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Fluor Corp. v. Superior Court: Analysis And Impact

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Commentary

Fluor Corp. v. Superior Court: Analysis And Impact

By
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[Editor's Note: Mr. Hofer is a partner in the Washington, D.C., office of Troutman Sanders LLP. He represents insurers in complex coverage litigation in jurisdictions across the country. Mr. Hofer was the principal attorney representing insurers in Henkel Corp. v. Hartford Acc. & Indem. Co., the case overturned by the California Supreme Court in Fluor. He also filed an amicus curiae brief in Fluor on behalf of Stonewall Insurance Company, which was extensively addressed in the Fluor opinion. Any commentary or opinions do not reflect the opinions of Troutman Sanders LLP, its clients, or LexisNexis, Mealey's. Copyright © 2016 by Patrick F. Hofer. Responses are welcome.]

In August 2015, the Supreme Court of California decided *Fluor Corp. v. Superior Court*,[1] overturning its relatively-recent decision in *Henkel Corp. v. Hartford Accident and Indemnity Co.*[2] *Henkel* had held that the consent-to-assignment provision in insurance policies was enforceable and that the provision precluded a policyholder from assigning policy rights to a newly-formed subsidiary, after the policy period, without insurer consent. *Fluor* reached the opposite conclusion, permitting the insured to assign policies to a newly-formed subsidiary, in terms suggesting that a policyholder can assign any and all rights under a policy to anyone, nearly at any time. Given the breadth of the court's statements, it is likely that disputes will arise among claimants, policyholders and insurers regarding their rights and obligations and regarding whether *Fluor* upsets other aspects of California insurance law.

Background

Henkel Decision

In 2003, the Supreme Court of California decided *Henkel*. In that case, the insured, Amchem, had created a new subsidiary in the 1970s and transferred to it certain assets used in making metal-treating chemicals (and the subsidiary assumed related liabilities). The transfer did not include any insurance policies or rights thereunder. The subsidiary was later sold to Henkel Corporation, and the two then merged. Henkel was sued in the 1980s for alleged bodily injury arising out of exposure to the chemicals. Henkel sought coverage under policies issued to it after it purchased the subsidiary as well as under policies issued to Amchem prior to the subsidiary's creation, claiming that rights under those policies were assigned to it by operation of law. In a subsequent coverage suit, a California trial court rejected Henkel's arguments and granted summary judgment to the insurers and the original insured (now called Rhone-Poulenc).

On appeal the Court of Appeal reversed, rejecting all prior California law and inventing a novel theory of insurance-policy assignment. Under that theory, a liability insurer's duty to defend and duty to indemnify were "benefits" segregable from the policy itself, which could be assigned to a third party without insurer consent after injury had allegedly taken place during the policy period, even though the policy prohibits assignment of any interest under the policy without insurer consent. Going even further, the Court of Appeal had held that those duties also *automatically must be assigned* to an entity that assumes a portion of the original policyholder's liabilities, even if the corporate transaction did not provide for any such assignment and *even if the original policyholder objects*.

The Supreme Court reversed. Consistent with the opinions of all three prior Court of Appeal cases to consider the issue, the court held that rights under a liability

insurance policy are contractual and may not be transferred by a court to a third party "by operation of law," where the third party had assumed the insured's liabilities by contract but (1) did not receive any assignment of insurance or (2) did not obtain the insurers' consent for any assignment.[3] The court further held that even if the insured had purported to assign those rights, any such assignment would have been ineffective without the consent of the insurer, as the policies stated that "Assignment of interest under this policy shall not bind the [insurer] until its consent is endorsed hereon."[4]

Henkel noted that common-law precedent has consistently upheld the consent-to-assignment clause in liability insurance policies as requiring the insurer's consent for any assignment of rights under a policy. The court noted that this restriction was subject to a limited exception: When a covered contingency has happened, and all conditions to coverage have been satisfied, the insurer then owes a payment to the insured, which like other debts is a "chose in action" that can be assigned to others notwithstanding the insurer's lack of consent.[5] Relying on decades of California precedent, the court ruled that in the context of a liability insurance policy such an assignable chose in action does not arise when underlying claimants were allegedly injured but instead arises when the insured's claims are "reduced to a sum of money due or to become due under the policy."[6] The court rejected the argument that "policy benefits can be assigned without consent once the event giving rise to liability has occurred."[7] Notably, *Henkel* was decided in favor of the original *policyholder*, Rhone-Poulenc, as well as its insurers.

