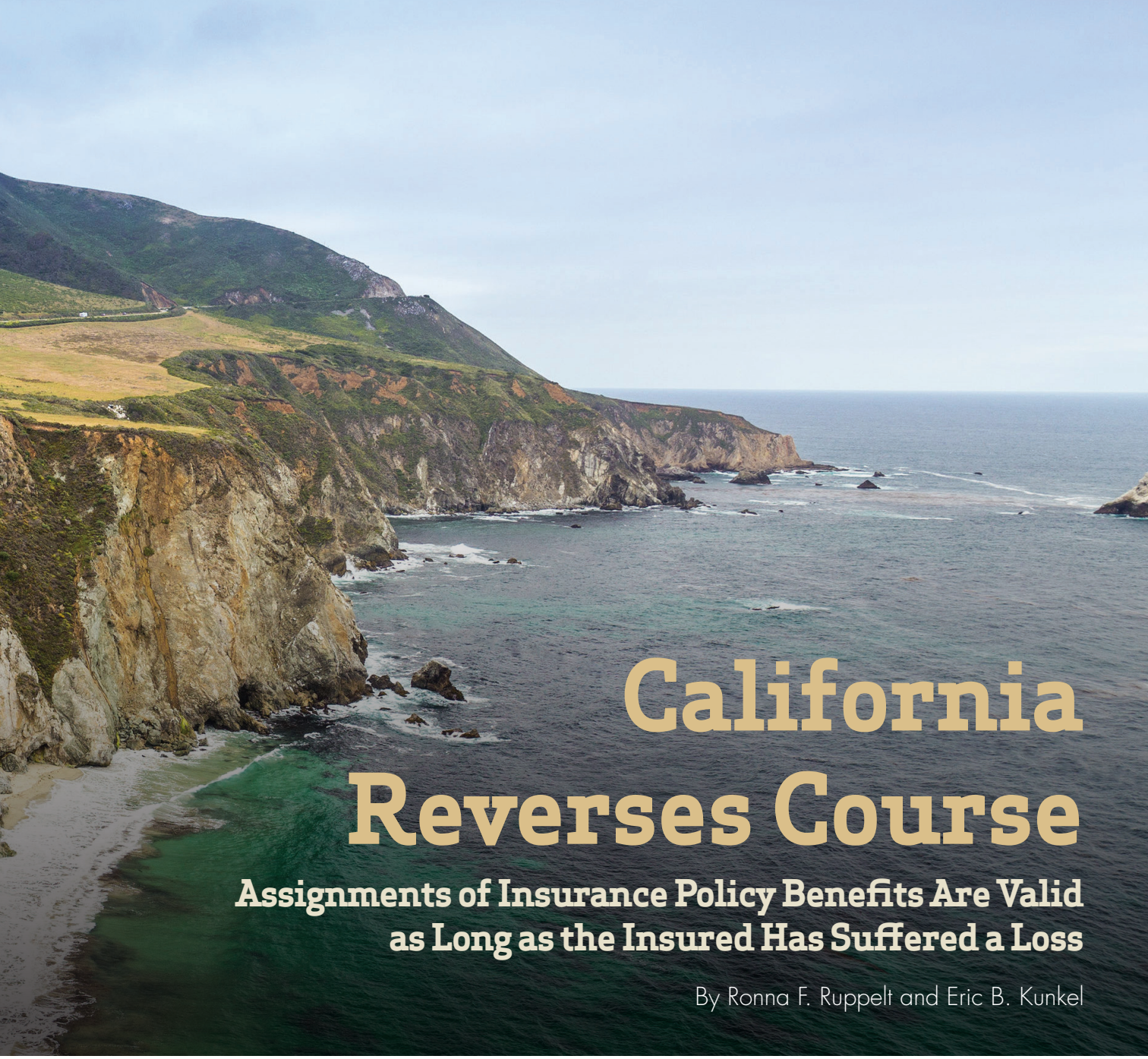
Despite policy language prohibiting them, insurers in California must now deal head-on with contractual assignments by their insureds of policy benefits to others. Aligning itself with what it termed the "overwhelming majority rule" and relying on a statutory provision previously cited only once in its 143 year existence, the California Supreme Court in *Fluor v. Superior Court* recently reversed prior authority generally upholding provisions in insurance policies prohibiting the assignment of policy benefits without the insurer's consent. The Court concluded assignments made after a "loss" has occurred are valid, irrespective of whether the insurer consented to the assignment.

