Case No. S205889

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED
CRC 8.25(b)
MAR 13 2013
Frank A. McGuire Clerk
Deputy

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. S 196592

Petition from the Superior Court of the State of California for the County of Orange Case No. 06CC00016, Honorable Ronald Bauer, Presiding

---

PETITIONER'S OPENING BRIEF ON THE MERITS

LATHAM & WATKINS LLP
BROOK B. ROBERTS (STATE BAR NO. 214794)
JOHN M. WILSON (STATE BAR NO. 229484)
G. ANDREW LUNDBERG (STATE BAR NO. 108509)
600 WEST BROADWAY, SUITE 1800
SAN DIEGO, CALIFORNIA 92101-3375
(619) 236-1234 • FAX: (619) 696-7419
BROOK.ROBERTS@LW.COM; JOHN.WILSON@LW.COM;
ANDY.LUNDBERG@LW.COM
Counsel for Petitioner Fluor Corporation

Case No. S205889

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. S 196592

Petition from the Superior Court of the State of California
for the County of Orange
Case No. 06CC00016, Honorable Ronald Bauer, Presiding

PETITIONER'S OPENING BRIEF ON THE MERITS

LATHAM & WATKINS LLP
BROOK B. ROBERTS (STATE BAR NO. 214794)
JOHN M. WILSON (STATE BAR NO. 229484)
G. ANDREW LUNDBERG (STATE BAR NO. 108509)
600 WEST BROADWAY, SUITE 1800
SAN DIEGO, CALIFORNIA 92101-3375
(619) 236-1234 • FAX: (619) 696-7419
BROOK.ROBERTS@LW.COM; JOHN.WILSON@LW.COM;
ANDY.LUNDBERG@LW.COM
Counsel for Petitioner Fluor Corporation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITY

I. ISSUES RAISED IN PETITION FOR REVIEW

1. Is Insurance Code section 520 -- a "General Rule Governing Insurance" -- applicable to third-party liability policies?

2. Are anti-assignment clauses in third-party liability policies unenforceable after a "loss has happened," as provided by Insurance Code section 520, or do such clauses remain enforceable even after "loss" if the insured's claim against the insurer has not yet matured into a "chose in action," as this Court ruled in *Henkel Corp. v. Hartford Accident & Indemnity Co.* (2003) 29 Cal.4th 934 ("*Henkel*") after the parties to *Henkel* failed to call section 520 to the Court's attention?

II. INTRODUCTION

In *Henkel,* this Court resolved a dispute between putative policyholders fighting over who was entitled to insurance benefits following a purported assignment of liability policies. The Court was asked by the insurers to invalidate the alleged assignment, contending that the policies prohibited assignment without their consent. However, neither the insurers, nor any of the other parties or *amicus curiae*, informed the Court of Insurance Code section 520 -- the statute which should have governed the debate.

Unaware of section 520, the Court announced a common law rule that conflicts with the statute. Moreover, as this case demonstrates, insurers are invoking *Henkel* not only to frustrate the rational transfer of insurance benefits, but also to escape their coverage obligations for covered losses. Section 520 was designed precisely to protect against these results. That section mandates the rule, urged by the *Henkel* dissent, that insurers may not enforce "anti-assignment" clauses after the insured "loss" has occurred. As the Legislature explained, it would be "grossly oppressive" to permit insurers to escape coverage on a technicality for the very risk they agreed to insure, ***after*** the coverage-triggering event had happened.

This case illustrates why section 520 exists and should be enforced. The insured, Fluor Corporation, entered into an economically prudent and efficient corporate transaction, by which a related entity was fully vested with both the liabilities and corresponding insurance coverage arising from its predecessor's historical operations. The transaction took place after the occurrence of the events triggering insurance coverage (asbestos exposure), yet Fluor's insurer, Hartford Accident and Indemnity Company ("Hartford"), invoked *Henkel* many years later to assert that coverage was forfeited under the policies' "anti-assignment" clauses.

Under the statutory law of section 520, Hartford should not be allowed to restrain Fluor's post-loss transfer of insurance rights, nor obtain a windfall by avoiding its duty to defend and indemnify losses it contracted to cover. Nonetheless, the trial court and Court of Appeal understandably felt constrained by *Henkel*, in which the majority rejected the "loss" test urged by the dissent and ruled as a matter of common law that "anti-assignment" clauses remain enforceable until the insured's liability is quantified as a sum of money due, such as final judgment. Accordingly, the courts below refused to apply section 520.

Although it has been exalted by insurers, *Henkel* was not intended to confiscate coverage where, as here (and as with the vast majority of assignments), the insured event already has happened before the transaction and all that remains is for the insurer to perform in accordance with its obligations under the policies. *Henkel* should be reconsidered in light of section 520's "loss" rule, and the denial of Petitioner Fluor Corporation's ("Fluor") motion for summary adjudication should be reversed.

III. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

1. The Hartford Policies Were Intended to Cover Precisely the Long-Tail Occurrences At Issue

Fluor is a Fortune 200 publicly owned engineering, procurement, construction, maintenance and project management ("EPC") firm. Fluor has conducted EPC operations through various corporate entities and subsidiaries since its founding as a family-owned construction company in the early 20th century. (App. Ex. 10, at p. 2807.)

Beginning in 1971, Hartford issued a series of eleven comprehensive general liability policies to insure these EPC firms, ultimately covering the period from May 1, 1971 to June 1, 1986 (the "Policies" or, individually, a "Policy"). (App. Ex. 2, at pp. 22-23 [¶¶ 3-13], 27-1338.) Under each Policy, Hartford agreed to provide insurance to every entity in Fluor's corporate family of EPC companies (collectively, the "Fluor Insureds"), as well as affiliated companies that may be later formed, defining the "Named Insured" to include:

> FLUOR CORPORATION and any subsidiary or affiliated companies, corporations, organizations or other entities as may exist or may be formed or acquired hereafter.

(App. Ex. 2, at pp. 28, 107, 221, 324, 444, 564, 677, 797, 914, 1032, 1181.)

The Policies were written on an "occurrence" basis. They require Hartford to defend the Fluor Insureds against suits alleging bodily injury "caused by an <u>occurrence</u>." (E.g., App. Ex. 2, at p. 31.) "Occurrence" is defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the Insured." (*Id.* at p. 114.)

2. The Asbestos Lawsuits Allege Fluor's Liability for Occurrences Within the Policies' Coverage

Fluor seeks coverage under the Policies for "long tail" asbestos bodily injury claims arising out of its historical EPC operations. Like many large EPC firms, the Fluor Insureds operated at job sites where asbestos allegedly was used. From 1985 until the present, various Fluor Insureds have been named as defendants in thousands of lawsuits alleging liability for injury caused by exposure to asbestos at sites where they purportedly performed EPC services (the "Asbestos Suits"). (App. Ex. 4, at p. 1422 [No. 31].)

Working with Hartford and their other insurers,[1] the Fluor Insureds are defending approximately 2,500 Asbestos Suits in California and other jurisdictions. (App. Ex. 13, at p. 4898 [¶ 8].) Hartford contemporaneously has paid defense costs for the Asbestos Suits, and has funded settlements and judgments on behalf of the Fluor Insureds for more than 25 years. (App. Ex. 4, at p. 1422 [No. 33].)

3. Fluor Separated Its Coal Business and Historic EPC Operations Through a Reverse Spinoff

During the 1980's, Fluor acquired a business outside its core EPC operations, named A.T. Massey Coal Company. Although it technically became a subsidiary of Fluor, A.T. Massey's mining operations were conducted and managed independently of Fluor's EPC operations. (App. Ex. 4, at p. 1980.) Accordingly, the companies' coverage rights under the Policies were structured much differently. Hartford continued to renew coverage for Fluor and its "subsidiary or affiliated companies, corporations, organizations or other entities as may exist or may be formed or acquired hereafter" to conduct the EPC business. (See App. Ex. 2, at pp. 677, 797,

---

1 In addition to Hartford, policies were issued to the Fluor Insureds by Chubb (Pacific Indemnity), Kemper (American Motorists) and Continental Casualty, covering periods between 1947 and 1971. Hartford has asserted cross-claims for contribution in this action against these insurers, demanding that each pay a larger percentage of defense costs and indemnity payments arising from the Asbestos Suits.