In reaching its holding, the *Henkel* court applied *Trubowitch v. Riverbank Canning Co.*, 30 Cal. 2d 335, 339-40 (1947), which stated, "It is established that a provision in a contract or a rule of law against assignment does not preclude the assignment of money due or to become due under the contract [citations] or of money damages for the breach of the contract." The court also applied *Bergson v. Builders' Ins. Co.*, 38 Cal. 541, 545 (1869), which disallowed assignment of a fire policy to a new insured without insurer consent, stating, "The insurer has a right to know, and an interest in knowing, for whom he stands as an insurer. He may be willing to insure one person and unwilling to insure another. . . . He may have confidence in the honesty of the one in protecting the property and thereby lessening the risk, and may have no confidence in the other." *Bergson* further noted that an assignment "after the loss" may be permitted as it is assignment "of the sum that has already become due," whereas "assignment before the loss, cannot, by possibility, have the effect to substitute the assignee in the place of the insured, or bring him into any relation with the contract." *Id.* at 544.

Henkel's rejection of the argument that liability insurance policies may be assigned to new entities as a matter of law accorded with the holdings of all three prior Court of Appeal cases that had considered the issue. *See General Accident Ins. Co. v. Superior Court*, 55 Cal. App. 4th 1444 (1997); *Quemetco Inc. v. Pacific Automobile Ins. Co.*, 24 Cal. App. 4th 494 (1994); *Oliver Machinery Co. v. United States Fid. & Guar. Co.*, 187 Cal. App. 3d 1510 (1986).

Fluor Decision

Facts

In *Fluor*, the insured, Fluor Corporation, had bought a corporation named A.T. Massey Coal Company. In 2000 it sought to divest itself of this company. Rather than just sell the stock of Massey (which presumably would have resulted in a tax on any capital gains), Fluor entered into a complicated tax-free transaction under which: (1) Fluor created a new subsidiary, also called "Fluor" ("Fluor-2"); the original Fluor ("Fluor-1") transferred its engineering and construction assets to Fluor-2 (and Fluor-2 assumed related liabilities) while Fluor-1 retained ownership of Massey stock; (3) Fluor-1 and Massey merged, with the new name of the successor "Massey Energy Corporation." Thus, the original insured continued in existence as "Massey Energy," and Fluor-2 continued the original engineering and construction business of the original insured. As part of the transaction, Fluor-1 assigned "any and all rights and/or obligations it may have" with respect to "all Parent Assets and Parent Liabilities."[8]

Fluor-2 began defending and paying asbestos claims asserted against "Fluor Corporation," even though Massey Energy was the corporate successor to the insured. Fluor-2 sought coverage for those claims, and Hartford defended Fluor-2 for some time and billed Fluor-2 for retrospective premiums, before asserting that Fluor-2 was not its insured. Hartford's assertion that Fluor-2 had not acquired Fluor-1's

insurance rights was upheld by a California trial court and a Court of Appeal, following *Henkel*.

Basis of Supreme Court's Decision: Overlooked 1872 Statute

The Supreme Court reversed. Fluor asserted that *Henkel* had been wrongly decided because it had not considered an 1872 statute (which had been cited only once in a court decision since then) that required a contrary outcome. That statute stated: "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. . . ." Cal. Ins. Code § 520. The Supreme Court agreed with Fluor that the statute was contrary to *Henkel* and controlling. It therefore overturned *Henkel* and held that the typical consent-to-assignment provision in liability insurance policies does not bar assignment of the "right to invoke policy coverage" after injury occurs during the policy period (that is, after the policy is "triggered"). 61 Cal. 4th at 1219.

Beyond Statute: *Fluor* Claims *Henkel* Was Contrary to Majority View

Beyond its conclusion that Section 520 required a different result, however, the *Fluor* opinion asserts that *Henkel* was contrary to what it viewed as the "overwhelming majority of cases" decided before and after *Henkel*. The decision catalogs decisions from several states which it says accept the proposition that an insured can assign policy rights any time after a "loss" occurs. 61 Cal. 4th at 1206-15.

