Case No. S205889

SUPREME COURT
FILED

AUG 02 2013

Frank A. McGuire Clerk

Deputy

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FLUOR CORPORATION,
Petitioner,

v.

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

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Real Party In Interest.

After a Decision by the Court of Appeal, Fourth Appellate District, Division Three Civil 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, Honorable Ronald Bauer, Presiding

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PETITIONER'S REPLY BRIEF ON THE MERITS

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I. INTRODUCTION

Fluor is not seeking to "overturn" *Henkel* as Hartford contends throughout its Answer. In fact, Fluor does not take issue with the principal holding of *Henkel* -- that insurance policies do not follow liabilities as a matter of law where the right to claim coverage was never intended to transfer. Instead, in accordance with Insurance Code section 520, Fluor challenges the Court's ruling regarding the enforceability of anti-assignment provisions.

While the point at which policy rights become freely assignable was a secondary issue in *Henkel* (because the courts up and down the line agreed with the original policyholder that there was no intent to transfer those rights to Henkel), section 520 confronts the issue squarely and dictates the rule Fluor seeks here: anti-assignment clauses are void "after a loss has happened."

"Loss" is the fulcrum on which section 520 depends. However, the *Henkel* majority did not apply the "loss" test (owing to the fact that neither the parties nor the amici ever brought the statute to the Court's attention). As the competing opinions make clear, the majority and dissent disagreed on whether to render anti-assignment clauses void at the time of "loss" (i.e., the occurrence that triggers coverage under a third-party liability policy), or instead only when a "chose in action" (i.e., conversion of that claim into a "sum of money due" from the insurer) later arises, with the majority opting for a "chose in action" test.

Now that Hartford's ever-changing position has evolved to concede that Insurance Code section 520 ***does*** provide the relevant test, and that anti-assignment clauses universally are invalid after the insured "loss" occurs, Hartford attempts to preserve the *Henkel* anti-assignment rule by retroactively equating the majority's "chose in action" with the "loss" central to section 520. This contention is not only belied by *Henkel*, but also every court (including this one) to consider when "loss" happens in a third-party liability policy.

As this case demonstrates, Hartford contorts *Henkel* to reach an entirely unprecedented and unfair result: Hartford refuses to be bound by the very assignment it pleads to invoke its anti-assignment clause, then Hartford relies on the same corporate transaction (the "Reverse Spinoff") to attempt to shift the obligations it owes to other insureds (subsidiaries Hartford concedes "are entitled to status as insureds") back onto Fluor through ***subrogation***. Because section 520 declares these clauses void at the time of "***loss***," rather than when the loss subsequently matures into a "chose in action," this Court should enforce the statute in accordance with its purpose -- to prevent insurers like Hartford from using their anti-assignment clauses to escape responsibility for liabilities they agreed to insure.

II. LEGAL ARGUMENT

A. Section 520 Governs the Third-Party Liability Policies Issued by Hartford

1. Hartford Cannot Defend the Court of Appeal's Erroneous Conclusion that Section 520 Applies Only to First-Party Policies Existing in 1872

Like similar sections of the Insurance Code, section 520 is indisputably a "General Rule Governing Insurance" that "has remained absolutely unchanged since its first enactment . . . [in] the 1872 Civil Code," "was placed into the Insurance Code unchanged in 1935," "has remained unamended in the succeeding years," and is "obviously intended [ ] to continue to apply" to ***all*** insurance policies in California, including liability policies. (*Evans v. Pacific Indemnity* (1975) 49 Cal.App.3d 537, 541.)

Accordingly, even Hartford now recognizes that the Court of Appeal erred in holding that section 520 "can have no bearing as a 'clear' or 'controlling' legislative expression on the assignability of liability insurance for the simple reason that liability insurance did not exist in 1872" (*Fluor Corp. v. Super. Ct.* (2012) 208 Cal.App.4th 1506, 1509). (See Answer, p. 13 [admitting that section 520 "limits assignment conditions that restrict post-'loss' assignments" in first- and third-party policies alike].)

The first question presented to this Court -- whether section 520 applies to third-party liability policies -- should therefore be answered in the affirmative.

2. Hartford's Attempt to Restrict the Assignment of "Interest" Under the Policies is Barred by Section 520 After a "Claim" Arises Upon the Happening of "Loss"

Unable to defend the Court of Appeal's reasoning, Hartford offers a new lead argument. While Hartford admits that section 520 does govern provisions in liability policies which purport to restrict the assignment of "claims," Hartford erroneously insists that the statute does not apply here because its clauses restrict the assignment of an "interest" under the Policies. (See Answer, pp. 13-14.) Contending that a "claim" is not an "interest," Hartford then argues that Fluor-2 asserts an "interest" for coverage under the Policies relating to its conduct, rather than a right to "claim" the benefits owed to Fluor-1 for ***its*** historic conduct. (*Ibid.*)[1]

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1 Hartford's brief attempts to sow confusion regarding which "Fluor" entity's liabilities and corresponding policy benefits were transferred to Petitioner Fluor Corporation through the Reverse Spinoff. "Fluor-1" in Hartford's parlance is the "Fluor Corporation" listed in the Hartford Policies, i.e. the engineering, procurement and construction ("EPC") company which also acquired various subsidiaries, such as A.T. Massey Coal Company, that were independently entitled to insurance under the Policies' broad "named insured" language. (See App. Ex. 2, at p. 1181 [defining "Named Insured" to include "FLUOR CORPORATION and any subsidiary or affiliated companies . . . as may exist or may be formed or acquired hereafter"]; Answer, p. 40.) In turn, "Fluor-2" is the "new" Fluor Corporation that, consistent with the purpose of the "named insured" provision, was formed in 2000 within the same corporate structure Hartford insured, to house the existing liabilities and corresponding insurance rights for Fluor-1's core EPC business -- the

Hartford's effort to distort the meaning of "claim" and "interest" not only tortures the language, but also leads Hartford to a fatal concession. After vehemently opposing this principle, Hartford now admits that "Fluor-1, as an insured, ***could freely transfer its claims . . . under the policies to any other entity, including Fluor-2***." (Answer, p. 14 [emphasis added].) Since Fluor-1's claims under the Policies are precisely what Fluor-2 has asserted following the Reverse Spinoff, Hartford has conceded the ultimate point.[2]

Hartford attempts to avoid this capitulation by arguing that a "claim" is not an "interest" under an insurance policy. Tellingly, Hartford fails to cite ***any*** definition of "claim" or "interest" that distinguishes the two

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business from which the Asbestos Suits arise. (App. Ex. 13, at pp. 4903, 4970, 4972, 4991, 4995-4996, 5021-5028, 5164.)

