TRANSFER OF INSURANCE RIGHTS UNDER LIABILITY POLICIES AS THE RESULT OF THE SALE OF A BUSINESS (REVISITED)

Joseph Thacker, Andrew Miller, Stephen Brown, and Seymour Nayer

I. INTRODUCTION

In *Henkel Corp. v. Hartford Accident & Indemnity Co.*,[1] the California Supreme Court fundamentally altered the law regarding transferability

1. 62 P.3d 69 (Cal. 2003).

Representing the policyholder's perspective, Joseph Thacker (jthacker@trzlaw.com) and Andrew Miller are shareholders in the Toledo office of Thacker Robinson Zinz LPA. The insurer's viewpoint is represented by Stephen Brown (sbrown@plunkett.com) and Seymour Nayer (snayer@plunkett.com), are partners in the Bloomfield Hills, Michigan, office of Plunkett Cooney, P.C.

of rights under occurrence-based general liability insurance policies. Holding that all assignments of rights under the policy were void unless the insurer consented to the transfer, the rule of the *Henkel* decision was contrary to virtually all prior case law and every major treatise dealing with this topic. Post-*Henkel*, numerous coverage cases involving general liability insurance policies began with a flurry of discovery and motion practice by the insurer designed to establish that the person presenting the claim was "a stranger to the policy" with no rights under the policy. A generation of transactional lawyers were dragged into service by litigators, helping them to parse through the mind-numbingly boring language of long-ago drafted agreements regarding corporate acquisitions and divestitures, mergers, and name changes. Numerous courts, ignoring decades of case law, followed *Henkel*, while others declined to do so.

In *Fluor Corp. v. Hartford Accident & Indemnity Co.*,[2] the California Supreme Court reversed *Henkel.* With its decision in *Fluor*, California's interpretation is now in line with multiple other state courts and the long-held historical rule. However, lawyers around the country, and especially in those jurisdictions that followed *Henkel*, are left wondering "where do we go from here?"

II. ANTI-ASSIGNMENT PROVISION

Henkel, its progeny, and *Fluor* focus on the applicability of "anti-assignment provisions" found in standard form, occurrence-based general liability policies. That provision limits a policyholder's ability to assign its rights to a third party: "*Assignment.* Assignment of interest under this policy shall not bind [the insurer] until its consent is endorsed hereon . . .[3]

Prior to *Henkel*, the anti-assignment clause was almost uniformly interpreted only to prevent an insured from transferring its policy rights to a third party prior to the date of a loss:

- "Policy provisions that require the company's consent for an assignment of rights are generally enforceable only before a loss occurs, however. As a general principle, a clause restricting assignment does not in any way limit the policyholder's power to make an assignment of the rights under the policy—consisting of the right to receive proceeds of the policy—after a loss has occurred."[4]
- "The purpose of a no-assignment clause is to protect the insurer from increased liability, and after events giving rise to the insurer's

2. 354 P.3d 302 (Cal. 2015).
3. 1973 Policy Jacket Specimen, Insurance Services Office, Inc., Conditions § 9 (Assignment).
4. 17 WILLISTON ON CONTRACTS § 49:126 (4th ed. 2003).

liability have occurred, the insurer's risk cannot be increased by a change in the insured's identity."[5]

- "In most jurisdictions, courts have held that an anti-assignment clause ordinarily will not apply to a post-loss assignment under a first-party insurance policy. Under this rule, disregarding an express provision is justified because the insurer experiences no change in risk: 'once the insured-against loss has occurred, the policyholder essentially is transferring a cause of action rather than a particular risk profile.' This rule is generally applied to rights under liability insurance policies, but there is a division of authority on when the 'loss' occurs for purposes of allowing an uncontested assignment."[6]

In short, coverage under an occurrence-based policy is limited to harm suffered during the policy term. Any insured injury or damage—known or unknown—necessarily happened prior to the expiration of the policy. Thus, after expiration of the policy, the policyholder's coverage rights are already vested and can be freely transferred as a "chose-in-action."[7]

The contrary view espoused by insurers is that the plain meaning and unambiguous language used in the anti-assignment provision means there should be no circumstance, even a post-loss assignment, that overrides the condition that—in order to bind the insurer—its consent must be obtained to transfer of any interest, coverage, or benefit under the policy. Where the policyholder fails to seek, let alone obtain, consent to the assignment of any interest under a liability policy (as opposed to a first-party policy), the policyholder has violated an explicit condition precedent to coverage, namely, that the insurer not be bound by any assignment until its consent was endorsed on the policy.[8] Such a position is consistent with the general rule, enforced almost universally in most states, that

5. 3 COUCH ON INSURANCE § 35:7 (3d ed. 2004).