The provision in question, now found in section 520 of the Insurance Code, had been completely overlooked in an earlier California Supreme Court decision, *Henkel Corp. v. Hartford Acc. & Indem. Co*. There, the Court addressed the same issue, namely, whether a transfer of third-party liability benefits from one corporation to another was invalid in light of an anti-assignment clause in the insurer's policy. In Henkel, the Court found the anti-assignment clause barred the assignment. However, the Court in Fluor found section 520 trumps anti-assignment clauses.

The Fluor Court concluded that section 520, which provides "[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 …," simply did not permit the invalidation of post-loss assignments. Acknowledging the fallibility of the courts and the parties, the



California Reverses Course

Assignments of Insurance Policy Benefits Are Valid as Long as the Insured Has Suffered a Loss

By Ronna F. Ruppelt and Eric B. Kunkel

Court owned up to its prior failure to consider the effect of the section, and concluded its prior decision in Henkel could not stand.

It noted it was better that wisdom come to its attention late, rather than not at all, and voted to overrule Henkel, holding that after personal injury or property damage occurs within an insurer's policy period, the right to defense and indemnification triggered by that loss can be transferred to another. In that respect, it rejected the insurer's appeal to uphold Henkel under the doctrine of stare decisis. The Court was quick to point out that doctrine cannot operate to preserve a common law decision directly at odds with an existing statute.

Decision Impact

The decision of California's high court in Fluor is notable for its scholarship, particularly its thorough research of the origins of section 520, and whether it was intended to apply to third-party liability policies. It is also notable for its comprehensive evaluation of the term "loss" in the third-party context, and precisely when an insurer's obligations under a third-party liability policy are triggered. Both points were certainly vital to the Court's conclusion that an insured can transfer third-party liability benefits once a loss occurs, notwithstanding a failure to secure the insurer's consent.

The decision is also commendable for its detailed canvassing of authority from other jurisdictions that substantially informed the Court's conclusions. Of considerable prominence was the decision of the U.S. Court of Appeals for the Eighth Circuit in *Ocean Accident & Guar. Corp.*

v. Southwestern Bell Tel. Co., issued just four years after section 520 was enacted. In fact, given the Court's extensive review of Ocean Accident and additional authority from other jurisdictions, its opinion may be seen as a strengthening of the rule permitting post-loss assignments in those jurisdictions, making it only all the more clear for insurers operating there.

One lesson from the decision for insurers is the fact the Court made clear the issue has been settled and that a further exploration of its reasoning is likely to be purely academic. Not only did the Court make clear post-loss assignments are valid notwithstanding anti-assignment provisions, it confirmed the rule applies in both first-party and third-party contexts. It also clarified that benefits owed the insured as a result of a loss need not be reduced to a claim for money due or to become due for an assignment to be valid. As a consequence, the more fruitful path going forward, for insurers doing business in California and other jurisdictions, is to recognize the possibility of an assignment, verify whether one has been made and, if so, handle it correctly.

Approaches to Assignments

For liability insurers, the first step is to recognize the possibility of an assignment. The most likely scenario for an assignment is the one posed by the Fluor decision — a corporate reorganization or restructuring, including the sale of a subsidiary to another entity. The "asset purchase" or "distribution" agreements employed in those transactions invariably call for a transfer of "any and all rights or obligations" with respect to the "assets" of the seller, without qualification. Insurers should be aware that the term "assets" may include insurance rights and therefore provide for a transfer of insurance benefits owed due to the fact a loss has occurred. Insurers should try to keep abreast of any steps by corporate insureds to reorganize or restructure their operations and ask for information relating to the agreements involved.