Notably, Hartford has never cited any case that suggests the later formation of a subsidiary company should bar coverage for the very liabilities Hartford collected premiums to insure. The only California case to address the broad "named insured" language of the Hartford Policies concluded merely that the "formed or acquired hereafter" language could not be used to inject ***additional*** liabilities into the scope of the policy's coverage. (See *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.* (1996) 45 Cal.App.4th 1, 81 ["[T]he premerger insurer of the acquiring company does not provide coverage for ***liabilities of the acquired company***." (emphasis added)].)

2 As explained in Petitioner's Opening Brief on the Merits, through the Reverse Spinoff, Fluor vested the company's core EPC functions (including the right to claim corresponding insurance benefits) in its new subsidiary, Fluor-2, while Fluor-1 was renamed Massey to operate the coal business. (See Opening Brief on the Merits, pp. 5-8; App. Ex. 13, at pp. 4903, 4928, 4970, 4972, 4987 4991, 4995-4996, 5021-5028, 5164.)

concepts. The reason for Hartford's omission is obvious: a "claim" ***is a type of*** "interest." (See Black's Law Dict. (9th ed. 2009) pp. 281-282 [defining "claim" as "an interest or remedy recognized at law"].)[3]

In a third-party liability policy, the "interest" insured is "the safety of persons or the freedom from damage to property, which might give rise to suits against him . . . ." (Russ & Segalla, 3 Couch on Insurance (2011) § 41:28; accord *Progressive N. Ins. Co. v. Consolidated Ins. Co.* (Ind. Ct. App. 1996) 673 N.E.2d 522, 525 ["The insurable interest in [liability insurance] cases is to be found in the interest the insured has in the safety of those persons who may maintain, or in the freedom from damage of property which may become the basis of, suits against him in case of injury or destruction." (quoting 43 Am.Jur.2d (1982) Insurance, § 1002)].)

Once an event occurs during the policy period to trigger that insurable interest -- i.e., the policyholder allegedly has caused bodily injury or property damage to another that might give rise to suits against him -- a

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3 Hartford cites *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 661-662 for the proposition that "this court has long recognized the difference between an assignment conferring an 'interest' . . . from an assignment of the right to recover on a claim against the insurer." (Answer, p. 14.) However, *Comunale* did not distinguish "interest" from "claim." *Comunale* merely held that one type of "interest" an anti-assignment clause "does not preclude" a policyholder from transferring is "a cause of action for damages for breach of contract." (*Comunale*, *supra*, 50 Cal.2d at pp. 661-662.) In section 520, the Legislature made clear that insurers are barred from enforcing anti-assignment clauses against ***any*** claim arising after a "loss has happened," including but not limited to claims for an insurer's breach of contract. (Ins. Code, § 520.)

loss has happened and the "interest" is now the right to assert a "claim" under the policy.[4] After the policy period has expired, the ***only*** interest the policyholder retains under an occurrence-based third party liability policy is the right to call upon the insurer's duties to defend and indemnify any suit arising from an occurrence that happened during the policy period.[5]

Hartford's Policies purport, from the inception of coverage, to bar the assignment of ***any*** interest the policyholder may have, including a claim that arises under the Policies. (See App. Ex. 2, at p. 1045.) However, pursuant to section 520, Hartford cannot enforce its anti-assignment provisions after the happening of a "loss":

> 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 . . . .

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[4] At the moment of "loss," the policyholder's "claim" may be "contingent" or "unliquidated." (See Black's Law Dict. (9th ed. 2009) at pp. 281-282 ["contingent claim" is a "claim that has not yet accrued and is dependent on some future event that may never happen"] ["unliquidated claim" is a "claim in which the liability of the party . . . is in dispute"].) But it is nevertheless a "claim." (See Civ. Code, § 3439.01, subd. (b) [defining "claim" as "a right to payment whether or not the right is reduced to judgment or it is . . . matured, unmatured, disputed, undisputed]; accord *Ohio v. Kovacs* (1985) 469 U.S. 274, 278.)

[5] See Thacker, et al., *Do Rights Transfer Under Occurrence-Based General Liability Policies After the Sale of a Business* (Fall 2011) 4 Brief 52, 53 ["Under the terms of an occurrence-based policy, coverage is limited to occurrences during the policy term. Therefore, any insured event -- known or unknown -- will have occurred before the policy's expiration. Any transfer of coverage rights *after* the expiration date of the policy necessarily occurs after an insured loss. Courts have reasoned that rights already vested under the insurance policy can be freely transferred . . . ."].

(Ins. Code, § 520.) Thus, at that point, the interest/claim in obtaining defense or indemnity against a loss that triggered any Hartford Policy is freely transferable.

Because there is no legitimate distinction between a policyholder's "interest" and "claim" after a loss has happened, much less after the policy period has expired, Hartford resorts to mischaracterizing Fluor's argument (and the Reverse Spinoff) as an attempt by "Fluor-2 to substitute itself as an insured" under the Policies. (Answer, p. 14.) This is sophistry. The Reverse Spinoff did not "substitute" insureds, since nothing Fluor did from that time forward could retroactively trigger coverage under long-expired policies. Once a policy expires, there is nothing left to substitute:

> Unless coverage has been triggered during the policy period, there is no coverage once the policy period has ended. Logically, then, neither is there a named insured once the policy period has ended. Thus, a corporate acquisition taking place after the policy has expired can have no retroactive effect on the identity of the named insured during the policy period.