6. 3-16 APPLEMAN ON INSURANCE § 16.05 (2016); *see also* 6bf-182f APPLEMAN ON INSURANCE LAW & PRACTICE ARCHIVE § 4269 (2013) ("However, an insurer may not limit an insured's ability to assign his or her rights under a policy after the occurrence of an event which gives rise to the insurer's liability.").

7. *See* N. Ins. Co. v. Allied Mut. Ins. Co., 955 F.2d 1353, 1358 (9th Cir. 1992) ("[T]he rationale for honoring 'no assignment' clauses vanishes when liability arises from presale activity"); *see also In re* Viking Pump, Inc., Nos. 518, 2014, 523, 2014, 525, 2014, and 528, 2014, 2016 Del. LEXIS 474, at *33–34 (Del. Sept. 12, 2016) ("Insurers have a legitimate interest in deciding whether to allow assignment of rights under an insurance policy, because the identity of an insured determines the extent of an insurer's risk, and an assignee may present a greater risk of loss. . . . However, that interest is not impeded by the assignment of rights to claims for pre-assignment occurrences since, in such instances, the insurer is covering the risk it originally contracted to insure.").

8. *See*, *e.g.*, Aetna Ins. Co. of Hartford v. Robinson, 6 N.E.2d 746, 750–53 (Ind. App. Ct. 1937) (recognizing that a policy provision requiring an assignment to be evidenced by a writing is enforceable unless the insurer gave oral consent); Del Monte Fresh Produce, Inc. v. Firemen's Fund Ins. Co., 183 P.3d 734 (Haw. 2007).

the provisions in an insurance policy must be enforced consistent with the clear and unambiguous policy language.[9]

III. *HENKEL* AND ITS PROGENY

The *Henkel* decision rejected the historical interpretation of the anti-assignment clause. In that case, Henkel argued that the insurer's consent was not required because, under an occurrence policy, "benefits can be assigned without consent once the event giving rise to liability has occurred."[10] But the court rejected this argument, holding that the underlying "claims had not been reduced to a sum of money due or to become due under the policy" and, therefore, were not a "chose-in-action" under California law.[11] Further, the court rejected Henkel's argument that since there was no additional risk to the insurer, assignment of claims should be permitted despite the anti-assignment clause. The court reasoned that "[a]n additional burden may arise whenever the predecessor corporation still exists or can be revived because of the ubiquitous potential for disputes over the existence and scope of the assignment."[12] The decision had a profound impact both on the ability of a policyholder to transfer coverage rights to a successor and on the legal effect of thousands of business transactions over several decades.

A. U.S. Filter *and* Wheelabrator Technologies

In 2008, the Indiana Supreme Court indicated it thought that "[t]he California Supreme Court's logic in *Henkel* seems about right" and adopted a *Henkel*-like approach in *Travelers Casualty & Surety Co. v. United States Filter Corp*.[13] In holding that a loss must be fixed before it can be transferred,[14] the court noted:

> At a minimum, for an insured loss to generate an assignable coverage benefit, the loss must be identifiable with some precision. It must be fixed, not spec-

9. See the appendix for a summary of major cases addressing the effect of anti-assignment clauses on transfers both inside and outside the successor liability context.

10. Henkel Corp. v. Hartford Accident & Indem. Co., 62 P.3d 69, 75 (Cal. 2003).

11. *Id.* at 76.

12. *Id.*

13. 895 N.E.2d 1172, 1180 (Ind. 2008).

14. It is worth noting that the *U.S. Filter* court's initial holdings were dispositive of the issues before the court and were decided favorably to the insurers. Those holdings were that, as an asset of the acquired business, the historical liability policies themselves were not transferred in 1986 transactional agreements and, further, even assuming that the policies were properly identified as a transferred asset in the transactional agreements "[b]ecause the policies require insurer consent before a valid assignment can be made, and that consent was not given, we hold that the several insurance policies at issue here were not transferred in any of the corporate transactions involving the Wheelabrator blast machine assets." *Id.* at 1177–78.

> ulative. This rule draws as much from the law on choses in action as from the law on insurance policies. A right not currently held is not a chose in action assignable at law. It follows that a chose in action only transfers in these circumstances if it is assigned at a moment when the policyholder could have brought its own action against the insurer for coverage. Under the liability policies implicated here, that moment does not arrive until a claim is made against the insured. Put another way, at a minimum the losses must have been reported to give rise to a chose in action.[15]

But the court expressly recognized a possible exception for "assignments made after a loss has occurred."[16]

The post-loss exception noted in *United States Filter* was the subject of the Indiana Court of Appeals' decision in *Continental Insurance Co. v. Wheelabrator Technologies, Inc.*[17] In *Wheelabrator Technologies*, certain corporate affiliates of one of the plaintiffs in *United States Filter*, including Wheelabrator Technologies, Inc. (WTI), attempted to obtain a post-loss assignment of policy rights. The companies entered a transaction in 2009 by which the historical policyholder, Honeywell International Inc., purported to transfer insurance rights to WTI. The *United States Filter* court held that those rights were not transferred in the 1986 transaction between the same parties.[18] Simply put, WTI and Honeywell attempted to make good on their 1986 arrangement by transferring the applicable coverage rights—now clearly post-loss—in 2009.