Language of *Fluor*

Fluor's language appears to go beyond what was necessary to decide the case before it, involving purported assignment of rights under a liability insurance policy to a new subsidiary of the insured who assumed certain liabilities of the insured. The opinion repeatedly frames the issue as whether the insured can assign the "right to invoke the policy coverage" to a third party, without limiting the issue only to corporate insureds or corporate reorganizations, or even limiting it to situations in which one party assumes the liability of the insured prior to assertion of underlying claims. By holding that the insured can assign the "right to invoke the policy coverage" to a third party at any time after injury occurs and triggers the policy, the opinion appears to open the door to arguments that other kinds of assignments, such as assignments to claimants or to purchasers of assets, are permitted as well.

Analysis

Criticisms of *Fluor*

Fluor erred in multiple ways. The most significant errors are addressed below.

Failure to Analyze Why a "Chose in Action" Is Assignable

Henkel, like many cases before it, rested its holding on a familiar distinction in the law, which the *Fluor* decision ignores: the distinction between contract rights and property rights. In other words, *Henkel* recognized the familiar and long-enforced rule that parties to a contract are held only to the obligations they created for themselves, and courts do not rewrite a contract for any reason;[9] but when a contract right changes into a vested right to obtain a sum of money, that right becomes "property," and the law of property steps in to regulate how it may be transferred. In legal parlance, the vested property right is called a "chose in action."[10] Common law decisions prior to *Henkel* consistently refused to permit assignment of any rights under an insurance policy except a chose in action, an accrued right to receive a money payment. *Fluor* does not discuss what a chose in action is and why it, and only it, is assignable.[11]

Misapprehended *Henkel*

Fluor's failure to consider what a chose in action is led it to mistake what *Henkel* actually held. It said that *Henkel* held that rights under a policy are assignable when "there exists a 'chose in action' **against the insured**, which we found in *Henkel* occurs only when the **claims against the insured** have 'been *reduced to a sum of money due or to become due* under the policy.' " 61 Cal. 4th at 1181 (italics original; boldface emphasis added). That is incorrect. Rather, as *Henkel* recognized, the issue is whether the *insurer* has a payment obligation, and therefore whether it holds a chose in action in *favor* of the insured, not whether *underlying claims* have been reduced to a chose in action *against* the insured. The fact that the decision confuses this issue suggests that the Court misunderstood what a chose in action is.

Rewrote Section 520 of the California Insurance Code

Fluor characterizes Section 520 of the California Insurance Code, which applies to "transfer [of] the *claim* of the insured," as addressing "the insured's right to invoke coverage." Indeed, the decision concludes, without

citation, that the statute's language referring to "transfer" of a "claim" "covers an agreement restricting the insured's authority to assign the right to assert, against the insurer, claims for defense and indemnification coverage concerning third party losses." 61 Cal. 4th at 1198 n.31. Throughout the opinion the court refers to Section 520 and court decisions as permitting an assignment of "rights to invoke coverage." Yet the cases whose common law rule Section 520 codified and many of the decisions the court cites in fact involved assignment of a current right to receive a money payment, a "claim" for money (or a chose in action) that had already accrued. The court's equation of word "claim" with the phrase "insured's right to invoke coverage," a phrase and a concept not used in the statute or the cases, essentially rewrites the statute and allows it to assert its decision is supported by both the statute and case law, when it is not.

Decision Is Advisory Opinion as a Significant Issue Was Disputed

The court admits that the question of whether the case even involves an assignment at all is disputed and not resolved by its decision. 61 Cal. 4th at 1184 n.3. Hartford had sought a declaration that "*assuming* the original Fluor Corporation had attempted to assign its insurance coverage claims to Fluor-2, the original corporation had failed to comply with the consent-to-assignment provisions found in each policy." 61 Cal. 4th at 1186 (emphasis original). Without seeking to establish that such an assignment in fact had occurred, Fluor-2 sought summary adjudication on Hartford's declaration. Under normal principles of jurisdiction and appellate prudence, the court should not have reached the issue of whether an assignment, which may or may not have occurred, would be valid, to avoid giving an advisory opinion.[12] The decision nevertheless seems eager to reach out and decide the issue in the abstract.