914, 1032, 1181; see generally *id.* at pp. 676-1338.) In contrast, because a separate line of insurance was maintained for A.T. Massey, Hartford issued "difference in conditions" exclusions which barred A.T. Massey from claiming benefits under the Policies, except to the extent that the separate coverage was materially more limited than the coverage provided under Hartford's Policies. (App. Ex. 2, at pp. 1026, 1165, 1314.)[2]

In 2000, Fluor decided to focus solely on its core EPC businesses, and separate those operations from A.T. Massey's coal business. (App. Ex. 13, at pp. 4958, 4970-4972, 4987, 5164.) Fluor's goal was to maintain the basic corporate structure, ownership, management, brand recognition and continuing operations of the EPC companies, while preserving the value of A.T. Massey's business for shareholders. (App. Ex. 10, at p. 3269; App. Ex. 13, at pp. 4958, 4987.) Because A.T. Massey's mining operations were dependent on several long-term leases, Fluor wanted to ensure that the spinoff did not disturb these leases merely because Fluor would no longer be A.T. Massey's corporate parent. (App. Ex. 13, at pp. 5045, 5149, 5158.)

---

[2] Hartford's "difference in conditions" language applicable to A.T. Massey provided:

> In consideration of an additional premium (included in composite rate), it is agreed that difference in conditions means when a liability policy purchased through another insurance company is more limited in its coverage than this policy [ ], the broader extensions of this policy shall apply to such coverage.

(App. Ex. 2, at pp. 1313-1314.)

Accordingly, Fluor considered several possible methods to achieve the same final result. (App. Ex. 10, at p. 3333; App. Ex. 13, at pp. 4987, 4991.)

The spinoff of A.T. Massey's coal business was ultimately implemented through a corporate restructuring known as the "Reverse Spinoff." (App. Ex. 10, at pp. 3201, 3415.) In that transaction, pre-spinoff Fluor incorporated a new subsidiary that retained the name Fluor Corporation to continue the company's longstanding EPC businesses as they had operated for nearly a century. (App. Ex. 13, at pp. 4903, 4970, 4972, 4991, 4995-4996, 5021-5028, 5164.) All of Fluor's EPC-related assets and liabilities were then transferred to the "new" Fluor, which became the parent of "old" Fluor's EPC subsidiaries. (App. Ex. 13, at pp. 4995-4996, 5021-5028.) Since the "old" Fluor parent company retained only the A.T. Massey coal business, it changed its name to Massey Energy Company ("Massey"). (App. Ex. 13, at pp. 4928, 4972, 4987, 4991, 5164.)

The paper transition of Fluor's EPC operations was seamless, and had no impact on Fluor's customers, employees, management, stockholders, creditors or insurers. (App. Ex. 10, at pp. 3269-3270.) Following the Reverse Spinoff, Petitioner Fluor Corporation operated as the continuation of the EPC business, with all the assets (including the Policies) and obligations (including liability for the Asbestos Suits) arising therefrom. (*Id.*, at p. 2807; App. Ex. 13, at pp. 4995, 5171-5172 [§ 5.01], 5173 [§ 5.08].) Fluor conducted the same EPC operations under the same name, and was treated as the "accounting successor" to pre-spinoff Fluor Corporation for financial reporting purposes. (App. Ex. 13, at pp. 4972, 4991, 5021-5028.) Using the same stock symbol ("FLR"), Fluor 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.)

4. Fluor Notified Hartford of the Reverse Spinoff

In early 2001, shortly after the Reverse Spinoff, Fluor notified Hartford of the transaction. Specifically, Fluor provided Hartford with copies of its Annual Report and the "Proxy Statement to Shareholders regarding the separation of Fluor and Massey," which included as an appendix the "Distribution Agreement" between "Fluor Corporation, a Delaware corporation incorporated in 2000 and Fluor Corporation, a Delaware corporation incorporated in 1978 (to be renamed Massey Energy Company on the Distribution Date described herein)" (the "Distribution Agreement"). (App. Ex. 13, at pp. 4898 [¶ 12], 4958-5159 [Proxy Statement], 5160-5182 [Distribution Agreement].) Fluor summarized the Reverse Spinoff as follows:

> On November 30, 2000, Fluor Corporation was separated into two publicly traded companies, "New Fluor" and "Massey Energy Company." Fluor Corporation changed its name to Massey Energy Company. Fluor Corporation distributed to its shareholders shares of New Fluor Common Stock, which represents a continuing interest in

> Fluor Corporation. "New Fluor" is a newly created entity named Fluor Corporation that was incorporated on September 11, 2000.

(App. Ex. 13, at p. 4903.)

Thereafter, Fluor and its insurer-funded defense counsel conducted numerous additional discussions regarding Fluor's corporate structure, including the impacts of the Reverse Spinoff. (App. Ex. 11, at pp. 4071-4072 [¶¶ 8-11]; App. Ex. 13, at p. 4898 [¶ 13]; see also App. Ex. 11, at pp. 3673-3675.)

5. Hartford Continued to Defend and Indemnify Fluor As An Insured Under the Policies for the Asbestos Suits

Based on the information provided by Fluor regarding the Reverse Spinoff, and the Policy language insuring both Fluor and any "subsidiary or affiliated companies, corporations, organizations or other entities as may exist or may be formed or acquired hereafter," Hartford "evaluated [that] Fluor Corporation was an insured under the policies." (App. Ex. 11, at p. 3956; see App. Ex. 4, at p. 1940.) Therefore, working with the same Fluor personnel who had extensive familiarity with the company's EPC operations and potential liabilities, Hartford continued to defend the new Fluor Corporation, and to make defense and indemnity payments on its behalf, for nearly a decade following the Reverse Spinoff. (App. Ex. 10, at p. 2828; App. Ex. 11, at pp. 4004-4007; App. Ex. 13, at pp. 4898-4900 [¶¶ 14-15, 18-19].)

Indeed, although Hartford specifically disclaimed coverage between 2001 and 2008 for certain companies that it asserted "do not qualify as 'insureds' on The Hartford Policies," Hartford admittedly did not raise any such objection as to "new" Fluor after the Reverse Spinoff. (App. Ex. 11, at pp. 4045, 4047; App. Ex. 13, at p. 4900 [¶¶ 18-19].) To the contrary, Hartford regularly defended cases involving both Fluor and its subsidiaries, as well as cases where Massey was also named as a defendant, with the understanding that its defense of Massey was merely an "accommodation" to its insured, Fluor. (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. 10145-46, 10400-10409.)[3]

Because Hartford recognized that Fluor was an insured under the Policies, Hartford invoiced and collected millions of dollars of "retrospective premiums" from Fluor following the Reverse Spinoff, which

---

[3] Following the Reverse Spinoff, there has never been any dispute between Fluor and Massey regarding Fluor's right to claim the Policy benefits for the Asbestos Suits. (App. Ex. 36, at pp. 10919-10923.) In fact, Massey has never claimed coverage for an Asbestos Suit or any other liability of "old" Fluor under the Policies. 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 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.) To the extent any claims arising from A.T. Massey's mining businesses are insured under the Policies' "difference in conditions" coverage, Massey pursues coverage separately from Fluor, just as it did before the Reverse Spinoff.

become chargeable under certain of the Policies after Hartford has made defense or indemnity payments on behalf of an "Insured." (App. Ex. 13, at p. 4899 [¶ 16].)[4] In total, Fluor paid and Hartford accepted approximately $4 million during the years after Fluor notified Hartford of the Reverse Spinoff. (App. Exs. 13-17, at pp. 4899 [¶ 16], 5230–8733.)

6. Fluor Sued Hartford for Declaratory Relief Concerning Hartford's Coverage Obligations

Although there was no dispute regarding Hartford's general duty to defend and indemnify the Asbestos Suits on behalf of the Fluor Insureds, various disputes arose concerning the scope of Hartford's coverage obligations under the Policies. Accordingly, Fluor filed suit against Hartford in February 2006, seeking declaratory relief on behalf of itself and all "its subsidiaries and related companies insured by Hartford." (App. Ex. 10, at p. 2772.) The lawsuit focused on four "core" issues concerning the conduct of Hartford's defense and the allocation of indemnity payments, including: (a) the Fluor Insureds' right to select the Policy(ies) under which Hartford would defend and indemnify the Asbestos Suits; (b)

---

4 Retrospective premiums are a feature of the policies that entitle Hartford to partial reimbursement (up to an aggregate cap) of defense and indemnity payments for claims made by the Fluor Insureds. Hartford annually calculates the retrospective premiums allegedly owed by the Fluor Insureds, and bills Fluor for those amounts. (See generally *Alexander & Alexander, Inc. v. Rose* (3d Cir. 1982) 671 F.2d 771, 773 ["A retrospective premium policy, . . . provides for retrospective determination of the insured's premium obligations according to a formula based on the cost of claims actually paid by the insurer under the policy."].)

