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October 12, 2011

Honorable Tani Cantil-Sakauye,
Chief Justice of California, and the
Honorable Associate Justices of the
California Supreme Court
Clerk of the Supreme Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

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Re: **United Policyholders' Amicus Curiae Letter in Support of Petition for Review in *Fluor Corporation, et al. v. Superior Court of the State of California, County of Orange (Hartford Accident & Indemnity Company)*, S 196592 (Petition Filed Sept. 19, 2011)**

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to 8.500(g) of the California Rules of Court, United Policyholders respectfully urges this Court to grant Fluor Corporation's Petition for Review of *Fluor Corporation, et al. v. Superior Court of the State of California, County of Orange (Hartford Accident & Indemnity Company)*, Court of Appeal (4th Appellate District, Division Three) Case No. G 045579, filed with this Court on September 19, 2011 (Case No. S 196592).

I. THE NATURE OF UNITED POLICYHOLDERS' INTEREST

United Policyholders is a 501(c) (3) organization founded in 1991 as a resource and advocate for buyers of all types of insurance products. Our organization helps enforce coverage promises and maintain integrity in the insurance system. In addition to serving as a claim help and information resource for disaster victims and individual and commercial policyholders, United Policyholders promotes financial literacy and preparedness and files amicus briefs in cases involving coverage and claim disputes. Donations, grants and volunteer labor support United Policyholders' work. For more information please visit www.uphelp.org

United Policyholders here seeks to fulfill the "classic role of amicus curiae by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." (*Miller-Wohl Co. v. Commissioner of Labor & Indus.* (9th Cir. 1982) 694 F.2d 203, 204.)

As commentators have often stressed, an amicus is often in a superior position to "focus the court's attention on the broader implications of various possible rulings." (R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice, 570-71 (1986) [quoting Ennis, Effective Amicus Briefs (1984) 33 Cath.U.L.Rev. 603, 608].)

During its 20 years of service, United Policyholders has filed more than 300 amicus briefs. This Court has considered our amicus filings in numerous previous cases including *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 760, and in *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 888. We also appeared as amicus in *Watts Industries, Inc. v. Zurich American Ins. Co.* (2004) 121 Cal.App.4th 1029, and have been invited by several districts of the California Court of Appeal to participate in oral argument as amicus. United Policyholders' amicus brief also was cited in the U.S. Supreme Court's opinion in *Humana Inc. et al v. Mary Forsyth* (1999), 525 U.S. 299, 119 S. Ct. 710, 142 L.Ed.2d 753. United Policyholders was the only national consumer organization to submit an amicus brief in the landmark case of *State Farm Mut. Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, 123 S. Ct. 1513, 155 L.Ed.2d 585.

Finally, United Policyholders has also appeared as amicus curiae in the high courts of two other states in cases considering the same issue presented here, the enforceability of insurance policy anti-assignment clauses in the liability coverage context. (See *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.* (2006) 112 Ohio St. 3d 482, 489-490; *Travelers Cas. & Sur. Co. v. U.S. Filter Corp.* (Ind. 2008) 895 N.E.2d 1172.)

United Policyholders thus has an ongoing interest in the issue at hand and has been an active litigant of this and other insurance coverage issues in the appellate courts of this and other states. Accordingly, although United Policyholders is not a party in interest in *Fluor Corporation v. Superior Court*, issues regarding the right of policyholders to engage in corporate transactions without fear of inadvertently sacrificing insurance coverage for losses that happened long before are of substantial and direct concern to United Policyholders. United Policyholders respectfully requests that its views be considered by this Court in considering the instant petition.

II. THIS COURT SHOULD GRANT REVIEW TO DECIDE THE IMPORTANT ISSUE PRESENTED IN THIS CASE

The issue raised by Fluor's Petition touch upon an important principle of insurance law that this Court previously agreed to address in *Henkel Corp. v. Hartford Accident & Indemnity Co.* (2003) 29 Cal.4th 934. Critically, however, the Court decided *Henkel* without the benefit of citation to California Insurance Code section 520, which specifically addresses the enforceability of anti-assignment clauses, and sets forth the rule that has been recognized by the great majority of American courts: anti-assignment clauses do not prevent the assignment of claims under third-party liability policies after a "loss" has happened, regardless of whether the policyholder's

claim has yet matured into a "sum of money due" from the insurer.[1] In addition to overlooking the governing statutory law, the opinion in *Henkel*, by departing from the clear majority rule, reached a result contrary to the reasonable expectations of comprehensive general liability ("CGL") policyholders:

Relying on this Court's decision in *Henkel*, Hartford argued below that the anti-assignment clauses in their policies prohibit all transfers of insurance rights without their consent. This vastly overbroad reading of the anti-assignment clause is at odds with the insurance industry's own understanding of how occurrence-based liability insurance policies work.

