CORPORATE SUCCESSION AND INSURANCE RIGHTS AFTER *HENKEL*: A RETURN TO COMMON SENSE

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I. INTRODUCTION

The article analyzes the pivotal ruling of the Supreme Court of California in *Henkel Corp. v. Hartford Accident and Indemnity Co.*[1] in February 2003, deciding who obtains a corporation's liability insurance rights when it sells assets and liabilities to a third party. It examines the decisions of several courts reached after the *Henkel* ruling, including that of a splintered Ohio Supreme Court in December 2006, and seeks to correct the view, adopted by some courts, that *Henkel* departed from precedent. The article demonstrates that under basic contract, tort and property principles, the insurer's obligations to the insured cannot be assigned to others without its consent. Certain courts have nevertheless held such assignments permissible after an accident or occurrence takes place, because such rights then become a "chose in action."

As *Henkel* recognized and as other courts have held for centuries, a chose in action is a current right to payment of a sum of money, and is therefore a property right. Because it is a property right, the law disfavors restraints upon its alienation. For that reason, choses in action for moneys due are generally assignable. In the context of liability insurance, this exception means the insured can assign the right to collect proceeds once a judgment has been entered against it, but not before then. Decisions that have treated a chose in action as arising as soon as the accident or occurrence occurs confuse the issue of a chose in action with the issue of when liability insurance is "triggered." *Henkel* properly noted the distinction and gave effect to the contractual bar on assignment. The decision applied time-honored legal principles and provided clarity to corporations contemplating reorganization.

The basic holding of *Henkel* was this: If Newcomer Corporation buys some assets from Oldtimer Corporation, and contractually assumes some of Oldtimer's tort liabilities, but neither seeks nor receives an assignment of Oldtimer's insurance rights to cover those liabilities, and does not seek consent from Oldtimer's insurers for any assignment as the policies require to make any assignment valid, Newcomer does not succeed to Oldtimer's insurance rights by operation of law or otherwise. One might view that result as merely reflecting common sense. After all, Newcomer acquired tort liabilities by agreement, yet it had not sought or obtained an insurance

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

assignment by agreement. Why should a court step in and rearrange the parties' contractual arrangements by declaring that insurance rights had been transferred by operation of law?

Yet the reaction to the *Henkel* decision from the policyholder bar and, to some extent, the corporate bar, has been one of shock and dismay. Commentators have called the decision an "extreme departure," have described it as setting a "trap for the unwary," and have said it is the source of "much consternation."[2] The California high court, however, did not chart new territory in the law or engage in an act of legal whimsy; rather, the court rejected prior attempts by other courts to do so and based its decision on bedrock foundations of contract, tort and property law. With this common sense approach to determining how insurance rights are affected by corporate divestitures, the *Henkel* ruling gives effect to the parties' contracts, makes corporate transactions more predictable, reduces the chance of disputes and litigation among the parties down the road, and fosters the appropriate defense and handling of claims covered by insurance.

Moreover, understanding *Henkel* and the principles it relied upon has become even more important with the decision of a fractured Ohio Supreme Court in *Pilkington North America, Inc. v. Travelers Casualty and Surety Co.*[3] in December 2006, which followed *Henkel* in some respects and rejected it in others. The divergent opinions issued in *Pilkington*, as well as the varying approaches other courts have taken after *Henkel*, suggest there remains a good deal of confusion over the foundational principles at issue. This article will attempt to dispel any confusion by demonstrating that the distinction *Henkel* relied upon—the distinction between assignment of a contract right and alienation of a property right—is well recognized in the law, and by demonstrating that *Henkel* correctly acknowledged that a non-assignable insurance contract right becomes an alienable property right only when it matures into a claim for a sum of money. The clarity these principles provide should assist corporations, their insurers, and courts in analyzing the effect of past corporate transactions on insurance rights, as well as assist corporations that are planning a corporate restructuring.

II. THE *HENKEL* DECISION: ENFORCE THE CONTRACT

Given the ruckus generated by the policyholder bar, one would never suspect that *Henkel* was decided *in favor* of a policyholder. Yet it was. The

2. E.g., William G. Passannante, An Extreme Departure: California *Law Now Lets Insurers Pocket Premiums and Break Their Promises*, Legal Intelligencer, Mar. 17, 2004, at 5; Robert D. Chester & Michael L. Rodburg, *Traps Set for the Unwary: California Supreme Court Invalidates Policy Rights in Corporate Restructuring*, 19:1 Envtl. Compliance & Litig. Strategy, Mar. 2003, at 1.

3. 861 N.E.2d 121 (Ohio 2006).

California Supreme Court sided with policyholder Rhone-Poulenc, Inc., which was the successor-by-merger to Amchem Products, Inc., the insured under various policies issued by Hartford Accident and Indemnity Company and Insurance Company of North America, among other insurers. Together with Hartford and INA's successor, Century Indemnity Company, Rhone-Poulenc argued that another company, Henkel, had not succeeded to Amchem's insurance rights. Rhone-Poulenc and the insurers prevailed, but the victory in demonstrating that a stranger to an insurance policy could not claim to have rights under it was just as much the policyholder's as the insurers'.

A. *Amchem Products, Inc.'s Corporate History*

The basic facts behind the insurance dispute were fairly straightforward. Hartford and INA were alleged to have issued various policies to a company called Amchem Products, Inc. between 1959 and 1975.[4] As of 1977, Amchem was a Pennsylvania corporation and was a subsidiary of Union Carbide Corporation.[5] By 1979, Amchem had been named as a defendant in numerous asbestos suits, growing out of asbestos-containing products in a discontinued product line.[6] Amchem continued to make products that fell into two general categories: agricultural chemicals and metal-treating chemicals.[7] Union Carbide, Amchem's corporate parent, decided to split the two product lines into distinct corporate entities, with operations related to the metal-treating chemical products being transferred to a newly formed Delaware subsidiary of Amchem, and the agricultural products operations being retained by Amchem (along with the asbestos liability).[8] The effect of this structuring of assets and liabilities was to permit the sale of the metal-treating chemicals business free and clear of Amchem's asbestos liability, while Amchem kept the asbestos liability as well as its insurance coverage.[9]

4. Henkel Corp.'s Answer Brief on the Merits to the Opening Briefs on the Merits by Rhone-Poulenc, Inc., Hartford Accident and Indemnity, and Century Indemnity Co. at 8, Henkel Corp. v. Hartford Accident & Indem. Co., 62 P.3d 69 (Cal. 2003) (No. S098242), 2001 WL 1700665, at *13–14.

5. Joint Petitioners' Brief on the Merits at 1, Henkel Corp. v. Hartford Accident & Indem. Co., 62 P.3d 69 (Cal. 2003) (No. S098242), 2001 WL 1700667, at *9. Between 1965 and 1977, Amchem underwent various corporate reorganizations and ownerships, irrelevant to the issue of Henkel's claims, in the process changing its state of incorporation from Delaware to Pennsylvania. The parties to the case did not dispute that the "Amchem Products, Inc." entity allegedly insured by Hartford and INA was, by 1977, a Pennsylvania corporation and a subsidiary of Union Carbide. *Id.* at n.3.

6. Joint Petitioners' Brief, 2001 WL 1700667, at *8–9.

7. *Henkel*, 62 P.3d at 71.

8. Joint Petitioners' Brief, 2001 WL 1700667, at *9.

9. *Id.*

Accordingly, in March 1979, Amchem created a new subsidiary, incorporated in Delaware, also called Amchem Products, Inc. (for convenience referred to here as Amchem No. 2); it changed its own name to "Union Carbide Agricultural Products Co." (or UCAPCO) and continued in existence as a Pennsylvania corporation (Amchem No. 1).[10]

At the time of its creation, Amchem No. 2's board of directors passed a resolution accepting "the transfer, conveyance and assignment . . . of all the right, title and interest of [Amchem No. 1] in and to the domestic assets, liabilities and goodwill utilized in its metalworking chemical activities."[11] None of the documents executed to effectuate the transfer assigned Amchem No. 1's insurance policies to Amchem No. 2.[12]

Later in 1979 Union Carbide and Amchem No. 1 sold Amchem No. 2 to a subsidiary of a third party, Henkel Corporation, in a stock sale.[13] Henkel did not seek or obtain an assignment of Amchem No. 1's insurance policies, nor were Amchem No. 1's prior insurers asked to consent to any assignment.[14]

In the 1980s Union Carbide sold Amchem No. 1 in a stock sale to Rhone-Poulenc, and in 1992 Rhone-Poulenc and Amchem No. 1 merged.[15] Rhone-Poulenc thereby became the successor-by-merger to Amchem No. 1.[16] Henkel merged with Amchem No. 2 in 1988 and thereby became its successor-by-merger.[17]

Following these transactions, therefore, Henkel was the successor to a corporation formed in 1979, which itself had accepted only some assets, and only some related tort liability, from Amchem No. 1, but which was not in existence when Hartford and INA insured Amchem No. 1 and which did not obtain an assignment of Amchem No. 1's insurance policies.[18] On the other hand, Rhone-Poulenc was the corporate successor to Amchem No. 1.[19] It was undisputed that Rhone-Poulenc continued to be potentially liable for all tort liability not assumed by Amchem No. 2, including asbestos liability, and that as successor to Amchem No. 1 it was the "insured" under the policies issued by Hartford and INA.[20]

10. Henkel Corp.'s Answer Brief, 2001 WL 1700665, at *14.
11. *Henkel*, 62 P.3d at 71.
12. Joint Petitioners' Brief, 2001 WL 1700667, at *10.
13. *Henkel*, 62 P.3d at 72.
14. Joint Petitioners' Brief, 2001 WL 1700667, at *10.
15. *Henkel*, 62 P.3d at 72.
16. *Id.*
17. *Id.*
18. Joint Petitioners' Brief, 2001 WL 1700667, at *10.
19. *Id.*
20. *Id.*