Hartford's improper attempt to re-classify numerous indemnity payments for the Asbestos Suits as "completed operations" claims subject to different sub-limits under the Policies; (c) Hartford's calculation of Fluor's retrospective premium obligations based on the assertion that all the Asbestos Suits constitute a single "occurrence"; and (d) the Fluor Insureds' right to independent defense counsel. (App. Ex. 10, at pp. 2771-79.)[5]

7. Hartford Belatedly Asserted Its "Named Insured" Claim

Hartford did not assert any affirmative defense or cross-claim based on the "named insured" status of the new Fluor Corporation (or any other Fluor Insured) in response to the original complaint. (App. Ex. 12, at pp. 4850-4869.) Instead, prior to 2009, Hartford litigated the underlying action on the basis that Fluor was a proper plaintiff under the Policies. (*Ibid.*)

---

5 In December 2011, the Superior Court conducted a bench trial to resolve each of the "core" issues that had animated this case from its inception. The Superior Court decided the "policy selection," "completed operations" and "single occurrence" issues in favor of the Fluor Insureds. (Fluor's Request for Judicial Notice, filed concurrently herewith, Exs. A, C, D.) The Court decided the "independent counsel" issue in favor of Hartford. (*Id.*, Ex B.) All other disputes between the Fluor Insureds and Hartford are dependent on the outcome of this proceeding, and accordingly have been stayed pending resolution by this Court. (*Id.*, Exs. E, F.)

Hartford first asserted its "named insured" claim only after informal settlement negotiations stalled in January 2009.[6] Hartford claimed (falsely) that it had only "recently" obtained a copy of the Distribution Agreement, and had only "recently become aware" of the issue. (App. Ex. 12, at pp. 4882, 4889.)[7] Hartford sought leave to amend its cross-complaint to raise its "named insured" argument -- eight years after being notified of the Reverse Spinoff and receiving the source documents (including the Distribution Agreement and Proxy Statement) necessary to evaluate its impact. (App. Ex. 13, at pp. 4898-5229.)

Hartford's Second Amended Cross-Complaint -- the pleading at issue here -- was filed on August 10, 2009. (App. Ex. 1.) Hartford expressly alleged for the first time 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 Fluor and its predecessor 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, but that Fluor "[n]ever sought

---

6 At Hartford's request, Fluor temporarily had agreed to stay the litigation for intermittent time periods in 2007 and 2008 to conduct settlement discussions.

7 In fact, Hartford had received that agreement in 2001 when Fluor advised it of the Reverse Spinoff transaction. (App. Ex. 13, at pp. 5160-5229.) Hartford also produced the Distribution Agreement back to Fluor in this very litigation -- ***in 2006***. (App. Ex. 10, at pp. 2766 [¶ 8], 3043-3065 [H019484-H019506].)

or obtained Hartford's consent to the purported assignment of insurance rights[.]" (*Id.* at pp. 7-8 [¶¶ 40-44].)

Based on these allegations of an assignment, Hartford's First Cause of Action seeks a declaration that Hartford has no obligation to defend or indemnify Fluor because it did not consent to the assignment of coverage rights for the Asbestos Suits to the new Fluor Corporation. (App. Ex. 1, at p. 8.) Hartford's Second Cause of Action seeks reimbursement of the defense and indemnity payments made on behalf of Fluor for the same reasons. (*Id.* at p. 9.)[8]

Hartford's causes of action are based upon the standard anti-assignment clause found in all of the Policies. That clause provides:

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

(E.g., App. Ex. 2, at p. 1045.)

B. PROCEDURAL HISTORY

1. The Superior Court Denied Fluor's Motion for Summary Adjudication of Hartford's "Anti-Assignment" Causes of Action

On February 16, 2011, Fluor moved to summarily adjudicate Hartford's First and Second Causes of Action. (App. Exs. 3, 8.) Because Hartford's claims allege there was an assignment which Hartford contends

---

[8] Hartford asserted an affirmative defense based on the same allegations. (See App. Ex. 12, p. 4873 [Eighth Affirmative Defense (Assignment Without Hartford's Consent): "[C]overage is barred to the extent Hartford did not consent to any such assignment of interest."].)

cannot be enforced against the Policies, Fluor's motion did not turn on any factual disputes regarding assignment.[9]

Rather, Fluor argued that Hartford's causes fail as a matter of law because Insurance Code section 520 voids the anti-assignment provisions "after a loss has happened." (App. Ex. 3, at pp. 1410-1411; App. Ex. 8, at pp. 2748-2753; Ins. Code, § 520.)[10] Since the Asbestos Suits allege bodily injury that happened during the Policy periods (i.e. between 1971 and 1986), the "loss" necessarily arose by the time that Hartford began defending and indemnifying the Fluor Insureds for the Asbestos Suits in 1985, thereby invalidating the anti-assignment clauses of the Policies long before the Reverse Spinoff.[11]

Hartford opposed the motion based on *Henkel.* (App. Ex. 20, at pp. 9911-9917.) Hartford argued that the Superior Court was "duty bound to apply *Henkel*, not [section] 520" because the Supreme Court's precedent

---

9 "The pleadings define the issues to be considered on a motion for summary judgment." (*Benedek v. PLC Santa Monica, LLC* (2002) 104 Cal.App.4th 1351, 1355; accord *Fortier v. Los Rios Community College Dist.* (1996) 45 Cal.App.4th 430, 433 ["The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues."]; *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."].)

10 Section 520 provides in relevant part: "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 . . . ."

11 Fluor also moved on other grounds not relevant to this Petition.

trumped the statutory law of the Insurance Code. (App. Ex. 36, at pp. 10911-10912.)[12]

Ultimately, the trial court concluded that it did "not have the luxury" of considering and applying section 520, because the Supreme Court definitively had addressed the enforceability of anti-assignment clauses in *Henkel*. (App. Ex. 37, at p. 10941.)[13] Therefore, on June 27,

---

12 Hartford's counsel and the Superior Court engaged in the following colloquy during oral argument:

> MR. RUGGERI: . . . This Court, of course, is bound to apply Supreme Court precedent. . . . This Court is not free to disregard *Henkel*, even if it thinks that the Supreme Court got it wrong in *Henkel*, which it didn't really get wrong. . . .
>
> THE COURT: You know, you've told me that that's not an issue. They can be dead wrong, but they are still the Supreme Court.
>
> MR. RUGGERI: They still are the Supreme Court. So we think this court is duty-bound to apply Henkel, not 520.

(App. Ex. 36, at pp. 10911-10912.)

13 The Superior Court's order stated:

> Fluor's invocation of Insurance Code section 520 is its antidote for the policies' requirement of a written assignment. That statute states: "An agreement not to transfer the claim of the insured against the insurer after a loss has happened is void if made before the loss . . . ." That statute is also Fluor's effort to shield itself from the California Supreme Court opinion in *Henkel Corp. v. Hartford Accident & Indemnity Co.* (2003) 29 Cal. 4th 934 where a no-assignment clause was enforced in a situation bearing many similarities to the present one . . . . Fluor's difficulty in distinguishing the *Henkel* opinion has led it to the remarkable conclusions that the Supreme Court there "failed to recognize and apply" the law, "failed to consider controlling statutory authority," did not "[apply] . . . governing law," and was "uninformed." This court does not have that luxury.

