ASSIGNMENT OF LIABILITY INSURANCE
RIGHTS FOR LATENT INJURY AND DAMAGE CLAIMS

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The efficiency of the American business community depends in part on the ability to transfer assets and stock with minimal limitations. Through mergers, asset sales, stock sales, corporate dissolutions, and other transactions, American businesses generally enjoy the freedom to change their structure to adapt to the constantly-evolving business environment.

In these transactions, there is often a link between the assets being transferred and the liabilities that are associated with those assets. For instance, under the state statutes governing corporate transactions, the surviving company in a merger typically is the successor to both the assets and liabilities of the merging companies. Similarly, corporate dissolutions often result in the transfer of the dissolving corporation’s assets and liabilities to its shareholders. In other transactions, the link between assets and their related liabilities has been broken. For example, under many states’ laws, assets generally may be sold free and clear of any liabilities associated with those assets, depending on the circumstances.

To ensure that transactions that could divorce assets from their related liabilities do not adversely affect third parties or the general public, legislatures and courts have developed a number of protections designed to allow society to obtain the economic benefits derived from such corporate transactions without incurring undesired consequences. For instance, through the laws governing fraudulent conveyances and successor liability, legislatures and courts have established safeguards that, when applicable and under certain circumstances, serve to prevent tort defendants from transferring their assets in a manner that would deprive tort claimants of a proper source for recovery.

This link between assets and liabilities is a two-way street. Just as courts have articulated rules to ensure that, in appropriate circumstances, the seller’s liabilities follow the assets being transferred, courts also have devised principles for determining whether certain assets, such as insurance assets, follow the liabilities being transferred to a buyer.

For example, courts across the country have adjudicated a recurrent dispute between insurers and policyholders regarding the effect of “anti-
assignment” conditions in insurance policies where the policyholder has attempted to transfer its insurance rights to a third party as part of a corporate or other transaction. This issue has been particularly difficult to resolve in the context of claims for insurance coverage for latent bodily injury and property damage, such as environmental, asbestos and other delayed-manifestation claims where the bodily injury or property damage already took place (or began to take place) prior to the transfer of insurance rights at issue but was not discovered until years after the transfer.

In such disputes, insurers often contend that anti-assignment conditions preclude the policyholder from transferring its insurance rights to a third party without the insurers’ consent, even where the transaction provides that the third party will assume the liabilities to which the insurance assets related (hereinafter, the “Insurer Position”). In response, the entity to which the insurance rights have been assigned (the “Successor Insured”) typically asserts that anti-assignment conditions cannot be used by insurers to avoid providing coverage for occurrences that already took place prior to the transfer, because the occurrences gave the assigning policyholder “chooses in action” under the policies that were freely transferable, with or without the insurers’ consent (hereinafter, the “Successor Insured Position”).

Courts have resolved this dispute in different ways. A number of courts have adopted the Successor Insured Position that, while an insurer cannot be required to insure a third party for new occurrences that relate solely to the third party’s conduct after the transfer in question, a policyholder is free to assign or otherwise transfer its insurance rights

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1. These anti-assignment conditions often purport to provide that the insurance policy, or interests thereunder, may not be assigned without the insurer’s consent. See, e.g., I MILLER’S STANDARD INSURANCE POLICIES ANNOTATED, at 421.4 (2006) (“Assignment of interest under this policy shall not bind the [insurer] until its consent is endorsed hereon.”).

2. The use of the terms “Successor Insured” and “Successor Insured Position” is a simplification and is not intended to suggest that all insureds will or should have the same position in a dispute over the transfer of insurance rights in a corporate transaction. Ultimately, resolution of such issues will turn on the unique circumstances and facts of each case and hence the discussion in this Article is necessarily general. The specific language of the transactional documents and the insurance policies should be consulted as such language may affect the transfer of insurance rights.
relating to occurrences that began prior to the transfer without having to obtain the insurer’s consent. On the other hand, other courts, including most notably the California Supreme Court in *Henkel Corp. v. Hartford Accident & Indem. Co.*, 3 have adopted the Insurer Position and held that an anti-assignment condition precluded the policyholder from transferring its insurance rights without the insurer’s consent, including its liability insurance rights for bodily injury that had already happened prior to, but was not discovered until after, the transfer in question. As a result, the insurers in *Henkel* and these other cases were able to avoid paying substantial amounts in coverage to the Successor Insured to which the policyholder had attempted to assign coverage. Based on *Henkel* and similar decisions, insurers are now more aggressively relying on anti-assignment conditions in their policies as a basis for denying coverage where the entity seeking coverage is a successor to the policyholder, whether by way of merger, stock sale, dissolution, or asset sale.4

From the Successor Insured’s perspective, this insurer effort arguably threatens to undermine the efficiency of corporate transactions while benefiting the insurers alone. On this view, insurers are seeking enormous windfalls through the virtual elimination of their coverage obligations pursuant to historical policies, for which they collected substantial premiums, by way of a corporate transaction or other subsequent circumstances having nothing to do with the scope of the risk insured under the policies. According to these Successor Insureds, courts should reject the *Henkel* decision and remain committed to the position that anti-assignment conditions do not preclude the transfer of liability insurance rights for losses that took place prior to the transfer in question. As discussed in more detail below, this position provides that, whether the corporate transaction resulting in the transfer of rights to coverage was a merger, stock sale, dissolution, or asset sale, the insurer’s consent is not required to transfer such insurance rights even where the injury or damage

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at issue did not manifest until years after the transaction. In recent months, there have been a number of developments in the decisional law addressing this tension between the Successor Insured Position and Insurer Position on the transferability of rights to insurance coverage.

I. AN INSURER’S CONSENT IS GENERALLY NOT NEEDED FOR A POLICYHOLDER’S INSURANCE RIGHTS TO TRANSFER BY MERGER

A policyholder’s insurance assets (along with its liabilities) generally transfer to the surviving corporation in a merger, even where the insurer has not consented to the transfer, notwithstanding any anti-assignment conditions in the insurer’s policy.

All fifty states have adopted some form of merger statute. Merger statutes generally provide that the surviving corporation, upon the effective date of the merger: (i) assumes all of the rights, privileges, powers, and immunities of the non-surviving corporation (provided they are not inconsistent with the articles of incorporation of the surviving corporation and that if the merger is with a foreign corporation they are not inconsistent with any limitation in the domestic jurisdiction), and (ii) is subject to and assumes the prior duties and liabilities of the non-surviving corporation.

For instance, Section 259(a) of the General Corporation Law of the State of Delaware (“DGCL”) provides that when a merger becomes effective, the separate existence of the non-surviving corporation ceases and the surviving corporation possesses “all the rights, privileges, powers and franchises as well of a public as of a private nature” and is “subject to all the restrictions, disabilities and duties” of each of the merged corporations. As Section 259(a) further states:

5. This article focuses on the question of an insured’s continuing right to its historical insurance coverage, notwithstanding changes in corporate structures and other transactions; it does not address the competing interests of multiple potential insureds with respect to the same policies, which can present different considerations (such as, for example, policyholders that intended to retain their insurance rights and not transfer them in the corporate transaction at issue). This article also does not focus in detail on the related issue of whether and under what circumstances historical liabilities and related rights to insurance coverage may be transferred to a Successor Insured by “operation of law.”

6. See infra section (IV)(C)(5) for a discussion of some of these recent developments.


8. Id.
The rights, privileges, powers and franchises of each of said [merging] corporations, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account, as well for stock subscriptions as all other things in action or belonging to each of such corporations shall be vested in the corporation surviving or resulting from such merger or consolidation; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation as they were of the several and respective constituent corporations . . . .

Consistent with Section 259(a), courts have held that a merger results in the transfer of the non-surviving corporation’s rights and obligations under its insurance policies to the surviving corporation by operation of law.10 Further, such a transfer does not violate any non-assignment provision in such policies.11


II. AN INSURER’S CONSENT TYPICALLY WOULD NOT BE NEEDED FOR A POLICYHOLDER’S INSURANCE RIGHTS TO TRANSFER IN A STOCK SALE

The conveyance of all of a corporation’s stock generally transfers ownership of the corporate entity as a whole, with the corporation generally retaining all of its assets unless certain assets are expressly excluded from the transaction. Hence, because the sale of a policyholder’s stock alone ordinarily does not involve an “assignment” of insurance policies, an insurer’s consent typically would not be required.

When a policyholder’s stock is sold, insurers sometimes contend that their consent is required for that policyholder to be able to keep its own insurance rights. In response, Successor Insureds may challenge this assertion on public policy grounds, contending that, if the insurers’ position were taken seriously, public companies, whose stock is bought and sold every day, would unwittingly forfeit their insurance rights each time a share of stock were sold. Indeed, the insurers’ position has been rejected by several courts for that reason.

For example, the court in *Knoll Pharm. Co. v. Automobile Ins. Co.* held that a company whose stock is being sold need not obtain the consent of its insurers to retain its insurance rights. In *Knoll*, all of the stock of the named insured was sold to a third party. The named insured later was

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11. *See, e.g.*, Imperial Enterprises, Inc. v. Fireman’s Fund Ins. Co., 535 F.2d 287, 292-93 (5th Cir. 1976) (“Thus, it is our conclusion that the no-assignment clause should not be applied ritualistically and mechanically to forfeit coverage in these circumstances”); *Knoll Pharm.*, 167 F. Supp.2d at 1011 n.7 (finding no increased risk associated with the statutory merger since the insurers were only liable on those claims against the surviving corporation that arose out of the covered acts of the insured corporation and refusing to enforce no-assignment clause); Texaco, 1995 WL 628997, at *6 (successors by merger entitled to access coverage issued to merged entities “notwithstanding the no-assignment clause, because the transfer of substantially all the assets of the corporation results in the transfer of liability as well, irrespective of any agreement otherwise”); *Paxton*, 497 F. Supp. at 581 (“It seems well recognized that a provision limiting assignment in an insurance policy simply does not apply to a transfer occurring by operation of law.”).


14. *Id.* at 1006.
merged with the plaintiff, and the plaintiff asserted that it was therefore the successor to the named insured’s insurance rights. While the insurers did not dispute that the plaintiff succeeded to whatever insurance rights the named insured had at the time of the merger, the insurers claimed that the named insured had no insurance rights after the earlier sale of its stock. In this regard, the insurers argued that the named insured’s insurance rights did not transfer with the insured in the stock sale because the insurers’ consent was not obtained. Rejecting the insurers’ arguments, the court held that the stock sale did not involve any change in the insured’s rights or obligations under the insurance policies.