B. *The Underlying Tort Claims Against Henkel*

Beginning in 1989, various suits were filed against Henkel alleging personal injury arising out of exposure to a particular product called "Alodine," a metal-treating chemical that it had manufactured since 1980.[21] Prior to 1979, Alodine had been manufactured by Amchem No. 1.[22] One of these suits involved dozens of plaintiffs who were employed at the Lockheed aircraft plant in Burbank, California.[23] Henkel sought coverage from its own insurers (under policies issued beginning in 1980) as well as from those that issued policies to Amchem No. 1 prior to the creation of Amchem No. 2.[24] Henkel filed a coverage action in state court in California.[25] In response to the suit, Hartford and Century, as successor to INA, asserted that Henkel was not their insured and did not obtain an assignment of Amchem No. 1's insurance policies; therefore, they asserted, they owed no coverage obligation to Henkel.[26]

C. *The Terms of the Insurance Policies*

The Hartford and INA policies contained the following provision prohibiting assignment of any interest under the policy without the insurer's consent: "Assignment of interest under this policy shall not bind the [insurer] until its consent is endorsed hereon."[27] The policies also contained definitions of "Persons Insured" or "named insured," which do not include entities that purchase assets or assume liability from the policyholder.[28]

D. *The Coverage Litigation*

After Henkel filed suit, the insurers contacted Rhone-Poulenc and asked for its position as to whether Henkel was entitled to coverage under Amchem No. 1's policies. Rhone-Poulenc objected to any payment to Henkel.[29] The insurers, put in the position of having to respond to competing claims to entitlement to Amchem's policies, asked the court to join Rhone-Poulenc as a necessary party, which the court did.[30]

Henkel argued in the trial court that it was the product-line successor to Amchem No. 1's liability and that, under *Northern Insurance Co. of New York v. Allied Mutual Insurance Co.*,[31] it should succeed to Amchem No. 1's

21. Henkel Corp. v. Hartford Accident & Indem. Co., 62 P.3d 69, 72 (Cal. 2003).
22. Joint Petitioners' Brief, 2001 WL 1700667, at *11.
23. *Henkel*, 62 P.3d at 72.
24. *Id.*
25. *Id.*
26. Joint Petitioners' Brief, 2001 WL 1700667, at *13.
27. *Id.* at *12.
28. *Id.*
29. *Id.*
30. *Id.*
31. 955 F.2d 1353 (9th Cir. 1992).

insurance rights "by operation of law."[32] Henkel did not argue that it was the corporate successor to Amchem No. 1, nor that it had sought or received an assignment of Amchem No. 1's insurance policies; it relied solely on its product-line succession argument.[33] Rhone-Poulenc and the insurers pointed out, however, that Henkel clearly was not a product-line successor to Amchem No. 1 under *Ray v. Alad Corp.*,[34] the seminal California decision defining under what circumstances the purchaser of assets would be held to have succeeded to a predecessor's product liability, notwithstanding its refusal to assume that liability contractually.[35] Henkel was not a product-line successor, they argued, because Henkel had expressly assumed the metal-treating chemicals product liability and therefore had not acquired it by operation of law under *Ray v. Alad Corp.*[36] Moreover, Henkel had acquired only some, not all, of the predecessor's assets, and the predecessor had not gone out of existence but continued to be potentially answerable to claimants.[37] Therefore, the *Ray v. Alad Corp.* factors clearly were not present.[38]

In addition, Rhone-Poulenc and the insurers demonstrated that the issue of whether Henkel was a product-line successor of Amchem No. 1 was irrelevant: California law, as laid out in cases decided since *Northern Insurance*, expressly rejected *Northern Insurance* and its proposition that insurance coverage could be transferred by operation of law, even if underlying tort liability could be.[39]

The trial court granted summary adjudication to the insurers and Rhone-Poulenc and dismissed Henkel's claims.[40] It found that Henkel was not a product-line successor to Amchem No. 1 and had not received any assignment of its insurance policies.[41] Therefore, Henkel was not entitled to coverage.[42]

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32. Joint Petitioners' Brief, 2001 WL 1700667, at *13. In *Northern Insurance*, applying California and Washington law, the court had held that a product-line successor *was* entitled to the predecessor's insurance coverage by operation of law. There, all of the policyholder's assets had been sold to a new entity, and the policyholder ceased operations—a predicate for finding product-line successor liability under *Ray v. Alad Corp.*, 560 P.2d 3 (Cal. 1977). *Northern Ins.*, 955 F.2d at 1357. Although the court found that an insurance policy did not transfer to the buyer by contract (because the asset sale excluded contracts for which assignment required consent), it held that coverage for the buyer's potential liability transferred by operation of law. *Id.* The court affirmed the district court's ruling that coverage "followed the liability." *Id.*
33. Henkel Corp. v. Hartford Accident & Indem. Co., 62 P.3d 69, 72 (Cal. 2003).
34. 560 P.2d 3 (Cal. 1977).
35. Joint Petitioners' Brief, 2001 WL 1700667, at *13.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. Henkel Corp. v. Hartford Accident & Indem. Co., 62 P.3d 69, 72–3 (Cal. 2003).
41. Joint Petitioners' Brief, 2001 WL 1700667, at *13–14.
42. *Id.* at *14.

On appeal by Henkel, the parties raised the same arguments as they raised in the trial court. The Court of Appeal reversed, adopting *Northern Insurance* and holding that insurance benefits follow liability by operation of law even when that liability is assumed contractually, not by operation of law, and even when the policyholder objects to that result.[43] Rhone-Poulenc and the insurers successfully sought review in the California Supreme Court.[44]

E. *The California Supreme Court's Opinion*

The Supreme Court of California reversed the intermediate court and reinstated the judgment of the trial court. Its analysis proceeded with straightforward logic. First, in the course of tracing the corporate histories, the court noted that the resolutions of the boards of directors of Amchem No. 1 and Amchem No. 2, under which the assets of Amchem No. 1 relating to metal-treating chemicals were transferred to Amchem No. 2 and the related liabilities were assumed, constituted a contract.[45] Henkel was not otherwise a corporate successor to Amchem No. 1, nor had it succeeded to Amchem No. 1's product liability under the product-line successor liability theory of *Ray v. Alad Corp.*[46] Thus, Amchem No. 2's assumption of tort liabilities (and Henkel's, as its successor) occurred because of contract, not by operation of law.[47]

Second, because Henkel had voluntarily assumed tort liability by contract, any rights it might claim to Amchem No. 1's insurance policy benefits "depend on the terms of the 1979 contract by which Amchem No. 2 acquired the assets of Amchem No. 1," and also were not transferred by operation of law.[48] In reaching this holding, the court cited with approval two prior intermediate appellate decisions, *Quemetco, Inc. v. Pacific Auto. Ins. Co.*[49] and *General Accident Ins. Co. v. Superior Court*,[50] that had rejected *Northern Insurance*.[51] The court rejected Henkel's suggestion that *Quemetco* and *General Accident* were wrongly decided, saying, "We perceive no conflict, however, in authority or principle over the rule that when liability is assumed by contract, the successor's rights are defined and limited by the contract."[52] Finding no provision in the contract that would

43. *Henkel*, 62 P.3d at 73.
44. *Id.*
45. *Id.* at 71.
46. *Id.* at 73–74.
47. *Id.* at 74.
48. *Id.*
49. 29 Cal. Rptr. 2d 627 (Ct. App. 1994).
50. 64 Cal. Rptr. 2d 781 (Ct. App. 1997).
51. Henkel Corp. v. Hartford Accident & Indem. Co., 62 P.3d 69, 74 (Cal. 2003).
52. *Id.*

assign Amchem No. 1's insurance rights, the court held that Henkel did not receive any.

Finally, the court held that even if Amchem No. 1 had assigned insurance rights to Henkel, any such assignment would have been invalid without the consent of the insurers, which was not given.[53] The court turned aside Henkel's argument that consent was not required once the "event giving rise to liability has occurred." In doing so, the court noted that clauses restricting assignment of insurance rights "are generally valid and enforceable."[54] It distinguished decisions that had permitted assignment of insurance proceeds after a loss had occurred as being premised not on an assignment of a contract right, but on assignment of a "chose in action," that is, a right to receive a fixed sum of money. Those cases did not apply here, the court reasoned, because as of the 1979 contract transferring Amchem No. 1's metal-treating assets and liabilities, Amchem No. 1 did not have a right to receive a fixed sum from the insurers. Indeed, the underlying claims for which Henkel would seek coverage would not be asserted for another ten years. "Those claims had not been reduced to a sum of money due or to become due under the policy."[55]

Similarly, the insurers had not breached the duty to defend or the duty to indemnify, and Amchem No. 1 could not have assigned any cause of action for that breach.[56] And even assuming enforcement of a clause restricting assignment requires a showing of increased burden or risk on the insurer, the court said, that increased risk exists whenever the predecessor remains in existence or could be revived and therefore could compete with the successor for coverage.[57] That risk was present here because both Amchem No. 1 and Henkel could claim the right to a defense, doubling the insurer's defense obligation, and could dispute their respective rights under the policies, creating additional burdens that the insurers justifiably could decline.[58]

F. *The Dissent*

One justice dissented from the *Henkel* opinion, asserting that the majority opinion "narrows" settled law on when non-assignable insurance rights become an assignable chose in action, and arguing that an assignable chose in action arose whenever injury occurred during the policy period, in essence

53. *Id.* at 74–75.
54. *Id.*
55. *Id.* at 75.
56. *Id.*
57. *Id.*
58. *Id.*

whenever a liability policy was triggered.[59] Relying on *Montrose Chemical Corp. v. Admiral Insurance Co.*,[60] the dissent posited:

> After coverage is triggered, the insurer owes a duty of defense and indemnification under the policy upon the assertion of such claims. It does not matter whether or not the claims are actually asserted during the policy period. So long as the injury-causing event has occurred during the policy period, coverage is triggered, and a loss has occurred.[61]