(*Armstrong World Industries, Inc.*, *supra*, 45 Cal.App.4th at p. 80.)

The only "interest under the policies" that existed as of November 30, 2000, was the right to assert "claims" arising from "loss" that happened between 1971 and 1985. Fluor, in its corporate incarnation following the Reverse Spinoff in 2000, was merely the name to whom Hartford was obligated to continue directing money for defense costs or indemnity payments, covering the same EPC liabilities the Policies had always insured.[6]

B. "Loss" Happens At the Time of Occurrence

Hoping to sidestep the central issue of whether "loss" in section 520 means the insured "occurrence" in liability policies, Hartford misrepresents Fluor's argument as a debate over the meaning of "chose in action." (Answer, p. 23 [mischaracterizing Fluor as seeking to "replace[] the [*Henkel*] majority's analysis of when a chose in action arises"].)

Fluor does not take issue with the main thrust of *Henkel* -- that insurance policies do not follow liabilities as a matter of law where the right to claim coverage was never intended to transfer. Nor does Fluor seek to re-litigate the majority's conception of when a "chose in action" arises. Instead, Fluor demonstrates that section 520 dictates a different rule for determining the enforceability of anti-assignment clauses because the statute declares these clauses void at the time of "***loss***," rather than when the loss subsequently matures into a "chose in action."

California case law, the underwriting history of liability policies, and other statutory guidance establish that "loss happens" when the event

[6] Ironically, if Hartford's latest argument -- the anti-assignment provisions in the Policies only bar the wholesale "substitution of insureds" -- were correct, then those provisions would not even apply to the Reverse Spinoff, since that transaction merely assigned to Fluor-2 the right to claim benefits owed to Fluor-1 under the Policies for losses that necessarily happened many years earlier.

triggering the policy occurs. Therefore, the anti-assignment clauses of Hartford's Policies were "void" upon the happening of an "occurrence" of bodily injury or property damage for which Fluor-1 allegedly was responsible.

1. *Henkel* Failed to Apply Section 520's "Loss" Rule

Through six rounds of briefing in the Superior Court, Court of Appeal and Supreme Court, Hartford has failed to identify a single case or commentator that equates "loss" with "chose in action" rather than "occurrence." Hartford instead attempts to manufacture its own precedent through a distorted re-telling of *Henkel*. According to Hartford, the "conclusion" of *Henkel* was:

> that ***"loss,"*** for purposes of the enforcement of anti-assignment provisions in third-party liability policies, ***occurs when the insured's clam against the insurer has been reduced to a chose in action***.

(Answer, p. 5 [emphasis added]; see also *id.* at p. 19 ["[T]his court explained in *Henkel*, in the third-party context, [that] ***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 injury." (Emphasis added)].)

Contrary to Hartford's assertion, there is no "conclusion," explanation, or commentary whereby the *Henkel* majority equates "loss" with "chose in action." Although Hartford repeatedly puts quotation marks around "loss," that term does not even appear in the majority opinion. (Cf.

Henkel Corp. v. Hartford Accident & Indemnity Co. (2003) 29 Cal.4th 934, 938-946.) This is not surprising because the majority did not agree with the dissent that "loss" was the relevant point for determining the enforceability of anti-assignment clauses under the common law.

Although the dissent and majority disagreed over when these provisions become void as a matter of common law, there was no dispute that a "chose in action" arises at a different time than "loss" under third-party liability policies. In fact, every court which has analyzed *Henkel* recognizes that this Court distinguished "loss" from "chose in action" (i.e., the subsequent point when a claim is reduced to a "sum of money due"):

> Under California law [i.e., *Henkel*], assignment of insurance benefits may violate an anti-assignment provision, ***even if such assignment took place after the insurance loss***, if the claim against the policy has not been "reduced to a sum of money due or to become due under the policy."

(*In re Thorpe Insulation Co.* (C.D.Cal. Sept. 21, 2010, No. cv 10-1493) 2010 U.S. Dist. LEXIS 104196, *10 [quoting *Henkel* (emphasis added)], revd. on other grounds, *Motor Vehicle Casualty Co. v. Thorpe Insulation Co.* (9th Cir. 2012) 677 F.3d 869; accord *Negri v. Nationwide Mutual Ins. Co.* (N.D. W.Va. Oct. 24, 2011, No. 5:11cv3) 2011 U.S. Dist. LEXIS 123083, *19-20 [*Henkel* "found even post-loss assignment of policy rights to be non-assignable"]; *Viking Pump, Inc. v. Century Indemnity Co.* (Del. Ch. 2009) 2 A.3d 76, 105 ["In [*Henkel*], the California Supreme Court found that anti-assignment clauses barred [the] transfer of insurance claims because . . . the insured loss had not been reduced to a fixed amount at the time of the assignment."]; *Sandburg Fin. Corp. v. Nat. Union Fire Ins. Co.* (S.D. Tex. July 25, 2011, No. H-10-2332) 2011 U.S.Dist. LEXIS 81398, *16 [describing *Henkel*'s holding as: "a post-loss, pre-judgment assignment without consent is prohibited"].)[7]

Henkel did not adopt the "loss" test mandated by section 520 because the parties (including Hartford) failed to bring the statute to the Court's attention.[8] Rather than acknowledging this mistake, Hartford seeks to avoid the statute by pretending this Court somehow "explain[ed] . . . [when] a 'loss' occurs for purposes of permitting the enforcement of an anti-assignment provision." (Answer, p. 19) This strains Hartford's credibility beyond the breaking point.

