choose whom it insures:

> Conditions against the assignment of policies have been long in use, and have been sustained by courts. The contract of insurance is one eminently of personal confidence, and the character of the insured forms an important element among the inducements of the underwriters to assume the risk; and hence the provision against assignments of the policy during the continuance of the risk is highly beneficial to the insurer.

(*Goit*, *supra*, 25 Barb. at p. 193.) The *Goit* decision goes on to explain that the rationale for prohibiting assignments no longer applies once a "loss" has happened because then, the insurer owes a debt to the insured, as opposed to an obligation to insure:

> There is certainly not the same reason for prohibiting an assignment after a loss, as before. After the loss the confidential relation of insurer and insured no longer exists, but a new relation has arisen out of it, to wit, that of debtor and creditor; and it is difficult to see any reason connected either with public policy or the proper rights of the former, why the latter should not be permitted to deal with and concerning this right in action as he is permitted to do in respect to any other absolute right, and transfer the same in payment of debts or to meet the other necessities of business.

(*Id.* at pp. 193-194.)

(...continued)
section 1413 of the 1865 New York Civil Code, the notes to which also cite *Goit*.

Thus, under *Goit,* as relied upon by the Code Commissioners, the "loss" cannot be the occurrence giving rise to third-party injury, as Fluor-2 contends. *Goit* expressly denies a right to assign the "confidential relation of insurer and insured." (*Goit, supra,* 25 Barb. at p. 193.) But once there is a discrete claim, a chose in action, the insurer has no legitimate interest in interfering with the insured's right to assign the policy proceeds or, expressed differently, the insurer's debt to the insured. The insurer has a relationship with the insured, but not with a mere payee. (*Id.* at pp. 193-194.)

The Code Commission's notes make it clear that what is now section 520 codifies the common law principle set forth in *Goit* and *Bergson*, and later *Henkel.* Indeed, such a codification would be presumed even if the notes did not make it explicit. (See Civ. Code, § 5 ["The provisions of this Code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments"]; *People v. Massicot* (2002) 97 Cal.App.4th 920, 928 ["statutes are presumed to codify common law rules absent clear language disclosing an intent to depart from those rules"].)

2. *Henkel*'s definition of "loss" is also consistent with Insurance Code section 108.

Statutory terms "should be given the same meaning throughout a code unless the Legislature has indicated otherwise." (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 716.) While section 520 of the Insurance Code does not define

"loss," another provision, section 108, does apply "loss" in the liability insurance context in a manner that leaves no ambiguity as to its meaning. Section 108 makes clear that "loss" is not the injury to the underlying claimant, but necessarily occurs after, and as a consequence of, such an injury:

> Liability insurance includes:
>
> (a) Insurance against *loss resulting from liability for injury,* fatal or nonfatal, *suffered by any natural person,* or resulting from liability for damage to property, or property interests of others but does not include worker's compensation, common carrier liability, boiler and machinery, or team and vehicle insurance.

(Ins. Code, § 108, emphasis added.)

Liability is thus, by definition, the cause of the loss. An effect cannot precede its own cause. For there to be "loss" for the purposes of a liability policy, the insured must first be liable.[12]

In response, Fluor-2 asserts that injury, liability and loss all happen simultaneously "at the moment the insured event occurs." (OBOM 37.) For that proposition, however, Fluor-2 cites a single case, decided by the Eighth Circuit in 1939. Fluor-2 fails to acknowledge that the Eighth Circuit stated expressly that it was applying Missouri law, did not cite California law or the Insurance Code, and did not opine that its decision was intended as a

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[12] The section of the Insurance Code concerning direct actions uses a virtually identical phrase, "loss or damage resulting from liability for injury suffered by another person." (Ins. Code, § 11580, subd. (a)(1).) Similarly, the Vehicle Code requires that drivers be insured "against loss from the liability imposed on that person by law for damages." (Veh. Code, § 16452.)

pronouncement of California law. (See *Ocean Accident & Guar. Corp. v. Southwestern B. Tel. Co.* (8th Cir. 1939) 100 F.2d 441, 446.)