In the dissent's view, if such a "loss" occurred during the policy period, an assignable chose in action also arose. Furthermore, the dissent argued, permitting such assignment notwithstanding the policies' consent-to-assignment clause would not increase the insurers' risk, because the nature of the original insured's risk would still be the subject of a tort suit defense, and any failure of the new insured to fulfill its duty of cooperation would nullify the defense obligation.[62] Finally, the dissent disagreed with the majority's view that permitting assignment without consent when the predecessor survives or can be revived would increase the insurer's defense burden, because "the insurer's legal obligation would run only to the successor."[63]

III. Reaction to *Henkel*: Policyholder Lawyers Decry Its Holding, but Most Courts Follow It

A. *Policyholder Commentary*

As noted above, most of the commentary regarding the *Henkel* decision has come from the policyholder bar and has been critical, notwithstanding that the decision favored the undisputed policyholder in that case and denied coverage to an entity that clearly had not sought or received an insurance assignment from the policyholder. One author chastised the California Supreme Court, calling *Henkel* an "extreme decision" and saying "courts have no business acting as after-the-fact underwriters, especially when they let insurance companies break their promises."[64] Another commentary used similarly harsh words, saying, "On balance, the decision is an unnecessary intrusion into a common form of corporate restructuring that serves only to defeat the reasonable expectations of insureds and to reward insurers for nothing more than standing by while the unwary practitioner falls prey to

59. *Id.* at 77–78.
60. 913 P.2d 878 (Cal. 1995).
61. Henkel Corp. v. Hartford Accident & Indem. Co., 62 P.3d 69, 78 (Cal. 2003).
62. *Id*. at 79 (quoting *Northern Insurance*, 955 F.2d at 1358).
63. *Id.*
64. William G. Passannante, *An Extreme Departure: California Law Now Lets Insurers Pocket Premiums and Break their Promises*, Legal Intelligencer, Mar. 17, 2004, at 5.

the trap set by the California Supreme Court."[65] One article asserted that *Henkel* had caused "much consternation among policyholders" and that the opinion "adopt[ed] a strict contract-based approach rather than analyzing equitable factors and the purposes of the non-assignment clauses."[66] Although each of these commentaries raises a variety of criticisms, they and the dissent in *Henkel* all have in common a criticism that the *Henkel* opinion departed from established law by refusing to permit an assignment of insurance rights, without consent from the insurer, after a "loss" has occurred, because such an assignment purportedly does not increase the insurer's risk.[67]

B. *Court Decisions*

By contrast, since *Henkel* was decided, most of the court decisions that have considered issues of corporate succession to insurance rights have followed *Henkel*, in one way or another. The Second Circuit acknowledged that under New York law a policy's restriction on assignment could validly prevent an insured from assigning the policy without insurer consent, even after a loss-producing event has occurred, where the "loss" (there, lost business income) was uncertain at the time of the assignment.[68] Citing *Henkel*, the court said, "The suggestion is that the accrual of an insurance claim extinguishes the insurer's interest in the risk profile of the insured, thereby converting the claim into, in effect, a chose in action."[69] As other New York decisions had held, however, "the accrual of an insurance claim" that is assignable is not necessarily simultaneous with the event triggering coverage: business interruption claims, for example, which seek recovery for lost income that results *after* an event (such as a fire) physically damages the insured's property, are more uncertain and speculative, are difficult to substantiate and are more risky to the insurer than claims for property

65. Robert D. Chesler & Michael L. Rodburg, *Traps Set for the Unwary: California Supreme Court Invalidates Policy Rights in Corporate Restructuring*, 19 No. 10 Envtl. Compliance & Litig. Strategy 1, March 2003.

66. Patricia A. Bronte & Jennifer A. Burke, *Inheriting Insurance Coverage for Successor Liabilities*, Mealey's Litig. Rep: Ins., Jan. 25, 2005, at 22, 24. A law review article regarding *Henkel* was more even-handed, discussing the reasoning of the court's opinion and those cases that have followed it. Gregory J. May, *Successors' Rights to Insurance Coverage for Predecessors' Preacquisition Activities: Recent Developments*, 40 Tort Trial & Ins. Prac. L.J. 911 (2005).

67. A law review discussion of recent developments similarly asserted that "*Henkel* departs from the majority rule that the right to recover for pretransaction liabilities may be freely assigned without the insurer's consent, notwithstanding the non-assignment policy language." John Dexter Marble et al., *Recent Developments in Insurance Coverage Litigation*, 39 Tort Trial & Ins. Prac. L.J. 493, 499 (2004).

68. Globecon Group, LLC v. Hartford Fire Ins. Co., 434 F.3d 165 (2d Cir. 2006).

69. *Id.* at 171.

damage that has already occurred.[70] The court remanded the case for a factual determination of whether a claim had actually been presented to the insurer prior to the assignment, before considering whether a claim could be assigned in the absence of such presentment.[71] *Globecon* thus recognized and followed the basic rule reiterated in *Henkel*, which is that consent-to-assignment clauses are valid and enforceable, but when the insurer's obligation matures into an obligation to pay a fixed sum—i.e., becomes a chose in action or debt—the chose in action is separate from an obligation under the contract and is assignable.

In *Century Indemnity Co. v. Aero-Motive Co.*,[72] a case more factually on-point with *Henkel*, a federal court in Michigan explicitly rejected *Northern Insurance* and its theory permitting the transfer of insurance rights by operation of law, and instead followed *Henkel.* There, a company called Aero-Motive Co. (Aero I) in 1972 sold all of its assets to a subsidiary of another company, which changed its name to "Aero-Motive Manufacturing Co." (Aero II). The asset purchase agreement assigned certain policies then in force to Aero II. In the 1990s, Aero II discovered contamination at its manufacturing site, which had migrated offsite a mile away. Aero II undertook remediation efforts and sought recovery from the owners of Aero I. Aero I and its owners in turn sought coverage from their insurers. Then, Aero II, Aero I and Aero I's owners settled Aero II's contribution claims, without the consent of the insurers, and filed a consent judgment, which set Aero I's liability at $5 million but required all but $100,000 of that amount to be recovered from Aero I's insurers. Aero I's insurers then filed the coverage litigation to determine their obligations. In the coverage suit, Aero II asserted it was an insured under Aero I's policies, including policies not specifically assigned to it, claiming succession "by operation of law" and relying on *Northern Insurance.* Predicting Michigan law, the court declined to follow *Northern Insurance.* Rather it agreed with *General Accident Ins. Co. v. Superior Court*,[73] which was cited with approval in *Henkel*, that "the relationship between an insurer and an insured is determined under contract principles rather than upon public policy."[74] Accordingly, it held that Aero II had not succeeded to Aero I's insurance rights. In addition, following *Henkel*, the court concluded that Aero's argument that it did not need consent from the insurers for an assignment was misplaced,

70. *Id.* (citing Holt v. Fidelity Phoenix Fire Ins. Co., 76 N.Y.S.2d 398 (App. Div.), *aff'd*, 80 N.E.2d 364 (N.Y. 1948); Bronx Entm't LLC v. St. Paul Mercury Ins. Co., 265 F. Supp. 2d 359 (S.D.N.Y. 2003); S.R. Int'l Bus. Ins. Co. v. World Trade Ctr. Props., 375 F. Supp. 2d 238, 249 (S.D.N.Y. 2005)).

71. *Globecon*, 434 F.3d at 175.

72. 318 F. Supp. 2d 530 (W.D. Mich. 2003).

73. 64 Cal. Rptr. 2d 781 (Ct. App. 1997).

74. *Aero-Motive*, 318 F. Supp. 2d at 539.

because "Aero I did not have a claim or accrued cause of action under the policies to assign to Aero II" at the time of the corporate transaction, as "the damages associated with the environmental cleanup were not assessed until almost two decades after the 1972 asset sale."[75] Further, the court agreed with *Henkel* that any assignment prior to the insurance claim's becoming a chose in action necessarily increased the insurer's risk by requiring the insurer to defend at least two entities instead of one.[76] In a *per curiam* unpublished opinion, the Sixth Circuit affirmed the district court's opinion, stating "the district court exhaustively analyzed and considered all the issues before it, and correctly applied the complex legal principles to the facts."[77]

Henkel also was embraced by a federal court in Ohio dealing with corporate succession and asbestos-related claims.[78] At issue were the corporate liabilities for Elliott Company, which was a stand-alone corporation that merged with Carrier Corporation in 1957.[79] Carrier was later a subsidiary of United Technologies Corporation (UTC) and insured under its insurance program beginning in 1979.[80] A new subsidiary of Carrier was incorporated in 1981, called Elliott Turbo, into which were transferred the assets and liabilities of the Elliott Co. division of Carrier.[81] Elliott Turbo, as a subsidiary of Carrier and an indirect subsidiary of UTC, continued to be insured under UTC's policies, until it was sold in 1987 to a group of outside investors.[82] As part of that sale, certain Liberty policies issued to

75. *Id.* at 540.

76. *Id.*

77. Century Indemnity Co. v. Aero-Motive Co., 155 Fed. Appx. 833, 835 (6th Cir. 2005). One of the articles criticizing *Henkel* asserts that the court in *Aero-Motive* later "reversed itself on reconsideration," citing an unpublished March 12, 2004 order. Bronte & Burke, *supra* note 66, at 25. The reconsideration order in fact addressed only two policies that covered the policy period when the corporate transaction took place and that were specifically assigned to the new corporate entity as part of the transaction. *Aero-Motive*, No. 1:02-CV-108, slip op. at 1 (Mar. 12, 2004). The court did not hold that the policies were effectively assigned without insurer consent, however, but ruled that there was an issue of fact as to whether Aero I had an assignable cause of action to assign to Aero II because contamination had already occurred. *Id.* at 3. Indeed, the ruling on reconsideration left undisturbed the court's adoption of *Henkel* with respect to many other policies issued to Aero I that were not assigned in the corporate transaction, but under which Aero II sought coverage. To say that the court "reversed itself" is therefore an overstatement. In any event, even as to the two policies that were the subject of the ruling, the ruling ended up being moot, because the court later held that the policyholder, Aero I, had voided coverage by breaching its duty of cooperation by settling without the insurers' consent, which also voided rights for any putative successor. Century Indemnity Co. v. Aero-Motive Co., 379 F. Supp. 2d 879, 884 (W.D. Mich. 2004).