Decision Based on Facts Not of Record

An error corollary to deciding the issue in the abstract is the court's reliance on statements in appellate briefs, including even *amicus* briefs, as providing facts supporting its decision, instead of limiting its decision to facts properly before it in the record. For example, the decision lays heavy stress on the statements made by Massey Energy in its amicus brief to conclude that it (that is, Fluor-1, the original insured) would not make claims against Hartford for asbestos liability and that the assignment would not increase Hartford's risk. 61 Cal. 4th at 1186 n.6. Those statements were unverified by being tested in discovery or cross-examination, and Hartford had no opportunity to demonstrate they were wrong.

Other Errors

In brief, *Fluor* also erred for the following reasons:

- The Supreme Court could have avoided overturning precedent by resting its decision on waiver or estoppel, which arguably would apply based on the facts of the case. Hartford had defended and paid the new insured (Fluor-2) without raising the issue of whether it was entitled to coverage, and the court cites this conduct as a reason why the assignment was effective.[13] Indeed, the court arguably could have found implied consent to the assignment based on the facts before it.

- The court did not apply its own jurisprudence on interpreting the California Civil Code. That jurisprudence establishes that, because the Civil Code as passed by the legislature in 1872 was a codification of common law rules, using language that was unclear, inartful and incomplete, the Civil Code's provisions cannot be interpreted like other statutes based on their "plain meaning."[14] Rather, that jurisprudence establishes that the Civil Code has to be interpreted using the common law rules the Civil Code attempts to enunciate, as stated by prior case law, regardless of the words chosen.[15] Here, however, *Fluor* ignored that jurisprudence and interpreted the statute "giving words of the provision their ordinary and usual meaning," saying their "plain meaning controls." 61 Cal. 4th at 1198. Even though it then concluded the statute was ambiguous, it did not limit its analysis to attempting to enforce the common law rule the statute codified (as its own jurisprudence would require), but sought to put its own gloss on what was meant.

- In conducting its analysis of the statute, the decision makes a critical mistake: It misreads the New York precedents upon which the statute was predicated as not requiring a judgment *against the insurer* to permit assignment of

accrued right to payment. Since those cases involved first-party insurance, not third-party insurance, they had no need to discuss a "judgment" at all: the issue was whether the insurer had a payment obligation, and in the first-party context such a payment obligation arises upon the happening of covered property damage or other casualty—the payment obligation arises then whether or not the insured later obtains a judgment to enforce it. Thus, the court's reliance on those cases as not requiring a "judgment" to allow assignment misreads what they stood for. By contrast, a third-party insurer's payment obligation does not arise until there is an *underlying judgment against the insured by a tort claimant*. The court simply fails to understand that a third-party liability insurer's payment obligation does not arise upon injury or damage, but only when the insured is held liable—when a judgment *against the insured* is entered. 61 Cal. 4th at 1205.

- The decision relies on a treatise written by Jeffrey Stempel for justification for its decision on public policy and "corporate efficiency" grounds. The court failed to examine Mr. Stempel's background. He has acknowledged that views he has published critical of *Henkel* were formed in part as a paid expert working for policyholders.[16] At a minimum, therefore, whether his analysis is objective is open to question.

Inconsistency of *Fluor* with Prior California Law

Fluor's broad insurance-law pronouncements, most of them unnecessary to its decision and addressing issues not briefed by the parties, are at odds with several prior decisions, which the decision either does not discuss or brushes aside. It is therefore unclear whether this prior law is now open to question.