That decision has no bearing here, particularly where the definition of liability insurance in section 108 is mirrored in prior decisions of this court. In *Day v. City of Fontana* (2001) 25 Cal.4th 268, the Court cited with approval Webster's definition of liability insurance, which is virtually identical to that in section 108: " 'insurance against *loss resulting from liability* for injury or damage to the persons or property of others.' " (*Id.* at p. 278, fn. 4, emphasis added, citing Webster's New Internat. Dict. (3d ed. 1981) p. 1302.) Because loss to the insured results from the insured's liability, the insured's liability must be established before the insurer is obligated to indemnify the loss.

Similarly, in *California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, this court held that an enforceable claim arises against a liability insurer not when injury occurs, but when the insured is held liable for that injury:

> Under an insurance contract, the insurer's obligation is to indemnify the insured to the extent of the insured's liability to the third party. Accordingly, " 'no enforceable claim accrues against the insurer until the insured's liability is in fact established.' "

(*Id.* at p. 663, quoting *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287, 306.) This holding goes hand in hand with the definition in section 108: there is no claim against the insurer

under an indemnity policy until the insured is held liable because being held liable is the necessary precondition to "loss."[13]

E. Even under Fluor-2's definition of "loss," section 520 would not permit an assignment from Fluor-1.

Section 520 only applies to an agreement not to assign a claim of the insured against the insurer "if made before the loss." If the agreement not to assign is made *after* the loss has taken place, section 520 has no effect. Yet, on Fluor-2's own reasoning, the agreements not to assign—that is, the Hartford Policies—were made after most of the "losses," i.e., the injuries to the underlying claimants through exposure to asbestos.

According to Fluor-2, loss occurs "at the point when that 'fortuity (i.e., the "occurrence" or "accident") has happened and the third party has been injured by the insured's conduct . . . .' [¶] . . . '[L]oss' arises at the time that occurrence begins." (OBOM 34.) Under California law, asbestos-related injury occurs upon " 'first exposure to asbestos or asbestos-containing products.' " (*Armstrong*

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[13] Likewise, in cases dealing with indemnity agreements, this court repeatedly has held that "loss" means the indemnitee's payment of the injured party's claim, not the injury itself: "[A]n indemnitor is not liable for a claim made against the indemnitee until the indemnitee suffers actual loss by being compelled to pay the claim." (*Gribaldo, Jacobs, Jones & Associates v. Agrippina Versicherunges A.G.* (1970) 3 Cal.3d 434, 447.) Insurance policies are merely a special type of indemnity contract, and the general principles of indemnity apply. (*Safeco Ins. Co. v. Robert S.* (2001) 26 Cal.4th 758, 767 ["An insurance policy is an indemnity contract"].)

World Industries v. Aetna Casualty & Surety Co. (1996) 45 Cal.App.4th 1, 43.) In the great majority of the underlying lawsuits filed against Fluor-2, the claimant's first exposure to asbestos for which Fluor-1 is allegedly responsible took place (or is alleged to have taken place) during the 1940's, 1950's, or 1960's, and predate the Hartford policy periods, which did not begin until May 1, 1971.

Thus, if Fluor-2 is right about when "loss" happens, then the agreements not to transfer—the Hartford Policies—were made after the "loss"—underlying claimants' first exposures to asbestos. Therefore, under Fluor-2's argument, section 520 would not bar enforcement of the assignment conditions of the Hartford Policies in any event.[14]

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[14] Fluor-2's theory of "loss" would lead to other puzzling consequences. For years, Hartford and Fluor-1 aggressively defended the underlying asbestos claims, and were able to obtain dismissals with prejudice of many suits in which claimants were unable to allege or prove (i) dates of exposure to asbestos for which Fluor-1 was responsible and/or (ii) that the claimant was exposed to Fluor-related asbestos at all. In other words, for many claims, there was no occurrence at all. Under Fluor-2's theory, there would be no "loss," and consequently any claims (whether for defense or otherwise) would not be transferable because they could never be "post-loss."

II. ENFORCING THE CONSENT-TO-ASSIGNMENT CLAUSES IS FAIR, EQUITABLE, AND SOUND PUBLIC POLICY.

Fluor-2 offers a barrage of reasons why it believes enforcing the consent-to-assignment conditions would be inequitable or against public policy. None of these arguments has merit.