78. Elliott Co. v. Liberty Mut. Ins. Co., 434 F. Supp. 2d 483 (N.D. Ohio 2006), *reconsideration granted on other grounds*, 239 F.R.D. 479 (N.D. Ohio 2006).

79. *Id.* at 486.

80. *Id.*

81. *Id.*

82. *Id.* at 487.

UTC were listed as being in effect, but sale documents stated that Elliott's "interest . . . as a named insured under or beneficiary of any of such polices shall terminate on the Closing Date except insofar as coverage relates to events, occurrences or losses sustained prior to the Closing Date which are covered by such policies."[83] Elliott claimed this constituted an assignment; but, it claimed, in any event it was entitled to coverage under Liberty's policies by operation of law. Liberty said that the language did not effect an assignment and that any assignment was without its consent and invalid.

Predicting Ohio law, the court agreed with *Henkel* and held that insurance coverage cannot transfer by operation of law.[84] The court rejected an Ohio intermediate appellate decision embracing the "by operation of law" theory in *Glidden Co. v. Lumbermens Mutual Insurance Co.*,[85] but which at that time had been accepted for review by the Ohio Supreme Court.[86] Instead, the court believed that the Ohio Supreme Court would agree with the dissent in the *Glidden* case and hold that "the *Northern Insurance* line of cases is too weak a foundation upon which to build a far-reaching blanket rule that coverage always follows liability, even when the parties to the corporate agreement chose not to assign coverage."[87] As for policies that the policyholder had assigned in a corporate transaction, however, the court ruled that the law in potentially applicable jurisdictions of Ohio, Pennsylvania, Connecticut, New York, and Delaware disagreed with *Henkel* that such assignments required the insurer's consent. The court believed that assignment of coverage rights under a liability policy after the event giving rise to liability had occurred was the equivalent of the assignment of a chose in action, which did not require insurer consent.[88] Thus, the court held that where the parties actually assigned policies, the assignment did not require the insurers' consent, but that where the parties had not assigned policies, rights under the policies would not be transferred by operation of law.

In an unpublished decision a federal court in Florida rejected *Northern Insurance* and found "more persuasive" the cases *Henkel* relied upon, *General Accident* and *Quemetco*, but did not cite or discuss *Henkel* itself.[89]

83. *Id.*
84. *Id.* at 496–97.
85. No. 81782, 2004 WL 2931019 (Ohio Ct. App. Dec. 17. 2004), *rev'd*, 861 N.E.2d 109 (Ohio 2006).
86. Elliott Co. v. Liberty Mut. Ins. Co., 434 F. Supp. 2d 483, 496 (N.D. Ohio 2006).
87. *Id.* at 497.
88. *Id.* at 491.
89. Atlanta Gas Light Co. v. UGI Utilities, Inc., No. 3:03-cv-614-J-20MMH (M.D. Fla. Mar. 22, 2005).

In that case, Atlanta Gas Light claimed to have rights under policies issued to alleged predecessors, but some of the corporate transactions involved statutory mergers, and some involved asset sales. As for the transactions involving asset sales, the court held, under Florida law, that the insurance policies did not transfer by operation of law, citing *General Accident*, *Quemetco*, and *Aero-Motive*.[90] As for the transactions involving statutory merger, the court found that Atlanta Gas Light succeeded to its predecessor's rights to coverage.[91]

The only appellate decision to have considered and rejected *Henkel* outright since its issuance was that of the Ohio intermediate court in *Glidden Co. v. Lumbermens Mutual Insurance Co.*,[92] and that decision was subsequently reversed by the Ohio Supreme Court. In that case, the policyholder, SCM Corp., had bought and merged with the original "The Glidden Company" (Glidden I) in 1967. Glidden I had made lead pigment or paints containing lead pigment. In 1986, SCM, a conglomerate that operated many businesses and made many products, including specialty chemicals, paint, and typewriters, sought to break itself into pieces and sell many of them off. It accomplished this break-up by distributing specific business assets to its twenty corporate shareholders, who were in turn owned by a single British company, in redemption of its stock. Afterward, each of the twenty companies would own specific assets associated with an SCM business instead of stock in SCM itself. The twenty companies were called "fan" companies, probably because a diagram of SCM's ownership structure looked like the splay of a fan.

In one such transaction with a fan company shareholder called HSCM-6, Inc., SCM distributed its assets used in its "Glidden Paints" division to HSCM-6, but specifically excluded all insurance policies from the transfer. HSCM-6 also assumed related liabilities. HSCM-6 then changed its name to The Glidden Co. ("Glidden II"). Later, the British parent company sold Glidden II/HSCM-6 to another company, ICI American Holdings, Inc. The contract for that sale also excluded SCM's insurance policies from the transfer. In subsequent transactions yet another "Glidden" company was formed ("Glidden III"), which received Glidden II's assets and assumed its liabilities. SCM continued in existence, through its successor-by-merger, Millennium Holdings, LLC.

Subsequently, personal injury lawsuits arising out of paint containing lead pigment named SCM, Glidden III, or both. SCM, through its successor, Millennium Holdings, and Glidden III each sought coverage from

90. *Id.*, slip op. at 35.
91. *Id.*, slip op. at 36–37.
92. No. 81782, 2004 WL 2931019 (Ohio Ct. App. Dec. 17. 2004), *rev'd*, 861 N.E.2d 109 (Ohio 2006).

SCM's insurers for the lead paint claims. The insurers acknowledged that Millennium Holdings was the successor to SCM; they denied that Glidden III was an insured, in light of the express exclusion of SCM's policies in the transfer of assets to Glidden II, and because they had not given consent for any assignment of SCM's policies.

In a declaratory judgment action, the trial court agreed with the insurers and granted summary judgment that Glidden III was not an insured. On appeal, the intermediate appellate court reversed, in a 2–1 decision. Despite a side letter agreement under which the ultimate parent company of SCM purported to give ICI and its subsidiaries "the benefit of any policy of insurance,"[93] the court ruled that the parent company had no right to transfer rights under a subsidiary's policies, and the subsidiary was not a party to that side letter agreement.[94] The policyholder (SCM) had instead manifested a clear intent *not* to transfer its policies in the purchase agreement.[95]

Notwithstanding this conclusion, the court went on to hold that SCM's rights to coverage transferred to Glidden III by operation of law. In analyzing the issue, the court first asserted that there was no need for a choice of law determination, despite the insurers' position that most of the policies were controlled by New York law and that New York appellate authority rejected transferring insurance rights by operation of law.[96] The Ohio court found the New York appellate decision "not conclusive authority" and determined it could proceed under Ohio law, where the issue had not yet been addressed.[97] The court then asserted there was "limited" authority from other jurisdictions, including *Henkel* and *Northern Insurance*.[98] The court relied on the dissent in *Henkel* and the dissent in another California appellate case to conclude that the "better-reasoned authority" supported transfer of insurance rights by operation of law.[99] The court did not analyze why a transfer by operation of law was appropriate when the liabilities themselves had not been transferred by operation of law (the premise of *Northern Insurance's* holding) and when the policyholder had explicitly withheld its insurance policies from the transfer of assets (a holding that the court itself affirmed). The court also held that the theory transferring rights by operation of law "applies even where the acquisition was a purchase of assets or only part of a predecessor corporation,"[100] even though

93. *Id.* at *2.
94. *Id.* at *6.
95. *Id.*
96. *Id.* at *7 (citing EM Indus., Inc. v. Birmingham Fire Ins. Co., 529 N.Y.S.2d 121 (App. Div. 1988)).
97. 2004 WL 2931019, at *7.
98. *Id.*
99. *Id.* at *9.
100. *Id.*

Northern Insurance's holding applied only where the all of the assets of the predecessor corporation were transferred and it was defunct.

The dissent in *Glidden* agreed with the trial court, *Henkel* and *Aero-Motive* that insurance rights are contractual and cannot be transferred by operation of law. "Glidden III was neither a named insured under the various policies nor a valid assignee. It cannot now assume either status merely because it succeeded to the assets of a predecessor corporation that held that status."[101]

The Ohio Supreme Court accepted discretionary review and reversed, relying on its holdings in a companion case, *Pilkington North America, Inc. v. Travelers Casualty and Surety Co.*,[102] discussed below. In short, the court held that there was no contractual assignment of SCM's insurance rights to Glidden III, and Glidden III did not obtain SCM's insurance rights by operation of law because it did not obtain SCM liabilities by operation of law.[103]

The Ohio Supreme Court's full analysis of the corporate succession issue was contained in *Glidden's* companion case, *Pilkington*. In that case, the court was asked by a federal district court to answer three certified questions:

1. Whether Pilkington's demand for defense and indemnification from insurers, on the facts of the case, constituted a "chose in action," as defined under Ohio law.
2. Whether the anti-assignment clause contained in the insurance policies at issue barred acquisition by Pilkington of such a chose in action.
3. Whether insurance benefits conveyed to Pilkington by operation of law along with transferred liabilities.[104]

In brief, the court answered as follows:

1. A claim for defense and indemnification under an occurrence-based policy is a chose in action as soon as the "covered loss" occurs.
2. The anti-assignment clause does not bar assignment of a chose in action for the duty to indemnify if the assignment is made after the covered loss occurs; no ruling was made with respect to whether the clause bars assignment of the duty to defend.
3. Coverage does not arise by operation of law when the liability was assumed by contract.[105]

Although a single majority opinion was issued, different justices joined in different answers to the certified questions, with no answer receiving

101. *Id.* at *14.
102. 861 N.E.2d 121 (Ohio 2006).
103. Glidden Co. v. Lumbermens Mut. Ins. Co., 861 N.E.2d 109, 117 (Ohio 2006).
104. *Pilkington*, 861 N.E.2d at 123.
105. *Id.*

more than four (out of seven) votes. As for the answer to Question 3, only the author of the majority opinion, Justice O'Connor, and Chief Justice Moyer concurred in the opinion, while three other justices concurred only in the answer (those justices would have gone further and held that insurance rights are contractual and never transfer by operation of law). In addition, as for the answer to Question 2, Justice O'Connor and Chief Justice Moyer penned a separate statement of their views regarding whether a claim for an insurer's *duty to defend* could be transferred as a chose in action. Two justices concurred in the opinion as to Questions 1 and 2 but dissented as to Question 3.