In its decision, however, the court did not address the applicability of the post-loss exception noted in *United States Filter*. Instead, it focused on the 1986 transaction, holding that WTI and its affiliates fully assumed Honeywell's liability for the claims at issue.[19] Thus, because Honeywell itself faced no liability for claims brought after 1986, it had no insurance rights to transfer to WTI in the 2009 transaction.[20]

The Indiana Supreme Court was not alone in thinking that *Henkel* was "about right"; courts in a few other jurisdictions followed *Henkel*'s lead in enforcing the anti-assignment provision in a manner not initially envisioned by the parties to the contract, including:

- The Hawaii Supreme Court, applying Hawaii law, held that insurance coverage for CERCLA claims could not be transferred by operation of law and that neither the duty to defend nor the duty

15. *Id.* at 1180.
16. *Id.* at 1179.
17. 960 N.E.2d 157 (Ind. App. Ct. 2011), *transfer denied*, 974 N.E.2d 476 (Ind. 2012).
18. *Id.* at 159.
19. *Id.* at 163.
20. *Id.* at 164–65 ("[B]ecause Honeywell was no longer liable for the Baghouse Claims," Honeywell "had no insurance coverage rights to assign . . . as a chose in action.").

to indemnify was assignable given the no-assignment provision in the applicable policy.[21]

- The Oregon Supreme Court held that the anti-assignment clause in a workers' compensation and employers' liability policy prohibited assignment of the "insured's rights or duties without regard to whether they arose pre-loss or post-loss" without an insurer's written consent.[22]
- The Fifth Circuit, in predicting the result under Texas law, held that the anti-assignment provision barred both the ability to assign policy rights and the right to assign the "proceeds" of an insurance claim.[23]
- Citing to *Henkel* and *United States Filter*, the Louisiana Supreme Court held that an insurer may prohibit post-loss assignment under a property policy, but noted that the prohibition must be clear and unambiguous.[24]

B. *The* Pilkington *Decision*

The Ohio Supreme Court reached a different, and historically accurate, conclusion in *Pilkington North America, Inc. v. Travelers Casualty & Surety Co.*[25] While *Henkel* only suggested that choses-in-action were transferrable despite an anti-assignment clause, *Pilkington* expressly held that they were transferrable.[26] But *Pilkington* truly distinguished *Henkel* with its conclusion regarding the nature of a chose-in-action: the court observed that a chose-in-action could be defined as "[t]he right to bring an action to recover a debt, money, or thing" and noted that courts have "recognized that the phrase applies to the right to bring an action in tort and in contract."[27] Consistent with these definitions and the principle that the insured's right to recovery arises automatically at the time of loss under the terms of an insurance contract, *Pilkington* held that a chose-in-action "arises at the time of the occurrence" rather than at the time the occurrence is reduced to a specific sum of money owed.[28] As the *Pilkington* court explained:

21. Del Monte Fresh Produce, Inc. v. Fireman's Fund Ins. Co., 183 P.3d 734 (Haw. 2007).
22. Holloway v. Republic Indem. Co., 147 P.3d 329, 335 (Or. 2006).
23. Keller Founds., Inc. v. Wausau Underwriters Ins. Co., 626 F.3d 871 (5th Cir. 2010).
24. *In re* Katrina Canal Breaches Litig., 63 So. 3d 955, 963 (La. 2011).
25. 861 N.E.2d 121 (Ohio 2006).
26. *Id.* at 128. On the same day it issued its decision in *Pilkington*, the Ohio Supreme Court also held that if transaction agreements between two entities expressly fail to transfer insurance rights, the successor entity cannot claim to have received them by operation of law. Glidden Co. v. Lumbermens Mut. Cas. Co., 861 N.E.2d 109 (Ohio 2006). In short, under Ohio law, insurance rights may be transferred by contract, but if the contract fails to provide for their transfer, they do not pass by operation of law.
27. *Pilkington*, 861 N.E.2d at 125 (quoting BLACK'S LAW DICTIONARY 258 (8th ed. 2004)).
28. *Id.* at 126.