Time an Insurer's Duty to Indemnify "Accrues"

Fluor concludes the duty to indemnify under a liability insurance policy "accrues" at the time a policy is triggered—that is, when covered bodily injury or property damage occurs during the policy period. 61 Cal. 4th at 1206-19. This contradicts several prior rulings of the Supreme Court holding that a liability insurer's duty to indemnify accrues only when the insured is held liable in an underlying judgment. *See Certain Underwriters at Lloyd's, London v. Superior Court (Powerine I)*, 24 Cal. 4th 945, 958 (2001) ("the duty to indemnify can arise only after damages are fixed in their amount"); *Javorek v. Superior Court (Larson*), 17 Cal. 3d 629, 641-44 (1976) ("State Farm has no liability to pay until defendants' liability has been determined. If it is determined that they have no liability, the insurer's liability never accrues."). The court attempts to reconcile its decision with prior law by saying, "It is true that an insurer's obligation to actually 'cut a check' and *transfer funds* in performance of its duty to indemnify does not arise until there is a judgment or approved settlement for a sum of money due." 61 Cal. 4th at 1220 (emphasis original) (citing *Montrose*, 10 Cal. 4th 645, 659 n.9). Yet it is unclear how the "duty to indemnify" is any different than the duty to "cut a check," and the decision does not explain the difference. In addition, the decision claims that an insured's "liability can arise simultaneously with loss and injury—at the same time someone causes a compensable injury—and not only when someone loses a lawsuit," with no citation to California law. *Id.* This assertion is plainly unsupportable. If it were true, and if liability were fixed and established with injury, then the entire tort system, which exists to determine precisely *whether* there is liability, is pointless. The statement ignores the fact that liability is not inexorable with injury, because the claimant must first timely file suit, must have a remedy at law, and must prove causation, breach of duty (or circumstances establishing strict liability) and damages, and because the defendant may prevail on any of a number of affirmative defenses. Indeed, "liability" is not fixed upon happening of injury but is contingent on the occurrence of several additional events, all or several of which may not occur.

Inconsistency with Cases Holding When Duty to Defend Accrues

Fluor's conclusion that the duty to *indemnify* accrues at the time a policy is triggered is also inconsistent with several past decisions holding that the duty to *defend* does not arise at the time of trigger but arises only when a suit is filed against the insured (and notice of it has been given to the insurer). *Foster-Gardner, Inc. v. National Union Fire Ins. Co.*, 18 Cal. 4th 857, 886 (1998) ("'The duty to defend arises when the insured tenders defense of the third party lawsuit to the insurer.' Prior to the filing of a complaint, there is nothing for the insured *to tender defense of*, and hence no duty to

defend arises.") (citation omitted); *Powerine I*, 24 Cal. 4th at 958 ("the duty to defend may arise as soon as *damages are sought* in some amount") (emphasis added); *Aerojet-General Corp. v. Transport Indem. Co.*, 17 Cal. 4th 38, 58 (1997). Thus, under the *Fluor* ruling, the duty to indemnify accrues *before* the duty to defend does, even though that is logically impossible, and all prior cases say the opposite. (The court does not address this inconsistency, nor does it say how an insurer can have a duty to indemnify a claim that has not even been asserted.)

Inconsistency with Case Law Holding that Insurer Has No Duty to Claimant Prior to Judgment

If *Fluor* is correct that the duty to indemnify arises upon injury and not upon judgment, its decision raises the issue of whether a liability insurer has a duty to pay a claimant prior to judgment (indeed, immediately upon injury) or whether it has other duties to claimants, including duties of good faith. Yet the Supreme Court has held that a liability insurer owes no duty to a claimant, including a duty to settle, before judgment. *Murphy v. Allstate Ins. Co.*, 17 Cal. 3d 937, 944 (1976) ("Neither third party beneficiary doctrine nor the Financial Responsibility Law warrant granting the injured claimant the right to recover from the insurer for breach of the duty to settle."). The duty to settle is owed to the insured, not to the claimant. *Comunale v. Traders & Gen. Insur. Co.*, 50 Cal. 2d 654, 659 (1958) ("in determining whether to settle the insurer must give the interests of the *insured* at least as much consideration as it gives to its own interests") (emphasis added). *Fluor's* logic appears to suggest that the insurer has a duty to pay the claimant without further determination of liability. *Fluor* does not address this conundrum.

Time of Assignability of Bad Faith Claim to Claimant

Prior California law made clear that a policyholder could not assign a bad faith claim to the claimant until a judgment was entered against the policyholder. *Smith v. State Farm Mut. Auto. Ins. Co.*, 5 Cal. App. 4th 1104, 1114 (1992) ("a judgment against the insured (or, . . . a payment by the insured in settlement of a claim) is a condition to the insured's right to assign to the claimant a cause of action for bad faith against the insurer"). But *Fluor* states that the policyholder has the right to assign its claims against its insurer as soon as injury occurs. If that is correct, there would seem to be no reason why a policyholder could not assign a bad faith claim prior to judgment.