The remarkable division among the justices may be expressed more simply: Three justices would follow *Henkel* and hold that insurance rights are contractual and cannot be transferred by operation of law, and that they cannot be assigned without consent of the insurers, either, as they are not a chose in action for money due. At the other end of the spectrum, two justices would reject *Henkel* and adopt *Northern Insurance*, allowing liability insurance rights to "follow the liability" whether or not they have matured into a chose in action. And in the middle, two justices would hold that the right to indemnity, but not defense, is a chose in action that is assignable by the insured once the "covered loss" occurs; but if liability is assumed by contract, insurance does not convey by operation of law.

On Question 1, the majority viewed the issue as determining when a chose in action is "an enforceable right," and noted that an unpublished Ohio intermediate appellate decision had "characterized a decedent's claim against his insurer for insurance proceeds as a 'chose in action.'"[106] That case involved first-party property insurance, however, and the issue was whether the right to recover the money due under the policy, which was owing because the covered damage had already occurred, was personalty, which, unlike real property, passes to the executor of an estate.[107] The appellate court had held that the claim for proceeds was a chose in action and therefore "personalty," that is, a personal property right.[108] There appeared to be no issue as to when the chose in action arose. Nevertheless, the supreme court relied on the case to hold that a chose in action arises "when a covered loss occurs." Later in the opinion, the majority also confused the issue of trigger with the issue of when an assignable chose in action arises, like the dissent in *Henkel*, saying, "Our precedent has consistently

106. *Id.* at 125 (citing *In re* Estate of Ray, No. WD-02–049, 2003 WL 1904412 (Ohio Ct. App. Apr. 18, 2003)).
107. *Id.*
108. *Id.*

recognized that the insurer's coverage obligation in an occurrence policy arises at the time of the occurrence."[109]

On Question 2, whether any chose in action for defense or indemnity could be assigned despite the consent-to-assignment clause, the majority first noted that Ohio law seemed to support the insurers' position that the consent-to-assignment clause was enforceable.[110] Despite that, and despite acknowledging that "[i]t would seem that the analysis should end at this point under the plain-language approach" of Ohio precedent, the court declared that "[i]nsurance contracts receive unique treatment post-loss, however," and "the assignment of an interest is valid *after* the occurrence of the loss insured against, and the assignment is then regarded as a transfer of the chose in action. . . ."[111] In addition, the opinion emphasized the distinction between the duty to defend and the duty to indemnify, and noted that "The duty to defend can be the most important coverage of a commercial general liability policy. . . ."[112] Yet the opinion reached no holding on whether the duty to defend can be assigned as a chose in action, limiting its reach to the duty to indemnify.[113]

Finally, on Question 3, the court declined to follow the "follow the liability"/by operation of law theory of *Northern Insurance*, noting that Ohio has not adopted the underlying tort theory that would permit tort liabilities to transfer by operation of law to a company that purchases product-line assets.[114] Given that Pilkington was not alleged to have succeeded to liabilities by operation of law, the court declined to reach the question of whether coverage follows by operation of law.[115] Instead, the court held that since Pilkington assumed liabilities by contract, it did not obtain insurance rights by operation of law.[116]

A plurality of three justices wrote forcefully to dissent from that part of the opinion that held that the duty to defend and the duty to indemnify arose at the time of "covered loss" and therefore constituted a chose in action. The plurality noted that the concept of a chose in action "is

109. *Id.* at 126 (citing Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co., 769 N.E.2d 835 (Ohio 2002)). *Goodyear* in fact did not hold that an "insurer's coverage obligation . . . arises at the time of the occurrence," nor did it even involve the question of trigger, but it addressed only issues of allocation among multiple policies assuming that all of the policies had been triggered. 769 N.E. 2d at 840 ("there is no dispute that there was continuous pollution across multiple policy periods that gave rise to occurrences and claims to which these policies apply. However, [the parties] disagree as to the appropriate method for distributing those losses across the triggered policies.").

110. *Id.* at 126–28.

111. *Id.* at 128.

112. *Id.* at 127.

113. *Id.* at 129.

114. *Id.* at 129–30.

115. *Id.* at 130.

116. *Id.* at 130–31.

misconstrued in the lead opinion when it tries to pinpoint when a chose in action becomes enforceable in the insurance context. A chose in action *is already* an accrued right, not a mere expectancy that later ripens or becomes enforceable."[117] The plurality disagreed that a chose in action arises when injury occurs during the policy period. "To determine whether Pilkington's demand constitutes a chose in action, I would instead ask if a sum is due or if the insurer has breached its obligation to the insured, applying the reasoning of [*Henkel*]."[118]

IV. CRITICS OF *HENKEL* RELY ON MISCONCEPTIONS OF ITS HOLDING AND OF BASIC PRINCIPLES OF LAW

As many critics of the *Henkel* ruling assert, several cases prior to *Henkel* had held that a policyholder *can* assign certain insurance rights without insurer consent, notwithstanding the consent-to-assignment clause. They criticize *Henkel* for failing to adhere to that precedent. The California Supreme Court itself discussed several of those cases in rendering its decision. How, then, was it able to reach a conclusion that insurer consent to assignment is indeed an enforceable term of an insurance policy, even where the event giving rise to liability—there, alleged bodily injury during the policy period—had occurred prior to the corporate transaction?

The answer lies in the fact that the court was careful to analyze and understand the root of the rule permitting assignment of the right to insurance proceeds, without insurer consent, after a "loss" has occurred; nearly all of the critics of *Henkel* fail to examine or understand that rule. The root of the rule is a fundamental distinction made in the law between contract and property. In essence, contracting parties generally may restrict assignment of the rights under their contract as they wish, but once a contract right becomes a right to receive a fixed sum of money, without more, the law regards it as something new, a *property* right, sometimes denominated a "chose in action." Since the law of property disfavors restraints on alienation of property, many courts have held that choses in action may be assigned even if the precursor contract right cannot be.[119]

117. *Id.* at 136.

118. *Id.* at 137. An unpublished Indiana trial court decision distinguished *Henkel* and followed *Northern Insurance* in permitting liability insurance to "follow the liability" in the context of liability for environmental remediation. P.R. Mallory & Co., Inc. v. Am. States Ins. Co., No. 54C01–0005-CP-00156, 2004 WL 1737489 (Ind. Cir. Ct. July 29, 2004). The court asserted that "the choses in action in *Henkel* had not occurred before the corporate transactions," whereas in the case before it "the 1969 fire occurred before the 1986 and 1988 corporate transactions." *Id.* at *8. It appears, however, that the court incorrectly characterized the occurrence of the 1969 fire as a "chose in action."

119. *See generally* 6 American Law of Property § 26.18 at 436 (A. James Casner, ed. 1952) (hereinafter "Casner") ("The rules governing restraints upon alienation apply to restraints

A. *A Chose in Action Is Property*

The law's treatment of a chose in action as a form of property is ancient. Blackstone classified personal property into two major groups: things "in possession," for which one had both the right and possession, and things "in action," for which one had the right but did not have possession, and over which one could not obtain possession and exercise dominion without bringing an action in court.[120] The prime example of a thing, or "chose,"[121] in action was money due on a bond.[122] There was no doubt that things in the possession of others to which one had the legal right were one's property; but because one cannot reduce them to possession without a judgment, they were property "in action" rather than "in possession."

Blackstone noted that "all property in action depends entirely on contracts, either express or implied; which are the only regular means of acquiring a chose in action."[123] For example, a creditor's chose in action for payment of a debt (a property right) was merely the flip side of the debtor's contractual obligation to make the payment, and without the contract, the creditor had no property right. Thus, choses in action, as property rights, were inextricably linked to contract rights. But not every contract right amounted to a chose in action. A right to payment contingent on a condition that had not occurred could not, of course, be enforced as if the condition had occurred. The contingent right to payment was a contract right, but since it had not matured into a right enforceable by a court, it was not a chose in action, a property right.[124]

B. *Choses in Action, as Property, Are Alienable, Even if Contract Rights Are Not*

As the law developed, this distinction between property and contract rights became important for the issue of assignment. At common law, choses in action were not assignable, even by agreement.[125] This may have been due in part to hostility to "maintenance," that is, the "assistance in prosecuting or defending a lawsuit given to a litigant by someone who has no bona

upon personal property. They apply, therefore, to restraints upon the transfer of choses in action when the restraint has been imposed after the creation of the chose.").

120. 2 William Blackstone, Commentaries *396–97.

121. "Chose" is Law French for "thing." It means "[a] thing, whether tangible or intangible; a personal article; a chattel." Black's Law Dictionary at 258 (8th ed. 2004).

122. Blackstone, *supra* note 120, at *397.

123. *Id.*

124. Blackstone illustrated this point with the example of an obligation under a bond: "Thus money due on a bond is a chose in action; for a property in the debt *vests at the time of forfeiture* mentioned in the obligation, but there is no possession till recovered by course of law." *Id.* (emphasis added).