> We have long held that an insurance policy is a *contract* between the insurer and the insured. In fact, the long-standing principle has been that the relationship between the insurer and the insured is purely contractual in nature. The insurance policies in the instant case are "occurrence" policies, i.e., they provide coverage for claims resulting from injury or damage that is based upon an occurrence during the policy period, regardless of when the claim is made. . . . We adopt the same principle and hold that a chose in action arises under an occurrence-based insurance policy at the time of the covered loss.[29]

Although *Pilkington* clearly held that "the chose in action as to the duty to indemnify is unaffected by the anti-assignment provision when the covered loss has already occurred," it left open the question of whether the right to a defense under the policy could be transferred.[30] The *Pilkington* court indicated, however, that whether the duty to defend is transferable should depend on the same principles: "all contract rights may be assigned except in three conditions."[31] These conditions include whether contractual language prohibits assignments (irrelevant in the post-loss assignment context), whether an assignment materially changes the burden or risk under the contract, and whether the assignment is forbidden by statute or public policy.[32] Pursuant to *Pilkington*, the question of whether defense rights transfer will largely depend on whether the risk is materially altered by the fact that the insured may have to defend two entities rather than one because anti-assignment provisions do not apply in the post-loss context and it is unlikely that a statute exists prohibiting transfer of defense rights under an insurance policy.

IV. THE *FLUOR* DECISION

As noted above, the California Supreme Court changed course in August 2015 in *Fluor*, overturning *Henkel* and adopting what it saw as a majority rule regarding the applicability of the anti-assignment provision.[33] The

29. *Id.* at 125–26 (internal quotes and citations omitted); *see also* Viking Pump, Inc. v. Century Indem. Co., 2 A.3d 76, 105–06 (Del. Ch. 2009) (rejecting the view that choses-in-action are transferable only after they are reduced to a fixed amount; reasoning that there is no increased risk to the insurer, and, based upon the public policy, that requiring a fixed amount would "hamstring markets for the sale of corporate assets and lead to insufficient recoveries for tort plaintiffs in situations when insurance to cover the plaintiffs' claims was bought and paid for").

30. *Id.* at 129.

31. Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co., 861 N.E.2d 121, 128 (Ohio 2006).

32. *Id.*

33. Fluor Corp. v. Hartford & Indem. Co., 354 P.3d 302, 327 (Cal. 2015) (characterizing *U.S. Filter* and other cases prohibiting post-loss assignments as "from minority jurisdictions"). Unfortunately, the California Supreme Court's opinion fails to recognize the ex-

dispute in *Fluor* revolved around the transfer of insurance rights in connection with a corporate transaction known as a "reverse spin-off." Briefly, the original Fluor Corp. decided to separate certain operations—engineering, procurement, and construction operations (collectively, the EPC business)—from its historical core. To accomplish the split, the original Fluor incorporated a new subsidiary (Fluor II) into which it transferred the EPC business. It then consolidated the rest of its non-EPC business operations into the "original" Fluor Corp. Fluor transferred ownership of Fluor II to its public shareholders and changed its own name to Massey Energy Company. After the transaction, the entity had become two publicly held corporations: Massey Energy Company (f/k/a Fluor Corp., i.e., Fluor I) and Fluor Corp (i.e., Fluor II), which continued the EPC business of Fluor I.[34]

Following the reverse spin-off, Hartford, which had issued a series of commercial general liability policies to Fluor I, continued to defend and indemnify Fluor II against asbestos-related claims arising out of Fluor I's operation of the EPC business. However, Hartford began to question is obligations to Fluor II for these suits, eventually resulting in litigation. During litigation, Hartford asserted for the first time that it had no obligation to provide coverage to Fluor II because it did not consent to an assignment of insurance rights from Fluor I to Fluor II as part of the reverse spin-off.[35]

The court's analysis initially focused on a provision of California's Insurance Code, under which "[a]n agreement not to transfer the claim of the insured against the insurer after a loss has happened, is void if made before the loss."[36] Tracing the history of the provision, the court held that it applied to general liability policies, even though those policies did not exist at the time the law was first drafted. The court next addressed at what point the assignment could be made—the meaning of "after a loss has happened"—by reviewing cases from other jurisdictions, including, among others, *Pilkington* and *United States Filter*, and its own interpretation of when a loss occurs under a policy. The court ultimately concluded:

> . . . the phrase "after a loss has happened" in section 520 should be interpreted as *referring to a loss sustained by a third party that is covered by the insured's policy, and for which the insured may be liable.* We conclude that the statutory phrase *does not contemplate that there need have been a money judgment or ap-*

treme irony in the fact that it is criticizing opinions that, but for its own decision in *Henkel*, may not exist.

34. *Id.* at 304–06.

35. *Id.* at 307.

36. CAL. INS. CODE § 520.

> *proved settlement* before such a claim concerning that loss may be assigned without the insurer's consent.[37]

Further, the court found that this was the only interpretation of the phrase that ensured that an insurer could not apply the anti-assignment provision in an "unjust" or "grossly oppressive manner."[38]

V. WHERE ARE WE TODAY?

A. *Insurers' Post-*Fluor *Viewpoint*

Although the California Supreme Court in *Fluor* held that California's Insurance Code section 520 does not permit the enforcement of anti-assignment provisions in liability policies after an insured bodily injury or property damage loss happens, this issue remains far from settled outside of California.