In an effort to distinguish Knoll and similar decisions, insurers frequently cite to other cases that they assert stand for the proposition that their consent is needed for a policyholder to retain its insurance rights when its stock is being sold. However, Successor Insureds may dispute whether such cases support the insurers’ position. For instance, in SCA Disposal Services of New England, Inc. v. Central National Insurance Company of Omaha, the purchaser of an insured’s stock argued that it could access the insured’s insurance, notwithstanding anti-assignment conditions, because the purchase of the insured’s stock was akin to a merger. The court rejected the purchaser’s right to access the insured’s insurance because, in a stock sale, the company whose stock is being sold retains all of its assets and liabilities:

[T]he transfer of [the insured] to [the purchaser’s predecessor] was accomplished through stock purchase, not by statutory merger. . . . [The insured] retained its separate corporate identity after the purchase. When acquisition is accomplished by stock purchase, all legal attributes of the acquired entity continue.

15. Id.
16. Id. at 1007.
17. Id. at 1010.
18. Id. The insurers also argued that the insurance rights did not transfer with the insured because the language of the purchase agreement expressly excluded insurance rights from the transfer. However, the court held that the exclusion was referring to the parent’s insurance contracts, not the insured’s. Id. at 1009.
19. Id. at 1007-08.
21. Id. at *4 (emphasis added).
The SCA court did not indicate that the insurers’ consent was needed for the insured to retain its insurance rights through the stock sale (and indeed the court went on to find coverage for the insured for its environmental liabilities under a policy not containing a pollution exclusion).22

Similarly, in Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.,23 the court held that a subsidiary whose stock was sold lost coverage because it had been covered under its parent’s policy as a “subsidiary.” After the parent sold the stock of the subsidiary, the latter ceased to be a subsidiary and, therefore, was no longer covered under the parent’s policy for post-sale losses. Critically, the court did not hold that the subsidiary lost coverage because it failed to obtain the insurer’s consent. As the Court of Appeal clarified on appeal: “At the time of the stock transfer from [the parent] to [the third party], [the former subsidiary] lost its status as a subsidiary and therefore no longer fell within the ambit of the [defendant’s] policy.”24

In addition, other cases often cited by insurers do not hold that an anti-assignment condition in an insurance policy requires that the insurer’s consent be obtained for the insured to retain its insurance rights when its stock is sold:

Bunzl Pulp & Paper Sale, Inc. v. Golder25 – No party in the case asserted that the sale of the stock of the insured in any way affected the insured’s own insurance rights. The company that bought the insured’s stock did assert that it could access its new subsidiary’s insurance policies, but the court rejected

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22. Id. at *10-11.
24. Indep. Petrochemical Corp., 944 F.2d at 948. The decision in Home Ins. Co. v. Service Am. Corp., 662 F. Supp. 964 (N.D. Ill. 1987), similarly does not support the contention that an insurer’s consent is needed for a policyholder to retain its insurance rights when its stock is being sold. Like Independent Petrochemical, the Home case involved a company that was insured as a “subsidiary” under its parent’s policy, but then the company was sold to a third party, thus causing the company to lose its status as a covered “subsidiary.” Id. at 967.
this claim because the policy “did not insure the shareholders of [the insured].”

_Lawyers Title Ins. Corp. v. CAE-Link Corp._ 27 – This decision did not hold that an insurer’s consent is required for an insured to retain its insurance rights when its stock is sold. 28 Nor did this decision involve a sale or assignment of insurance rights or policies, or even anti-assignment conditions. 29 Rather, the _Lawyers Title_ decision involved a form of insurance entirely different from general liability insurance – title insurance – with unique policy language not found in standard-form liability policies. 30 Specifically, the title insurance in _Lawyers Title_ provided coverage for the “insured,” which was defined to mean the named insured and “those who succeed to the interest [in the real estate at issue] of [the named insured] by operation of law as distinguished from purchase including, but not limited to, heirs, distributees, devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors.” 31 Because the defendant acquired the real estate at issue through a “purchase,” the court held that it did not qualify as an insured under this definition. 32

_In re Asian Yard Partners_ 33 – This decision did not involve insurance policies or language similar to the typical standard-form “Assignment” conditions. 34 The partnership agreement at issue included a “No Transfer” provision that stated: “No Partner may sell, assign, transfer, give,
hypotheicate or otherwise encumber . . . directly or indirectly, or by operation of law or otherwise, any interest in the Partnership . . . .”35 The sole asset of one of the partners, AOC, was its 1% general partnership interest. One of the limited partners, AYP, owned 100% of the stock of AOC.36 When AYP sought bankruptcy court approval of the sale of all of AOC’s stock, the court concluded that this sale would constitute an indirect sale of AOC’s 1% general partnership interest in the partnership, and thus that the sale violated the “No Transfer” provision.37

Accordingly, Successor Insureds may argue that, because the sale of a policyholder’s stock does not involve the assignment of any insurance rights (let alone insurance policies), an insurer’s consent is typically not required under normal circumstances for the policyholder to retain its insurance rights through the sale.

III. AN INSURER’S CONSENT GENERALLY WOULD NOT BE NEEDED TO TRANSFER INSURANCE ASSETS AS PART OF A POLICYHOLDER’S DISSOLUTION

When a corporate policyholder is dissolved and its assets transferred to a third party (typically its shareholder(s)), insurers frequently contend that this transfer of insurance assets requires their consent under the “Assignment” conditions in their policies.38 Successor Insureds will ordinarily be able to refute the insurers’ position, relying on two principal grounds.

First, in cases involving the transfer of insurance rights in the context of a corporate dissolution, courts have held that an anti-assignment condition does not apply to the transfer of insurance assets relating to pre-transfer losses, even where those losses are ongoing, but not discovered until after the transfer.40 For instance, in Sharon Steel Corp. v. Aetna

35. Id. at *5.
36. Id. at *1.
37. Id. at *6-7.
39. Id.
Casualty & Surety Co., the policyholder had engaged in operations that were causing undiscovered environmental property damage. In 1979, the policyholder was dissolved, and its remaining assets were transferred to a liquidating trust. In the mid-1980’s, the environmental property damage was discovered, and the Environmental Protection Agency (EPA) demanded that the liquidating trust clean up the site of the operations. When the trust sought coverage under the policyholder’s policies, one of the insurers contended that an anti-assignment condition had precluded the transfer of the policyholder’s insurance assets to the trust. Rejecting the insurer’s position, the Utah Supreme Court held that all of the policyholder’s insurance assets had transferred to the liquidating trust, despite the anti-assignment condition.

One of the cases relied on by the Sharon court -- National American Insurance Co. v. Jamison Agency, Inc. -- held that assignment of an insurance policy and coverage for post-assignment losses of the assignee are not precluded by an anti-assignment condition in the policy, where the assignment of the insurance policy did not increase the risk of the insurer. In Jamison, the policyholder purchased a fire insurance policy from the insurer. Soon after the issuance of the policy, one of the defendants purchased all of the stock of the policyholder. Several months after this stock purchase, the policyholder was dissolved, and all of its assets were distributed to its sole shareholder, including the fire policy. After the dissolution and assignment, a fire caused damage to the insured premises, and the shareholder sought coverage under the policy. Rejecting the anti-assignment condition as a basis for denying coverage, the court held that such conditions do not apply to the assignment of policies providing coverage for post-assignment losses if “the assignment involves no increase in risk to the insurer.” Finding that the dissolution of the policyholder and assignment of the insurance policy resulted in no such increase in the risk to the insurer, the court concluded that the anti-assignment condition

41. Id. at 130.
42. Id.
43. Id.
44. Id. at 139 n.15.
45. Id. (citing cases finding anti-assignment conditions inapplicable).
47. Id.
48. Id.
49. Id.
50. Id. at 1128.
did not apply.\textsuperscript{51} To hold otherwise, according to the court, would “place form over substance and would conflict with the oft-expressed doctrine that forfeitures of insurance policies are not favored in the law and are to be avoided whenever possible.”\textsuperscript{52}

Second, certain dissolutions arguably constitute de facto mergers for which an insurer’s consent is not required in order to transfer insurance assets. Courts addressing dissolutions have concluded that, where a company purchases all of the stock of another company and then subsequently dissolves its new subsidiary, transferring all of the subsidiary’s assets and liabilities to it, a de facto merger may have occurred.\textsuperscript{53} For example, in \textit{Arnold Graphics Industries, Inc. v. Independent Agent Center, Inc.}, the court held that there had been a de facto merger between a parent and its subsidiary where, some time after purchasing all of the subsidiary’s stock, the assets and liabilities of the subsidiary were transferred to the parent and the subsidiary dissolved.\textsuperscript{54} The court came to this conclusion even though the subsidiary had conducted business as a distinct legal entity for about a year between the parent’s purchase of its stock and the transfer of the subsidiary’s assets to the parent, stating that “there is no requirement that all of the events that are necessary to a finding of de facto merger occur at the same time.”\textsuperscript{55} As discussed above in Section I, Successor Insureds may assert that the transfer of insurance rights through a merger (“de facto” or otherwise) does not require the consent of insurers.

Notwithstanding these two arguments advanced by Successor Insureds, in an effort to avoid providing coverage to the sole shareholder parent of a policyholder that has been dissolved, insurers may repeat their contention that insurance must pass “by operation of law” for the anti-assignment condition of their policies to not apply and that a transfer of assets through

\textsuperscript{51} Jamison, 501 F.2d at 1128.

\textsuperscript{52} \textit{Id.}; see also Paxton & Vierling Steel Co. v. Great Am. Ins. Co., 497 F. Supp. 573, 580 (D. Neb. 1980) (noting that, with respect to whether an anti-assignment condition applies, the difference between a transfer of assets upon corporate dissolution and a transfer based on a merger is not material, as the inquiry in both cases is focused on whether the insurer’s risk has been materially increased).

\textsuperscript{53} Arnold Graphics Indus., Inc. v. Indep. Agent Ctr., Inc., 775 F.2d 38, 42 (2d Cir. 1985).

\textsuperscript{54} \textit{Id.}

\textsuperscript{55} \textit{Id.}; see also Hoche Prods. v. Jayark Films Corp., 256 F. Supp. 291, 295-96 (S.D.N.Y. 1966) (finding de facto merger where (1) company purchased all of the stock of third party, (2) third party then assigned all of its assets to the company, and (3) third party later dissolved).
a dissolution is not a transfer “by operation of law.” However, Successor Insureds may attempt to refute this insurer position on two grounds. First, as discussed below, insurance rights for pre-transfer liabilities arguably do not have to transfer by operation of law to survive an anti-assignment condition.56 Second, assuming arguendo that this standard were controlling, the cases regularly cited by insurers arguably do not support their contention that such a transfer in connection with a corporate dissolution is not “by operation of law.”