2011, the Superior Court denied Fluor's motion.[14]

2. Following this Court's Granting of Fluor's First Petition for Review, the Court of Appeal Denied Fluor's Petition for Peremptory Writ of Mandate

Fluor timely petitioned the Court of Appeal for writ review of the Superior Court's order, to determine whether Insurance Code section 520 or *Henkel* controlled the parties' legal dispute. (Fluor's Petition for Peremptory Writ of Mandate, filed Aug. 1, 2011, at pp. 1, 18 [¶ 31], 36-38; Hartford's Answer to Writ Petition, filed Feb. 8, 2012, at p. 17 [¶ 31].) The Court of Appeal issued a *Palma* notice, inviting Hartford to submit an informal response. (Court of Appeal Order, filed Aug. 8, 2011.) However,

---

[14] The Court also denied Hartford's separate motion for summary judgment of Fluor's operative complaint (a motion which is not at issue here). Relying on *Henkel*, Hartford moved on the ground that Fluor is not a "named insured" under the Policies because Hartford allegedly never consented to Fluor as an assignee. (App. Ex. 37, at pp. 10939-10941.) Fluor opposed that motion not only on the basis of section 520, but also by highlighting a series of "fact-intensive" inquiries that would ultimately prove Fluor's right to claim benefits under the Policies ***even if*** the anti-assignment clauses are enforceable. (See App. Ex. 36, at pp. 10923-10928.) Among other things, Fluor argued that it should be deemed a "mere continuation" of its corporate predecessor for purposes of determining whether it is a "named insured," and that Hartford's acknowledgement of Fluor as an insured for nearly a decade after it learned of the Reverse Spinoff (including through more than three years of the instant coverage litigation) constitutes an estoppel, waiver, modification or effective consent to Fluor's right to claim benefits under the Policies. (*Ibid*; see also App. Ex. 11, at pp. 3510-3512; App. Ex. 13, at pp. 4898-4901 [¶¶ 12-24].)

Section 520 should spare the parties and the Superior Court an expensive and factually intensive trial on these issues. Because it is undisputed that the coverage-triggering losses (i.e. the "occurrences" of alleged bodily injury) happened many years before the Reverse Spinoff, section 520 renders the anti-assignment clauses in the Policies void.

the Court of Appeal denied Fluor's petition without a hearing. (Court of Appeal Order, filed Sept. 8, 2011.)

Fluor then petitioned this Court for review. (Fluor's First Petition for Review, filed Sept. 19, 2011.) On November 16, 2011, this Court granted Fluor's first Petition for Review, and transferred the case to the Court of Appeal with directions to vacate its order denying Fluor's petition for a writ of mandate and to issue an order to show cause to Respondent Superior Court. (Order, filed Nov. 16, 2011.)

The Court of Appeal heard argument from the parties on July 24, 2012. (See Fluor's Request for Judicial Notice in support of its Second Petition for Review, filed Oct. 9, 2012 ("Fluor RJN – Second Petition for Review"), Ex. 1.)[15]

On August 30, 2012, the Court of Appeal issued a decision denying Fluor's Petition for Writ of Mandate. (*Fluor Corp. v. Super. Ct.* (2012) 208 Cal.App.4th 1506.) Rather than addressing the issues in Fluor's Petition for which review had been granted, the Court's published decision adopted an interpretation of section 520 that was not advocated by either party: The Court held that despite its inclusion in general insurance statutes, section 520 applies only to the limited category of first-party property policies and does not apply to third-party liability policies. (*Id.* at

[15] The Fluor RJN – Second Petition for Review was granted by this Court in its Order dated December 12, 2012.

pp. 1509, 1514, 1516, 1519.) The Court reached this unprecedented result despite the fact that other critical laws with precisely the same statutory lineage -- such as the pro-insurer rule of Insurance Code section 533 -- consistently have been applied by California courts to third-party liability policies. As detailed below, the Court of Appeal's faulty analysis not only leaves unanswered the critical legal issues presented by Fluor's Petition, it sows more confusion by upending settled expectations that general insurance laws apply to first- and third-party policies alike.

Therefore, Fluor timely filed another Petition for Review with this Court, seeking to resolve the parties' legal dispute over section 520. (See Fluor's Second Petition for Review, filed Oct. 9, 2012.) On December 12, 2012, the Court granted Fluor's second Petition. (Order, filed Dec. 12, 2012.)

IV. ARGUMENT

A. Section 520 Invalidates Anti-Assignment Clauses in Insurance Policies "After a Loss Has Happened"

Section 520 of the California Insurance Code establishes the point when insurance policies' anti-assignment clauses become unenforceable:

> 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 is found in Division 1 of the Insurance Code, which sets forth the "General Rules Governing Insurance" which apply to all insurance policies, including the liability policies at issue here and in *Henkel.* It is the first provision found in Chapter 6 of that Division, which chapter is entitled "Loss." The express purpose of the section is to establish a rule invalidating anti-assignment clauses ***after a loss***. According to the Legislature, its goal was to prevent the "grossly oppressive" attempts by insurers to prohibit assignment after the policy has been triggered by the happening or occurrence 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[16] ("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].)[17]

Although the statute's roots trace back to the original Civil Code of 1872, it was enacted as section 520 when the Insurance Code was adopted in 1935. The Legislature amended section 520 in 1947 to ensure consistency with provisions of the Code dealing with life and disability

---

[16] The Fluor RJN – Writ Reply was granted by the Court of Appeal. (See *Fluor v. Super. Ct.*, *supra*, 208 Cal.App.4th at p. 1511.)

[17] Special significance is attributed to the notes and comments of the Code Commissioners when ascertaining the Legislature's intent in enacting the original Civil Code. (See *Li v. Yellow Cab Co. of Cal.* (1975) 13 Cal.3d 804, 817, fn. 10; accord *Gomez v. Super. Ct.* (2005) 35 Cal.4th 1125, 1143-1149 [dis. opn. of Chin, J.].)

insurance. The statute has been reenacted annually without further change.[18]

B. Section 520 Supersedes *Henkel*'s Conflicting Common-Law Holding

1. *Henkel* Did Not Measure the Enforceability of Anti-Assignment Clauses Against the "Loss" Test Mandated by Section 520

Despite its longstanding inclusion in the Insurance Code, section 520 was not considered in *Henkel* because the parties failed to bring it to the courts' attention.[19] Consequently, *Henkel* did not analyze the validity of anti-assignment clauses under the test required by the statute.

Instead, all seven members of the Court agreed on the universal common law principle that, at some point, anti-assignment provisions in insurance policies become unenforceable regardless of whether the insurer consents. The Justices parted ways, however, on whether that line should be drawn at the point when the coverage-triggering "loss" happens, or later when the policyholder's claim against the insurer is subsequently "reduced to a sum of money due or to become due under the policy" (i.e., a "chose in

---

[18] At the time of its codification in the Insurance Code (and its subsequent reenactment), liability insurance was common. (E.g., *Aronson v. Frankfurt Accident & Plate Glass Ins. Co.* (1908) 9 Cal.App. 473, 474; *Ocean Accident & Guarantee Corp. v. Southwestern Bell Telephone Co.* (8th Cir. 1939) 100 F.2d 441, 446-447.)

[19] The available record of the *Henkel* action -- including the briefs in the Court of Appeal following the trial court's summary judgment ruling, and the briefs of the parties and the several *amici curiae* appearing on both sides in this Court -- reveals that section 520 was never cited. (See App. Ex. 5, at pp. 2048-2533.)

action"). (*Henkel*, *supra*, 29 Cal.4th at p. 944; compare *id.* at p. 947 [dis. opn. of Moreno, J.].) That common-law debate between the majority and dissent should have been irrelevant, because section 520 conclusively draws the line at the time the loss happens. (See Ins. Code, § 520 [voiding insurance policy anti-assignment clauses "after a loss has happened"].)

Although the time of "loss" is dispositive under section 520, the word "loss" does not appear once in the *Henkel* majority opinion. (See *Henkel*, *supra*, 29 Cal.4th at pp. 938-944.) This is unsurprising in light of the majority's decision to reject the common law rule urged by Justice Moreno (in dissent) and Justice Croskey (at the Court of Appeal) -- that "loss" is the proper benchmark for measuring the enforceability of anti-assignment clauses -- in favor of drawing the line of unenforceability at the subsequent "chose in action."

Courts that have considered *Henkel* in determining when anti-assignment clauses become unenforceable recognize that the Supreme Court plainly distinguished "loss" from "chose in action" (i.e., when a claim is subsequently 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. Cal. 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"]; *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"].)[20]

Tellingly, Hartford concedes the crucial point that the *Henkel* majority declined to apply a "loss" test:

> The dissent put the "loss" issue front and center, as had the earlier decision of the Court of Appeal. ***The majority adopted a different analysis.***

(Hartford's Answer to Writ Petition, at p. 6 [emphasis added].) The "different analysis" that the *Henkel* majority adopted was ***not*** the one mandated by the Legislature, which establishes the time that "loss happens" as the critical point when anti-assignment clauses become "void" as a matter of law. (See Ins. Code, § 520; cf. *Cal. Bank v. Schlesinger* (1958)

---

[20] (See also Stempel, *Assessing the Coverage Carnage: Asbestos Liability and Insurance After Three Decades of Dispute* (2006) 12 Conn. Ins. L.J. 349, 459 ["In California, it is no longer enough for the loss event to have taken place in order for an insurance policy to become assignable (even in the face of anti-assignment or consent requirement language in the policy). Instead, ***the loss must not only have taken place but must 'have been reduced to a sum of money due or to become due under the policy.'***" (quoting *Henkel*, emphasis added)].)