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1 See, e.g., *Gopher Oil Co. v. American Hardware Mutual Ins. Co.* (Minn. Ct. App. 1999) 588 N.W.2d 756, 763 ["The purpose of a non-assignment clause is to protect the insurer from an increase to the risk it has agreed to insure . . .. But when events giving rise to an insurer's liability have already occurred, the insurer's risk is not increased by a change in the insured's identity"]; *Missouri State Life Ins. Co. v. Robertson Banking Co.* (1931), 223 Ala. 13; *National Mut. Casualty Co. v. Cypret* (1944) 207 Ark. 11; *St. Paul Fire & Marine Ins. Co. v. Allstate Ins. Co.* (1976) 25 Ariz.App. 309, 311; *Metropolitan Life Ins. Co. v. Lanigan* (1924) 74 Colo. 386; *Antal's Restaurant, Inc. v. Lumbermen's Mut. Cas. Co.* (D.C. 1996) 680 A.2d 1386, 1388; *Progressive Life Ins. Co. v. Bohannon* (1946) 74 Ga.App. 617; *Morticians' Acceptance Co. v. Metropolitan Life Ins. Co.* (1944) 321 Ill.App. 277, affirmed (1945) 389 Ill. 81; *Conrad Bros. v. John Deere Ins. Co.* (Iowa 2001) 640 N.W.2d 231; *Kintzelv. Wheatland Mut. Ins. Ass'n* (Iowa 1973) 203 N.W.2d 799; *Geddes & Moss Undertaking & Embalming Co. v. Metropolitan Life Ins. Co.* (La. Ct. App. 1936) 167 So. 209; *Windey v. North Star Farmers Mut. Ins. Co.* (1950) 231 Minn. 279; *Elat, Inc. v. Aetna Cas. & Sur. Co.* (App. Div. 1995) 280 N.J.Super. 62, 67 [agreeing with "most insurance law reporters and commentators" that anti-assignment provisions do not apply to assignment after loss]; *National Memorial Serv., Inc. v. Metropolitan Life Ins. Co.* (1946) 159 Pa.Super. 292, aff'd (1946) 355 Pa. 155; *Ligon v. Metropolitan Life Ins. Co.* (1951) 219 S.C. 143; *National Life & Acc. Ins. Co. v. Lucas Funeral Home* (Tex. Civ. App. 1935) 89 S.W.2d 468; *Aetna Ins. Co. v. Aston* (1918) 123 Va. 327; *Max L. Bloom Co. v. United States Casualty Co.* (1926) 191 Wis. 524; *Imperial Enter., Inc. v. Fireman's Fund Ins. Co.* (5th Cir. 1976) 535 F.2d 287, 293 ["no-assignment clause should not be applied ritualistically and mechanically to forfeit coverage"], rehearing denied by (5th Cir. 1976) 540 F.2d 1085; *Ocean Acc. & Guarantee Corp. v. Southwestern Bell Tel. Co.* (8th Cir. 1939) 100 F.2d 441, certiorari denied by (1939) 306 U.S. 658; *Pacific Coast Casualty Co. v. General Bonding & Casualty Ins. Co.* (9th Cir. 1917) 240 F. 36; *Total Waste Mgmt. Corp. v. Commercial Union Ins. Co.* (D.N.H. 1994) 857 F.Supp. 140, 152-53 [finding that although the anti-assignment clause is intended to protect the insurance company, the transfer of policy benefits to cover risks that have already occurred impose no additional burden on the insurance company]; *Brunswick Corp. v. St. Paul Fire & Marine Ins. Co.* (E.D. Pa. 1981) 509 F. Supp. 750, 753 ["[T]he insurer can claim no prejudice from [refusing to apply a 'no assignment' clause] for [it] will be liable only on those claims against [the successor] arising out of covered acts of [the predecessor] which occurred during the period of[the insurer's] coverage"].

One of the main benefits of purchasing "occurrence"-based liability coverage is that it provides lasting protection. The benefits of insurance last as long as there is a possibility that someone might allege that the policyholder caused harm during the policy period. This protection against future claims is fundamental and basic to the occurrence form of coverage. In insurance-speak, this protection is referred to as protection against incurred but not yet reported ("IBNR") losses. It means that an entity can purchase liability insurance protection at the time it engages in a potentially loss-causing operation and be assured that, as long as the amount of insurance purchased is adequate, it will have protection against future claims relating to that activity. Protection for IBNR losses is the essence of the protection provided by an occurrence policy.