To support their position that their consent is needed for the transfer of insurance rights in the context of a corporate dissolution, insurers have cited to the decision in *Snellman v. A.B. Dick Co*.57 However, Successor Insureds may contend that the *Snellman* decision supports their position that a successor may recover under a contract, such as an insurance policy, for the damages suffered, but not discovered, by its predecessor prior to the transfer of the predecessor’s rights. In *Snellman*, the plaintiff’s subsidiary entered into an agency agreement with the defendant.58 Unbeknownst to the plaintiff or his subsidiary, the defendant began to engage in activities that allegedly constituted breaches of the agreement.59 The subsidiary was later dissolved.60 Subsequently, the plaintiff discovered the defendant’s activities and sued for breach of the agency agreement between the dissolved subsidiary and the defendant.61 The defendant asserted that the agency agreement had terminated at the time of the subsidiary’s dissolution in light of a broadly-drafted anti-assignment condition in the agreement.62 Because the agreement was an executory contract and the court believed that the plaintiff’s subsidiary should not be permitted to assign its ongoing duties under the agency agreement to a third party with whom the defendant had not agreed to contract, the court held that the anti-assignment condition precluded the contract from continuing to be in effect after the dissolution.63 However, to the extent that the plaintiff’s breach-of-contract claim was based on the defendant’s conduct before the subsidiary was dissolved, the court, relying on Illinois’ statute regarding corporate

56. *See infra* Section IV.A.
58. *Id.* at *2.
59. *Id.* at *10 (citing plaintiff’s allegations of breaches of agency agreement that may have occurred prior to dissolution of plaintiff’s subsidiary).
60. *Id.* at *1.
61. *Id.* at *2.
62. *Id.* at *3.
dissolution, held that the plaintiff retained the subsidiary’s cause of action despite the dissolution.64 Thus, even though the subsidiary was not aware at the time of its dissolution that the defendant had already breached their agreement, the subsidiary’s causes in action for this undiscovered breach were transferred to the plaintiff at the time of its dissolution under Illinois law, and this transfer was unaffected by the anti-assignment condition included in the agreement.

In addition to Snellman, insurers frequently rely on Butera v. Attorneys’ Title Guar. Fund, Inc., for the proposition that the transfer of insurance rights to the sole shareholder of a policyholder upon the policyholder’s dissolution is not a transfer by “operation of law.”65 However, Successor Insureds may argue that Butera is inapposite for four principal reasons. First, the Butera case did not involve an anti-assignment condition, but rather the interpretation of a definition of “insured” that is unique to title insurance policies.66 Second, the definition of “insured” at issue in Butera specifically provided that transfers “by operation of law” did not include transfers by “purchase.”67 Therefore, even if it were relevant whether a transfer was “by operation of law” as that phrase is used in its ordinary legal meaning, the Butera case involved a definition of “by operation of law” that was unique to the particular policy language at issue and thus arguably provides no guidance regarding the ordinary legal meaning of that phrase. Third, Butera did not involve transfers of assets upon dissolution. Fourth, the court indicated that a transfer of property to an insured’s sole shareholders as a result of the insured’s dissolution would constitute a transfer “by operation of law.”68 Instead, the court held that a separate purchase of the property by a third party from the insured was a “purchase” and therefore not a transfer “by operation of law” under the policy.69

64. Id. at *10.
66. Id. at 951, 952.
67. Id. at 951.
68. Id. at 952-53 (discussing favorably the decision in Historic Smithville Development Co. v. Chelsea Title & Guar. Co., 445 A.2d 1174 (N.J. Super. Ch. Div. 1981), aff’d in part, rev’d in part on other grounds 464 A.2d 1177 (N.J. Super. App. Div. 1983), in which the court held that “if a corporation, in dissolution or otherwise, transfers all of its assets to some other entity or to an individual, the transferee is a ‘successor’ in every sense of the word”).
69. Id. at 954.
Finally, insurers often cite to the decision in *Bunzl Pulp & Paper Sale, Inc. v. Golder*, for the proposition that dissolutions do not transfer insurance policies containing anti-assignment clauses because dissolutions are not transfers by “operation of law.” In *Bunzl*, the insured transferred title to real estate to its parent and then was dissolved. The decision does not explain what happened to the insured’s other assets, including its insurance rights, at dissolution. The parent asserted that it could access the insured’s liability policy either (i) because it owned all of the stock of the insured when the insured dissolved, or (ii) because the insured had transferred real estate to the parent. The court rejected both of these arguments. First, the insurance policy did not insure the shareholders of the insured and therefore the parent was not insured under the policy by virtue of its ownership of the insured’s stock. Second, the mere acquisition by deed from the insured of title to real estate did not also give the parent the insured’s insurance rights relating to that property.

These holdings typically are irrelevant to cases involving the question of whether the sole shareholder parent of a policyholder succeeds to that policyholder’s insurance rights upon the policyholder’s dissolution, because, unlike the transfer of real estate by deed in *Bunzl* which was limited to real estate and did not seek to transfer insurance assets, the dissolutions of corporate policyholders typically include the transfer of all assets, including insurance assets and liabilities to the sole shareholder parent.

In sum, Successor Insureds have a number of arguments to distinguish the Insurers’ cases and to support the Successor Insureds’ Position that insurance assets may be transferred to them in the context of the policyholder’s dissolution, notwithstanding anti-assignment conditions contained in the policies at issue.

IV. TRANSFERRING INSURANCE ASSETS AS PART OF AN ASSET PURCHASE AGREEMENT

Bolstered by the *Henkel* decision, insurers are now asserting more aggressively that the anti-assignment conditions in their policies preclude the transfer of historical insurance rights without their consent.

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71. *Id.* at *2.
72. *Id.* at *2, 3.
73. *Id.*
74. *Id.* at *3.*
Specifically, even though a purchaser may have intended to obtain all of the assets, including insurance rights, of a seller, insurers contend that their anti-assignment conditions operate to block the transfer of insurance rights and to defeat the purchaser’s and seller’s intent. This conclusion, and the Henkel decision upon which it rests, is currently the subject of substantial coverage litigation.

a. CASES ADDRESSING WHETHER THE TRANSFER OF INSURANCE RIGHTS FOR COVERAGE FOR PRE-TRANSFER EVENTS REQUIRES AN INSURER’S CONSENT

A number of courts addressing the issue have held that anti-assignment conditions do not preclude a transferee from obtaining coverage under the transferor’s policies for the liabilities arising out of pre-transfer events. These courts have reasoned that, because the event causing the liability already took place prior to the transfer, the transfer of the insurance rights relating to this liability does not materially increase the risk to the insurer.75

For instance, the Supreme Court of Illinois has held that rights to insurance may be assigned without the insurers’ consent where the loss has taken place prior to the assignment.76 In Lain, the beneficiary of a life insurance policy assigned the policy benefits after the death of the insured to a funeral home to cover the insured’s funeral expenses.77 The insurer denied coverage, arguing that it had not given consent to the assignment. Rejecting the insurer’s reliance on the anti-assignment condition, the court held that such conditions do not preclude an assignment of insurance benefits where the assignment takes place after the loss has occurred:

The general rule, supported by a great wealth of authority, is that general stipulations in policies, prohibiting assignment thereof except with the insurer’s

75. See, e.g., Elat, Inc. v. Aetna Cas. & Sur. Co., 654 A.2d 503, 505-06 (N.J. Super. Ct. App. Div. 1995) (rejecting the insurer’s reliance on an anti-assignment condition where the assignment took place after the property damage at issue had occurred, stating: “[T]he purpose behind a no-assignment clause in a casualty or liability policy . . . is to protect the insurer from insuring a different risk than intended. Assignment of the right to collect or to enforce the right to proceed under a casualty or liability policy does not alter, in any meaningful way, the obligations the insurer accepted under the policy. The assignment only changes the identity of the entity enforcing the insurer’s obligation to insure the same risk.”).


77. Id. at 588.
consent, or upon giving some notice, or like conditions, have universally been held to apply only to assignments before loss, and, accordingly, not to prevent an assignment after loss, of the claim or interest of the insured in the insurance money then due in respect to the loss.78

Similarly, courts applying New York law have found that rights to insurance may be assigned without the insurer’s consent where the event from which the liability arose took place prior to the assignment.79

In addition, courts in other jurisdictions that have considered the issue agree that insurance benefits may be transferred without the insurer’s consent despite the presence of an anti-assignment condition, where the injury or damage in question took place prior to the transfer.80

78. Id. (emphasis added).
79. Bronx Entm’t v. St. Paul’s Mercury Ins. Co., 265 F. Supp. 2d 359, 363 (S.D.N.Y. 2003) (following Holt, and stating that, even though the policy at issue contained an anti-assignment condition, the assignee of insurance rights could maintain an action against the insurer for the named insured’s pre-assignment business interruption damages); Employers Ins. of Wausau v. Duplan Corp., No. 94 Civ. 3143(CSH), 1999 WL 777976, at *32 (S.D.N.Y. Oct. 20, 1999) (confirming that an entity that is not a named insured may invoke rights under an insurance policy “when the party seeking coverage (1) is the surviving corporation in a merger with the insured; (2) is legally regarded as the corporate successor of the insured through purchase or transfer of the insured’s assets; or (3) has been assigned the insured’s rights in the policy”) (emphasis added); see, e.g., Holt v. Fid. Phoenix Fire Ins. Co., 76 N.Y.S. 2d 398, 399-400 (N.Y. App. Div. 1948) (noting that, once a fire occurred, the named insured had an accrued claim under its fire insurance policy that it could have assigned to a third party); see also Texaco A/S, S.A. v. Commercial Ins. Co. of Newark, N.J., No. 90 Civ. 2722 (JFK), 1995 WL 628997, at *6 (S.D.N.Y. Oct. 26, 1995) (“[T]he rationale for respecting the no-assignment clause does not apply when liability arises from pre-sale activity – no-assignment clauses are designed to protect insurers from unforeseen increases in risk. When the loss occurs before the transfer, any increase in risk due to the successor’s characteristics is irrelevant.”) (emphasis added; citations omitted), vacated on other grounds, 160 F.3d 124 (2d Cir. 1998).
80. See, e.g., Nat’l Am. Ins. Co. v. Jamison Agency, Inc., 501 F.2d 1125, 1128, 1130 (8th Cir. 1974) (holding that transfer of all assets to sole shareholder upon dissolution of corporation effectively transferred insurance coverage for pre-dissolution losses); Ocean Accident & Guar. Corp. v. Sw. Bell Tel. Co., 100 F.2d 441, 443, 447 (8th Cir. 1939) (rejecting insurer’s reliance on anti-assignment condition and holding that assignment of “[a]ll other property rights and assets of whatsoever nature and description” transferred to succeeding corporation the right to insurance coverage for injuries occurring before the date of conveyance); B.S.B. Diversified Co. v. Am. Motorists Ins. Co., 947 F. Supp. 1476, 1479 (W.D. Wash. 1996) (“The purpose of a no-assignment clause in an insurance contract is to protect the insurer from increased liability. After the 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.”); Int’l Rediscount Corp. v. Hartford Accident & Indem. Co., 425 F. Supp. 669,
b. Cases Addressing Whether the Transfer of Insurance Rights Requires the Consent of the Insurer Where the Injury or Damage Was Not Discovered Until After the Transfer

A number of courts, including cases decided under New York and Illinois law, have held that anti-assignment conditions do not preclude the transfer of liability insurance rights relating to bodily injuries that took place prior to, but were not discovered until after, the transfer.