Fluor, despite delving into the common law at great length, ultimately construed a specific California statute providing that "[a]n agreement not to transfer the claim of the insured against the insurer after a loss has happened is void if made before the loss."[39] The statutory language was at the heart of the court's decision and therefore limits the applicability of the holding in states that do not have such a statute. The precise question framed by the *Fluor* court was whether its decision in *Henkel* should be overruled given that it failed to consider the effect of section 520. The court decided to overrule its precedent because "Insurance Code section 520 dictates a result different from that reached in *Henkel*" and because "*Henkel*, which assessed the proper application of a consent-to-assignment clause *under common law principles*, cannot stand in view of the contrary dictates of the controlling statutory provisions of section 520."[40] As such, it is not at all clear if *Fluor* will carry much weight outside of California.

Furthermore, *Fluor* understates the number of cases that support the enforceability of anti-assignment clauses. The body of the opinion declares that the court is "aware of only one out-of-state exception" that upheld such a clause, citing the Indiana Supreme Court's *United States Filter* decision. But, *Fluor* then cites an additional four cases in a footnote that were decided under the laws of Hawaii, Texas, Oregon, and Louisiana, respectively: *Del Monte Fresh Produce (Hawaii), Inc. v. Fireman's Fund Insurance Co.*[41]; *Holloway v. Republic Indemnity Company of America*[42]; *Keller*

37. *Fluor*, 354 P.3d at 330 (emphasis added).
38. *Id.*
39. CAL. INS. CODE § 520.
40. Fluor Corp. v. Hartford & Indem. Co., 354 P.3d 302, 303–04 (Cal. 2015).
41. 183 P.3d 734 (Haw. 2007).
42. 147 P.3d 329 (Or. 2006).

Foundations, Inc. v. Wausau Underwriters Insurance Co.[43]; and *In re Katrina Canal Breaches Litigation*.[44] Relegating those citations to a footnote, as the *Fluor* court did, does not make the authority go away.

Texas case law, for example, as interpreted by both state and federal courts, remains firmly in favor of enforcing anti-assignment provisions according to their plain meaning.[45] Under Texas law, the label "proceeds" forcefully rejects the distinction, posited by *Fluor* and some cases in its camp, between (1) assigning the coverage provided by a liability insurance policy, which is barred by the anti-assignment clause; and (2) assigning a post-loss chose-in-action representing the proceeds of such a claim, which, it is contended, is immune from the clause. Texas law describes this distinction as "specious" and changing "a plugged nickel into a silver dollar."[46]

Just as important, *Fluor's* survey of other states' case law on this issue avoids some basic principles of contract law. *Fluor* does not address the point, made by the *United States Filter* court, that parties can negotiate transactional documents that avoid the challenges presented by incurred-but-not-reported (IBNR) losses and known claims that have not yet been reduced to a sum certain under occurrence-based liability policies. *United States Filter* explains that a purchaser that is understandably concerned by the plain language of consent-to-assignment provisions in the seller's liability policies can

> negotiate for indemnification [by the insured seller] of losses that have occurred up to the moment of exchange. If that strategy was followed over time, a distant successor [of the purchaser] could still benefit from the original policyholder's [i.e., the insured seller's] liability insurance via indemnity claims made up the chain of corporate succession. Or, if the seller will not indemnify potential losses, the buyer can negotiate the price down to compensate for the increased risk of liability.[47]

43. 626 F.3d 871 (5th Cir. 2010).

44. 63 So. 3d 955 (La. 2011).

45. Keller Founds., Inc. v. Wausau Underwriters Ins. Co., 626 F.3d 871 (5th Cir. 2010); Conoco, Inc. v. Republic Ins. Co., 819 F.2d 120 (5th Cir. 1987) (applying Texas law); Tex. Farmers Co. Ins. v. Gerdes, 880 S.W.2d 215 (Tex. App. 1994); Tex. Pac. Indem. Co. v. Atl. Richfield Co., 846 S.W.2d 580 (Tex. App. 1993).

46. *Conoco*, 819 F.2d at 124, *quoted in Keller Founds.*, 626 F.3d at 875.

47. Travelers Cas. & Sur. Co. v. U.S. Filter Corp., 895 N.E.2d 1172, 1181 (Ind. 2008); *see also* Quemetco v. Pac. Auto. Ins. Co., 24 Cal. App. 4th 494, 502–03 (Cal. Ct. App. 1994) (claims that do not exist at the time of an asset sale do not amount to a chose in action; there "was no loss or injury or accrued right to collect the proceeds in existence" because "cleanup damages were not assessed until" long after the sale); Gen. Accident Ins. Co. v. Super. Ct., 55 Cal. App. 4th 1444 (1997) (finding that "successor liability in tort does not create from whole cloth an insurance relationship between strangers, and insurance coverage under these circumstances transfers by operation of law"); Red Arrow Prods. Co., Inc. v. Emp'rs Ins. of Wausau, 607 N.W.2d 294, 301 (Wis. Ct. App. 2000) (enforcing anti-assignment clauses and calling N. Ins. Co. of N.Y. v. Allied Mut. Ins. Co., 955 F.2d 1353