A. Enforcing the consent-to-assignment conditions does not result in a "forfeiture" of coverage, nor any windfall to the insurer.

Fluor-2 contends that forcing Hartford to insure Fluor-2 meets the parties' "reasonable expectations" even though it is undisputed that Hartford never agreed to do so because the event triggering coverage—the occurrence—is "the fundamental risk insured in liability policies." (OBOM 38-39.) Post-loss events, Fluor-2 contends, "do not alter this careful balance of competing interests." (OBOM 40.) This court, however, has already recognized that this is not the case. In *Henkel*, this court concluded that an increased risk arises where a purported assignment creates the increased burden of potentially being required to defend both the original insured and its assignee. (See *Henkel*, *supra*, 29 Cal.4th at p. 945.) Fluor-2 tries to evade this problem by asserting that Fluor-1 no longer has rights under the policy. Just as Amchem No. 1 disputed this assertion in *Henkel* (see Hartford Accident and Indemnity Company's RJN in Support of ABOM to Petitioner's

OBOM, Exh. 2 (Court of Appeal opinion in *Henkel Corp. v. Hartford Accident & Indemnity Co.* (2001) 88 Cal.App.4th 876 [106 Cal.Rptr.2d 341], review granted July 18, 2001, S098242)), so, too, apparently does Fluor-1, which continues to tender claims directly to Hartford for coverage under the Hartford Policies. Those claims are in addition to claims Fluor-2 tenders, including claims asserted against both Fluor-1 and Fluor-2 and claims asserted only against Fluor-1 (Massey) where Fluor-2 is not named but is implicated as indemnitor of Fluor-1.[15]

Moreover, the increase in risk exists after the occurrence separate and apart from the extra burdens of multiplying Hartford's defense obligations. While the occurrence establishes the existence of an injury, it does not resolve the extent of the injury, nor what ultimate liability will be borne as a result. There is a virtually infinite number of post-occurrence factors that may affect the risk to the insurer, including the transfer of policy interests to a different insured, particularly if the assignee is another asbestos defendant with a higher profile in the asbestos world. Most asbestos-related bodily injury complaints name multiple (if not dozens of) defendants and are pleaded in vague, broad terms. Assume that Fluor-1 attempted to assign its asbestos-related liabilities and assets,

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[15] See Exh. 2, p. 23 [¶¶ 14-15]; Exh. 21, p. 9937 [¶ 36]; Exh. 24, pp. 10731-10733 [112:19-114:17]; see also Hartford Accident and Indemnity Company's RJN in Support of ABOM to Petitioner's OBOM, Exh. 1 (Original Petition for Damages and First Supplemental and Amending Petition, *Schenck v. Garlock Sealing Technologies, LLC et al.*, Case No. 2008-4772 (La. Civ. Dist. Ct., Orleans Parish) [HART041213-HART041239].)

including the Hartford Policies, not to Fluor-2, but to a defendant with a higher profile, or a defendant with a separate line of business. In such a case, whenever that defendant were named in a complaint, it would frequently be impossible to determine whether the defendant was named for its own liabilities, or those acquired from Fluor-1. As a result, Hartford could be called on to defend not only the risks it agreed to insure—liabilities against Fluor-1, but also liabilities for another entity it never agreed to insure. The rule that Fluor-2 suggests here, in other words, would allow insureds to greatly expand potential coverage for insureds never contemplated in the policies.

Other risks arise from the potentially unfettered substitution of insureds that Fluor-2 proposes. Fluor-2 concedes that the insured has policy obligations intended to assist the insurer in managing the risk insured against. These include (but are not limited to) the obligation to give notice of an occurrence, to provide notice of a claim, and to cooperate in the defense of the underlying claims. A policy assignee's compliance with these obligations may not be as effective in assisting the insurer in the defense of underlying claims, which translates directly into increased risk for which the insurer did not contract.