125. *See* 29 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 74:2 at 208 (4th ed. 2003). *See generally* Walter W. Cook, *The Alienability of Choses in Action*, 29 Harv. L. Rev. 816 (1916).

fide interest in the case,"[126] or in part because "the relation between the original obligor and obligee was regarded as a vital part of the obligation that could no more be changed than any other term of the obligation."[127] Over time, however, the courts of equity began to enforce assignments of choses in action, and by the end of the eighteenth century courts of law began to do so, such that by the mid-twentieth century most courts of law fully protected such assignments.[128] On the other hand, the common law allowed contracting parties to restrict to whom their contract rights could be assigned.[129] Moreover, the law recognized that some contract rights are "personal," meaning they may be claimed only by a specific person, or depend on the repose of confidence in specific persons.[130] Rights under such personal contracts cannot be assigned without the consent of the obligee, even if the contracts themselves do not forbid assignment, because assignment would defeat the purpose of the contract.[131]

Thus, cases arose in which contracts that forbade assignment of any interest, or that required the personal performance of one of the parties, were no longer executory, and all that remained was the payment of a sum of money, the right to which one of the parties had assigned (usually to a creditor, as collateral or to satisfy a debt). These cases considered whether the right to a sum of money, alone, could be restricted from alienation, even if the parties could not otherwise assign rights under the contract. At its most fundamental, the issue involved the collision between the common law's protection of the freedom to contract and its general prohibition on the ability to restrict alienation of property. It therefore explored the dividing line between contract and property, or at least an area in which contract and property principles met, overlapped, and reached diverging results.

An interesting split of authority on this issue developed. The U.S. Supreme Court weighed in relatively early, in a bankruptcy case, coming

126. Black's Law Dictionary at 973 (8th ed. 2004).

127. Williston & Lord, *supra* note 125, § 74:2 at 208.

128. *Id.* at 216–17. Professor Williston believed that the assignee of a chose in action held an equitable, rather than a legal, right to obtain the debt or other property held by the obligor, but that the right was enforceable in a court of law, not merely in chancery. Samuel Williston, *Is the Right of an Assignee of a Chose in Action Legal or Equitable?*, 30 Harv. L. Rev. 97 (1916). The issue of whether the assignee of a chose in action held a legal right, an equitable right, or a right "concurrently equitable and legal" generated a heated debate between Professors Williston and Cook, which explored fundamental concepts of law and equity. In addition to the Cook article cited in note 125 *supra* and the Williston article cited in this note, see also Walter W. Cook, *The Alienability of Choses in Action: A Reply to Professor Williston*, 30 Harv. L. Rev. 449 (1916), and Samuel Williston, *The Word "Equitable" and its Application to the Assignment of Choses in Action*, 31 Harv. L. Rev. 822 (1917). Both professors concurred, however, that a chose in action was assignable.

129. Williston & Lord, *supra* note 125 § 74:22.

130. *Id.* § 74:28.

131. *Id.*

down on the side of permitting assignment of the right to moneys due, and treating that right as a property right that is freely alienable, even if the precursor contract rights were not.[132] In that case, a general contractor on a contract with the City of San Francisco took out a bank loan and assigned to the bank amounts that would be paid by the City under the contract. A subcontractor later attempted to garnish the same amounts, and the issue was whether the prior assignment was valid. The contract prohibited not only assignment to others of the contractor's work, but also assignment of "any of the moneys payable under this contract."[133] The Court noted the "logical difficulty in putting another man into the relation of the covenantee to the covenantor."[134] Nevertheless, the Court believed the common law would treat a right to money due as a property right, which should be as freely alienable as any other property:

> Of course a covenantor is not to be held beyond his undertaking and he may make that as narrow as he likes. But when he has incurred a debt, which is property in the hands of the creditor, it is a different thing to say that, as between the creditor and a third person, the debtor can restrain his alienation of that, although he could not forbid the sale or pledge of other chattels. When a man sells a horse, what he does, from the point of view of the law, is to transfer a right, and a right being regarded by the law as a thing, even though a *res incorporalis*, it is not illogical to apply the same rule to a debt that would be applied to a horse.[135]

Several later state court decisions made this same distinction, calling a creditor's right to money due under a contract a "chose in action" that was freely assignable, even if the contract prohibited assignment, often treating the chose in action as a unilateral obligation to pay that was distinct from the bilateral contract that created it. For example, in *State Street Furniture Co. v. Armour & Co.*,[136] the court held that an employer could not restrain its employees from assigning their wages to creditors: "The relationship between employer and employee with respect to unpaid wages is that of debtor and creditor, and the right of the employee to those wages is a chose in action and as such may be assigned."[137] Citing *Welles*, the court concluded that assignment of debts should be as unrestrained as assignment of other property.

> Where the employer owes the employee for wages earned, the contract of employment has, as to the wages earned, ceased to be a bilateral contract with mutual rights and duties. It has then become a unilateral contract or debt,

132. Portuguese-American Bank v. Welles, 242 U.S. 7 (1916).
133. *Id.* at 10–11.
134. *Id.* at 11.
135. *Id.* (citation omitted).
136. 177 N.E. 702 (Ill. 1931).
137. *Id.* at 703.

> with an absolute obligation on the part of the employer to pay and an absolute right on the part of the employee to receive his pay. When one has incurred a debt, which is property in the hands of the creditor, the debtor cannot restrain his alienation as between the creditor and a third person any more than he can forbid the sale or pledge of other chattels.[138]

Other decisions after *Welles*, however, disagreed that a claim for money due under a contract should be freely assignable where the contract prohibited assignments. The New York Court of Appeals, for example, held that a clause barring assignment of money due under a contract was enforceable, implicitly taking issue with the Supreme Court's evaluation of the common law.[139] After noting the issue had "troubled" courts (citing *Welles*, *State Street Furn.*, and *Trubowitch*, among others), the court concluded that New York's jurisprudence favored freedom of contract over a court-imposed bar on restraints on alienation of property:

> [W]hile the courts have striven to uphold freedom of assignability, they have not failed to recognize the concept of freedom to contract. In large measure they agree that, where appropriate language is used, assignments of money due under contracts may be prohibited. . . .
>
> The right to moneys under the contracts is but a companion to other jural relations forming an aggregation of actual and potential interrelated rights and obligations. No sound reason appears why an assignee should remain unaffected by a provision in the very contract which gave life to the claim he asserts.[140]

At least for contracts subject to its purview, the Uniform Commercial Code resolved this split in authority in favor of permitting assignment of choses in action for money due under a contract. As promulgated, the U.C.C. provided:

> A term in any contract between an account debtor and an assignor is ineffective if it prohibits assignment of any account or prohibits creation of a security interest in a general intangible for money due or to become due or requires the account debtor's consent to such assignment or security interest.[141]

138. *Id.* at 704 (citation omitted); *see also* Trubowitch v. Riverbank Canning Co., 182 P.2d 182, 189 (Cal. 1947) (Traynor, J.) (dissolved New York corporation's right to money damages against California company was assigned to individuals who continued New York corporation's business, because claim for money damages was in existence at time of the assignment, and claim for money damages is assignable even if contract prohibits assignment; "[P]erformance of the contract involved only the receiving of money by defendant, not to be compared with fiduciary services, . . . or with other services requiring special skill, capacity or taste.")

139. Allhusen v. Caristo Const. Corp., 103 N.E.2d 891 (N.Y. 1952).

140. *Id.* at 893; *see also* Concrete Form Co., Inc. v. W.T. Grange Const. Co., 181 A. 589, 590 (Pa. 1935) (upholding consent-to-assignment clause with respect to assignment of right to payment; "defendant's consent [to any assignment] was an essential prerequisite to its liability to any party other than its subcontractor").

141. U.C.C. § 9–318(4) (1962). Under Revised Article 9 of the U.C.C., which became effective July 1, 2001, this provision, as revised, is now located at Section 9–406(d).

The Official Comment to this section notes that the common law had only recently permitted assignment of a chose in action for money due, and in many jurisdictions the general enforceability of no-assignment provisions continued to apply even to choses in action:

> Subsection (4) breaks sharply with the older contract doctrines by denying effectiveness to contractual terms prohibiting assignment of sums due and to become due under contracts of sale, construction contracts and the like. . . .
>
> It is only for the past hundred years that our law has recognized the possibility of assigning choses in action. The history of this development, at law and equity, is in broad outline well known. Lingering traces of the absolute common law prohibition have survived almost to our own day.
>
> There can be no doubt that a term prohibiting assignment of proceeds was effective against an assignee with notice through the nineteenth century and well into the twentieth. Section 151 of the Restatement of Contracts (1932) so states the law without qualification, but the changing character of the law is shown in the proposed Section 154 of the Restatement, Second, Contracts.
>
> The original rule of law has been progressively undermined by a process of erosion which began much earlier than the cited section of the Restatement of Contracts would suggest. The cases are legion in which courts have construed the heart out of prohibitory or restrictive terms and held the assignment good. The cases are not lacking where courts have flatly held assignments valid without bothering to construe away the prohibition. *See* 4 Corbin on Contracts (1951) §§ 872, 873. Such cases as *Allhusen v. Caristo Const. Corp.*, 303 N.Y. 446, 103 N.E.2d 891 (1952), are rejected by this subsection.

This gradual and largely unacknowledged shift in legal doctrine has taken place in response to economic need: as accounts and other rights under contracts have become the collateral that secures an ever increasing number of financing transactions, it has been necessary to reshape the law so that these intangibles, like negotiable instruments and negotiable documents of title, can be freely assigned.[142]

To summarize, then: Although at common law no-assignment clauses were upheld with respect to choses in action for payment of money due, now, either by judicial decision or through enactment of the U.C.C., the law generally permits such assignments. Yet even when courts held that the right to money due under a contract is a chose in action that may be assigned, notwithstanding a no-assignment clause, they have not suggested that *any* contract right was assignable in the face of such a clause, or that a no-assignment clause outside of the money-payment context was unenforceable. To the contrary, as multiple decisions have recognized, no-assignment clauses have commonly been enforced.[143]

142. U.C.C. § 9–318 cmt. 4 (1962).

143. *See, e.g.*, Trubowitch, 182 P.2d 182 (assuming validity of no-assignment clause, but holding that claim for money damages was separate and assignable after breach of contract took place); Mueller v. Northwestern Univ., 63 N.E. 110 (Ill. 1902) (no-assignment clause

Henkel did not break new ground in recognizing this distinction between non-assignable contract rights and assignable choses in action for money due. Indeed, the distinction was well recognized under California law as applied to insurance policies long before *Henkel* was decided. In *Greco v. Oregon Mutual Fire Insurance Co.*,[144] the issue was whether an insured-owner of a building could assign its right to payment under a fire insurance policy to a buyer of the building, where the assignment took place after the building was destroyed. The Court of Appeal relied on settled California Supreme Court precedent to hold, first, that as a general matter the no-assignment clause of a fire insurance policy was fully enforceable and barred substituting one insured for another without the consent of the insurer;[145] and second, that, even so, "[t]he accrued right to collect the proceeds of the fire insurance policy is a chose in action, and an effective assignment there of may be expressed orally as well as in writing . . . ."[146] Accordingly, the court permitted the assignment of the due-and owing proceeds, because the assignment of the proceeds took place after the fire.