159 Cal.App.2d Supp. 854, 865 ["[S]tatute law must control whether [] cases are in harmony therewith or not."].)

As is now apparent, section 520 makes "loss" rather than "chose in action" the test, and reflects the same rule that Justice Moreno argued flows from the common law: Anti-assignment clauses are unenforceable if they restrict the assignment of rights after the "occurrence" happens, regardless of whether that loss has been further "reduced to a sum of money due or to become due under the policy" at the time of the assignment. (Cf. *Henkel*, *supra*, 29 Cal.4th at p. 944.)

2. Statutory Law Controls Over Common Law

Notwithstanding an understandable reluctance, the Court of Appeal was obliged to apply section 520, even though it compels a different result than this Court reached in *Henkel* applying the common law.

It is axiomatic that when a common-law decision conflicts with a statute, the statute takes precedence. (E.g., *Schlesinger*, *supra*, 159 Cal.App.2d Supp. at p. 865 ["[S]tatute law must control whether [] cases are in harmony therewith or not."].)[21] As the Civil Code provides: "The

---

[21] The Court of Appeal incorrectly reversed this rule. (See *Fluor v. Super. Ct.*, *supra*, 208 Cal.App.4th at p. 1513 ("We have neither ***the power*** nor the inclination to reverse *Henkel*." [emphasis added])].)

[C]ode establishes the law of this state respecting the subjects to which it relates[.]" (Civ. Code, § 4.)[22]

If the adversary process does not call a controlling statute to the courts' attention and the common law develops in ignorance of the legislative rule, California courts are duty-bound to correct the error. (See *Myers v. City & County of San Francisco* (1871) 42 Cal. 215, 217 ["The statute supersedes the common law rule, and must control."].)[23] This ensures the integrity of the judicial system.

3. Section 520, A "General Rule Governing Insurance," Governs Third-Party Liability Policies

Rather than remedying this rare lapse of the adversary process, the Court of Appeal attempted to explain away the omission of section 520 based on a new theory not asserted by either party. According to the Court, the reason no one cited the statute in *Henkel* was because section 520:

---

[22] "The will of the supreme power is expressed: (a) By the Constitution; (b) By Statutes." (Civ. Code, § 22.1.) "The organic law is the constitution of government and is altogether written. Other written laws are denominated statutes. The written law of this State is therefore contained in its Constitution and statutes . . . ." (Code Civ. Proc., § 1897.) Judicial decisions are "unwritten law." (*Id.*, § 1899.)

[23] (See also *Franklin Capital Corp. v. Wilson* (2007) 148 Cal.App.4th 187, 193, 210 ["While the case law . . . is extensive, we must remember that the right . . . is set forth in a statute, and all permutations of circumstances on the subject flow from that statute. . . . [¶] [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."].)

> 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 v. Super. Ct.*, *supra*, 208 Cal.App.4th at p. 1509.)

Even though section 520 is a "General Rule Governing Insurance," the Court of Appeal held that it is applicable only to first-party policies that were in effect more than 125 years ago. The Court repeatedly emphasized that section 520 does not govern the assignment of liability policies:

> The 1872 Statute Does Not Constitute an Express Legislative Pronouncement Regarding the Assignability of Liability Insurance Policies . . . .[24]
>
> . . . .
>
> Insurance Code section 520, as we have noted, was first adopted in 1872 . . . . At the time, liability insurance did not even exist as a concept.[25]
>
> . . . .
>
> The 1872 Legislature drew no bright lines and made no controlling pronouncements about liability insurance, or about how "loss" in the context of such policies is to be defined.[26]

Not even Hartford advocated this position. In fact, Hartford's counsel conceded to the Court of Appeal during oral argument that section 520 governs the ***liability policies*** at issue in this case:

---

[24] (*Fluor v. Super. Ct.*, *supra*, 208 Cal.App.4th at p. 1514.)

[25] (*Fluor v. Super. Ct.*, *supra*, 208 Cal.App.4th at p. 1516.)

[26] (*Fluor v. Super. Ct.*, *supra*, 208 Cal.App.4th at p. 1519.)

> 520 says we can't prevent the transfer of a claim of the insured after the loss. ***Hartford doesn't disagree with that.***

(Fluor RJN-Second Petition for Review, Ex. 1, p. 42:7-9.)

Nonetheless, the Court of Appeal ruled otherwise. Instead of relying on the well-established meaning of "loss" articulated by this Court in *Montrose* and *Continental*[27] to determine how section 520 must apply in the context of liability policies, the Court of Appeal discounted the statute altogether: "[T]he 1872 Legislature cared not a whit" about the "definitional question" of what "loss" means in the context of liability policies since "the idea of third party liability insurance was [ ] alien . . . ." (*Fluor v. Super. Ct.*, *supra*, 208 Cal.App.4th at p. 1517.)

The Court of Appeal's attempt to limit section 520's application to 19th century policies flatly is contradicted by decades of California jurisprudence. This Court long has recognized that an analogous provision, Insurance Code section 533 -- a statute with the same lineage as section 520 -- applies to ***all*** insurance policies in California, including liability policies.

Section 533, a pro-insurer statute, declares the public policy of the state not to insure policyholders for liability arising from their willful conduct. It appears in the same Division ("General Rules Governing Insurance") and Chapter ("Loss") of the Insurance Code as section 520.

---

[27] (*Montrose Chemical Corp. of Cal. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645; *State of California v. Continental Insurance Co.* (2012) 55 Cal.4th 186.)

Similarly, it originally was codified as section 2629 of the Civil Code, and has remained substantively unchanged since then, even as it was adopted into the Insurance Code in 1935.[28]

As this Court repeatedly has held, Section 533 is an implied exclusionary clause that governs ***all*** policies in California, ***including third-party liability policies***. (See *Arenson v. Nat. Automobile & Casualty Ins. Co.* (1955) 45 Cal.2d 81, 84 ["Section 533 of the Insurance Code . . . codifies the general rule that an insurance policy indemnifying the insured against liability due to his own wilful wrong is void as against public policy . . . ."]; *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18 ["[B]y statute, and as a matter of public policy, the insurer may not provide coverage for willful injuries by the insured against a third party. (Ins. Code, § 533.)"].)

Courts have reviewed the historical development of section 533 -- which parallels the development of section 520 -- and explained why it ***must*** apply to liability policies:

> Plaintiffs next contend that section 533 of the Insurance Code should not apply to liability insurance policies at

---

[28] (See *Cal. Casualty Management Co. v. Martocchio* (1992) 11 Cal.App.4th 1527, 1531 ["Insurance Code section 533 has existed without substantive change in the law of this state since it was codified as Civil Code section 2629 in 1873-1874."]; *Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 499, fn. 30 ["The first clause of [now section 533], exonerating an insurer 'for a loss caused by the wilful act of the insured,' has survived without amendment since its enactment in 1872."].)

> all. At the urging of both parties in their excellent briefs on the subject, we have considered the historical background of insurance development generally and of section 533 of the Insurance Code in particular. It is significant that the first clause of section 533 of the Insurance Code, providing that an insurer is not liable for a loss caused by the wilful act of the insured, has remained absolutely unchanged since its first enactment as section 2629 of the 1872 Civil Code. (See History and Development of Insurance Law in California, Introduction to West's Cal. Ins. Code, p. XLI.) An amendment in 1873 made no change in the provisions with which we are here concerned. There were no other amendments. The provision was placed into the Insurance Code unchanged in 1935, and it has remained unamended in the succeeding years. In this long span of time, many changes have taken place in types and forms of insurance and the Legislature was aware of these. Having made no changes in the law in question, the Legislature obviously intended it to continue to apply in accordance with its clear and unambiguous wording.

(*Evans v. Pacific Indemnity* (1975) 49 Cal.App.3d 541.)