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7 Even the court in *Travelers Casualty & Surety Co. v. U.S. Filter Corp.* (Ind. 2008) 895 N.E.2d 1172 -- the only state supreme court to endorse *Henkel*'s reasoning -- recognizes that *Henkel* rejected the argument that "policy benefits can be assigned ***post-loss*** without receiving consent," in favor of a rule that the loss must subsequently "become an assignable chose in action" by being "reduced to a sum of money due or to become due under the policy." (*Id.* at p. 1180 (emphasis added).) Of course, *Henkel* did so without being directed to the statute compelling the line of assignability to be drawn at "loss." (Ins. Code, § 520.)

8 The central issue in *Henkel* focused on whether the policies transferred with the liabilities as a matter of law, regardless of whether the parties also intended to assign the policies. (*Henkel, supra*, 29 Cal.4th at pp. 941-943.) The parties' failure to cite and apply section 520 may be explained by the fact that enforceability of the anti-assignment provision was a secondary issue.

2. "Loss" Happens Under Third-Party Liability Policies At the Time of the "Occurrence" Triggering Coverage

The fundamental concept of "loss" is the same in all policies: "Loss" is the underlying event that triggers coverage. (See, e.g., *Montrose Chemical Corp. of Cal. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 654-655; *State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186, 200.) While "loss" may happen at different times under different types of policies, an unbroken line of courts, commentators and the insurance industry itself recognizes that "loss," in the case of third-party liability policies, means the "occurrence." Hartford has been unable to cite a single case challenging this principle.

Consistent with the general rule that "loss" is the happening of the insured event, this Court and the Courts of Appeal repeatedly have confirmed that "loss" happens at the time of the "occurrence" of bodily injury or property damage that triggers third-party liability policies. (See, e.g., *Montrose, supra,* 10 Cal.4th at pp. 654-655; *Continental, supra,* 55 Cal.4th at p. 200; *Westoil Terminals Co. v. Harbor Ins. Co.* (1999) 73 Cal.App.4th 634, 641-642; *Employers Ins. Co. of Wausau v. Travelers Indemnity Co.* (2006) 141 Cal.App.4th 398, 405.)

Other courts uniformly agree that "loss" arises at the time of the occurrence that triggers coverage, regardless of where they draw the line of assignability. (E.g., *Pilkington N. Am., Inc. v. Travelers Casualty & Surety*

Co. (2006) 112 Ohio St. 3d 482, 486-490 ["The losses are fixed at the time of the occurrence."]; *Egger v. Gulf Ins. Co.* (2006) 588 Pa. 287, 299-302 ["***[A] 'loss' is 'the occurrence*** of the event, which creates the liability of the insurer.' [Citation.] The event that occasioned the liability of Gulf, was the 'Occurrence' to which the policy applied; **i.e., *the bodily injury*** that Foulke caused to Egger on September 5, 1997." (emphasis added)]; *In re Ambassador Ins. Co.* (2008) 184 Vt. 408, 416 ["[T]he losses that triggered Ambassador's potential liability had already occurred" since claims arose when the underlying claimants were "injured by [policyholder's] asbestos-containing products."]; *Ill. Tool Works v. Commerce & Industry Ins. Co.* (Ill. Ct. App. 2011) 962 N.E.2d 1042, 1053-1055 ["The policies are third-party occurrence-based policies . . . . They provide the insured with protection against future claims by third parties for covered losses incurred by the third parties as a result of the insured's actions during the coverage period. [¶] . . . Once an insurance policy is executed, it only remains to be seen whether any occurrences/losses for which the insurer took on the risk and the insured bought coverage will occur during the policy coverage period and whether claims for those losses will be brought . . . ."]; *In re ACandS, Inc.* (Bankr. D.Del. 2004) 311 B.R. 36, 41 [permitting assignment of asbestos bodily injury claims: "[B]ecause an insured's right to proceeds vests at the time of the loss giving rise to the insured's liability, restrictions on an insured's right to assign its proceeds are generally void. . . . [¶]

[T]he loss giving rise to the liabilities in this case have already accrued, thus making the policies assignable[.]"]; *Gopher Oil Co. v. Am. Hardware Mut. Ins. Co.* (Minn. Ct. App. 1999) 588 N.W.2d 756, 764 ["The Minnesota Supreme Court . . . has held that a loss occurs at the time of contamination[.]"]; *Travelers Casualty & Surety Co., supra*, 895 N.E.2d at p. 1179 [describing injuries alleged in underlying third-party claims as "occurred but not yet reported losses"].)

This settled understanding of when "loss" happens under a third-party liability policy is consistent with the purpose and development of this form of insurance and the insurance industry's own interpretation. As the Secretary of the National Bureau of Casualty Underwriters (the group responsible for drafting the standardized policy language reflected in the Policies) explained over 40 years ago, the insurance industry ***explicitly*** intended for the term "occurrence" to "identify the time of ***loss***" in third-party liability policies. (Elliott, The New Comprehensive General Liability Policy (Schreiber ed. 1968) Practicing Law Institute, Liability Insurance Disputes, 12-5 [emphasis added].)[9]

Unable to cite a single case or commentator endorsing its view, Hartford again mischaracterizes this Court's decisions explaining "loss" in

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9 "It is [ ] 'a settled principle of statutory construction that a Legislature in legislating with regard to an industry or an activity, must be regarded as having had in mind the actual conditions to which the act will apply; that is, the customs and usages of such industry or activity.'" (*Bernard v. City of Oakland* (2012) 202 Cal.App.4th 1553, 1569.)

the context of liability policies. Hartford insists that the Court does not "discuss the concept of loss" in the *Montrose* decision (Answer, p. 23), even though an entire section of that opinion is devoted to explaining when coverage is available for the "continuous or progressively deteriorating ***property or bodily injury losses insurable under a third party CGL policy***[.]" (*Montrose, supra,* 10 Cal.4th at p. 655 (emphasis added).) Moreover, Hartford's selective reading of *Montrose* is belied by this Court's subsequent decision in *Continental,* which affirmed its recognition that "loss" refers to the event that triggers coverage under a liability policy when it extended *Montrose*'s holding to the indemnity context:

> [T]he policies at issue obligate the insurers to pay all sums for property damage . . . as long as some of the continuous property damage occurred while each policy was "on the loss."