For example, a policy assignee may not have access to the same documents, witnesses, or other evidence that could be of assistance in defending underlying suits. Likewise, an assignee may not have the historical knowledge about the assignor's operations, such as being able to identify the sites where the alleged tortfeasor did (and did not) conduct operations, which might allow a

defending insurer to eliminate meritless claims. It is not until the liability against the insured has been fixed, and the benefit due from the insurer is reduced to an amount due, or to become due, that there is no longer the prospect of increased risk for which the parties did not bargain and for which the insured was not charged premium. The *Henkel* decision, therefore, lands on the correct point in determining when the risk has been finalized and can be assigned without unanticipated risk, or undue burden, being transferred unfairly to the insurer.

Enforcing the Hartford Policies as written effects no "forfeiture" of coverage, nor does the insurer receive an undeserved windfall. Fluor-1 remains an insured under the Hartford Policies, and is entitled to receive (and, indeed, has received on numerous occasions) the full extent of coverage provided under the terms and conditions of the Policies, including defense against asbestos claims, where appropriate. In addition, Hartford has, for decades, provided coverage for more than a dozen former subsidiaries of Fluor-1, which are entitled to status as insureds because they were direct or indirect subsidiaries of Fluor-1 at the time that one or more of the Hartford Policies were issued. Hartford has expended substantial sums to defend and indemnify all of these entities from the underlying asbestos claims, has done so with vigor to the insureds' benefit, and continues to do so. In the face of Hartford's efforts on behalf of all these entities over more than a quarter century, Fluor-2's claims that enforcement of an agreed-upon contractual policy

provision would result in a "windfall" for Hartford are disingenuous.[16]

B. Fluor-2's concerns that corporate transactions will be inhibited are speculative and unsubstantiated.

Fluor-2 also contends that enforcing the consent-to-assignment clauses would penalize "efficient and routine corporate transactions." (OBOM 44.) The problem with that argument is that, by Fluor-2's own admission, a reverse spin-off—the transaction that Fluor-2 now contends effected a policy transfer—is anything but routine. Fluor-2's own corporate secretary volunteered that a reverse spin-off is "not a very common transaction," such that it required special naming conventions to explain to shareholders. (See Exh. 10, p. 3261 [91:22-24].) In an "ordinary" transaction, Fluor-1 would have spun off the Massey entities—the energy businesses which comprised a discrete part of its operations—from Fluor-1, leaving the dominant EPC businesses in place. Had Fluor-1 conducted its separation that way, there would be no question about coverage for the asbestos claims asserted against the EPC businesses. Fluor-1 concluded that there

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[16] Even one of the pro-policyholder commentators that Fluor-2 routinely cites acknowledges that there is no windfall wherever there is a predecessor corporation that remains liable in tort. (See Scales, *Following Form: Corporate Succession and Liability Insurance* (2011) 60 DePaul L.Rev. 573, 616, fn. 150 [Petitioner's Appen. of Other Authorities, tab 9]) [where "the predecessors remain liable as a matter of tort law," "it follows that "insurers will not receive a windfall under the *Henkel* approach."]

was a financial advantage to be gained from structuring its business through an unusual transaction that did not comply with its contractual obligations to obtain Hartford's consent to the transaction/alleged assignment. Fluor-1 was certainly free to do so, but that does not mean that Fluor-2 is entitled to complain that it did not receive coverage when neither it nor Fluor-1 met the conditions for an assignment to which Fluor-1 and Hartford agreed.

Nor has Fluor-2 shown that enforcing the consent-to-assignment clauses would lead to any unfair "penalty" for corporate transactions more broadly. Fluor-2 has not shown that there is an abundance of corporate transactions that seek to substitute one insured for another that would not proceed if the parties' contractual expectations are enforced. Against a backdrop of due diligence, regulatory approvals and stockholder permissions, Fluor-2 certainly has not shown that it would be unfairly burdensome to require insureds to comply with their obligations and obtain approval of their insured to transfer insured status to a new entity.[17] Here, of course, neither Fluor-1 nor Fluor-2 even tried to do so.