Under the Court of Appeal's decision here, the foregoing cases were decided wrongly "for the simple reason that liability insurance did not exist in 1872." (*Fluor v. Super. Ct.*, *supra*, 208 Cal.App.4th at p. 1509.) As these authorities demonstrate, however, the fact that liability insurance may not have existed in 1872 is of no moment. Courts do not assume that "the Legislature was prescient enough" to "exclude" from the scope of its statutory commands things which had not yet come into existence. (*O'Grady v. Super. Ct.* (2006) 139 Cal.App.4th 1423, 1461.) That is especially true in this context, where the Legislature adopted section 520 as a "General Rule[] Governing Insurance" when it enacted the Insurance Code ***in 1935*** -- a time when liability insurance was well known. (See

Aronson, *supra*, 9 Cal.App. at p. 474; *Ocean Accident*, *supra*, 100 F.2d at pp. 444-445.)

There is simply no authority to support the novel proposition that section 520 is limited to "marine, fire, and property damage" policies, while section 533 (which has a virtually identical history) is not. Yet this is precisely the unsupported reasoning upon which the Court of Appeal based its denial of Fluor's Petition for Writ of Mandate. The first question presented to this Court -- whether section 520 applies to third-party liability policies -- should be answered in the affirmative, to ensure consistency in the Court's jurisprudence, and to protect against the unintended adverse consequences of the Court of Appeal's published decision.

C. Under "Occurrence"-Based Liability Insurance Policies, the Relevant "Loss" Under Section 520 is the "Occurrence" that Triggers Coverage

When analyzed through the proper prism of section 520, the key issue raised by this Petition is: At what point does a "loss happen" in an occurrence-based liability policy, rendering subsequent assignments valid? The answer is the same whether consulting the case law, the underwriting history of liability policies, or other statutory guidance. "Loss happens" when the event triggering the policy occurs. It is at that moment when the insured risk has materialized, the insurance contract has lost its aleatory character, and section 520 allows the policyholder freely to assign its rights. In occurrence-based third party liability policies, that moment is the happening of an "occurrence" of bodily injury or property damage for which the insured is responsible.

1. California Courts Recognize That "Loss" Occurs In Third-Party Liability Policies When the Triggering "Occurrence" Happens

California's insurance jurisprudence, including this Court's landmark decisions in *Montrose* and *Continental*, confirms that "loss" arises in an occurrence-based liability policy when an underlying claimant suffers "bodily injury" or "property damage."

In *Montrose*, this Court repeatedly equated "loss" with the underlying event that triggers coverage. (See, e.g., *Montrose, supra,* 10 Cal.4th at pp. 654-655 [defining the relevant "losses" as the "***continuous or progressively deteriorating bodily injury and property damage that occurred*** during the successive policy periods"]; *id.* at pp. 679-680 [describing the "insurer's obligation to indemnify an insured for *manifested* losses" (citation omitted)].) As Justice Baxter explained, "[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." (*Montrose, supra,* 10 Cal.4th at p. 697 [Baxter, J., concurring].)

The insurance industry explicitly acknowledged that "loss" equals "occurrence" in third-party liability policies, explaining that the term "occurrence" was intended to "identify the time of ***loss***":

> [T]he definition of occurrence ***serves to identify the time of loss*** for the purpose of applying coverage[.].

(Elliott, The New Comprehensive General Liability Policy (Schreiber ed. 1968) Practicing Law Institute, Liability Insurance Disputes, 12-5 [quoting the Secretary of the National Bureau of Casualty Underwriters; emphasis added].)[29]

The Court recently reaffirmed that settled understanding of "loss" in *Continental.* In ruling that "the 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), the Court again equated "loss" with the underlying event that triggers coverage. For cases of "continuous" or "long-tail loss," the Court held:

> [T]he principles announced in [*Montrose* and *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 55–57] apply to the insurers' indemnity obligations in this case, so long as the ***insurers insured the State during the property damage itself.***

(*Id.* at p. 191 [emphasis added]; see also *id.* at p. 197 ["[A]s long as the property is insured at some point during the continuing damage period, the insurers' indemnity obligations persist until the loss is complete, or terminates."]; *id.* at p. 198 ["The fact that all policies were covering the risk

---

29 "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.)

at some point during the property loss is enough to trigger the insurers' indemnity obligation."]; *id.* at p. 201 ["[The] insurer reasonably expects to pay for property damage occurring during a long-tail loss it covered . . ."].)

The courts of appeal have followed that interpretation. For example, in *Westoil Terminals Co. v. Harbor Ins. Co.* (1999) 73 Cal.App.4th 634, 641-642, the Court was presented with a claim for coverage arising from pollution that happened in the 1970's under policies for which the benefits had been assigned in the 1980's. The Court held that the insured "loss" was the "occurrence" of contamination that caused damage to third-party property and so gave rise to the insured's liability:

> In the matter before us, ***the loss occurred during the policies' periods in the early 1970's***. The transfer of the policies to Westoil Partnership in 1986 was well after the loss . . . Inasmuch as the loss occurred in the early 1970's, any transfer of the policies in 1986 did not in any fashion increase the risk to respondents. . . .

(*Westoil, supra*, 73 Cal.App.4th at pp. 641-42 [emphasis added].)[30]

Similarly, in *Employers Ins. Co. of Wausau v. Travelers Indemnity Co.* (2006) 141 Cal.App.4th 398, the Court explained that third-party liability insurers'

> obligation to their insured arose long ago: long before the *Jensen-Kelly* releases and the *Avila* and *Arlich* actions were filed. (*Fireman's Fund, supra,* 65 Cal.App.4th at p. 1304, 77 Cal.Rptr.2d 296 ["Primary coverage provides immediate coverage upon the 'occurrence' of a 'loss' or the 'happening' of an 'event' giving rise to liability"]; see

[30] The *Henkel* majority opinion itself approvingly cited *Westoil*, albeit for a different purpose. (*Henkel, supra*, 29 Cal.4th at p. 944.)

> generally *Montrose Chemical Corp. v. Admiral Ins. Co., supra,* 10 Cal.4th at p. 645, 42 Cal.Rptr.2d 324, 913 P.2d 878 [analyzing "trigger of coverage" question in context of continuous or progressive injury from environmental contamination].) ***At the time of loss, each insurer had a potential obligation to defend and indemnify Whitman against claims that might arise from a toxic discharge.***

(*Id.* at p. 405 [emphasis added].)

These decisions recognize that, in third-party liability policies, the events within the policyholder's control that must occur to give rise to coverage have all taken place at the time that fortuitous event happens. It is 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, [that] liability coverage becomes implicated." (*Chu v. Canadian Indemnity Co.* (1990) 224 Cal.App.3d 86, 95.)

Other states' courts uniformly agree that "loss" arises at the time that occurrence begins. (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)].)[31]

Given this settled understanding of the term "loss" by insurers and courts alike, the *Henkel* majority and dissent did not dispute the meaning of "loss" in the third-party liability insurance context. As Justice Moreno

---

[31] (See also *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."]; *Illinois Tool Works, Inc. v. Commerce & Industry Ins. Co.* (2011 Ill. App. Ct.) 962 N.E.2d 1042, 1053 ["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. . . ."].)

The "vast majority of courts" to have considered whether anti-assignment clauses should remain enforceable until the underlying occurrence happens, or until that loss is fixed as a sum of money due, have determined that "no-assignment clauses do not prevent the voluntary assignment of coverage rights under occurrence-based policies for claims related to preassignment occurrences." (*Elliott Co. v. Liberty Mutual Ins. Co.* (N.D. Ohio 2006) 434 F.Supp.2d 483, 490; *Viking Pump, Inc. v. Century Indemnity Co.* (Del. Ch. 2009) 2 A.3d 76, 106; see *Pilkington N. Am., Inc., supra*, 112 Ohio St. 3d at p. 486 ["the insured's right to recover arises automatically at the time of loss"]; *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[.]"].)

However, even the minority of courts that subscribe to *Henkel's* common law analysis of when a "chose in action" arises and invalidates anti-assignment conditions also recognize that a "loss" happens at the time of the coverage-triggering occurrence. (E.g., *Travelers Casualty & Surety Co. v. United States Filter Corp.* (Ind. 2008) 895 N.E.2d 1172, 1178-1181 ["loss" must subsequently mature into a "chose in action" to become assignable].) Thus, regardless of where they draw the line on enforceability, courts recognize that "loss" means "occurrence" under third-party liability policies.

explained, "loss" refers to the "occurrence" that triggers coverage:

> [T]he **date of the *injury* . . . is when the loss occurs. . . . So long as the injury-causing event has occurred** during the policy period, **coverage is triggered, and a loss has occurred**.