(*Continental, supra*, 55 Cal.4th at p. 200.)

Although Hartford eventually concedes that this Court has "use[d] the term 'loss'" on multiple occasions to mean the "underlying injury" that triggers insurance coverage, Hartford argues that the Court did not intend to "equate" these terms. (Answer, p. 26.) There is no reason to second-guess the Court's intention in *Montrose* and *Continental.* These cases make clear that, in both the defense and indemnity contexts, "loss" happens under third-party liability policies at the time of the coverage-triggering "occurrence."[10]

Hartford acknowledges that "words must be construed in context" when courts enforce statutory commands. (Answer, p. 24 [citing *Lakin v. Watkins Assoc. Indus.* (1993) 6 Cal.4th 644, 659].) The critical "context" in this case is the meaning of the term "loss" as it applies to third-party liability policies. This Court answered that question in *Montrose* and

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[10] As Fluor previously has explained, section 108 of the Insurance Code also confirms that the "loss" in third-party liability policies is the "occurrence" of an "injury" to another that is transferred to the tortfeasor through "liability." (See Petitioner's Opening Brief on the Merits, pp. 36-38.) In response, Hartford argues that "loss" cannot occur until the policyholder is "***held*** liable" for an injury it causes in a subsequent lawsuit. (Answer, pp. 33-35; emphasis added.) This would turn liability insurance on its head. Unlike indemnity policies, occurrence-based third party liability policies are "activated" by the occurrence of bodily injury. (*Montrose*, *supra*, 10 Cal.4th at p. 655.) Under Hartford's erroneous rationale, there would never be a duty to defend, since lawsuits alleging the policyholder's (disputed) liability necessarily must be litigated in order to "establish[ ]" "the insured's liability." (Answer, p. 34; cf. *Egger*, *supra*, 588 Pa. at p. 302 [Hartford's argument "confuses loss with the subsequent fixing of a precise amount of damages for that loss."].)

Courts have long recognized that "loss" and "injury" are merely two sides of the same coin, with the "injury" to a third-party transferred as "loss" at the moment "liability" attaches, regardless of whether that liability is admitted, contested or uncertain in its amount. (E.g., *Ocean Accident & Guarantee Corp. v. Southwestern Bell Telephone Co.* (8th Cir. 1939) 100 F.2d 441, 446-447 ["[U]nder a liability policy such as the one under consideration, the liability, the loss and the cause of action arise simultaneously with the happening of the accidental injury to the employee. . . . The fact that the loss does not 'mature' until final judgment against the insured is entered is not material . . . . 'The recovery of the judgment against the insured by the injured party is . . . is a mere test or mode for proof. . . . In contemplation of law the insured either was or was not, from the first, liable for the consequence of the accident . . . ." (citation omitted)].)

Continental, in accordance with the meaning universally held by other states' courts and the insurance industry for decades. Therefore, this Court should apply this undisputed meaning of "loss" to section 520, in furtherance of the Legislature's directive to prevent "grossly oppressive" attempts by insurers to prohibit assignment after the policy has been triggered by the happening of the insured event. (Fluor's Request for Judicial Notice in support of Reply to Hartford's Answer to Petition for Peremptory Writ, filed Apr. 13, 2012 ("Fluor RJN – Writ Reply"), Ex. A [Former Civ. Code, § 2599 (1872); Code Commrs., note foll. Civ. Code, § 2599 (1st ed. 1872, Haymond & Burch, Commrs.-annotators) Vol. II, at p. 152, citations omitted; emphasis added].)[11]

3. The Loss That Triggered Each Hartford Policy Necessarily Happened After the Policy's Inception

As a last-ditch effort to avoid section 520, Hartford now argues that the Policies' anti-assignment "agreements" were not "made before the

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[11] Hartford invents an alternative legislative history for section 520's Civil Code predecessor, arguing that its citation of *Goit v. Nat. Protection Ins. Co.* (N.Y. Gen. Term 1855) 25 Barb. 189, supports a different meaning for "loss." (Answer, p. 31.) To the contrary, *Goit* confirms that the purpose of anti-assignment clauses is to protect insurers "***during the continuance of the risk***." (*Goit*, *supra*, 25 Barb. at p. 193 (emphasis added).) The "insurable risk" in a liability policy is the "damage or injury that may occur ***during the policy period***." (*Montrose*, *supra*, 10 Cal.4th at p. 655.) Once that risk is realized by the happening of a "loss" which triggers coverage (which either did, or did not, occur prior to the expiration of the policy), anti-assignment clauses are deemed to be an impermissible restraint on alienation prohibited by law. (Ins. Code, § 520; accord *Goit*, 25 Barb. at pp. 193-194.)

loss" (as required by section 520) because, in some Asbestos Suits, the claimant allegedly was first exposed to asbestos prior to the inception of Hartford's Policies. (Answer, p. 36.) Hartford's latest twist fundamentally misconstrues the nature of occurrence-based liability insurance.

The purpose of insurance is to shift the risk that a fortuity (i.e., an "occurrence" or "loss") may happen during the policy period, thereby "activating" the insurer's obligations to its policyholder. (*Montrose*, *supra*, 10 Cal.4th at p. 655; *Chu v. Canadian Indemnity Co.* (1990) 224 Cal.App.3d 86, 95.) The loss that must occur to trigger coverage under an occurrence-based liability policy is "damage or injury . . . ***during the policy period.***" (*Montrose*, *supra*, 10 Cal.4th at p. 655; emphasis added.) Without any damage or injury during the policy period, a loss does not happen.

Therefore, the relevant issue for purposes of determining when the loss arises is not whether injury or damage began before the policy incepted, but instead whether injury or damage also occurred during the policy period.[12] That is the "context" through which section 520's

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[12] As this Court previously has explained, the event that ***triggers*** coverage, however, does not define the ***scope*** of an insurer's obligation:

> [T]he event which triggers an insurance policy's coverage does not define the extent of the coverage. Although a policy is triggered only if [bodily injury or] property damage takes place "during the policy period," once a policy is triggered, the policy obligates the insurer

application to liability policies must be analyzed.