The burden that Fluor-2 postulates on corporate transactions is hypothetical at best. In contrast, Fluor-2's paradigm of freely

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[17] Even assuming that consent was withheld (as the insurer's rights permit), Fluor-2 has not shown such withholding would represent an unreasonable burden on corporate efficiency. In that event, the corporate entities would still have a range of other options, including the transferor's agreement to indemnify the transferee for legacy liabilities, the transferee's declining to assume the liabilities covered by the putative transferor's insurance assets, or the parties' negotiation of a different price for the transaction.

assignable insurance policies demonstrably burdens a policy that this court has repeatedly recognized: freedom of contract. Hartford and Fluor-1 entered into a contract under which they agreed that no transfer of interest in the policy would be effective without Hartford's consent. This court has recognized that under California law insurer and insured are "generally free to contract as they please[ ]." (*Aerojet, supra,* 17 Cal.4th at p. 75.) After the parties have done so, this court will "not rewrite any provision of any contract, including the standard policy underlying any individual policy, for any purpose." (*Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1078.) And, as far back as *Bergson*, this court has recognized that this freedom of contract extends to allowing the insurer to choose whom he intends to insure. (*Bergson, supra,* 38 Cal. at p. 545 ["The insurer has a right to know, and an interest in knowing, for whom he stands as an insurer. He may be willing to insure one person and unwilling to insure another"]; see also *Greco, supra,* 191 Cal.App.2d at p. 682 ["the selection of its indemnitee properly is a matter of its own choice"].) Requiring the insured to observe its contractual obligation to obtain the insurer's consent before adding or substituting additional insureds is economically reasonable and ensures that the insured receives the coverage it has purchased, while the insurer has the opportunity to charge premium for any additional risk it agrees to insure.

III. FLUOR-2 CANNOT PREVAIL ON ITS PETITION BECAUSE IT HAS NOT ESTABLISHED THAT ANY ASSIGNMENT FROM FLUOR-1 TOOK PLACE.

Even if Fluor-2 were correct and section 520 barred enforcement of the consent-to-assignment conditions, Fluor-2 still would not be entitled to relief on its petition. The petition seeks a writ directing the trial court to grant its motion for summary adjudication on two of Hartford's causes of action concerning whether Fluor-2 can claim coverage under the policies that Hartford issued to Fluor-1. For Fluor-2 to be entitled to summary adjudication, it would have to show that (1) Fluor-1 could assign the Hartford Policies to Fluor-2 without Hartford's consent, and (2) Fluor-1 did in fact assign the Policies to Fluor-2. Here, Fluor-2 failed to make any showing that Fluor-1 attempted to assign the Policies to Fluor-2. Indeed, prior to the filing of its petition in the Court of Appeal, it actually *denied* that any assignment took place. Rather, in its attempt to persuade the trial court that the consent-to-assignment provision was no obstacle to claiming coverage, Fluor-2 denied there was any assignment because Fluor-2 "retained" rights it attained by operation of law.

Fluor-2's witnesses supported its assertion that it "retained" policy rights through corporate succession rather than obtaining them by assignment. Mr. Helm testified (as Fluor-2's corporate designee and managing general counsel) that "the Hartford policies . . . were part of the assets retained by the EPC business," (Exh. 10, p. 3384 [214:11-13]), and that Fluor-2 succeeded to policy

rights "by virtue of the shareholder votes to split the company in half," not by assignment. (Exh. 10, p. 3382 [212:17-18].) The reorganization was carried out in accordance with a "Distribution Agreement," which contemplated that certain assets would be transferred, but which Mr. Helm (one of the attorneys involved in drafting the Distribution Agreement) (see Exh. 10, p. 3241 [71:23-24]), denied effected the assignment of policy rights:

> Q. What about the insurance assets, where did those go?
>
> A. Those were part of the EPC business. When the split of the companies occurred, they went with the EPC business.
>
> Q. So the Hartford policies, were they part of the EPC business?
>
> A. They were part of the overall Fluor business to start with.
>
> Q. But did they go anywhere?
>
> A. No. They stayed with the EPC business.

(Exh. 10, p. 3381 [211:5-15].) In short, the agreement did not address the Hartford Policies, and those Policies did not "go anywhere"—that is, they were not assigned.

Another of Fluor-2's witnesses, managing general counsel Paul Bruno, was even more emphatic. Mr. Bruno asserted that the Distribution Agreement was "unnecessary" to Fluor-2's succession to rights under the Hartford Policies (Exh. 11, p. 3465 [21:3]), and that "[t]he reverse spin-off is not an asset transfer. . . . [¶] . . . [¶] I am never going to agree that a reverse spin-off is an asset transfer." (Exh. 11, p. 3553 [109:1-2, 20-21].) He also denied that the words

"transfer," "assign," or "convey" accurately characterized what the Distribution Agreement accomplished.