Liability May Not Be "Transferred"

Fluor bases its ruling in part on the supposition that the new entity, Fluor-2, obtained the asbestos liability from the insured, Fluor-1, and Fluor-1's corporate successor, Massey Energy, had no such exposure remaining (and therefore no need for insurance coverage for it), obviating any concern that allowing the assignment of insurance rights to Fluor-2 increased Hartford's risk. This supposition is unexamined in the opinion, however, and it is contrary to California law. That law clearly holds that when a parent corporation creates a new subsidiary that assumes certain tort liabilities of the parent, the parent *continues* to be primarily liable for those torts, notwithstanding the subsidiary's contractual promise to meet that liability. *Beatrice Co. v. State Bd. of Equalization*, 6 Cal. 4th 767, 782-83 (1993) ("An agreement to assume liabilities is a contractual promise to perform the obligations of another. If supported by consideration, it is enforceable notwithstanding *the continuing primary liability of the promisee* for the same obligation.") (emphasis added). In other words, contrary to *Fluor's* assumption, liability may not be "transferred." One corporation may assume another's liabilities, but the first continues to have the liability (absent the agreement of claimants to release it), especially to the extent the second is unable or unwilling to meet its agreement to indemnify the first.

Duty to Defend Is Not Capable of Assignment

Fluor ignores the Supreme Court's prior holding that the duty to defend is personal to the insured and may never be reduced to a sum of money, such that it cannot be transferred to a third party. *Javorek*, 17 Cal. 3d at 644-45. As the court said there: "[T]his executory promise to defend . . . is not the type of interest which is subject to attachment. Under the terms of the policy, State Farm is obligated only to provide a defense with attorneys of its own choosing. There is no obligation to pay money to the insureds so that they may provide their own defense. *Such an obligation to provide personal services is not capable of transfer. . . .*" *Id.* (emphasis added).

The Main Holding of *Henkel* Remains Good Law

Despite the fact that *Fluor* overturned *Henkel*, it made clear it was only doing so to the extent inconsistent with

its opinion. The main holding of *Henkel* was that insurance rights do not transfer *automatically* by operation of law when one party assumes the liability of an insured party, but any rights are defined and subject to the contract at issue. In *Henkel*, there was no assignment by contract, so there was no assignment by operation of law. *Henkel* went on to say that even if an assignment had been attempted it would not be valid without insurer consent. Only that portion of *Henkel* was overturned. Accordingly, insurers should cite *Henkel* to reject any attempt by policyholders to claim that they have policy rights by operation of law in the absence of actual contractual assignment.

Areas for Potential Disputes

As the foregoing discussion suggests, policyholders and plaintiff counsel may attempt to argue that *Fluor* opens the door to changes in the law on many different issues. Whether they would be successful remains to be seen. For example:

- Does *Fluor* implicitly overturn or undercut the "known loss" ruling of *Montrose*? *Montrose* had held that insurance policies in effect after an insured knew of environmental contamination continued to afford coverage, and the insurers issuing them could not claim a "known loss" defense, because the policies covered liability, and the risk of liability continued to be uncertain and insurable until a judgment was entered against the insured—only then did the insured's "loss" become uninsurable.[17] *Fluor*, on the other hand, regards the insured's liability as fixed upon the happening of injury, and similarly regards the insurer's indemnity obligation as fixed then as well. If so, that injury should be uninsurable for future policies as soon as it occurs, contrary to *Montrose*.

- Does *Fluor* essentially turn California into a direct action state? That is, may an insured assign its insurance "claim" to the tort plaintiff immediately, such that the tort plaintiff can sue the insurer for recovery prior to judgment against the insured?

- Does *Fluor* create duties on the part of a liability insurer to injured parties immediately upon injury? Do those duties include a duty of good faith? How does that affect the insurer's duty to settle? What effect would it have on an insurer's duty to avoid an excess judgment?