For example, in *Tenneco Chemicals, Inc. v. Employers Mut. Liab. Ins. Co.*, the policyholder’s product was injected into the claimant in 1950, and allegedly, as a result of atomic decay, unknowingly caused continuous bodily injury to the claimant until 1971, when the claimant was diagnosed. The policyholder was insured under policies issued by the defendant-insurer that were in effect from 1952 to 1960. As a result of a corporate reorganization in 1963, the policyholder’s assets were transferred to the plaintiff. When the claimant filed suit against the plaintiff in 1973, 672-73 (D. Del. 1977) (agreeing with the “numerous other courts over the years” that have held that anti-assignment conditions do not apply to the transfer of insurance rights providing coverage for pre-transfer losses, stating that “it would be a mere act of caprice or bad faith for [the insurer] to take advantage of the stipulation that the transfers were subject to its consent”); *Aetna Cas. & Sur. Co. v. Valley Nat’l Bank*, 485 P.2d 837, 839 (Ariz. App. 1971) (“[T]his [anti-assignment] rule is based upon the right of the insurer to choose its insured so as to know its risks. Therefore, it is not applicable when an assignment is made by an insured after the liability-causing event has occurred.” (citing several cases)); *P.R. Mallory & Co. v. Am. States Ins. Co.*, No. 54C01-0005-CP-00156, 2004 WL 1737489, at *8 (Ind. Cir. Ct. July 29, 2004) (noting that the loss at issue took place before the transfer of insurance rights); *Conrad Bros. v. John Deere Ins. Co.*, 640 N.W.2d 231, 237 (Iowa 2001) (holding that anti-assignment condition was inapplicable to transfer of chose in action for coverage for loss occurring prior to transfer, and noting that, “even if the [anti-assignment] provision had specifically prohibited post-loss assignments, it would most likely be in contravention of public policy and the general purpose of indemnity contracts”); *Massachusetts Elec. Co. v. Commercial Union Ins.*, No. 9900467B, 2005 WL 3489658, at *2 (Mass. Super. Ct. Oct. 18, 2005) (recognizing that the general rule is that anti-assignment clauses do not prevent the transfer of insurance rights for pre-transfer losses); *Egger v. Gulf Ins. Co.*, 903 A.2d 1219 (Pa. 2006) (assignment of rights to coverage as part of litigation settlement valid where loss pre-dated assignment); 3 *COUCH ON INS.* 3d, § 35:7 (1997) (noting that “the great majority of courts adhere to the rule that general stipulations in policies prohibiting assignments thereof except with the consent of the insurer apply only to assignments before loss, and do not prevent an assignment after loss”).

82. *Id.* at *1-2.
83. *Id.* at *2.
84. *Id.* at *8.
the plaintiff sought coverage under the policies issued by the defendant to the policyholder. Rejecting the insurer’s reliance on its anti-assignment condition, the court, applying New York law, held that the policyholder had an accrued claim at the time of the asset transfer in 1963 for the bodily injuries that took place prior to that time, even though no claim was asserted against the policyholder until ten years after the asset transfer:

Such [anti-assignment] clauses do not apply to an assignment of an insurance claim after the loss has occurred. This is so even if the insurance contract reads to the contrary, because the assignment of an accrued insurance claim is the same as assigning a chose in action, and contractual limitations on such assignments are contrary to the public policy of New York.

In this instance, any claim of [the policyholder] against [the defendant-insurer] accrued between 1952 and 1960, and the transfer of [the policyholder]’s assets ultimately to [the plaintiff] in 1963 occurred after any insurance claim against [the defendant-insurer] had arisen.

Thus, even though the insurer did not breach its policy obligations by failing to defend until the claimant filed suit in 1973, the insurance claim was deemed to have accrued when the bodily injury itself took place from 1952 through 1960, prior to the transfer of insurance assets in 1963. Accordingly, the anti-assignment condition could not apply.

85. Id. at *1-2.
86. Id. at *7-8 (citations omitted).
87. Id. at *8-9.
88. Id.; see also Citicorp Indus. Credit, Inc. v. Federal Ins. Co., 672 F. Supp. 1105, 1105-07 (N.D. Ill. 1987) (anti-assignment condition did not preclude plaintiff, which acquired the policyholder’s contract rights through foreclosure, from recovering under the policyholder’s indemnity policy where the losses took place prior to, but were not discovered until after, the transfer of insurance rights); Snellman v. A.B. Dick Co., No. 81C3048, 1987 WL 8619 (N.D. Ill. Mar. 24, 1987) (a successor may recover under a contract for the damages suffered, but not discovered, by its predecessor prior to the transfer of the predecessor’s rights under the contract to the successor); see generally Am. Nat’l Fire Ins. Co. v. Harold Abrams, P.C., No. 99 C 5807, 2002 U.S. Dist. LEXIS 2577 (N.D. Ill. Feb. 19, 2002) (contrasting occurrence-based policies with claims-made policies, and noting that coverage attaches under occurrence-based policies when the occurrence causing the bodily injury or property damage takes place, not when the claim is made: “In the “occurrence” policy, the peril insured is the “occurrence” itself. Once the occurrence takes place, coverage attaches even though the claim may not be made for some time thereafter."
Beyond New York and Illinois, a number of courts in other jurisdictions have also held that anti-assignment conditions do not bar the transfer of liability insurance rights relating to losses that took place prior to, but were not discovered until after, the transfer. For example, in *Gopher Oil Co. v. American Hardware Mut. Ins. Co.*, the policyholder engaged in activities in the 1950s and 1960s that resulted in undetected environmental property damage during the insurers’ policy periods. In 1973, the policyholder assigned all of its assets to the plaintiff. Eighteen years later, the property damage manifested, and the plaintiff was sued. The insurer refused to provide coverage based on an anti-assignment condition in its policies. Rejecting the insurer’s reliance on the anti-assignment conditions, the court held that it would follow the “great majority of courts” that had concluded that anti-assignment conditions do not bar the transfer of insurance rights for liability coverage for events that took place prior to the transfer:

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.

Thus, because there could not be a material increase in risk to the insurer with respect to tortious conduct that had already taken place, the court ruled that the anti-assignment condition did not apply to this transfer of liability insurance rights for property damage that was ongoing, but not yet discovered, at the time of the transfer.

Similarly, in *Total Waste Management Corp. v. Commercial Union Insurance Co.*, the policyholder was insured under a general liability

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89. 588 N.W.2d 756 (Minn. App. 1999).
90. *Id.* at 761-62.
91. *Id.* at 761, 763.
92. *Id.* at 761.
93. *Id.* at 761-762.
94. *Id.* at 763.
95. *Gopher Oil*, 588 N.W.2d at 763.
policy issued by the defendant with a policy period ending in 1984.97 In 1988, the policyholder sold certain assets to the plaintiff.98 A third party subsequently sued the plaintiff for property damage that had occurred, but had not been discovered, prior to the asset sale.99 The insurer denied the plaintiff’s claim that it had succeeded to the policyholder’s liability coverage rights.100 The court ruled against the insurer, holding that the anti-assignment condition did not preclude the plaintiff’s right to liability coverage for property damage that had been caused by the policyholder and that had taken place during the insurer’s policy period:

Some of the damage or loss caused by [the policyholder] to [the third party]’s property allegedly occurred during the term of [the insurer]’s policy and prior to [the policyholder]’s transfer of assets. [The insurer]’s risk is therefore no greater than when the policy “covers only the risk it evaluated when it wrote the policy.” If [the plaintiff] is found to be the corporate successor to [the policyholder], [the insurer]’s liability on the insurance contract to [the policyholder] would be limited to the terms and date of the policy.101

In the context of asbestos-related bankruptcy plans, several courts have confirmed that insurance rights of a debtor-policyholder may be transferred to a trust to fund the payment not only of pending asbestos claims, but also of future asbestos claims not yet asserted, despite the objections of the debtor’s insurers based on the anti-assignment conditions in their policies.102

97. Id. at 154.
98. Id. at 143 n.2.
99. Id. at 142.
100. Id. at 145.
101. Id. at 153 (quoting N. Ins. Co. of New York v. Allied Mut. Ins. Co., 955 F.2d at 1358); see also Wolkerstorfer Co. v. Bituminous Cas. Co., No. C0-93-12712, slip op. at 8-11 (Minn. 10th Dist. May 19, 1994) (holding that transfer of assets from a partnership to a corporation transferred rights to liability coverage for environmental property damage that had taken place prior to the transfer but which was not discovered until years after the transfer); Sharon Steel Corp. v. Aetna Casualty & Surety Co., 931 P.2d 127, 139 n.15 (Utah 1997) (holding that an insurer’s consent was not needed to transfer insurance rights covering liability for ongoing, but undiscovered, property damage from the policyholder to a liquidating trust as part of the policyholder’s dissolution).
102. See In re ACandS, Inc., 311 B.R. 36, 41 (Bankr. D. Del. 2004) (“[B]ecause an insured’s right to proceeds vests at the time of the loss giving rise to the insured’s liability, restrictions on an insured’s right to assign its proceeds are generally rendered void.”)
c. POTENTIAL INSURER RESPONSES

Insurers often proffer a series of arguments to support their position that insurance rights may not be transferred in the face of an anti-assignment provision without their consent, including the following arguments. Specifically, insurers frequently argue:

1. That a policyholder has not suffered a “loss” under the policy until the insurer has breached its duty to defend or indemnify, and therefore that no “loss” could have taken place prior to the execution of the asset purchase agreement where the bodily injury or property damage was not discovered until after that time;
2. That insurance rights can only be transferred “by operation of law”;
3. That various cases should be read to support the conclusion that the anti-assignment conditions apply to the transfer of historical insurance assets;
4. That the decisions in Henkel and related cases represent the better reasoned view.

As discussed below, Successor Insureds may raise various hurdles in an attempt to defeat these insurer arguments.