Fluor avoids this approach but acknowledges that cases enforcing anti-assignment clauses according to their plain terms "are animated by the view that 'freedom of contract' requires consent-to-assignment clauses be rigidly enforced."[48] Although *Fluor* chose to cast that view in negative terms, the *United States Filter* approach is quite consistent with the general rule that undefined terms in insurance policies must be interpreted in accordance with their plain and ordinary meaning. "The most basic rule in construing insurance contracts is that policy language should be given its popular and ordinary meaning, unless it is apparent from a reading of the whole instrument that a different or special meaning was intended."[49] The plain meaning of anti-assignment clauses is that coverage rights cannot be transferred absent the insurer's prior consent. The "plain meaning" argument remains viable and available despite *Fluor*.

In the end, a corporation purchasing a policyholder is a stranger to the policyholder's historical liability policies under which it might seek coverage, and allowing assignment of those policies without the issuing insurer's written consent may result in dramatically increased risks to the insurer. And while some courts have recognized an exception for transfers of choses-in-action (a post-loss assignment), those cases typically involve readily identifiable fixed losses, such as fire losses or losses that have been reduced to a sum certain. That concept should not be extended into the realm of long-tail environmental or toxic tort claims under historical liability policies, where losses may result from long-term exposures that may or may not give rise to compensable injury until many years after the transaction, if ever. The plain language of the policy that requires written consent of the insurer to any assignment of interest under the policy should be enforced as written. Should the seller in a corporate transaction for some reason wish to avoid seeking such consent, the parties to that transaction should find other ways to manage the risk of future claims, such as indemnification or adjustments to the sales price to account for the increased risk to the buyer.

(9th Cir. 1992), "unpersuasive"); Elliott v. Metro. Life Ins., 64 N.E.2d 911 (Ind. Ct. App. 1946); Methodist Hosp. of Ind. v. Town & Country Mut. Ins. Co., 197 N.E.2d 773, 777–78 (1964) (assignment of money due under insurance policy was invalid because there was no evidence that all the conditions required to give rise to a right of actions under the contract had occurred).

48. Fluor Corp. v. Hartford & Indem. Co., 354 P.3d 302, 327 n.46 (Cal. 2015).

49. 2 A. WINDT, INSURANCE CLAIMS AND DISPUTES § 6:2 (6th ed. 2015) (citing cases nationwide).

B. *Policyholders' Post-*Fluor *Viewpoint*

1. Importance of Timing and Form

Fluor, *Pilkington*, and *United States Filter* are uniform in their holding that coverage rights do not follow liability as a matter of law where the liability was assumed by contract,[50] but they diverge on the issue of *when* a chose-in-action arises (or, in the case of *Fluor*, when a "loss has happened") and becomes transferable, despite an anti-assignment clause.

Pilkington and *Fluor* clearly held that a chose-in-action can be transferred despite an anti-assignment clause, and *Pilkington* held that a chose-in-action arises at the time of the loss, even where "the loss may be over a period of indeterminate length and of an indeterminate magnitude."[51] Conversely, the Indiana Supreme Court in *United States Filter*, specifically declining to permit assignment of a long-tail claim, recognized that although a chose-in-action is freely transferable, the loss must be "identifiable with some precision" before it may be transferred.[52] And, under *Wheelabrator Technologies*, the Indiana Court of Appeals made clear that in order to transfer insurance coverage rights, the transferor must face liability for the claims at issue, which in turn gives rise to a right to insurance coverage.[53]

The result of these decisions is uncertainty as to whether a seller of a business can effectively transfer coverage rights in the sale of the business, the resolution of which is largely dependent on state law. Given that most states have not addressed the issue of whether and to what extent a claim can be transferred, it is likely that these three decisions will be of continuing importance in the field of insurance recovery.[54]

2. Challenges to *Henkel*'s Progeny

Given their reliance on *Henkel*, it is not unforeseeable that the *Henkel*-like decisions in other jurisdictions will face new challenges. While the *Fluor* decision is rooted in a specific, California statutory provision, the opinion itself can be read as a broader repudiation of the logic supporting *Henkel*. The California Supreme Court could have simply cited to section 520 and stopped its analysis. But it didn't. Perhaps appreciating the magnitude of

50. Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co., 861 N.E.2d 121, 126 (Ohio 2006); *United States Filter*, 895 N.E.2d at 1177–78; Henkel Corp. v. Hartford Accident & Indem. Co., 62 P.3d 69, 73–74 (Cal. 2003). But it should be further noted that *Pilkington* expressly left open the question of whether coverage rights follow liability imposed by operation of law. *Pilkington*, 861 N.E.2d at 131.