C. *Criticisms of* Henkel *Fail to Understand the Nature of a Chose in Action*

As the foregoing makes clear, when *Henkel* decided that the duty to defend and the duty to indemnify under a liability insurance policy could not be assigned, without the consent of the insurers, to a corporate newcomer who purchased certain assets of the insured and assumed certain liabilities, because the insured did not have a chose in action for money due under the policies at the time of the purported assignment, it was doing nothing more than adhering to settled law. Indeed, those who accuse the court of somehow departing from prior law in reaching its conclusion fail to appreciate the distinction the common law made for years between assignable choses in action and non-assignable contract rights.

valid, but upholding assignment of money to become due under contract); Shaffer v. Liberty Life Assur. Co., 746 N.E.2d 285, 293 (Ill. App. Ct. 2001) ("there is no general rule or public policy invalidating antiassignment provisions"); Fortunato v. Patten, 41 N.E. 572 (N.Y. 1895) (prohibition on assignment valid to bar assignee's claim against contract party for whose benefit no-assignment clause was inserted, but did not bar assignment of chose in action for moneys due); C.U. Annuity Serv. Corp. v. Young, 722 N.Y.S.2d 236 (App. Div. 2001) (the assignor's "[h]aving surrendered his legal ability to assign, there was no basis upon which he or any assignee could assert that a purported sale could have any legal effect"); *see* 29 Williston § 74:22 at 352 ("Contract provisions prohibiting the assignment of rights under the contract will ordinarily be upheld, depending on the particular facts and circumstances.").

144. 12 Cal. Rptr. 802 (App. Ct. 1961).

145. *Id.* at 806 (citing Bergson v. Builders' Ins. Co., 38 Cal. 541, 545 (1869).

146. *Id.* at 807 (citing Hibernia Sav. & Loan Soc. v. Belcher, 48 P.2d 681, 684 (Cal. 1935); Oswald v. Schwartz, 185 P. 959, 961 (Cal. 1919)).

This error in criticism began with the dissent in *Henkel* itself. The dissent noted, correctly, that under California law "a chose in action, also known as a 'thing in action,' is statutorily defined as 'a right to recover money or other personal property by a judicial proceeding.' "[147] But the dissent then asserted that in the context of an occurrence-based liability insurance policy the insured has such a chose in action against the insurer as soon as damage or injury occurs during the policy period.[148] That is clearly incorrect: An insured has no right to money due from a liability insurer as soon as injury or damage occurs, because a critical precondition to coverage—the filing of a suit by the injured party—has not yet occurred, and may never occur. Indeed, the predicate for the dissent's chose-in-action analysis—that the insurers' duties to defend or to indemnify accrue as soon as injury occurs—has been rejected by the California Supreme Court several times. Under standard insurance policies, an insurer has no duty or obligation until a "suit" is filed against the policyholder and tendered to the insurer.[149] Of course, if an insurer has no obligation to defend or to indemnify prior to the tendering of a suit or the entry of judgment, the insured cannot have a chose in action for money due with respect to those obligations.[150]

The *Henkel* dissent confused two issues: (1) what constitutes an assignable chose in action in the context of an occurrence-based liability insurance policy; and (2) what must happen during a policy period to determine, once a suit is actually filed, whether a particular policy is "triggered." The issues are distinct. A chose in action arises or "accrues" (a word which denotes a transformation from expectancy to certainty, such that whatever accrues can be counted as an asset or "property," and not as something that might be an asset in the future) when all the conditions to coverage have been met, and all that remains to be done is for the insurer to pay. "Trigger" (in an occurrence-based policy) addresses whether one of those precursor conditions to coverage has been met: that is, whether bodily injury or property damage occurred during the policy period. That condition must be satisfied, as well as several others (including that the insured is legally liable to pay damages

147. *Henkel*, 62 P.3d 6 at 77 (Cal. 2003) (citing Cal. Civ. Code § 953).

148. *Id.* at 78.

149. Foster-Gardner, Inc. v. National Union Fire Ins. Co., 959 P.2d 265, 285–86 (Cal. 1998) (" 'The duty to defend arises when the insured tenders defense of the third party lawsuit to the insurer.' Prior to the filing of a complaint, there is nothing for the insured *to tender defense of*, and hence no duty to defend arises.") (citation omitted); Certain Underwriters at Lloyd's, London v. Superior Court (Powerine I), 16 P.3d 94, 102 (Cal. 2001) ("the duty to indemnify can arise only after *damages are fixed* in their amount;" "the duty to defend may arise as soon as *damages are sought* in some amount") (emphasis added); Aerojet-General Corp. v. Transport Indem. Co., 948 P.2d 909, 919–20 (Cal. 1997); Javorek v. Superior Court (Larson), 552 P.2d 728, 737–40 (Cal. 1976).

150. Indeed, it is doubtful that an insured could ever have a chose in action for money due with respect to the duty to defend, because that obligation is to provide the services of an

on account of that injury, and that the injury be caused by an "occurrence" to which the insurance applies). Obviously, a chose in action for payment of money cannot arise at the time of injury, because all of the other conditions to coverage have not been satisfied, and may never be.

This confusion is also the basis of other decisions' faulty criticism of *Henkel*. For example, the Ohio intermediate appellate court in *Glidden* cited the *Henkel* dissent as "better-reasoned," noting that the dissenting judge criticized the majority opinion as "contrary to well-settled law."[151] Yet that criticism was misplaced, and the holding of the *Henkel* majority was firmly in line with well-settled law, as demonstrated above.[152] Also, the *Glidden* panel asserted that "because *Henkel* viewed the *liabilities* as arising after the acquisition, we do not adopt its rejection of the 'operation of law' theory."[153] The panel's reference to "liabilities" suggests that it confused assignable choses in action for money due with the underlying tort liability. Obviously, the underlying tort liability had to have arisen before the corporate transaction in *Henkel*, or else it would not have been assumed by Henkel. The *Henkel* ruling was *not* that such liabilities had not arisen, but that a chose in action for payment from the insurer had not arisen at the time of the transaction, and therefore any assignment of insurance without insurer consent was invalid. By concluding that *Henkel* was contrary to well-settled law, the *Glidden* court failed to understand the distinction long made in the law between assignability of the immediate right to payment and non-assignability of other contract rights.

The *Henkel* dissent's confusion over when a chose in action arises was the same confusion that led the Ohio Supreme Court to hold in *Pilkington*

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attorney to defend the insured and runs personally to the insured; it cannot be reduced to a monetary obligation or "debt" that can be assigned to a third party. *See Javorek*, 552 P.2d at 740. As the court said there:

> [T]his executory promise to defend . . . is not the type of interest which is subject to attachment. Under the terms of the policy, State Farm is obligated only to provide a defense with attorneys of its own choosing. There is no obligation to pay money to the insureds so that they may provide their own defense. *Such an obligation to provide personal services is not capable of transfer* so as to satisfy the claim of an attaching creditor. If it is assumed that the obligation to defend could be translated into a monetary equivalent, how is that to be done? "What . . . is the value of this duty to a potential purchaser at execution sale? Because *the insurance carrier could not be obligated to defend a stranger to the contract* by such a sale, we cannot conceive what there is to be sold. Rather, we are convinced that *whatever value inheres in the contractual duty of the insurer is personal to the insured.*"

Id. (emphasis added and citations omitted) (quoting with approval Robinson v. O.F. Shearer & Sons, Inc., 429 F.2d 83, 86 (3d Cir. 1970)).

151. Glidden Co. v. Lumbermens Mut. Ins. Co., No. 81782, 2004 WL 2931019, at *9 (Ohio Ct. App. Dec. 17. 2004), *rev'd*, 861 N.E.2d 109 (Ohio 2006).

152. *See* § IV, *supra*.

153. *Glidden*, 2004 WL 2931019, at *9 (emphasis added).

that a chose in action for defense and indemnity under a liability insurance policy arises at the time of the occurrence.[154] The court correctly noted that a chose in action "is a 'proprietary right in personam,'" (that is, personal property) and "'is ordinarily understood [to be] a right of action for money.'"[155] But the court failed to acknowledge that a "right of action for money" does not arise under a liability insurance policy as soon as the underlying occurrence occurs, but only later, after the tort plaintiff has brought suit, has obtained a judgment (or settled with the insured and the insurer), and all of the conditions to coverage have been met.

Similarly, the court in *Elliott Co.* erred in concluding that *Henkel* was inconsistent with other states' laws. In that case, the court asserted that, under the law of the states whose law might apply to that case, Ohio, Pennsylvania, Connecticut, New York and Delaware, a voluntary assignment of the "right to bring claims" under an insurance policy is not proscribed by the consent-to-assignment clause, and that *Henkel's* contrary conclusion under California law should not be followed.[156] But the cases cited by the court do not disagree with *Henkel*, as they involved either—(1) assignment of a claim for indemnity after the underlying claim had already resulted in judgment or settlement; (2) a first-party insurance policy where the loss-causing event had already occurred; or (3) a true corporate successor to the insured (and the case therefore did not involve any issue of assignment). Indeed, many of these cases specifically note that the consent-to-assignment clause is enforceable to prevent substituting the identity of the insured, just as *Henkel* held.[157] Thus, *Henkel* and the cases cited by the *Elliott Co.* court are in harmony, and *Elliott Co.* should have agreed with

154. Pilkington N. Am., Inc. v. Travelers Cas. and Sur. Co., 861 N.E.2d 121, 126 (Ohio 2006).

155. *Id.* at 125.