1. The Successor Insured Position: Insurance Rights for Pre-Transfer Injuries or Damage May Be Transferred Regardless of Whether or Not the Insurer Has Breached Its Duties by the Time of the Transfer

As discussed above, a number of courts have held that an anti-assignment condition does not ordinarily preclude the transfer of insurance

(quotting Cont. Cas. Co. v. Diversified Indus., Inc., 884 F. Supp. 937, 946 (E.D. Pa. 1995)); see also In re Combustion Eng’g, Inc., No. 03-10495(JKF), Transcript of Bench Opinion at 145-46 (D. Del., July 31, 2003) (confirming bankruptcy plan that assigned insurance proceeds to trust over the objections of debtor’s insurers based on anti-assignment conditions, stating that “[a]ssignment of a right to receive proceeds does not change any risk that was insured against.”) (vacated on other grounds, 391 F.3d 190, 218-19 (3d Cir. 2004)) (declining to reach merits of insurers’ argument that assignment of proceeds violated anti-assignment conditions in policies).
rights providing liability coverage for injuries or damage that was ongoing, but undiscovered, at the time of the transfer. Insurers often try to avoid that conclusion by asserting that, for such injuries or damage, the relevant loss did not occur until after the execution of the asset purchase agreement. The insurers base this contention on the theory that a policyholder does not suffer a “loss” until an insurer has failed to defend or indemnify it. To illustrate, in cases involving asbestos, environmental, and other latent bodily injury and property damage claims that were not filed until after an asset sale took place, the insurers may argue that they did not fail to defend or indemnify the policyholder before the asset sale, and hence that no policyholder incurred a “loss” until after the asset purchase agreement was executed. Thus, the argument goes, there were no insurance rights or choices in action to transfer to the purchaser at the time of the asset sale.

The decisions discussed above cast doubt on this pro-insurer argument. In each of those cases, the underlying injury or damage had not yet been discovered at the time of transfer of the insurance asset, and no suit had been filed against the party seeking insurance coverage. Accordingly, no claim had been made for the insurer to deny before the transfer. Under the pro-insurer argument, no “loss” – i.e., rejection of the request for a defense or indemnity – had occurred before the applicable transfer; nonetheless, the courts concluded in each case that the anti-assignment condition was inapplicable.

The decisional law discussed above thus appears to undercut the pro-insurer position that “loss” for purposes of analyzing the applicability of an anti-assignment condition relates to when the insurer decides to deny a claim for coverage. Rather, the view of these courts is that the relevant “loss” occurs not when the insurer denies coverage, but rather when the event giving rise to the liability takes place, e.g., when the bodily injury or property damage occurs.

Notwithstanding such cases, *Henkel* and its related cases, discussed below, provide support for the insurers’ position. In an effort to build further support, insurers may take relatively novel positions on the interpretation of decisional law to bolster their position that liability insurance rights cannot be transferred until the insurer has failed to defend or indemnify the insured. However, Successor Insureds may contend that the cases that insurers typically rely upon do not provide the necessary foundation for that position:
Bronx Entertainment v. St. Paul’s Mercury Ins. Co.\textsuperscript{103} – In this decision, the named insured assigned its insurance claim for business interruption damages to the plaintiff. Even though the policy at issue contained an anti-assignment condition, the court held that the plaintiff could maintain an action against the insurer for these pre-assignment business interruption damages.\textsuperscript{104} The court held that the plaintiff could not recover for its own business interruption losses suffered after the assignment at issue, absent the insurer’s consent.\textsuperscript{105}

Service Adjustment Co. v. Underwriters at Lloyd’s, London\textsuperscript{106} – Consistent with the majority rule discussed above, this decision, which involves a fire loss under a fire insurance policy, stands for the simple proposition that “[a]n insured’s claim under a policy may be assigned after the loss.”\textsuperscript{107} The decision does not address situations in which the loss took place prior to the transfer, but was not discovered until after the transfer.

Loyola Univ. Med. Center v. Med Care HMO\textsuperscript{108} – In this decision, the court held that an anti-assignment condition did not apply to the transfer of medical insurance benefits where the injury had taken place before the transfer, even though the medical costs for which the insurance policy would provide reimbursement had not yet been incurred.\textsuperscript{109} Even though the medical insurance policy would have no obligation to indemnify the policyholder until it incurred medical costs, the court found that the relevant “loss” was

\begin{flushright}
\textsuperscript{103} 265 F. Supp. 2d 359 (S.D.N.Y. 2003).
\textsuperscript{104} Id. at 363 (“Of course Plaintiff may maintain an action for [transferor’s] losses that accrued as of the date of the assignment.”)
\textsuperscript{105} Id.
\textsuperscript{107} Id. at 1049.
\textsuperscript{109} Id. at 1129.
\end{flushright}
the incidence of injury and not the payment of medical costs. Accordingly, because the loss occurred before the assignment, the assignment was not precluded by the anti-assignment condition.\textsuperscript{110}

In sum, as discussed above, a number of courts have held that an anti-assignment condition does not apply to the transfer of liability insurance rights for coverage for injuries or damage taking place prior to the transfer, even where such injuries or damage have not been discovered prior to the transfer. The insurers’ contention that an assignor does not have any insurance choices in action to transfer until it has been the victim of a breach by the insurer of its duty to defend or indemnify is not consistent with this decisional law.

2. The Successor Insured Position: To Survive Application of an Anti-Assignment Condition, a Transfer of Insurance Rights Is Not Required to Occur “by Operation of Law

Insurers often contend that, where a policy contains an anti-assignment condition and the insurer’s consent has not been obtained, coverage rights can only be transferred if, among other requirements, that transfer occurs “by operation of law.” Under this approach, insurers contend that neither an asset purchase, a stock purchase, nor an assignment in connection with a corporate dissolution constitutes a transfer “by operation of law.” As a result, such insurers argue, the transferee in question cannot be the successor to the transferor’s insurance rights at issue.

This particular pro-insurer position has substantial weaknesses. Among other things, no requirement that the transfer of insurance rights must be accomplished “by operation of law” can be gleaned from much of the decisional law.\textsuperscript{111} Successor Insureds may argue that no basis exists to

\begin{itemize}
\item \textbf{110.} Id. (“What [the policyholder] assigned was her present conditional right to the insurance proceeds. A valid assignment of a conditional right is enforceable in equity.” (citations omitted)).
\end{itemize}
impose such a requirement and that so doing would run afoul of the case law supporting their position.

3. The Successor Insured Position: Cases Relied Upon by Insurers Do Not Support the Insurers’ Position

In addition to Henkel, insurers often assert that a number of cases hold that anti-assignment conditions preclude the transfer of insurance rights in corporate transactions other than mergers. However, Successor Insureds may argue that these decisions do not support the insurers’ position:

Employers Ins. of Wausau v. Duplan Corp.\(^{112}\) – Apparently contradicting the insurers’ suggestion that coverage can transfer only through a merger, this decision expressly confirms that an entity that is not a named insured may still invoke rights under an insurance policy not only as a result of a merger, but also when the entity “is legally regarded as the corporate successor of the insured through purchase or transfer of the insured’s assets; or . . . has been assigned the insured’s rights in the policy.”\(^{113}\) The party seeking coverage in Wausau was denied coverage because it had not purchased the named insured’s assets, obtained an assignment from the named insured, or merged with the insured.\(^{114}\)

Home Ins. Co. v. Service Am. Corp.\(^{115}\) – In this decision, the defendant was initially a subsidiary of the named insured, and thus initially was covered under a policy that insured the named insured and its “subsidiaries.”\(^{116}\) When the defendant was sold to a third party, it ceased to be a subsidiary of the

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\(^{112}\) No. 94 Civ. 3143(CSH), 1999 WL 777976 (S.D.N.Y. Sept. 30, 1999).
\(^{113}\) Id. at *32.
\(^{114}\) Id.
\(^{115}\) 662 F.Supp. 964 (N.D. Ill. 1987).
\(^{116}\) Id. at 965.
named insured, and thus ceased to be insured under the policy for any losses that arose after the sale.\textsuperscript{117} Consequently, when the defendant suffered a fire loss after the sale, the court found no coverage for the defendant’s fire loss.\textsuperscript{118}

\textit{Butera v. Attorneys’ Title Guar. Fund, Inc.}\textsuperscript{119} – This decision involves an entirely different form of insurance from standard-form liability policies – title insurance – that has unique policy language not found in standard-form liability insurance policies.\textsuperscript{120} Specifically, the title insurance at issue in \textit{Butera} provided coverage for the “insured,” defined to mean “the [named] insured [and] . . . those who succeed to the interest [in the real property at issue] of such insured by operation of law as distinguished from purchase including, but not limited to, heirs, distributees, devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors.”\textsuperscript{121} Because the plaintiffs acquired the real property at issue through a “purchase,” the court held that they did not qualify as insureds under this definition.\textsuperscript{122} As the court noted, “Title insurance is an unusual type of insurance. It is not a recurring policy: there is a single premium, and the policy remains outstanding forever to protect the property owner.”\textsuperscript{123} In short, because of the substantial differences in the type of policy at issue, the policy language, and the risks covered by the policy, \textit{Butera} may not be applicable more generally to cases in which liability insurance rights are being transferred.

\begin{itemize}
\item \textsuperscript{117} \textit{Id.}
\item \textsuperscript{118} \textit{Id.} at 968.
\item \textsuperscript{119} 747 N.E.2d 949 (Ill. App. Ct. 2001).
\item \textsuperscript{120} \textit{Id.} at 950.
\item \textsuperscript{121} \textit{Id.} at 951.
\item \textsuperscript{122} \textit{Id.} at 954.
\item \textsuperscript{123} \textit{Id.}
\end{itemize}
Holt v. Fidelity Phoenix Fire Ins. Co.\textsuperscript{124} – In this decision, the court agreed that, once a fire occurred, the named insured had an accrued claim under its fire insurance policy that it could have assigned to a third party.\textsuperscript{125} Other than recognizing that insurance rights may be assigned without the insurer’s consent where the loss has taken place prior to the assignment, this decision stands for the relatively commonplace proposition that an assignee of a business interruption rider to a fire policy may not recover for its own business interruption losses that were incurred after the assignment, absent the insurer’s consent.\textsuperscript{126}

Bronx Entertainment v. St. Paul’s Mercury Ins. Co.\textsuperscript{127} – Similar to the facts in Holt, this decision involved a claim by the named insured under a business interruption policy.\textsuperscript{128} Shortly after suffering property damage, the named insured assigned its insurance claim to the plaintiff.\textsuperscript{129} Even though the policy contained an anti-assignment condition, the court confirmed that the plaintiff could maintain an action for these pre-assignment damages against the insurer.\textsuperscript{130} As in Holt, the court held that the plaintiff could not recover for its own business interruption losses suffered after the assignment at issue, absent the insurer’s consent.\textsuperscript{131}

Carle Place Plaza Corp. v. Excelsior Ins. Co.\textsuperscript{132} – Similar to the decision in Holt, this decision also stands for the proposition that an assignee may not recover under a fire insurance

\textsuperscript{125} Id. at 399.
\textsuperscript{126} Id. at 399-400.
\textsuperscript{127} 265 F.Supp. 2d 359 (S.D.N.Y. 2003).
\textsuperscript{128} Id. at 361.
\textsuperscript{129} Id. at 360.
\textsuperscript{130} Id. at 363.
\textsuperscript{131} Id.
policy for a fire loss that takes place after the assignment, absent consent of the insurer.  