51. *Pilkington*, 861 N.E.2d at 126; *Fluor Corp.*, 354 P.3d at 304.

52. *U.S. Filter*, 895 N.E.2d at 1180.

53. Cont'l Ins. Co. v. Wheelabrator Techs., 960 N.E.2d 157, 164–65 (Ind. App. Ct. 2011), *transfer denied*, 974 N.E.2d 476 (Ind. 2012).

54. Additionally, choice of law considerations are of even greater importance because the decisions vary from jurisdiction to jurisdiction.

the coverage forfeited in jurisdictions adopting its reasoning, the court's opinion winds through the historical interpretations of the anti-assignment clause before finally falling into line with what it would call the majority rule. Given California's abandonment of *Henkel*'s flawed logic, courts in other jurisdictions might find a willingness to reassess their own logic.

VI. PRACTICAL CONSIDERATIONS FOR STRUCTURING A TRANSACTION

Legal practitioners must pay careful attention to the form and structure of a given transaction depending upon which state law—a *Pilkington*-like rule or a *United States Filter*-like rule—might apply to any insurance rights transferred.

As a result of *United States Filter*, asset transactions are disfavored in any situation in which insurance coverage for IBNR liabilities or claims that have not yet been reduced to a sum certain are a concern. Stock transactions and mergers are much safer in such circumstances. The simple sale of a corporation's stock has no impact on the rights and duties of that entity, and therefore there is no need for an assignment. Likewise, in the case of a merger, the resulting entity acquires all of the rights of its constituent entities under the applicable state statute, again eliminating the need for an assignment.[55]

Pilkington drew a distinction between the insurer's duty to indemnify and its duty to defend. Because an injured party can collect only once for its loss, a post-loss assignment does not multiply the insurer's original risk as it relates to settlements or judgments. However, because both the original policyholder and the successor might be sued for the same loss

55. *See, e.g.*, DEL. CODE ANN. tit. 8, § 259(a) (2009) ("the constituent corporations shall become a new corporation, or be merged into 1 of such corporations . . . possessing all the rights, privileges, powers and franchises . . . of each of such corporations so merged . . ."); Travelers Cas. & Sur. Co. v. U.S. Filter Corp., 895 N.E.2d 1172, 1177 (Ind. 2008) (discussing Indiana's merger statute and noting automatic transfer of coverage rights); Brunswick Corp. v. St. Paul Fire & Marine Ins. Co., 509 F. Supp. 750, 752–53 (E.D. Pa. 1981) ("In other words, the surviving corporation simply stands in the same position as that occupied by the merged corporation prior to the merger."); *see also* 3-16 APPLEMAN ON INSURANCE § 16.05 (2016) ("When two corporations merge, the governing statutes typically provide that the surviving corporation (a) succeeds to all of the rights, privileges, powers and immunities of the non-surviving corporation and (b) is subject to and assumes the prior duties and liabilities of the non-surviving corporation. Accordingly, the surviving corporation 'is vested with all rights and benefits under a liability insurance policy formerly due the merged corporation.' At least so long as the transfer by operation of law does not alter the risk insured, it does not run afoul of the anti-assignment provision. Similar principles are applied when a corporation dissolves and, by operation of law, distributes its assets and liabilities to its shareholders or to a liquidating trust. When a subsidiary corporation owns its own insurance policies, transfer of all of the subsidiary's stock to a new parent does not change the identity of the insured, so there is no assignment and the insurer's consent is not necessary.").

and both might seek a defense from the insurer, the insurer faces at least a theoretical risk that its defense obligations would be multiplied by an assignment. But any increased risk is easily eliminated with a joint defense agreement between the two corporate entities at issue. This underscores the importance of maintaining a good working relationship between entities involved in the corporate transaction after closing.

Because *United States Filter* only forecloses pre-loss assignments, once an individual claim arises, the original entity can transfer the now liquidated chose-in-action to its successor, although given the court's failure to address the situation in *Wheelabrator Technologies*, it is not clear exactly under what circumstance this can be accomplished. But, to the extent a transfer is permissible, a good relationship between the parties to the corporate transaction is helpful long after the deal was originally consummated.

VII. CONCLUSION

Given the inconsistencies with recent decisions, the departure from previously settled law and the fact that multiple states have yet to weigh in, the impact of the anti-assignment provision will continue to be frequently litigated. Commerce dictates that corporations continue to engage in acquisitions and divestitures. The unsettled and inconsistent state of the law requires the practitioner to draft agreements carefully and to thoroughly examine prior transactions to maintain the integrity of insurance rights.