(*Henkel*, 29 Cal.4th at pp. 948-49 [Moreno, J., dissenting] [boldfacing added, italics original].) While disagreeing with Justice Moreno about whether an anti-assignment clause should be deemed void at the time of "loss" or instead at the time that "money [is] due or to become due," the *Henkel* majority did not take issue with his reading of the term "loss" as being equivalent to "occurrence." (See *id.* at p. 944.)

2. Section 108 Supports the Courts' Interpretation of "Loss" in Liability Policies

Section 108 of the Insurance Code confirms that the "loss" in third-party liability policies is the "occurrence." Section 108 defines the commercial instrument that is used to protect policyholders against the fundamental risk of the tort system. (See Russ & Segalla, 3 COUCH ON INSURANCE (2011) § 41:28.) The statute provides:

> 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 . . . .

(Ins. Code, § 108(a).)

The tort system is predicated on shifting the risk of "injury" from claimant to tortfeasor. "Liability" – i.e., "legal responsibility to another" (Black's Law Dict. (9th ed. 2009)) – is the legal structure by which that transfer occurs. Since a claimant's "injury" cannot ***literally*** be transferred to the tortfeasor, "loss" is the expression of the risk that is shifted from claimant to tortfeasor through "liability."

Under the tort system, "'loss' result[s] from 'liability' for 'injury'" because it is through liability that the claimant's "injury" is transferred to the tortfeasor, as "loss." (Ins. Code, § 108.)[32] As courts have recognized since the time that section 520 was incorporated into the Insurance Code, that transfer necessarily happens at the moment the insured event occurs, because it is then that "liability" attaches:

> [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, "for an assured is not protected against loss if he has to pay a judgment before he can recover against the insurer." *Miller v. Collins*, 328 Mo. 313, 40 S.W.2d 1062, 1065. *See also Nat. City Bank v. Nat. Security Co.*, 6 Cir., 58 F.2d 7; *Butler Bros. v. American Fidelity Co.*, 120 Minn. 157, 165, 139 N.W. 355, 44 L.R.A., N.S., 609; *Ross v. American Employers' Liability Ins. Co.*, 56 N.J.Eq. 41, 38 A. 22. . . . "The recovery of the judgment against the insured by the injured party is not the injury against which the insurer insures him, but it is the liability for the consequences of the accident against which he is insured, and of which liability the judgment is a mere test or mode for proof. In fact, the recovery of the judgment is a mere mode by which the insured proves to the insurer that the intrinsic

[32] Hartford previously argued that under section 108 "loss . . . logically must come after[ ] the underlying injury that gives rise to liability." (Hartford's Answer to Second Petition for Review, filed Oct. 29, 2012, at p. 11.) Not so. Hartford "confuses loss with the subsequent fixing of a precise amount of damages for that loss." (*Egger*, *supra*, 588 Pa. at p. 302.)

> character of the accident was such that he was liable for the consequences of it. . . . And in the case of a judgment against the party insured under one of these policies for damages for the result of an accident, the liability, though legally fixed at that time, relates back to the accident itself. In contemplation of law the insured either was or was not, from the first, liable for the consequence of the accident . . . ." [citation omitted].

(*Ocean Accident, supra,* 100 F.2d at pp. 446-447 [emphasis added]; accord *Montrose*, *supra*, 10 Cal.4th at p. 655 [occurrence of bodily injury or property damage "activate[s] the insurer's defense and indemnity obligations under the policy"].)[33]

3. Section 520's "Loss" Rule Protects the Reasonable Expectations of All Parties Involved in Liability Insurance Disputes and Serves the Public Interest

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. It is the presence of risk that makes the relationship between underwriter and policyholder one

---

[33] Section 108, enacted as part of the codification of California insurance law in 1935, was originally part of the Political Code. The section's predecessor statute, Political Code section 594(8), defined "liability insurance" as:

> workmen's compensation insurance and all other insurance against loss or damage resulting from accident to another person, and for which the insured is liable[.]

(Pol. Code, § 594, subd. (8) [Deering 1916].) Thus, "loss" in the definitional statute clearly refers to the tort responsibility transferred to the policyholder at the time of the liability-producing event -- *i.e.* the "loss or damage resulting from accident" referenced in section 594(8), and the "injury . . . suffered by any natural person, or . . . damage to property" referenced in section 108 -- just as insurers and courts have understood the term since.

of insurance. When that risk subsequently disappears upon the happening of a triggering event, there is no longer an "insured risk," but a "loss." At that moment, section 520 allows the policyholder to freely assign its rights.

As discussed, the contingency at the heart of a third-party liability policy -- i.e., the point at which the underwritten risk materializes -- is the happening of an "occurrence" giving rise to the insurer's obligations. As the Court explained in *Montrose*:

> In the third party liability insurance context, "trigger of coverage" has been used by insureds and insurers alike to denote ***the circumstances that activate the insurer's defense and indemnity obligations under the policy***.

(*Montrose*, *supra*, 10 Cal.4th at p. 655 [emphasis added].)

This triggering event is the fundamental risk insured in liability policies: damage or injury to a third party. (Accord *Chu*, *supra*, 224 Cal.App.3d at p. 95 [It is at the point when "the third party has been injured by the insured's conduct, [that] liability coverage becomes implicated."].) Without this threshold loss, liability policies never come into play. Once that loss has occurred, the facts and circumstances attending the injury or damage have happened, the risk is realized, and the insurance must stand ready to pay on behalf of the insured or his assignee, as the case may be.[34]

---

[34] Since liability policies insure only against "occurrences" of bodily injury or property damage happening during their terms, once the policy period has run, no future "occurrence" can trigger coverage. The insurer's obligation to perform either was "activated" by an "occurrence" during the policy period, or it wasn't. (Cf. *Montrose*,

By drawing the assignability line at "loss," section 520 protects policyholders from insurers' attempts to use the "anti-assignment" clause to prevent the rational transfer of policy benefits to cover the loss insured against, or to effect a coverage forfeiture following a post-loss transfer. (Cf. *Ryman v. Am. Nat. Ins. Co.* (1971) 5 Cal.3d 620, 629 ["Forfeitures, particularly in insurance contracts, are not favored."]; *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."].) This is precisely the "gross oppression" that the Legislature sought to avoid. (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, p. 152, citations omitted].)

Aligning the restrictions on assignment with the happening of the insured risk not only protects insureds by preventing needless forfeitures, but also allows insurers to restrict pre-loss transfers that could alter the risk without corresponding premium increases. ***Post***-loss events, including policy transfers through routine corporate assignments, do not alter this careful balance of competing interests. Liability policies uniformly

---

supra, 10 Cal.4th at p. 655.) Thus, any concern of increasing the insured risk vanishes in the context of occurrence-based liability policies after the loss occurs, and particularly after expiration of the policy period.

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 ["In view of the general understanding that only the insurer undertakes duties, the term will be interpreted as making that event a condition of the insurer's duty rather than as imposing a duty on the insured."].) These conditions bind the insured and its successor by assignment: liability insurers rightfully expect the current policyholder (whether the original insured or an assignee) to 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."].) So long as the assignee of the policy benefits satisfies the conditions stated in the policy, it is entitled to the same performance as the original insured. (Cf. *Bergson v. Builders' Ins. Co.* (1869) 38 Cal. 541, 545 ["The assignee holds no better position than the assignor, but he takes the policy subject to all the rights, equities and liabilities existing between the insurer and the insured."].) Conversely, if the assignee is unable or unwilling to cooperate in the defense of the underlying matter, then an insurer may be relieved of its duties. Moreover, because the assignee holds the rights to the policy following assignment, liability insurers are not required to defend or indemnify the original insured.[35]