By definition, so long as injury or damage allegedly occurred during the Policies' coverage period (which is not in dispute), the "agreement not to transfer the claim of the insured against the insurer" (i.e., the anti-assignment clauses in the Hartford Policies), were necessarily "made before the loss" (i.e., the injury which triggers the Policies), and are therefore "void" "after a loss has happened" during the policy period. (Ins. Code, § 520.)

C. <u>Section 520's "Loss" Rule Protects the Reasonable Expectations of All Parties Involved in Liability Insurance and Serves the Public Interest</u>

1. Section 520 Promotes the Efficient Operation of Corporate Transactions

In section 520, the Legislature adopted as the policy of this state the rule that insurers should not be allowed to restrict the alienation of policy rights once the risk insured against happens. Upon the happening of a triggering event, there is no longer an "insured risk," but a "loss." (Cf. *Montrose*, *supra*, 10 Cal.4th at p. 655.) At that moment, section 520 allows the policyholder to freely assign its rights, which promotes the efficient

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> to pay "all sums" which the insured shall become liable to pay as damages for bodily injury.

(*Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 57, fn. 10.) "[U]nder *Aerojet*, as long as the policyholder is insured at some point during the continuing damage period, the insurers' indemnity obligations persist until the loss is complete, or terminates." (*Continental*, *supra*, 55 Cal.4th at p. 197; accord *id.* at pp. 191, 200.)

transfer of assets and liabilities and enhances commerce in California.

This sound policy is endorsed by other states with large economies. As the court explained in *Viking Pump*:

> Enabling efficient exchange appears to be a long-standing public policy rationale for New York law's rule against enforcing anti-assignment provisions in post-loss scenarios. See, e.g., *Courtney v. The New York City Ins. Co.*, 28 Barb. 116 (N.Y. Supr. 1858) (giving as reasons for refusing to enforce an anti-assignment provision post-loss the fact that "[the anti-assignment provision] is a positive impediment in the way of the assured, for it forbids him to sell, assign or hypothecate his claim or to realize a dollar towards the reparation of his loss and the renovation of his property" and that such provisions are "manifestly in restraint of the free use and enjoyment of the rights of the assured under the contract").

(*Viking Pump*, *supra*, 2 A.3d at pp. 105-106, fn. 92.)

Notwithstanding the Legislature's directive, Hartford contends that insurance companies should be granted a veto power over corporate transactions in the form of an unfettered right to withhold consent to a transfer of claims by policyholders even after a loss triggering coverage has already happened. In the event that an insurance company exercises that power, Hartford argues that the entire corporate transaction must be restructured or "a different price for the transaction" negotiated. (Answer, p. 42.) In other words, Hartford demands that insurance companies be permitted to extort an additional premium from corporate policyholders as the price for continuing to cover the very liabilities the insurance company was already paid to insure.[13]

The rule advocated by Hartford places corporate actors in the untenable position of ceding their transactional decisions to insurers, who would have an incentive to use the rule as a sword to escape coverage obligations for which they already collected premiums. This is precisely the type of technical forfeiture this Court has long abhorred, particularly in the insurance context. (See *Ryman v. Am. Nat. Ins. Co.* (1971) 5 Cal.3d 620, 629 ["Forfeitures, particularly in insurance contracts, are not favored."]; accord *Univ. of Judaism v. Transamerica Ins. Co.* (1976) 61 Cal.App.3d 937, 941 ["Forfeitures on technical grounds which bear no substantial relationship to the insurer's risk are disfavored."].)

Nevertheless, a forfeiture is exactly what Hartford brazenly seeks in this litigation. After collecting more than ***$4 million*** in retroactive premiums from Fluor-2 during the eight years of defending and indemnifying the Asbestos Suits following the Reverse Spinoff, Hartford now attempts to escape the very liabilities it insured.[14]

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13 There is no other class of assets that is restricted in this manner. In fact, insurance companies routinely transfer coverage portfolios among themselves without the permission of their policyholders. This is endorsed by regulators and courts alike.

14 Hartford falsely contends that it only "learn[ed] that 'Fluor' is Fluor-2" based on a "discovery" made in October 2008. (Answer, p. 10.) This is beyond the pale. Shortly after the Reverse Spinoff, Fluor expressly informed Hartford (in 2001) that it had "separated into two publicly traded companies, 'New Fluor' and 'Massey Energy Company,'" and

Worse yet, Hartford seeks to compound this perverse result by relying on the Reverse Spinoff to shift ***all*** its obligations, including those Hartford owes to entities it concedes are insured, ***to Fluor-2***:

> The Fluor Subsidiaries . . . were subsidiaries of [Fluor-1] at the time the Distribution Agreement was entered into. . . . Hartford is subrogated to the rights of the Fluor Subsidiaries . . . . Hartford is therefore entitled to recover from [Fluor-2] any amounts paid for defense and/or indemnity to the Fluor Subsidiaries under the policies that Hartford issued . . . .

(App. Ex. 1 at p. 10 [¶¶ 63-65].)[15] This is precisely the "gross oppression" the Legislature enacted section 520 to protect against. (Fluor RJN – Writ Reply, Ex. A.)

At bottom, Hartford's dispute is with the Legislature. Regardless of whether Hartford would fashion a different rule if it were operating on a blank slate, the Legislature has already determined that insurance policy

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that "Fluor Corporation changed its name to Massey Energy Company" while "'New Fluor' is a newly created entity named Fluor Corporation that was incorporated on September 11, 2000." (App. Ex. 13, at p. 4903.) At the same time, Fluor provided Hartford with copies of the transactional documents evidencing the Reverse Spinoff. (App. Ex. 13, at pp. 4898 [¶ 12], 4958-5159 [Proxy Statement], 5160-5182 [Distribution Agreement].) Hartford admittedly received and understood the Reverse Spinoff contemporaneously. (App. Ex. 4, at pp. 1790:5-9, 1791:5-12, 1795:6-20, 1798:15-22, 1805:25-1806:11.) Moreover, far from "discovering" the transactional documents in ***2008***, Hartford produced the copies it had already been provided back to Fluor as part of discovery in this very litigation -- ***over two years earlier***. (App. Ex. 10, at pp. 2766 [¶ 8], 3043-3065 [H019484-H019506].)