156. Elliott Co. v. Liberty Mut. Ins. Co., 434 F. Supp. 2d 483, 491 (N.D. Ohio May 10, 2006).

157. *See* Fiorentino v. Lightning Rod Mut. Ins. Co., 682 N.E.2d 1099, 1102 (Ohio Ct. App. 1996) (insured assigned claim to proceeds under policy to tort plaintiff after reaching settlement with plaintiff; insured "assign[ed] its right to collect a debt (coverage proceeds) from [the insurer]," which is distinct from "assigning the right to the policy itself"); Viola v. Fireman's Fund Ins. Co., 965 F. Supp. 654, 658 (E.D. Pa. 1997) (insured assigned right to policy proceeds to tort plaintiff after default judgment; claim was not barred by consent-to-assignment clause because "'after a loss has occurred, the right of the insured . . . to the indemnity provided in the policy becomes a fixed and vested right; it is an obligation or debt due from the insurer to the insured;'" nevertheless, "courts will enforce the clause to prevent the insured from assigning coverage to a new insured"); Peck v. Public Serv. Mut. Ins. Co., 114 F. Supp. 2d 51, 55–56 (D. Conn. 2000) (tort plaintiff obtained judgment against insured and sought recovery of policy proceeds under Connecticut direct action statute, which was not barred by consent-to-assignment clause; "Had the plaintiff attempted to sue [the insurer] before she attempted to obtain a judgment against the insured, the direct action statute would not have been available to her and these cases [on the consent-to-assignment clause] might have been relevant;" "An assignment before a loss involves a transfer of

Henkel that the insured may not unilaterally assign insurance rights prior to those rights maturing into an assignable chose in action for payment of money.[158]

V. BESIDE BEING ROOTED IN LAW, *HENKEL'S* RULING PROMOTES FAIRNESS AND PREDICTABILITY

Although *Henkel* is amply supported by precedent and reflects nothing more than a return to well-understood and applied principles of law (contrary to *Northern Insurance*, which departed from those principles in order to invent a theory of transfer of insurance rights), it also has the virtue of promoting fairness and predictability. First and foremost, any rule that permits insurance rights to be transferred in violation of the consent-to-assignment clause or by operation of law necessarily increases the insurer's risk. This is because the insured's tort liability can never be "transferred" by contract to a third party, at least without the release and acquiescence of the tort claimant. If Company B "assumes" Company A's tort liability (meaning it agrees contractually to pay any liability Company A may owe third parties and to indemnify Company A against such third-party claims), the tort liability is not "transferred" away from Company A. Instead, the tort claimant's rights against Company A remain fully viable, especially to the extent Company B refuses or is unable to meet its obligations of indemnity. Thus, a "transfer" of liability really has the effect of making two companies responsible for the same liability, whereas before only one was.[159] A rule permitting the transfer of insurance rights to Company B therefore necessarily increases the insurer's risks and burdens, as under such a rule the insurer may have to defend and indemnify two companies even though it

a contractual relationship, whereas an assignment after a loss is the transfer of a right to a money claim"); Texaco A/S, S.A. v. Commercial Ins. Co., No. 90 Civ. 2722 (JFK), 1995 WL 628997 (S.D.N.Y. Oct. 26, 1995) (plaintiffs were the same corporations as insured subsidiaries of named insured, having only been sold and undergone a name change; no issue of whether insurance rights could be assigned without consent); Int'l Rediscount Corp. v. Hartford Acc. and Indem. Co., 425 F. Supp. 669, 672–73 (D. Del. 1977) (insured assigned right to claim proceeds under first-party employee dishonesty policy after loss had occurred and proof of loss had been submitted to insurer).

158. The court in *Mallory* failed to follow *Henkel* based on the same misconception of what a "chose in action" is, claiming that "the choses in action in *Henkel* had not occurred before the corporate transactions involving the plaintiff, whereas in this case the 1969 fire occurred before the 1986 and 1988 corporate transactions." 2004 WL 1737489, at *8.

159. *See* Beatrice Co. v. State Bd. of Equalization, 863 P.2d 683, 693 (Cal. 1993) ("An agreement to assume liabilities is a contractual promise to perform the obligations of another. If supported by consideration, it is enforceable notwithstanding the continuing primary liability of the promisee for the same obligation.").

insured only one. Moreover, this risk exists even if the predecessor corporation ceases to exist, if it can be revived to pay tort claims. As *Henkel* said:

> An additional burden may arise whenever the predecessor corporation still exists or can be revived, because of the ubiquitous potential for disputes over the existence and scope of the assignment. If both assignor and assignee were to claim the right to defense, the insurer might effectively be forced to undertake the burden of defending both parties. In view of the potential for such increased burdens, it is reasonable to uphold the insurer's contractual right to accept or reject an assignment.[160]

Second, unlike the "operation of law" theory, enforcing the consent-to-assignment clause precludes a corporate policyholder from imposing on insurers the burden of keeping track of multiple corporate divestitures, which create multiple new entities that can be sold off to strangers, who then claim status of "insured" under pre-existing policies. Simply put, an insurer should not be in the position of having to decipher complex corporate transaction documents years or decades down the road in order to ascertain whether the entity claiming coverage is really its insured, when it was not privy to the corporate transaction and did not consent to assignment of rights to a new entity.

Third, *Henkel* also precludes these spun-off, newly created corporations from making claims to coverage adverse to each other and putting the insurer in the middle of resolving them (on penalty of alleged bad faith, in some cases, if it is wrong).

Fourth, a rule that insurance follows liability necessarily has no limiting principle: It permits multiplication of insureds ad infinitum, proportionately increasing the insurer's risk and its costs of defense. *Henkel* involved the creation of one new insured, but there is no reason a given corporate transaction could not create twenty new entities (as was the case in *Glidden*), or more. Each of those entities could engage in their own multiplication, and over time the potential for multiplication only grows. Before long the insurer is put in the place of the Sorcerer's Apprentice, impossibly trying to keep track of insureds while they multiply, without any means of knowing who is who.

Fifth, requiring insurance to "follow the liability" presumes "the liability" has been ascertained and can be followed. Yet the vast majority of tort claims are settled without any finding of liability. This means that, where multiple entities are claimed to be responsible for the liabilities of a single insured, there may never be a determination of which company, if any, is actually liable, and which company, therefore, has insurance. Any question

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

or dispute as to who has "the liability" and who has the insurance would present an obstacle to non-litigated resolution of claims and to the quick and efficient defense of claims by the insurer, as all parties would have to seek a court's determination of those issues. Insurance contracts apply to the *insured's* liability, not to the liability of any entity that may acquire liability arising out of the insured's business. *Henkel's* resolution makes it quite clear who has the insurance: the named insured.

Finally, enforcing the consent-to-assignment clause means corporations can restructure their corporate form knowing with certainty that if another company assumes tort liability, it does so without the right to claim insurance under the first company's policies. Myriad contractual solutions may be suggested to address that fact, including an agreement under which the second company declines to assume tort liability (and presumably pays a higher price for the assets it purchases) so that the liability and the insurance remain tied to the original, one entity.

VI. CONCLUSION

Insurance policies are contracts and should be enforced the same as other contracts. Particularly because an insurance contract involves an exchange of risk, the parties to the contract need to know that the agreements they reach will be enforced and that courts will not require the parties to bear unbargained-for risks. In the context of a liability insurance policy, an insurer identifies with precision what risk it is undertaking when it identifies "whose" liability it is insuring: that of the named insured. To permit the insured unilaterally to assign its rights to third parties, whom the insurer has not underwritten and with whom the insurer has no agreement, greatly increases the insurer's risk. Accordingly, courts uniformly have enforced the consent-to-assignment clause in insurance policies.

A limited exception to this rule applies where an insurance right has become a current right to a money payment, and therefore is a property right (a chose in action) or a debt that can be alienated notwithstanding the consent-to-assignment clause. This exception is no different than the rule that applies to other contracts, which permits assignment of a right to money due even if the underlying contract forbids assignments. As applied to an insurance policy, the exception applies only where the thing insured against (in liability policies, a money judgment of liability against the insured; in first-party property policies, an event of property damage or other covered loss whose value has been determined) has happened, and nothing remains to happen for the insurer's obligation to make payment to become due. Beyond this limited exception, other rights under the policy remain subject to the consent-to-assignment provision, because the contract requires it.

Courts and commentators who have criticized *Henkel* misapprehend what a chose in action is or when one arises under a liability insurance policy. Courts that have held that a chose in action includes the right to defense and indemnity as soon as an occurrence occurs during the policy period confuse the issue of "trigger" with when a chose in action arises, and misread the scope of the limited exception for assignments of choses in action. They therefore permit the limited exception to swallow the rule that the consent-to-assignment clause is generally enforceable. Those decisions run contrary to established common-law principles and should not be followed.

Indeed, courts should be especially wary of adopting any rule that considers insurance policies as somehow unique or subject to "unique treatment" by the courts. Such a rule may simply permit courts to re-write the insurance contracts to reach a result they consider fairer, or one they view as in better harmony with public policy. But a court's role in a contract case is merely to enforce the agreement the parties made, and courts have no power to rewrite a contract, for any reason. As the Supreme Court of California said, "we do not rewrite any provision of any contract, including the standard [insurance] policy underlying any individual policy, for any purpose."[161] *Henkel* correctly applied this common sense rule and should be followed.

161. Certain Underwriters at Lloyd's, London v. Superior Court (Powerine Oil Co.), 16 P.3d 94, 108 (Cal. 2001).