Insurers should also recognize that an entity acquiring the assets and liabilities of another will also want to acquire insurance rights and that courts will be solicitous of that end. As the Fluor Court observed, its holding:

[p]rotects the ability of an insured, in the course of transferring assets and liabilities to another business entity in connection with a corporate sale or reorganization, to assign rights to claim defense and indemnification coverage provided by prior and existing policies concerning the business's previous conduct. Because any such new business entity typically will assume both the assets and the liabilities of the prior business entity, the new business entity will understandably expect to obtain the rights to claim defense and indemnification coverage for such liabilities triggered during the policy period.

Know the Players

Insurers should also pay careful attention to the identities of the players involved in such transactions to make sure the insurer knows exactly which entity got what and which are still in existence once the dust has settled. In Fluor, the original corporate insured, Fluor Corporation, undertook a "reverse spinoff." Instead of selling its subsidiary, it took on the name and operations of its subsidiary, and transferred all of its assets relating to its original business operations to a new corporation that had never existed before. It then gave its original name, "Fluor Corporation," to the new company. Insurers should request to see, if possible, the agreements relating to such transactions, especially if they have notice of any claims involving their insureds.

Once an assignment is verified, the insurer will want to find out whether the original insured disputes it. Although that is unlikely, if so, the original insured and the entity claim-

ing the benefit of the assignment will likely have to resolve their differences before benefits can be provided.

Approaches to Assignments

Liability insurers are not the only ones who need to recognize the potential for an assignment and be prepared to handle it. Many healthcare providers have undertaken an aggressive approach in collecting their charges, including demanding an assignment of benefits due under policies offering uninsured/underinsured and medical payments coverage when they begin to provide care. Although under prior California authority such assignments were invalid to the extent the healthcare provider had not provided all of the treatment necessary for a particular injury, the Fluor decision has made clear that is no longer the law. So long as the insured has been injured, the fact that further treatment is needed will not obviate the assignment.

As for determining whether there has been an assignment, insurers will obviously want to speak to their insured. However, as a practical matter, the insured may not know the initial paperwork includes an assignment of policy benefits. The healthcare provider may not have identified it in the paperwork presented to the insured and the insured may not have read the paperwork carefully. Insurers should therefore find out if the insured signed any paperwork prior to being treated at a hospital or by another health-care provider. If so, the insurer should obtain an authorization for the insured's medical records. If an assignment was made, the insurer should also ask whether the insured disputes it.

Assuming the insured does not dispute the assignment, or its validity has been determined in court, first-party insurers should make sure the insured still wants to pursue a claim for uninsured or underinsured motorist benefits and/or medical payments, knowing the healthcare provider will receive all or a portion of the benefits. The insured may want to do so despite that fact, realizing pursuit of the claim will help pay all or some portion of the provider's charges. If the insured does not want to pursue the claim, insurers will want to advise the hospital or other healthcare provider of that fact.

Finally, if the insured still wants to pursue the claim, first-party insurers will need to make sure the rights of both the insured and the assignee are protected. Given that a healthcare provider's charges may or may not be commensurate with the insured's policy limit for uninsured/underinsured motorist coverage or medical payments benefits, there may be instances where the amount owed on a claim exceeds the healthcare provider's charges. The healthcare provider therefore may not be entitled to everything. Insurers should accordingly consider issuing payment to both the healthcare provider and the insured.

Fresh Start

Assignments of benefits have effectively been given a fresh start in California following the Fluor decision. Provided they are made after a loss has occurred, they are valid notwithstanding an anti-assignment provision. Moreover, the Court's detailed review of the law of other jurisdictions and its finding that they overwhelmingly support the same rule, likely only strengthened the rule in those states. Insurers operating in California and elsewhere are therefore better served by taking steps to learn whether there has been an assignment and making sure it is handled correctly. In the latter regard, insurers will need to make sure the rights of the assignee are respected, recognizing the insured has relinquished all or a portion of any claim he or she had to them. LM

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