EM Indus. Inc. v. Birmingham Fire Ins. Co. – This decision cites favorably the decision in Ocean Accident & Guar. Corp. v. Southwestern Bell Tel. Co., which held that insurance benefits may be transferred without the insurer’s consent despite the presence of an anti-assignment condition in the policy where the injury or damage has taken place prior to the transfer. The court in EM Indus. stated that the plaintiff’s insurer had “failed to establish its alternative contentions that [another insurer] is obligated to the plaintiff and therefore to it under an assignment theory (see, Ocean Acc. & Guar. Corp. v. Southwestern Bell Tel. Co., 100 F.2d 441, cert. denied, 306 U.S. 658 [and cases cited therein]) or under a successor-enterprise liability theory, since there was no merger of companies as a result of the [purchase agreement] (see, Schumacher v. Richards Shear Co., 59 N.Y.2d 239).” In other words, insurance rights could have transferred either by merger or by a non-merger transaction, as in Ocean Accident.

Insurance Co. of N. Am. v. Snyder Moving & Storage, Inc. – The court in Snyder noted that the seller in an asset sale may be permitted to sell its rights to insurance benefits despite an anti-assignment condition: “This [non-assignment] rule is based upon the right of the insurer to choose its insured so as to know its risks. Therefore, it is not applicable when an assignment is made by an insured after the liability-causing event has occurred. . . . In such a case the general rule is that

133. Id. at 398.
135. 100 F.2d 441 (8th Cir.1939), cert. denied, 306 U.S. 658 (1939).
136. Id. at 444-45.
137. EM Indus., 529 N.Y.S.2d at 123.
138. Id.
139. 52 Fed. Appx. 899 (9th Cir. 2002).
the assignment is not of the policy itself, but of a claim under, or a right of action on, the policy.”

*Federal Ins. Co. v. Purex Indus., Inc.*

In this decision, the court denied an insurer’s motion for summary judgment based on an anti-assignment condition because the insurer had failed to carry its burden of showing that the condition applied. The court did not have occasion to rule whether insurance assets could be transferred only in a merger.

*Red Arrow Prods. Co. v. Employers Ins. of Wausau*

In this decision, the court rejected the asset purchaser’s claim to coverage under the seller’s policies because the parties agreed that the insurance rights were not part of the assets conveyed in the asset purchase agreement. Unable to argue that there had been an express transfer of the seller’s insurance rights, the buyer relied entirely on the *Northern Insurance* line of cases to assert that, because it had CERCLA liability for the actions of the seller, it should be entitled to access the seller’s insurance by operation of law. The court rejected the reasoning of the *Northern Insurance* line of cases because “[t]he [public] policies driving the product-line successor liability rule, however, are clearly not at play here [in a case involving CERCLA liability].”

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140. *Id.* at 903-04 (quoting *Aetna Cas. & Sur. Co. v. Valley Nat. Bank of Ariz.*, 485 P.2d 837, 839 (1971)). Having said that, the court went on to deny that the plaintiff had acquired the insurance benefits of the seller on the grounds that the asset purchase agreement identified the specific assets that were being transferred, and insurance was not among them. *Id.*
142. *Id.* at 899-90.
144. *Id.* at 299.
145. *Id.* at 299-300.
146. *Id.* at 302-03.
Muslin v. Frelinghuysen Livestock Managers, Inc.\textsuperscript{147} – In this decision, a racehorse mortality policy contained an anti-assignment condition and, in addition, expressly provided that transfer of any interest in the horse at issue would result in the voiding of the policy. The policyholder orally transferred the horse to third parties. As a result, the court held that the policy was void as of the time of the transfer. Consequently, when the horse died after the transfer, the new owners of the horse could not recover under the mortality policy.\textsuperscript{148} Because Muslin involves a type of policy and policy language not at issue in standard-form liability insurance policies, the decision may be viewed by courts as irrelevant in cases involving the assignment of liability insurance rights. At best, Muslin stands for the proposition that, where an insurance policy containing an anti-assignment condition was assigned without the insurer’s consent, the policy does not provide coverage to the assignee for losses incurred after the assignment.

In sum, Successor Insureds have a number of arguments that they may rely on to attempt to distinguish the cases often cited by insurers seeking to establish the broad applicability of anti-assignment provisions.

4. Henkel and Cases Involving Retroactive Liability

a. The Henkel Decision

While the decisional law discussed above may not provide a strong foundation of support to insurers seeking broad enforcement of anti-assignment provisions, the Henkel decision does support the insurers’ usual position that anti-assignment conditions bar the transfer of coverage rights without their consent. However, the Henkel decision may be vulnerable to several counter-arguments that Successor Insureds may raise.

\textsuperscript{147} 777 F.2d 1230 (7th Cir. 1985).

\textsuperscript{148} Id. at 1232.
From the Successor Insured’s perspective, the *Henkel* decision should not be followed because requiring insurer consent to transfer insurance proceeds for undiscovered losses that took place prior to the transfer would lead to unreasonable consequences. On this view, an insurer has no incentive whatsoever to consent to a request by the policyholder to assign insurance proceeds. Indeed, an insurer arguably has an incentive to *not* consent, in the hope that the policyholder would go forward with the asset sale anyway, thereby giving the insurer an argument that it is free of any coverage obligation for pre-assignment losses.

The policyholder seemingly is then left with a Hobson’s choice – abandon the asset sale and its attendant benefits or, under *Henkel*, cause the insurance rights that it had already paid premiums to obtain to vanish, giving the insurer a windfall and likely making the asset sale much less attractive to the buyer, who then may be risking the assumption of liabilities without insurance to pay for them. Under the Successor Insured view, either result is against public policy.

First, two entities that have decided that it is in each of their respective economic interests to enter into an asset sale should not be dissuaded from doing so because insurers, who have already been paid premiums to cover a certain risk, can escape that risk by refusing to consent to the assignment. Putting this kind of power in the hands of insurance companies to deter legal and beneficial commerce benefits no one except those insurance companies.

Second, from a Successor Insured’s perspective, insurers would receive an undeserved windfall as a result of the *Henkel* approach in those cases where the contracting parties went ahead with the asset sale. In contrast, the Successor Insured Position avoids such windfalls by permitting the transfer of coverage for pre-transfer losses on the rationale that such a transfer does not increase the risk that the insurers agreed to accept and for which they were paid substantial premiums.

Third, Successor Insureds may argue that the *Henkel* decision is at odds with the well-settled principle of insurance law that ambiguous policy language should not be construed to forfeit coverage.149

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Fourth, according to Successor Insureds, the *Henkel* decision runs afoul of the general rule that anti-assignment conditions are to be construed narrowly, against the party seeking to prohibit the assignment. Therefore, the Successor Insured’s Position goes, because typical anti-assignment conditions do not unambiguously apply to transfers of insurance rights relating to losses that took place prior to the transfer, the *Henkel* court should have construed the anti-assignment condition at issue there against the insurer and in a manner that preserved, rather than forfeited, coverage. In sum, the Successor Insured Position posits that the *Henkel* decision, if followed, would result in unfair and economically detrimental consequences. Under this Position, because courts are to avoid interpreting insurance policy or other contractual provisions in a manner that leads to absurd consequences, courts should not construe the anti-assignment conditions to bar the transfer of liability insurance rights where the losses already took place, or began to take place, prior to the transfer.

In addition to leading to unfair consequences, Successor Insureds may claim that the *Henkel* court’s analysis is flawed because it incorrectly concluded that the transfer of insurance rights relating to losses that had already taken place would subject the insurer to an increased risk. The important purposes in contemporary society, and courts should be quick to find facts which support coverage.”); Brynildsen v. Ambassador Ins. Co., 274 A.2d 327, 329 (N.J. Super. Law Div. 1971) (“This court is in accord with the general principle of the law of insurance that forfeitures are not looked upon with favor, and is disposed to avoid forfeiture if by reasonable interpretation it can do so.”).

150. See, e.g., Elzinga & Volkers, Inc. v. LSSC Corp., 838 F. Supp. 1306, 1313 (N.D. Ind. 1993) (“[B]ecause the [anti-assignment] clause is a restriction on alienation, it must be strictly construed against the party urging the restriction.”); First Bank & Trust v. Novak, 747 P.2d 850, 855 (Kan. Ct. App. 1987) (“A restriction against assignment is a restraint on alienation, and as such it is strictly construed against the party urging the restriction”).

151. Cross Armored Carrier Corp. v. Valentine, 268 N.Y.S.2d 792, 797-98 (N.Y. Supr. Ct. 1966) (“Resort to a literal construction may not be had where the result would be to thwart the obvious and clearly expressed purpose which the parties intended to accomplish or where such a construction would lead to an obvious absurdity or place one party at the mercy of another.” (citations omitted)); U.S. Fire Ins. Co. v. Hartford Ins. Co., 726 N.E.2d 126, 128 (Ill. App. Ct. 2000) (“[A] strained, forced, unnatural, or unreasonable construction, or one which would lead to an absurd result must be adopted.”)
principal basis for the court’s conclusion was that, where the assignor still exists or can be revived, the insurer may be required to “face[] the dilemma” whether to provide coverage to the assignor, the assignee, or both if a dispute arises over the existence and scope of the assignment. 152 Successor Insureds may argue that, contrary to the court’s suggestion, such a circumstance would not subject the insurer to any risk that is any different from the risks that the insurers agreed to accept.

First, insurers are faced with the potential for invalid coverage claims every day. Whether it is a request for coverage by a company that previously assigned away its insurance rights or a request for coverage by an insured whose claim falls within an exclusion, the business of insurers is to apply their policies to the facts and pay those claims that are valid. The fact that an insurer must distinguish valid claims from invalid claims does not constitute an increase in the insured risk, but rather is a part of that insurer’s normal business operations.

Second, the law and applicable rules provide procedural vehicles through which the insurers may resolve any uncertainties regarding whether coverage exists for a claim. If an insurer cannot determine whether a claim is covered or excluded, or whether the entity requesting coverage is insured or not, the insurer may reserve its rights and commence a declaratory judgment action that will clarify its obligations. Alternatively, where more than one entity claims a right to the same set of insurance proceeds, the insurer may commence an interpleader action and/or pay the proceeds into an account with the court, with the proceeds to be paid to the entity that succeeds in demonstrating that it is entitled to them. 153 These procedural mechanisms ensure that the insurer will not be required to pay any more money than it is obligated to pay under its insurance policy.

Third, depending on the circumstances, the insurers may be obligated to provide coverage to both entities seeking coverage. Insurers routinely provide coverage, for instance, to multiple members of the same corporate family. Each claim for coverage by competing claimants must be evaluated on its own merits.