Insurance companies are well aware that they may be called upon to defend or indemnify their policyholder for IBNR losses. Long before the corporate transaction at issue here took place, representatives of the insurance industry reiterated what everyone always knew about "occurrence" based liability insurance policies. The Insurance Services Office, Inc. ("ISO")[2] told insurance regulators and the public that it intended to cover damage caused during the policy period regardless of when the claim materialized and when the policyholder learned of the damage:

> An "occurrence" policy covers bodily injury and property damage that occurs during the policy period. When that policy period ends, all the injury and damage ultimately to be covered by the policy will have already occurred, but only some of it will be known and under handling by the company. Future claims may also come in for injury or damage unknown to the company when the policy expires, and these will also be covered if the injury or damage occurred during the policy period. These claims are called [incurred but not reported]; they may come in many years -- even decades -- after the policy expires, and they may arise from causes and tort theories neither known nor predictable when the policy was issued.

(Insurance Services Office, Inc. (Aug. 1985) Positions On Major Issues Raised At The July 25 Forum, Commercial General Liability Insurance, ISO Makes The Case For The CGL, at p. 8.) It is a basic principle that IBNR losses are covered by general liability policies well after the end of the policy period.

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2 ISO is an association of approximately 1,400 domestic property and casualty insurers and operates as the "almost exclusive source of support services in this country for CGL insurance." (*Hartford Fire Ins. Co. v. California* (1993) 509 U.S. 764, 772, 113 S. Ct. 2891,125 L.Ed.2d 612.) "ISO develops standard policy forms and files or lodges them with each State's insurance regulators; most CGL insurance written in the United States is written on these forms." (*Ibid.*)

The transfer of IBNR insurance benefits with the alleged IBNR liabilities furthers the important public policies of (1) risk spreading and (2) avoidance of forfeitures. It furthers the public policy of risk spreading because, in the context of liability insurance which covers long-tail bodily injury losses, such as asbestos-related claims, retroactive separation of alleged IBNR liability from the very IBNR benefits that were intended to insure against those losses would prevent liability insurance from fulfilling its primary purpose.

Transferring IBNR insurance benefits with the alleged IBNR liabilities that they cover also furthers the public policy against forfeitures. In a typical sale of a business division, the seller transfers to the purchaser both the assets and certain liabilities relating to the operations of that business division. Requiring insurer consent to post-occurrence assignments results in a significant forfeiture of insurance benefits, because there has not been a custom in the corporate deal market of obtaining insurance company consent for the transfer of accrued IBNR benefits.

The primary reason for the anti-assignment clause is to protect the insurance company against increased risks of loss resulting from an assignment of coverage to a new policyholder during the policy period. (See *Viola v. Fireman's Fund Ins. Co.* (E.D.Pa. 1992) 965 F.Supp. 654, 659; *St. Paul Fire & Marine Ins. Co. v. Allstate Ins. Co.* (1975) 25 Ariz.App. 309, 311.) The assignee may present a greater risk of loss to the insurance company than the original policyholder. The need to protect the insurance company no longer exists, however, after the injury-producing event that gives rise to the policyholder's liability and triggers coverage has happened. That event is the last in the series of events that could be affected by the policyholder's particular risk profile that is within the policyholder's control. Once that loss has occurred, the insurer cannot be prejudiced by any change in the riskiness of the operation, or the operator, it agreed to insure. (See *Fiorentino v. Lightning Rod Mut. Ins. Co.* (1996) 114 Ohio.App.3d 188, 192 ["The assignment of a particular claim under the policy in question would not change the essential risks involved, i.e., the insured party would remain the same, and the risks and benefits bargained for between insured and insurer would not change."].)

Once a loss has triggered the liability provisions of the insurance policy, an assignment is no longer regarded as a transfer of the actual policy. Instead, it is a transfer of the claims under the policy that arise from that loss. (*St. Paul Fire & Marine Ins. Co.*, *supra*, 25 Ariz.App. at p. 311.) At this point, the insurer-insured relationship is more analogous to that of a debtor and creditor, with the policy serving as evidence of the amount of debt owed. (*Antal's Restaurant, Inc. v. Lumbermen's Mut. Cas. Co.* (D.C. 1996) 680 A.2d 1386, 1389.) Thus, the argument that a transfer of a claim arising from pre-transaction losses somehow "increases" an insurance company's risk is a myth perpetrated by the insurance industry to avoid paying claims.

Insurance benefits relating to alleged IBNR claims should, as a matter of good public policy, be transferred with the sale of business units potentially subject to liability for those claims. (See 3 Couch on Ins. (3d ed. Nov. 2004) § 35:8 ["a specific provision against assignment after loss has been held null and void, as being inconsistent with the obligation of the insurer. . . . and as accordingly being contrary to public policy"].) Commentators therefore agree that the anti-assignment clause does not apply to post-loss assignments:

> Anti-assignment clauses in insurance policies are strictly enforced against attempted transfers of the policy itself before a loss has occurred, because this type of assignment involves a transfer of the contractual relationship and, in most cases, would materially increase the risk to the insurer. 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 the proceeds of the policy--***after a loss has occurred***. The reasoning here is that once a loss occurs, an assignment of the policyholder's rights regarding that loss in no way materially increases the risk to the insurer.