15 Hartford admits that the "Fluor Subsidiaries" are independently "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." (Answer, p. 40.)

anti-assignment clauses are not enforceable after the coverage-triggering loss has occurred. (See *Franklin Capital Corp. v. Wilson* (2007) 148 Cal.App.4th 187, 193, 210 ["[A different rule] might be an excellent judicial policy and indeed we might adopt it ourselves if writing in vacuum. But it's not what the Legislature said."].)

2. Enforcing Section 520 Does Not Prejudice Hartford

Hoping to discourage enforcement of section 520, Hartford imagines a parade of horribles that it contends could flow from invalidating its anti-assignment clauses after the coverage-triggering loss has happened. (Answer, pp. 37-40.) None justifies departing from the result compelled by the Legislature.

Hartford's primary contention is that, even after a loss has happened, there are various "factors that may affect the risk to the insurer" (Answer, p. 38) as it performs the defense and indemnity obligations that were "activated" by coverage-triggering occurrences. (*Montrose*, *supra*, 10 Cal.4th at p. 655; *Chu*, *supra*, 224 Cal.App.3d at p. 95.) In particular, Hartford argues that an assignee "may not have access to the same documents, witnesses, or other evidence" as the original insured, or "may not have the historical knowledge" necessary to effectively defend underlying lawsuits. (Answer, p. 39.) That makeweight concern is already addressed by the Policies.

Liability policies uniformly condition the insurer's performance of its duties on notice and cooperation provisions that protect against any increase in risk after the coverage-triggering occurrence has happened. (See Rest.2d Contracts, § 227, com. d.) These conditions bind the insured and its successor by assignment: Liability insurers rightfully can demand that the entity asserting a claim (whether the original insured or an assignee) satisfy the conditions of performance imposed by the policy. (See *O'Morrow v. Borad* (1946) 27 Cal.2d 794, 800 ["[The cooperation] requirements are not conditions precedent to the validity and enforcement of an insurance policy but are conditions subsequent to be pleaded by the insurer in defense of liability."].) If an assignee is unable or unwilling to cooperate in the defense of the underlying matter, then an insurer may be relieved of its duties.

Importantly, as Hartford well knows, there is no such concern in this case. The purpose of the Reverse Spinoff was to allow Fluor to focus on its core EPC functions -- the business from which the Asbestos Suits arise, and the precise business operations insured by Hartford. (App. Ex. 13, at pp. 4958, 4970-4972, 4987, 5164.) The basic corporate structure, ownership, management, brand recognition and continuing operations of the EPC companies were preserved in the "new" Fluor, which was owned by the same shareholders, managed by the same executive team, headquartered at the same location in Aliso Viejo, and retained all of the books, licenses, permits, contracts and agreements associated with the EPC business. (App. Ex. 10, at pp. 2807, 3268-3269; App. Ex. 13, at p. 5059.)

Massey, on the other hand, retained only the coal business. (App. Ex. 13, at pp. 4928, 4972, 4987, 4991, 5164.) Consequently, Massey would not be able to provide the meaningful "assistance in defending underlying suits" that Hartford now claims to seek. (Answer, p. 39.) Because Fluor is the ***only*** entity (as between Fluor and Massey) which can effectively assist Hartford in defending the Asbestos Suits, Hartford's position would lead to the very problems that it now pretends to fear.

In reality, because Massey did not acquire Fluor's EPC operations, there has never been any dispute between Fluor and Massey regarding which entity is entitled to insurance coverage for the Asbestos Suits . (App. Ex. 36, at pp. 10919-10923.) Consistent with the risks the Policies were meant to insure and the purpose of the Reverse Spinoff, Massey tenders any claims arising from the historic operations of the EPC business, including the Asbestos Suits, to Fluor, which continues to bear responsibility for pursuing coverage under the Policies written to insure those losses. (App. Ex. 10, at pp. 3244-3245, 3294-3299; App. Ex. 13, at pp. 4995-4996, 5168-5170.) Fluor, in turn, looks to Hartford to defend and indemnify those claims, as Hartford was obligated to do from the moment the Policies were triggered by the occurrence of any loss during the applicable policy periods.

On the other hand, to the extent any claims arising from A.T. Massey's mining business are insured under the Policies' "difference in conditions" coverage,[16] Massey pursues coverage separately from Fluor, just as it did before the Reverse Spinoff. Contrary to Hartford's suggestion, Massey has never claimed coverage for an Asbestos Suit or any other liability of Fluor-1 under the Policies.[17]

Therefore, Hartford is not required to provide multiple defenses, nor to defend any additional risks beyond the losses that triggered its Policies during the relevant policy periods. (Contra Answer, p. 39.)

D. Fluor Is Entitled to Summary Adjudication of Hartford's Causes of Action

Hartford's Answer redoubles its prior attempt to avoid the merits of this dispute by erecting procedural roadblocks. To prevail in this Court, Hartford contends that Fluor must show (i) that it "could assign the Hartford Policies . . . without Hartford's consent" and (ii) that the Policies

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16 This coverage entitles A.T. Massey, the coal mining subsidiary acquired by Fluor-1 in 1981, to coverage in its own right. (App. Ex. 2, at pp. 1026, 1165, 1314; accord Answer, p. 40.)