- Does *Fluor* effectively eviscerate an insured's duty of cooperation? If an insured may assign its insurance rights immediately, what obligation does it have after assignment to cooperate in the defense? How can its cooperation be meaningful if it has assigned its coverage rights and the plaintiff has agreed not to execute on any other assets?

- Does *Fluor* apply in first-party property insurance cases to permit an insured owner of property to assign its "right to invoke coverage" to a purchaser of the property, such that the purchaser may claim coverage from the seller's insurer for any unknown property damage that occurred prior to the sale? There seems to be no reason in *Fluor* to bar this sort of assignment.

- Does *Fluor* apply to multiply the insurer's risk? In *Fluor* the court seemed to assume that the original insured faced no asbestos liability and gave rise to no increased or doubled risk of defense or indemnity to the insurer. That was an incorrect assumption. But if a case arises where both the original insured and the putative new insured seek coverage for the same claims or make inconsistent demands for coverage, is the assignment still valid? *Fluor* does not suggest it would invalidate the assignment, even though that situation clearly multiplies the insurer's risk.

Conclusion

Fluor's broad pronouncements dealing with abstract issues somewhat in a vacuum led the court to err in several ways, errors it could have avoided if it had not sought to decide issues not before it and to overturn recent precedent that was itself based on careful examination of prior law. Indeed, the court's apparent enthusiasm for overturning one of its own precedents contravenes its jurisprudence on *stare decicis*, which holds that a prior decision should not be overturned merely because the current court would decide it differently if it were before the court for the first time. This enthusiasm may not bode well for how the court honors and respects its precedents in similar contexts going forward.

Endnotes

1. 61 Cal. 4th 1175 (2015).

2. 29 Cal. 4th 934 (2003).

3. *Id.* at 941-43.

4. *Id.* at 944.

5. *Id.* The term "chose in action" is a common law term of art based on the French word "chose" (meaning "thing") and means any article of personal property that the owner does not have in his or her possession but that is in the possession of another person, which the owner can recover by instituting an "action" for recovery. *Black's Law Dictionary* at 219 (5th ed. 1979). All personal property can be classified as choses "in action" or choses "in possession." *Id.*

6. 29 Cal. 4th at 944.

7. *Id.*

8. The *Fluor* decision says whether this assignment constituted "an assignment of claims regarding benefits under the insurance policies" was disputed, was not before the court, and "remains an unresolved issue of law and fact." 61 Cal. 4th at 1184 n.3. Given the uncertainty of whether the corporate transaction did or did not effect an assignment of insurance claims, it is difficult to understand how the court could proceed to the rest of its analysis without issuing an advisory opinion.

9. *Certain Underwriters at Lloyd's, London v. Superior Court (Powerine Oil Co.)*, 24 Cal. 4th 945, 968 (2001) ("we do not rewrite any provision of any contract, including the standard [insurance] policy underlying any individual policy, for any purpose").

10. *See* note 5 above.

11. *Fluor* was also incorrect to assert that *Henkel* was inconsistent with the majority of other decisions to consider the issue. *See* Patrick F. Hofer, "Corporate Succession and Insurance Rights after *Henkel*: A Return to Common Sense," 42 Tort, Trial & Ins. Practice L.J. 763, 782-92 (2007) (demonstrating *Henkel's* consistency with law in multiple jurisdictions permitting assignments only of choses in action, not substitution of new "insured").

12. *See Branick v. Downey Savings & Loan Assn.*, 39 Cal. 4th 235, 242-43 (2006) (refusing to reach issue when "We thus do not know the facts that would necessarily inform the superior court's discretionary decision," as to do so would render advisory opinion).

13. 61 Cal. 4th at 1222.

14. *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 815 (1975) (citing *Estate of Elizalde*, 182 Cal. 427, 433 (1920)).

15. *Id.*

16. As Mr. Stempel disclosed in a law review article which criticizes *Henkel*, "Some of my views on insurance coverage issues relating to asbestos claims were formed in the course of examining those issues as an expert witness or consultant, primarily for policyholders who manufactured, sold or used asbestos in some form." Jeffrey W. Stempel, "Assessing the Coverage Carnage: Asbestos Liability and Insurance after Three Decades of Dispute," 12 Conn. Ins. L.J. 349, 349 n.* (2006).

17. *Montrose Chem. Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 692-93 (1995). ■

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