153. See, e.g., Krauss v. Central Ins. Co., 40 N.Y.S.2d 736, 738 (N.Y. Supr. Ct. 1943) (explaining that in a dispute between a policyholder and an entity that alleged that the policyholder had assigned its interest in insurance proceeds to the entity, the insurer deposited the insurance proceeds with the court, to be distributed to whichever claimant succeeded in demonstrating its entitlement).
Thus, under the Successor Insured view, the fact that an assignor and an assignee may both claim an entitlement to insurance proceeds does not necessarily “increase the risk” to the insurer. An insurer may pay the party that it believes possesses a valid claim, or a court may determine which party has the valid claim. What the insurer should not be permitted to do, according to Successor Insureds, is refuse to pay either claim because of the possible occurrence of the other. This is particularly true when the lack of increased risk to the insurer is weighed against the consequences to an asset purchaser of finding that, contrary to its reasonable expectations, it did not obtain any insurance rights after all. In sum, Successor Insureds may strongly contest the court’s finding in *Henkel* that assignment of rights to insurance proceeds increases the risk to the insurer.

iii. The Successor Insured Position: The *Henkel* Decision Incorrectly Requires a Breach by the Insurer Before an Interest in the Policy May Be Assigned

The *Henkel* decision also is based on the premise that the insurer must have breached the policy before the policyholder has a right that may be assigned. Without significant analysis, the *Henkel* court concluded that the assignor there did not have an assignable chose in action for breach of the insurance policy at the time of the assignment because the underlying asbestos claimants had not yet asserted any claims; consequently, no claim had been made yet to the insurer and no chose in action for breach of contract existed that could be assigned.  

Successor Insureds will argue that the *Henkel* court’s holding that the insurer must first breach the policy before the policyholder has accrued any assignable rights under the policy is contrary to the rulings of the numerous courts discussed above that have held that the policyholder possesses a chose in action at the time that the underlying claimant suffers bodily injury (or property damage). Those cases did not require a breach of the

155. See supra Parts IV.A-IV.C.1. While these courts have found that the claim or chose in action has arisen at the time that the loss takes place and therefore may be transferred in a corporate transaction, the claim will typically not be considered to have accrued for purposes of the statute of limitations, because different considerations and public policies are implicated in the analysis of whether the statute of limitations has expired in a given case. Analysis of statute of limitations issues are outside the scope of this article.
policy by the insurer – only that the loss in the underlying case occurred prior to the transfer.

Further, even assuming arguendo that the policyholder does not possess an accrued insurance claim at the time of the assignment, it arguably does possess a conditional right under the policies. Such conditional rights have been found by certain courts to be assignable.\textsuperscript{156}

From the Successor Insured’s perspective, just as anti-assignment conditions do not apply to accrued insurance claims relating to losses that took place prior to the assignment, such conditions do not bar the assignment of conditional rights to insurance coverage. As an example in support of this position, in \textit{Loyola University Medical Center v. Med Care HMO},\textsuperscript{157} an insured possessed an insurance contract with a health maintenance organization (HMO) that entitled her to reimbursement for payments made for medical treatment covered under the contract.\textsuperscript{158} Prior to receiving treatment or paying any medical expenses for a medical condition that the insured sustained, the insured assigned her rights to proceeds under the medical insurance contract to the hospital that would be providing her treatment.\textsuperscript{159} After providing treatment, the hospital sought payment from the HMO. However, the HMO denied coverage on the grounds that the insured’s assignment of the insurance proceeds violated an anti-assignment clause. Specifically, the HMO argued that the medical insurance contract provided indemnity for the cost of medical services and, since the insured had not received any medical services at the time of the assignment, the insured had no chose in action to assign to the hospital.\textsuperscript{160} Rejecting this argument, the court held that the anti-assignment clause did not preclude the transfer of the insured’s conditional right to insurance proceeds:

\textsuperscript{156} See, e.g., \textsc{Restatement (Second) of Contracts}, § 320 (“The fact that a right . . . is conditional on the performance of a return promise or is otherwise conditional does not prevent its assignment before the condition occurs.”); \textit{Great Am. Indem. Co. v. Allied Freightways, Inc.}, 91 N.E.2d 823, 824-25 (Mass. 1950) (following the “great weight of authority” recognizing the validity of a present assignment of anticipated benefits under a contract that are conditioned on an event that may or may not happen in the future); \textit{Costanzo v. Costanzo}, 590 A.2d 268, 271 (N.J. Super. Law Div. 1991) (confirming that injured victim could assign his conditional right to settlement proceeds even though his tort claim had not settled and may have never settled).

\textsuperscript{158} \textit{Id.} at 1129.
\textsuperscript{159} \textit{Id.} at 1126-27.
\textsuperscript{160} \textit{Id.} at 1128-29 & n.2.
What [the insured] assigned was her present conditional right to the insurance proceeds. A valid assignment of a conditional right is enforceable in equity. Hence, the assignment attaches to each installment of money “to become due” under an existing contract as it becomes due and payable to the assignor.\(^{161}\)

Accordingly, Successor Insureds will argue that, once a claimant has suffered injury or damage, the policyholder has an accrued liability insurance claim under its policies in effect during the time of the injury or damage, or, at a minimum, the policyholder has a conditional right to proceeds under those policies. Either way, under the Successor Insured Position, the claim or right is assignable and such an assignment would not violate an anti-assignment condition.

Moreover, for the reasons discussed above, Successor Insureds may contend that the *Henkel* decision is erroneous, and hence courts should follow the cases holding that anti-assignment conditions do not apply to the transfer of liability insurance rights relating to losses that took place prior to the transfer, including losses that are not discovered until after the transfer.

b. Cases Involving Retroactive Liability

Insurers also typically rely heavily on two cases, (1) *Quemetco Inc. v. Pacific Auto. Ins. Co.*\(^{162}\), and (2) *Century Indem. Co. v. Aero-Motive Co.*\(^{163}\), involving an asset purchaser’s ability to access the seller’s insurance policies for environmental liability imposed retroactively by statutes passed subsequent to the date of the asset purchase.\(^{164}\) In each of these cases, according to the insurers’ perspective, the asset seller allegedly could not have had a right to insurance proceeds at the time of the asset sale because there was no basis for liability at that time.\(^{165}\) It was not until years after each respective transaction, however, that statutes were passed. These

\(^{161}\) Id. at 1129 (citations omitted); see also Robert S. Pinzur, Ltd. v. Hartford, 511 N.E.2d 1281, 1286 (Ill. App. Ct. 1987) (confirming that a policyholder may assign its present conditional right to proceeds that had not yet accrued, though ultimately finding no assignment because the assignor received no consideration), appeal denied, 515 N.E.2d 126 (Ill. 1987).


\(^{164}\) *Quemetco*, 29 Cal. Rptr. 2d at 628; *Aero-Motive*, 318 F. Supp. 2d at 532.

\(^{165}\) See *Quemetco*, 29 Cal. Rptr. 2d at 629-30; *Aero-Motive*, 318 F. Supp. 2d at 537.
statutes retroactively imposed environmental liability on the asset seller
(and the asset purchasers) such that a right to insurance proceeds could
exist; even though the asset seller had no right to insurance proceeds at the
time of the transaction and no right to insurance proceeds could have been
conveyed to the asset purchaser. The courts, agreeing with this position,
held that no insurance proceeds transferred to the asset purchasers.166

For instance, in Quemetco, the buyer contended that it had acquired the
seller’s insurance choses in action in the asset purchase agreement. The
court cited with approval the decisions in Ocean Acc. & Guar. Corp. v. Sw.
courts held that anti-assignment conditions did not preclude the transfer of
insurance proceeds for losses that took place prior to the transfer.169
However, because of the retroactive nature of CERCLA, the court held that
no loss or damage existed at the time of the sale, and thus no insurance
proceeds could have been purchased by the asset buyer.170

Similarly, in Aero-Motive, in 1972, the named insured sold assets,
including a manufacturing plant, to the defendant, and expressly assigned
two insurance policies to the defendant.171 In the early 1990s, the
defendant discovered contamination at the site where the plant was located,
and was then required to take remedial action by the Michigan Department
of Environmental Quality.172 Like the court in Quemetco, the court in
Aero-Motive confirmed that “an anti-assignment clause will not be
enforced where a loss occurs before the assignment, because in that
situation the assignment of the claim under the policy is viewed no
differently than any other assignment of an accrued cause of action.”173
Moreover, the court noted that the “majority rule” was that “an insurer’s
responsibility under a liability policy accrues at the time the complainant
suffers damage rather than at the time of the negligent act.”174

Nevertheless, because there was no damage upon which liability could be
imposed until decades after the asset sale, the court concluded that there
was no right to insurance proceeds at the time of the sale, and thus the asset

166. See Quemetco, 29 Cal. Rptr. 2d at 632; Aero-Motive, 318 F. Supp. 2d at 538-39.
167. 100 F.2d 441 (8th Cir. 1939).
169. Ocean Acc. & Guar. Corp., 100 F.2d at 447; Greco, 12 Cal. Rptr. at 806.
170. Quemetco, 29 Cal. Rptr. 2d at 632.
172. Id. at 533.
173. Id. at 539 (citations omitted).
174. Id. at 540.
purchaser did not acquire any rights to coverage for the environmental liability at issue.

From the Successor Insured’s perspective, the decisions in Quemetco and Aero-Motive are flawed because, while these courts correctly acknowledged and agreed with the cases that anti-assignment conditions generally do not bar the transfer of coverage for pre-transfer losses, these courts failed to properly apply this conclusion. While the courts were focused on the passage of statutes after the transfers in question that sought to impose retroactive liability, the courts ignored the fact that the common law typically provides a basis, such as under the laws of trespass and nuisance, for imposing liability for environmental property damage. Thus, as subsequent courts have found, Successor Insureds may assert that the courts were arguably mistaken in concluding that there was no right to insurance proceeds at the time of the transfers in question. In addition, where a policyholder’s conduct has caused bodily injury or property damage, the policyholder arguably possesses, at a minimum, a conditional right under its insurance policies, and hence, even though this right may be conditioned on the subsequent imposition of liability for such conduct, the policyholder’s conditional right is transferable.

V. RECENT DEVELOPMENTS

Several recent court decisions have addressed the rights of a successor to access insurance coverage for pre-transfer losses.

A. PILKINGTON AND GLIDDEN

The Ohio Supreme Court recently issued two decisions holding that, where a successor assumed liabilities under a contract, the rights to coverage did not automatically transfer to the successor by operation of

175. See, e.g., Gopher Oil Co. v. American Hardware Mut. Ins. Co., 588 N.W.2d 756, 764 (Minn. App. 1999) (refusing to follow Quemetco because, while the loss at issue in Quemetco under California law arguably did not occur until Congress enacted CERCLA in 1980, the loss at issue in Gopher Oil clearly occurred under Minnesota law at the time of the contamination).