(17 Williston on Contracts (4th ed. July 2003) § 49:126 [emphasis added].)

> The purpose of a no assignment clause is to protect the insurer from increased liability, and ***after events giving rise to the insurer's liability have occurred, the insurer's risk cannot be increased by a change in the insured's identity***.

(3 Couch on Ins., *supra*, § 35:7 [emphasis added].)

This is precisely the principle reflected in Insurance Code section 520, which provides:

> 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; emphasis added.)

Since this Court announced *Henkel*, at least two other state high courts have declined to follow its rationale. In *Egger v. Gulf Ins. Co.*, the Pennsylvania Supreme Court held that the anti-assignment clause did not bar assignment of a policy after ***"'loss,'"*** which ***"is 'the occurrence*** of the event, which creates the liability of the insurer. . . . The event that occasioned the liability of Gulf, was the 'Occurrence' to which the policy applied***; i.e., the bodily injury***[.]" (*Egger v. Gulf Ins. Co.* (2006) 588 Pa. 287, 299-300 [emphasis added].) Similarly, in *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, supra, the Ohio Supreme Court held anti-assignment clauses unenforceable under occurrence-based liability policies, because "[t]he losses are fixed at the time of the occurrence." (See *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.* (2006) 112 Ohio St. 3d 482, 489-490.) The Court relied on the same rule embodied in Insurance Code section 520 to contrast its holding from this Court's ruling in *Henkel* :

> The distinction created in *Henkel* does not align with the obligations recognized in Ohio that the insured's right to recover arises automatically at the time of loss.

(*Id.* p. 486.)

United Policyholders respectfully submits that Insurance Code section 520, which calls for anti-assignment clauses to be measured against the occurrence of "loss" rather than the fixing of the amount an insured is entitled to recover against its insurer, compels the same analysis under California law, and the reconsideration of *Henkel*'s common law rule.

III. CONCLUSION

Henkel -- which has effectively nullified policyholders' rights to transfer claims for which their CGL insurance has already been triggered by the happening of a "loss" during the policy period -- has exceptionally broad ramifications for CGL policyholders, and accordingly merits this Court's consideration. As the actions of the lower courts in this case confirm, the clear mandate of section 520 will continue to go unenforced unless and until this Court addresses its application to third-party liability policies -- something the parties an amici in *Henkel* did not ask it to do.

Ultimately, United Policyholders would urge this Court to overturn the common-law rule announced by *Henkel*. At present, however, United Policyholders respectfully requests that the Court grant review in order to apply section 520, the controlling written law of this state, to policyholders' assignments of claims for coverage under third-party liability policies after a loss has happened. Granting review in this case will greatly clarify the law on this critical issue, and should prevent forfeiture of coverage for policyholders whose liability was established (albeit not quantified) years before corporate transactions having nothing to do with the underlying loss.

Thank you for your consideration.

Respectfully submitted,

By ____________________

Amy Bach, Esq.
Counsel for United Policyholders
State Bar # 142029

cc: Service List (attached)

PROOF OF SERVICE BY MAIL

Supreme Court of California Case No. S 196592

Court of Appeal (4th Appellate District, Division Three) Case No. G 045579

Case Title: ***Fluor Corporation, et al. v. Superior Court of the State of California, County of Orange (Hartford Accident & Indemnity Company)***

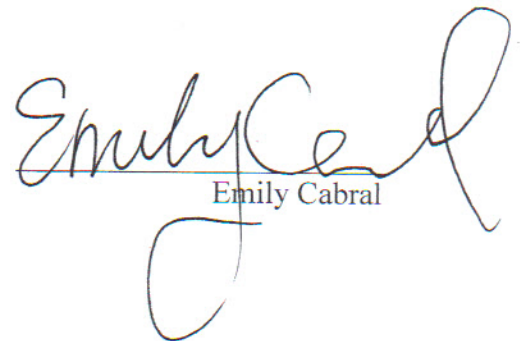
I declare that I am employed in the County of San Francisco, California. I am over the age of 18 years and am not a party to the within cause; my business address is 381 Bush Street, 8th Floor, San Francisco, CA 94104. On October 12, 2011, I served the enclosed

AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW

on the parties listed below by placing copies thereof in sealed envelopes with adequate postage for first class delivery and depositing each with the U.S. Postal Service. Under California Rule of Court 8.1125(a) (5), copies of this letter were mailed to the following:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on October 12, 2011 at San Francisco, California.



Emily Cabral

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