APPENDIX

Cases Finding That Anti-Assignment Clause Prohibits Post-Loss Assignment

Case	Jurisdiction	Description
Holloway v. Republic Indem. Co., 147 P.3d 329 (Or. 2006)	Oregon Supreme Court	Held that the anti-assignment clause in a Workers' Compensation and Employers' Liability Policy prohibited the "insured's rights or duties without regard to whether they arose pre-loss or post-loss." "In other words, none of the insured's rights or duties could be assigned without [an insurer's] written consent."
Glidden Co. v. Lumbermens Mut. Cas. Co., 861 N.E.2d 109 (Ohio 2006)	Ohio Supreme Court	Held that insurance rights did not pass by operation of law where the transaction agreements providing for the transfer of assets specifically failed to transfer them, because the transferring entity did not actually own the rights in question.
Travelers Cas. & Sur. Co. v. U.S. Filter Corp., 895 N.E.2d 1172 (Ind. 2008)	Indiana Supreme Court	Citing *Henkel*, held that the anti-assignment clause in a liability policy prohibited assignment of policy rights until the time at which the loss was "identifiable with some precision."
Del Monte Fresh Produce (Haw.), Inc. v. Fireman's Fund Ins. Co., 183 P.3d 734 (Haw. 2007)	Hawaii Supreme Court	In a case involving environmental liabilities, held that the anti-assignment clause prohibits transfer of policy rights by contract, and that any other interpretation would be inconsistent with Hawaii contract law. But, the court specifically noted that the case before it was different than a products liability case, because under the relevant environmental law, the predecessor corporation is not relieved of its liability simply because it no longer owned the site at issue, giving rise to a potential multiplication of the insurer's defense obligation.
Keller Founds., Inc. v. Wausau Underwriters Ins. Co., No. 08-50253, 2010 U.S. App. LEXIS 23838 (5th Cir. Nov. 19, 2010)	5th Circuit	Predicting the result under Texas law, held that the anti-assignment clause prohibits transfer of policy rights. The court went further, holding that transfers of the "proceeds" of an insurance claim—such as a chose-in-action—were also prohibited by the anti-assignment clause.
In re Katrina Canal Breaches Litig., 63 So. 3d 955, 963 (La. 2011)	Louisiana Supreme Court	As to property policies, holding that insurers may prohibit post-loss assignment under the contract, but that "the contract language must clearly and unambiguously express that the non-assignment clause applies to post-loss assignments."

Cases Finding That Anti-Assignment Clause Does Not Prohibit Post-Loss Assignment

Case	Jurisdiction	Description
Northern Ins. Co. v. Allied Mut. Ins. Co., 955 F.2d 1353 (9th Cir. 1992)	9th Circuit	Held that, even though a policy contains an anti-assignment clause, policy rights transfer by operation of law. Because the entity in question was responsible for the liabilities of another under the product-line successor theory, it was also entitled to the insurance rights that accompanied those liabilities.
Conrad Bros. v. John Deere Ins. Co., 640 N.W.2d 231 (Iowa 2001)	Iowa Supreme Court	Held that the anti-assignment clause in a property insurance policy only applied to pre-loss assignments, and that post-loss assignments were valid. The court specifically noted that "once the loss has triggered the liability provisions of the insurance policy, an assignment is no longer regarded as a transfer of the actual policy" and that "if we permitted an insurer to avoid its contractual obligations by prohibiting all post-loss assignments, we could be granting the insurer a windfall."
Egger v. Gulf Ins. Co., 903 A.2d 1219 (Pa. 2006)	Pennsylvania Supreme Court	Held that a post-loss assignment of policy rights, where from a defendant-policyholder to the plaintiff, was valid, even though the policy contained an anti-assignment clause. The court cited its prior holding that "stipulations in policies forbidding an assignment, except with the insurer's consent, apply only to assignments before loss . . . [a]n assignment of the policy or rights thereunder after the occurrence of the event, which creates the liability of the insurer, is not, therefore, precluded."
Pilkington N. Am. v. Travelers Cas. & Sur. Co., 861 N.E.2d 121 (Ohio 2006)	Ohio Supreme Court	Held that a post-loss assignment of policy rights from a policyholder to a third-party successor-in-interest was valid. Integral to the court's reasoning was that, at the time of the assignment in question, the loss had already occurred, giving rise to an assignable chose-in-action.
Viking Pump, Inc. v. Century Indem. Co., 2 A.3d 76, 107 (Del. Ch. 2009)	Delaware Chancery Court	Applying New York law, held that an anti-assignment provision did not bar post-loss assignment because the loss occurred at the time of the injury.
Narruhn v. Alea London Ltd., 745 S.E.2d 90, 94 (S.C. 2013).	South Carolina Supreme Court	In permitting a post-loss assignment of a chose in action, noting that "it is generally held that an assignment after a loss has already occurred does not require an insurer's consent."
Fluor Corp. v. Hartford Accident & Indem. Co., 354 P.3d 302 (2015)	California Supreme Court	In overturning its prior decision in Henkel, held that, consistent with § 520 of the California Insurance Code, the anti-assignment provision did not bar assignment of policy rights after a loss is sustained by a third-party for which the insured may be liable.