176. See supra Section IV.A.
In order to address whether the insurance rights could be transferred, the Pilkington Court first examined the corporate history, which the Court set forth as follows: prior to 1986, various insurance companies issued occurrence policies (the “LOF policies”) to Libbey-Owens-Ford Glass Company (“LOF Glass Co.”). In 1986, Pilkington purchased LOF Glass Co.’s glass-manufacturing business in a two-part transaction. First, in February 1986, LOF Glass Co. placed the assets and liabilities of its glass-manufacturing division into a new wholly-owned subsidiary, LOF Glass, Inc., pursuant to a Transfer and Assumption Agreement. Second, in March 1986, LOF Glass Co. entered into a Share Exchange Agreement with Pilkington Brothers P.L.C. and one of its subsidiaries, Pilkington Holdings, Inc., pursuant to which the Pilkington entities acquired all of the stock of the newly-formed LOF Glass, Inc. In July 2000, LOF Glass, Inc. was renamed Pilkington North America. As a result of the transactions, Pilkington obtained both the glass business and the environmental liabilities arising from the business, including liabilities arising from conduct by LOF Glass Co. Pilkington sought coverage for defense and indemnification for those liabilities under the LOF policies.

The court was presented with the question whether, despite the presence of anti-assignment conditions in the policies, Pilkington had the right to defense and indemnification under the LOF policies for the environmental liabilities it had assumed. The Ohio Supreme Court certified three questions of state law from the United States District Court for the Northern District of Ohio, Western Division. The three questions

177. 861 N.E.2d 109 (Ohio 2006).
178. 681 N.E.2d 121 (Ohio 2006). The issue of a successor’s rights to coverage also has been recently addressed in the courts of Indiana, and is pending before the Indiana Supreme Court in the case of Travelers Cas. & Sur. Co. et al. v. U.S. Filter Corp., 870 N.E.2d 529, 541 (Ind. Ct.App. 2007) (holding that “a chose in action arises under an occurrence-based insurance policy at the time of the covered loss.... The lack of a specifically defined amount of recovery is not fatal to the determination that a chose in action exists.”), opinion vacated and transfer granted, 878 N.E.2d 222 (Ind. Dec. 20, 2007).
179. Pilkington, 861 N.E.2d at 124.
180. Id.
181. Id.
182. Id.
183. Id.
184. Id.
185. Id.
186. Id. at 123.
addressed by the court were: (i) Whether Pilkington’s demand for defense and indemnification constituted a “chose in action”; (ii) whether anti-assignment conditions in the policies barred Pilkington’s acquisition of such a chose in action; and (iii) whether rights to coverage for pre-transfer occurrences automatically followed liabilities by operation of law when the liabilities had been assumed by contract.187

The court, rejecting the reasoning of the Henkel court that a chose in action arises when a sum certain is due and payable, held that “a chose in action arises under an occurrence-based insurance policy at the time of the covered loss. 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.”188 The court further ruled in favor of the Successor Insured Position that “[w]e see no reason to deviate from the standard rule on this issue, and thus we hold 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.”189

Finally, the court rejected Pilkington’s argument that, because it had assumed liabilities by contract, it should be able to access the insurance rights by operation of law. Rather, the court recognized that insureds may intend to transfer liabilities while retaining the insurance assets that may respond to those liabilities, and reasoned that “[t]he parties specifically contract to control liability. Allowing indemnity to follow liability as a matter of law interferes with that control.”190 Accordingly, the court held that “when a covered occurrence under an insurance policy occurs before liability is transferred to a successor corporation, coverage does not arise by operation of law when the liability was assumed by contract.”191

Relying on the reasoning set forth in the Pilkington decision, the Ohio Supreme Court in Glidden reversed the pro-successor holding of the Ohio Court of Appeals that rights to coverage followed liabilities by operation of law.192 Specifically, the Ohio Court of Appeals had held that Glidden’s rights to coverage arose by operation of law, following certain historical liabilities that had been transferred to it. In so holding, the Court of Appeals had rejected the reasoning in Henkel that permitting the transfer of

187. Id.
188. Id.
189. The court did not reach a definitive holding regarding the transferability of the insurers’ duty to defend under the policies. Id. at 134.
190. Id. at 131.
191. Id.
insurance rights by operation of law would undercut the freedom of parties to contract as they please. Reversing the Court of Appeals, the Ohio Supreme Court reiterated the reasoning set forth in Pilkington and held that rights to insurance coverage do not follow the transfer of liabilities by operation of law.193

B. ELLIOTT

In another recent Ohio decision, Elliott Co. v. Liberty Mut. Ins. Co., the district court for the Northern District of Ohio framed the question before it as follows: “[T]he specific issue in this case [is] whether coverage can pass by operation of law where liability was assumed by contract.”195

Specifically, the facts in Elliott were described by the court as follows: In 1957, the original Elliott Company and Carrier Corporation (“Carrier”) merged and Elliott Company was dissolved and operated thereafter as a division of Carrier (“Elliott Division”).196 For the next six years, the defendant insurer issued policies that insured Carrier and “The Elliott Company, A Division of Carrier Corporation.”197 In 1979, United Technologies Corporation (“UTC”) acquired Carrier, and the Elliott Division continued to operate as a division of Carrier.198

In 1981, UTC incorporated Elliott Turbomachinery Company, Inc. (“Elliott Turbo”), and UTC, Carrier, and Elliott Turbo entered into an “Agreement and Plan of Reorganization and Corporate Separation” (“Separation Agreement”).199 Under the Separation Agreement, the parties agreed to transfer all of the assets and liabilities of the Elliott Division to Elliott Turbo.200 In the Elliott action, Elliott Turbo contends that, pursuant to the Separation Agreement, it also had transferred to it the insurance

193. Id. Based on the specific facts presented, the court further rejected Glidden’s arguments that rights to coverage were expressly transferred by the terms of the corporate transactional documents at issue, that the insurers were collaterally estopped from raising certain defenses to coverage, and that the insurers’ “corporate history” defense was barred by waiver and/or equitable estoppel. Id. at 115-116.


195. Id. at 495.

196. Id. at 486.

197. Id.

198. Id.

199. Id.

200. Id.
rights under the 1957-63 Carrier policies. However, the exhibit to the Separation Agreement that is identified therein as listing the specific assets transferred to Elliott Turbo has been lost and, as a result, the insurer argues that Elliott Turbo cannot establish that the insurance rights were transferred to it by contract.

When plaintiff Elliott Co. sought coverage under the Carrier policies for asbestos claims arising from the pre-transfer alleged conduct of the Elliott Division and Elliott Turbo, the insurer argued that, among other things, the anti-assignment conditions in its policies barred the assignment of coverage for such claims. Disagreeing with the insurer’s position, the court noted that the “vast majority of courts, including courts in Ohio, Pennsylvania, Connecticut, New York and Delaware, hold that no-assignment clauses do not prevent the voluntary assignment of coverage rights under occurrence-based policies for claims related to preassignment occurrences.” Following such courts and rejecting the conflicting view espoused in Henkel, the court concluded that “no-assignment clauses do not preclude the assignment of coverage for preassignment occurrences.”

Having found that the insurers’ anti-assignment conditions did not apply, the court then addressed whether the parties intended in the relevant transactional agreements to transfer to plaintiff the rights to the coverage at issue. The court initially found that the parties did not intend to transfer rights under the Carrier policies to plaintiff under the 1981 Separation Agreement. In addition, the court held that the rights under the Carrier policies were not transferred to plaintiff by “operation of law” where the liabilities at issue had been transferred to plaintiff by contract. In so holding, the court stated that, “[i]f sophisticated parties to a corporate transaction do not intend for the entity acquiring liability to also succeed to coverage, there is no reason for the courts to rewrite their contracts.”

201. Id.
202. Id. at 491.
203. Id. at 486-87.
204. Id. at 490.
205. Id. at 491
206. Id. at 492. The court subsequently granted Elliott’s motion for reconsideration and held that whether rights to coverage under the Carrier policies were transferred under the 1981 Separation Agreement is an issue of disputed fact. Elliot Co. v. Liberty Mutual Co., 239 F.R.D. 4791, 481 (N.D. Ohio Aug. 8, 2006).
207. Elliot, 434 F.Supp. 2d at 496 (“When a successor entity acquires liability by contract, it is not entitled to coverage for that liability unless coverage was also acquired by contract.”).
208. Id. at 498.
C. Holloway

The Oregon Supreme Court adopted a different approach to the issue in Holloway v. Republic Indem. Co. of America.\(^\text{209}\) In Holloway, the insured sought coverage under a “Worker’s Compensation and Employers’ Liability Policy” for an injury claim brought by one of the insured’s employees.\(^\text{210}\) After the insurer denied coverage, the insured and claimant reached a settlement that stipulated to the entry of a judgment against the insured and to a covenant not to execute on that judgment against the insured for more than a fraction of the judgment.\(^\text{211}\) Under the settlement agreement and notwithstanding an anti-assignment condition in the policy, the insured also assigned her rights against the insurer for indemnity payments or any breach of the insurance contract to the claimant.\(^\text{212}\) The claimant then sought to recover from the insurer on the grounds that the anti-assignment condition was ambiguous and should be construed to not apply to losses that took place prior to the assignment.\(^\text{213}\)

Rejecting the validity of the assignment, the Oregon Supreme Court held that the anti-assignment condition in the policy did not distinguish between pre- and post-transfer losses: “Nothing in the [anti-assignment] clause suggests a limitation to pre-loss rights or duties or provides an exception for post-loss rights or duties. Reading such an exception into the policy would not be reasonable and would ‘insert what has been omitted.’”\(^\text{214}\) Accordingly, the Oregon Supreme Court concluded that the anti-assignment clause in the employers’ liability policy at issue was unambiguous and precluded the insured’s assignment of rights.\(^\text{215}\)

VI. CONCLUSION

After successfully defeating their coverage obligations in Henkel, insurers have been more aggressively raising the anti-assignment condition to attack policyholders’ claims for insurance coverage for latent bodily

\(^{209}\) 147 P.3d 329 (Or. 2006).
\(^{210}\) Id. at 332.
\(^{211}\) Id.
\(^{212}\) Id.
\(^{213}\) Id. at 330.
\(^{214}\) Id. at 334 (quoting OR. REV. STAT. § 42.230).
\(^{215}\) Id. at 335 (“[T]he anti-assignment clause in question is not ambiguous … we conclude that that clause prohibited the assignment of rights from the insured to Holloway because the insured had not obtained [the insurer’s] written consent.”).
injury and property damage, such as environmental, asbestos and other delayed-manifestation claims. To counter these arguments by insurers, Successor Insureds may rely on decisional law holding that anti-assignment conditions do not preclude the transfer of insurance rights relating to bodily injury or property damage that took place prior to the transfer. These cases may successfully undermine insurers’ arguments, concluding that a policyholder may transfer to a third party its liability insurance rights without its insurers’ consent, whether the corporate transaction in which the insurance rights were transferred was a merger, stock sale, dissolution, or asset sale, even where the injury or damage at issue did not manifest until years after the transaction.