Hartford's argument for a different common law policy -- the "chose in action" rule announced in *Henkel* -- makes no sense given the careful balance and protections established by the Legislature through section 520's "loss" rule, particularly given the facts here. As Hartford well knows, the Policies provided liability insurance on an occurrence basis to every entity in Fluor's corporate family of EPC companies, covering the period from 1971 to 1985. (App. Ex. 2, at pp. 28, 107, 221, 324, 444, 564, 677, 797, 914, 1032, 1181 [defining "Named Insured" to include "FLUOR CORPORATION and any subsidiary or affiliated companies . . . as may exist or may be formed or acquired hereafter"].) The "Reverse Spinoff" did not take place until 2000, many years after the last of the Hartford Policies expired. By that time, any "loss" triggering the Policies already had happened. Hartford belatedly invoked the boilerplate "anti-assignment" clause for the sole purpose of imposing a forfeiture of coverage for the risk insured, based upon an unrelated change in corporate form that had no effect on Hartford's defense and indemnification of the Asbestos Suits for

[35] To the extent there is a legitimate dispute over the holder of policy rights, an insurer is free to resolve the matter in a declaratory relief action, just as it would be whenever there is a dispute over insured status. These disputes are not dependent on the timing of the assignment, and they cannot be resolved by a rule that merely delays the assignment until the loss matures into a chose in action. Thus, concerns over these potential disputes provide no justification to circumvent the Legislature's unconditional directive allowing the free transfer of the policy following the happening of the insured risk, i.e. the "occurrence."

nearly a decade. Hartford's attempt to escape coverage now, years after Hartford learned of the "Reverse Spinoff" and continued to defend and indemnify Fluor without dispute or incident, would completely subvert its obligation under the Policies to provide coverage for the "losses" that occurred years earlier.

Section 520 would not alter the result in *Henkel*, since the Court ruled there had been no assignment of insurance benefits under the facts of that case. (*Henkel*, *supra*, 29 Cal.4th at pp. 938, 941.)[36] However, the facts of this case demonstrate why *Henkel*'s common law rule regarding the enforcement of anti-assignment clauses is contrary to section 520. The problem with the *Henkel* "chose in action" test is that it swept too broadly,

---

[36] In *Henkel*, the majority was troubled by the prospect of establishing as a default rule the Court of Appeal's holding that insurance coverage always follows liability, even in circumstances where a policyholder did not intend for its policies to transfer to a successor corporation. (See *Henkel*, *supra*, 29 Cal.4th at p. 940; compare *Henkel Corp. v. Hartford Accident & Indemnity Co.* (2001) 88 Cal.App.4th 876, 881-882.) The circumstances of that case were unique: two putative policyholders disagreed regarding the ownership of the policies, but the Court of Appeal nevertheless ruled that the insurers were obligated to provide coverage, because "ownership of the policies is not relevant to Henkel's right to receive policy benefits for claims arising, and as to which a basis for coverage under the Insurers' policies had existed, prior to the transfer of the predecessor's business . . . ." (*Henkel*, *supra*, 88 Cal.App.4th at pp. 881, 886-887.) The Court announced its "chose in action" rule in an effort to address the "ubiquitous" disputes between the alleged policyholders regarding the "existence and scope of the assignment," without considering the "loss" test mandated by section 520. (*Henkel*, *supra*, 29 Cal.4th at pp. 943-945.) Unbeknownst to the Court, however, the Legislature already had established the time at which policyholders have the right to transfer their policy rights by invalidating anti-assignment clauses. (Ins. Code, § 520.)

as it would here, to encompass the vast majority of routine corporate transactions where the insured risk already has happened and would not be changed by any subsequent assignment, and the insurance coverage is intended through the assignment to remain available for the very losses it was meant to insure. That approach allows insurers like Hartford to use *Henkel* not as a shield to prevent unjust increases in the risk, but as a sword to escape the coverage obligations for which they collected premiums. Equally harmful, the injured party loses the indemnifying resources of insurance by the fortuity of the insured's unrelated corporate transaction. The public policy underlying section 520 is not served by imposing a penalty of forfeiture because of efficient and routine corporate transactions, in which the liability and the accompanying insurance are transferred to a successor entity after the loss has occurred. To the contrary, section 520's "loss" test is, in addition to being mandated by law, the fairest approach for all concerned.

D. <u>Fluor Is Entitled to Summary Adjudication of Hartford's First and Second Causes of Action</u>

Section 520 makes clear that ***when "loss" occurs*** relative to the time of assignment determines whether an insurer may enforce an anti-assignment clause contained in its policy. (Ins. Code, § 520.) Applying section 520's express terms to this case demonstrates that the anti-assignment provisions of the Hartford Policies are void, and Fluor is therefore entitled to summary adjudication of Hartford's First and Second Causes of Action.

First, the "agreement not to transfer" claims for coverage between Fluor and Hartford was made at the time each Policy was issued between 1971 and 1985. An anti-assignment clause contained in an occurrence-based liability policy at the time it is issued is necessarily "made before the loss"-- because such policies cover liability only for events occurring after the policy incepts.

Second, the Policies provide "occurrence"-based coverage that requires the events giving rise to the asbestos liabilities to have occurred during the policy period, sometime in the period between 1971 and 1986. There is no dispute that the "occurrences" giving rise to Fluor's asbestos-related liabilities happened, by definition, prior to the expiration of the Policies -- otherwise, the policies would not have been "triggered" -- and before Hartford began defending and indemnifying the Fluor Insureds for the Asbestos Suits in 1985.

Third, therefore, the "loss" triggering coverage under the Policies necessarily happened between 1971 and 1986 -- long before the Reverse Spinoff in 2000. Because the "loss" in this case arose decades ago, and certainly by the time that Hartford began defending and indemnifying the Fluor Insureds for the Asbestos Suits in 1985, the anti-assignment clauses of the Policies had already been rendered "void" by section 520 at the time of the Reserve Spinoff in 2000.

Thus, Hartford's First and Second Causes of Action, which allege an assignment to Fluor that Hartford contends cannot be enforced because of the Policies' anti-assignment provisions, fail as a matter of law.

V. CONCLUSION

Section 520 prohibits insurers from using anti-assignment clauses to frustrate the transfer of insurance benefits or undermine coverage for losses that have already happened. Yet that is precisely what Hartford now seeks from this Court: 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: March 12, 2013

LATHAM & WATKINS LLP
Brook B. Roberts
John M. Wilson
G. Andrew Lundberg

By: ______________________
John M. Wilson
Attorneys for Petitioner
Fluor Corporation

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 12,055 words, as counted by the word-processing program (Microsoft Word) used to generate this Petition, exclusive of the Tables and Certification.

DATED: March 12, 2013

LATHAM & WATKINS LLP
Brook B. Roberts
John M. Wilson
G. Andrew Lundberg

By: John M. Wilson
John M. Wilson
Attorneys for Petitioner
Fluor Corporation

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 March 12, 2013, I served the following document described as:

PETITIONER'S OPENING BRIEF ON THE MERITS

by serving a true copy of the above-described document in the following manner:

BY OVERNIGHT MAIL DELIVERY

I am familiar with the office practice of Latham & Watkins LLP for collecting and processing documents for overnight mail delivery by Federal Express Mail or other express service carrier. Under that practice, documents are deposited with the Latham & Watkins LLP personnel responsible for depositing documents in a post office, mailbox, subpost office, substation, mail chute, or other like facility regularly maintained for receipt of overnight mail by Federal Express Mail or other express service carrier; such documents are delivered for overnight mail delivery by Federal Express Mail or other express service carrier on that same day in the ordinary course of business, with delivery fees thereon fully prepaid and/or provided for. I deposited in Latham & Watkins LLP' interoffice mail a sealed envelope or package containing the above-described document and addressed as set forth below in accordance with the office practice of Latham & Watkins LLP for collecting and processing documents for overnight mail delivery by Federal Express Mail or other express service carrier:

SEE ATTACHED SERVICE LIST

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 12, 2013, at San Diego, California.

Andrea Rasco

SERVICE LIST

Alan Jay Weil, Esq. Jeffrey B. Ellis, Esq. Gaims, Weil, West & Epstein, LLP 1875 Century Park East, Suite 1200 Los Angeles, CA 90067-2513 Telephone: (310) 407-4500 Facsimile: (310) 277-2133 ajweil@gwwe.com jellis@gwwe.com	**Counsel for Hartford Accident and Indemnity Company**
James P. Ruggeri, Esq. (pro hac vice) Tara Plochocki, Esq. Joshua Weinberg, Esq. Shipman & Goodwin LLP 1133 Connecticut Avenue, NW Washington, D.C. 20009 Telephone: (202) 469-7750 Facsimile: (202) 469-7751 jruggeri@goodwin.com tplochocki@goodwin.com jweinberg@goodwin.com	**Counsel for Hartford Accident and Indemnity Company**