In its petition, Fluor-2 abandoned the "mere continuation" argument, placing its eggs instead in the section 520 basket.[18] In so doing, Fluor-2 is not only changing its position on critical facts and adopting a new position for the first time in its petition, but it is also, remarkably, asking this court to grant the extraordinary relief of reversing the trial court's denial of summary adjudication because the trial court failed to find facts that Fluor-2 itself denied, and that its own witnesses contradicted. This record cannot support the entry of summary adjudication. Fluor-2 has failed to meet its burden of "mak[ing] a prima facie showing of the nonexistence of any triable issue of material fact," where it previously (in line with its own witnesses) denied any assignment took place. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Under these circumstances, there is, at a minimum, a genuine issue of fact as to whether any assignment occurred.

Fluor-2 does not offer any evidence of an assignment in response. Rather, Fluor-2 asserts that there is no factual issue as to the assignment "[b]ecause Hartford's claims allege there was an assignment which Hartford contends cannot be enforced against the Policies." (OBOM 14-15.) This is incorrect. Hartford's cross-complaint makes the following relevant allegations:

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[18] Fluor-2 abandoned the "mere continuation" argument for good reason: it is untenable under California law. This Court has stated that a corporation cannot be the "mere continuation" of another when both have a separate existence, as Fluor-2 and Fluor-1 do here. (See *Henkel, supra*, 29 Cal.4th at p. 941.)

> 40. The Distribution Agreement provides that Fluor Corporation ("[Fluor-1]") was to transfer the assets and liabilities relating to [certain specified] businesses to [Fluor-2] . . . .
>
> [¶] . . . [¶]
>
> 43. The Distribution Agreement also provides that [Fluor-1] was to transfer to [Fluor-2] all assets and liabilities related to any insurance policies issued to [Fluor-1] (including general liability policies), while still preserving insurance right for [Fluor-1].

(Exh. 1, p. 7.)

Hartford is not alleging that the Distribution Agreement assigns assets from Fluor-1 to Fluor-2. It is alleging that, under the Distribution Agreement, Fluor-1 was obligated to transfer assets to Fluor-2. That is, the Distribution Agreement creates the obligation to transfer assets by separate instrument, but Hartford has not alleged, and Fluor-2 has not proven, that such an assignment actually occurred.

But even if Hartford *had* alleged that there was an assignment, Fluor-2 responded to Hartford's allegations with a general denial of *all* allegations in Hartford's cross-complaint, including any allegation of an assignment. Where, as here, the allegations set forth in a pleading have been denied, the parties are required to submit evidence to prove the allegations necessary to support their claims. (See, e.g., *Advantec Group, Inc. v. Edwin's Plumbing Co., Inc.* (2007) 153 Cal.App.4th 621, 627 ["The effect of a general denial is to 'put in issue the material allegations of the complaint' "].) Fluor-2 has failed to offer any proof—much less conclusive evidence—of an intended assignment from Fluor-1. The

Court of Appeal correctly concluded that there were factual issues, independent of the meaning of section 520, that preclude summary adjudication in Fluor-2's favor. Fluor-2 is not entitled to the relief it seeks, and this court should affirm the denial of its petition.

CONCLUSION

For the reasons set forth above, Hartford respectfully submits that the court should affirm and reinstate the ruling by the Court of Appeal.

June 11, 2013

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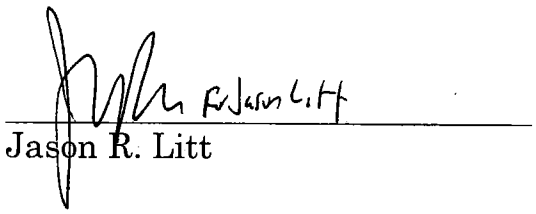
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.520(c)(1).)

The text of this brief consists of 11,896 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: June 11, 2013



Jason R. Litt

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On June 11, 2013, I served true copies of the following document(s) described as **ANSWER BRIEF ON THE MERITS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 11, 2013, at Encino, California.

/s/

Jan Loza

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