17 Hartford misleadingly implies that Massey (i.e., Fluor-1) "continues to tender claims" for the Asbestos Suits "for coverage under the Hartford Policies." (Answer, p. 38.) Hartford offers no record citation, because it knows that its suggestion is false. Massey does not tender claims to Hartford for any liabilities arising from the historical operations of ***Fluor***, and Hartford does not cite a single instance in which it was forced to provide multiple defenses to any Asbestos Suit. (App. Ex. 11, at pp. 4045, 4123-4127, 4129-4133; App. Ex. 12, at pp. 4413-4415; App. Ex. 13, at pp. 4898-4899 [¶ 14]; App. Ex. 22, at pp. 10145-10146, 10400-10409; compare Answer, pp. 38-39.)

were "in fact assign[ed]." (Answer, p. 44.) Hartford again misstates the nature of the causes of action Fluor seeks to resolve.

This dispute arises from the Superior Court's denial of Fluor's motion for summary adjudication, which targeted two causes of action asserted in Hartford's 2009 cross-complaint -- the sole pleading at issue here. Critically, Hartford's cross-complaint did not dispute that there was an assignment. Instead, Hartford pleaded that the Reverse Spinoff was an "assignment of insurance rights" to Fluor made without Hartford's consent. (App. Ex. 1, at p. 8 [¶ 44].) Hartford alleged that, although Fluor and its predecessor had agreed to "transfer the assets and liabilities" relating to the historic EPC business, including "all assets and liabilities related to any insurance policies" which covered the EPC liabilities, Fluor "[n]ever sought or obtained Hartford's consent to the purported assignment of insurance rights[.]" (*Id.* at pp. 7-8 [¶¶ 40-44].) Based on the facts alleged by Hartford, Fluor moved to summarily adjudicate Hartford's causes of action on the ground that the anti-assignment clauses are void as a matter of law under section 520, and therefore unenforceable.

Despite predicating the causes of action at issue upon an assignment, and despite filing multiple briefs before three courts arguing that *Henkel* resolved the dispute as a matter of law, Hartford attempted a sleight of hand in the Court of Appeal by challenging (without withdrawing) its own pleaded allegation concerning the allegedly unenforceable assignment. Hartford never raised this inconsistent procedural argument until after this Court granted Fluor's first Petition for Review and ordered the Court of Appeal to consider the merits of Fluor's legal argument that section 520 bars Hartford from relying on its anti-assignment provisions. To the contrary, Hartford told this Court "***it is undisputed that the purported assignment took place*** . . . ." (Answer to First Petition for Review, at p. 23; emphasis added.)

The Court of Appeal did not accept this change in course from Hartford, and neither should this Court. Yet Hartford now rests its belated procedural challenge on a purported alternative ruling that the Court of Appeal never made. (See Answer, at pp. 6, 47-48 ["[T]he Court of Appeal properly concluded that several disputed factual issues would preclude summary judgment[.]"].) Contrary to Hartford's representation, the court explicitly declined Hartford's invitation to address certain factual disputes that were not before it, and which would not need to be litigated if section 520 "voids" the anti-assignment provisions of the Hartford Policies. (See *Fluor*, *supra*, 208 Cal.App.4th at p. 1520.) After noting that Fluor's motion targeted the causes of action and allegations pleaded by Hartford, the court found no need to debate Hartford's belated argument because the pleadings "have not properly placed into issue whether Fluor-1 assigned the policies to Fluor-2." (*Ibid.*)

This is precisely why Fluor's motion for summary adjudication, which is the sole subject of this appellate proceeding, does not turn on any factual disputes regarding assignment: Fluor targets Hartford's causes of action which allege there was an assignment. Fluor was under no obligation to prove an assignment because Hartford's causes of action did not put that question at issue. "The pleadings define the issues to be considered on a motion for summary judgment." (*Benedek v. PLC Santa Monica* (2002) 104 Cal.App.4th 1351, 1355; accord *Danieley v. Goldmine Ski Associates, Inc.* (1990) 218 Cal.App.3d 111, 119 ["Whenever a court must rule on a motion for summary judgment, the factual issue guidelines for such motion are fixed by reference solely to the pleadings."].)

At this late stage, Hartford cannot retreat from its own pleading and terminate the legal debate about the enforceability of its anti-assignment clauses in light of section 520. Fluor's motion targeted Hartford's causes of action based on the facts as alleged by Hartford, which therefore frame the pure legal issue presented. Because Fluor's interpretation of section 520 is correct, Hartford's causes of action fail as a matter of law and its anti-assignment provisions are void.

III. <u>CONCLUSION</u>

Section 520 prohibits insurers from using anti-assignment clauses to frustrate the transfer of insurance benefits or undermine coverage for losses that already have happened. Yet that is precisely what Hartford now attempts to obtain from this Court: Hartford seeks a forfeiture of coverage after the alleged occurrences have happened; after the Policies have expired; and after the potential liabilities and the corresponding coverage rights for those liabilities were transferred to a related entity in a beneficial corporate transaction that did not prejudice Hartford's ongoing duty to defend and indemnify the Asbestos Suits.

Because *Henkel* was decided without the benefit of section 520's direction, this Court should confirm that the "loss" rule established by the statute prohibits the "grossly oppressive" practice of insurers seeking to restrict assignments and impose technical forfeitures of coverage after the coverage-triggering event has happened. Accordingly, Fluor respectfully requests an order directing the Superior Court to vacate its prior order and grant Fluor's motion for summary adjudication on the First and Second Causes of Action of Hartford's operative cross-complaint.

DATED: August 1, 2013

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By: ______________________
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CERTIFICATION OF COMPLIANCE WITH RULES OF COURT

Petitioner's counsel certifies that this brief meets the requirements of the California Rules of Court. It has been prepared in 13-point Times New Roman typeface and consists of a total of 7,970 words, as counted by the word-processing program (Microsoft Word) used to generate this Petition, exclusive of the Tables and Certification.

DATED: August 1, 2013

LATHAM & WATKINS LLP
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G. Andrew Lundberg

By: ______________________
John M. Wilson
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PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 600 West Broadway, Suite 1800, San Diego, CA 92101-3375.

On August 1, 2013, I served the following document described as:

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Executed on August 1, 2013, at San Diego, California.

Andrea Rasco

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