STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
APPEAL NO. 2021-AP-00635

PEPSI-COLA METROPOLITAN
BOTTLING COMPANY, INC.,

Plaintiff-Appellant,

vs.

EMPLOYERS INSURANCE COMPANY
OF WAUSAU,

Defendant-Respondent

ON APPEAL FROM WAUKESHA COUNTY CIRCUIT COURT
THE HONORABLE RALPH M. RAMIREZ PRESIDING
WAUKESHA COUNTY CASE NUMBER 2019-CV-001307

BRIEF OF AMICI CURIAE OF WISCONSIN MANUFACTURERS AND COMMERCE AND EMERSON ELECTRIC CO.

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INTEREST OF AMICI CURIAE

A staple of the American and Wisconsin economy is the ability of companies to freely sell subsidiary businesses (including assets and liabilities) to entities that can put these businesses to more productive use. This case concerns a decision of the Circuit Court of Waukesha County that, if affirmed, would interfere with the ability of Wisconsin companies to do so.

Wisconsin Manufacturers & Commerce ("WMC"), as the state's largest business organization, seeks status as an *amicus curiae* to call attention to the substantial impact that the decision below, if permitted to stand, would have on the Wisconsin economy and Wisconsin businesses. Emerson Electric Co. is a publicly held company with business operations throughout the United States, including substantial operations in Wisconsin; and has a vital interest in the outcome of this lawsuit as an entity that would be impacted by the inability to include insurance rights in the transfer of historic business operations.

Amici curiae urge this Court to hold that ***post-loss*** assignments of insurance rights are valid and enforceable, even in the absence of insurer consent to the assignment. Such a ruling is essential to the ability of Wisconsin companies make more productive use of economic assets through the purchase and sale of legacy businesses with long-tail asbestos or environmental liabilities covered by historical policies.

I. POST-LOSS ASSIGNMENT OF INSURANCE RIGHTS IS ESSENTIAL TO THE SALE OF BUSINESS UNITS ENCUMBERED BY LONG-TAIL ASBESTOS AND ENVIRONMENTAL LIABILITIES

A. The Ability to Buy and Sell Business Assets Is Indispensable to Productive Use of Assets in a Free-Market Economy

A essential feature of the American economy is the ability of companies to freely buy and sell business units (including assets and liabilities). Such free

transferability ensures that productive assets will be deployed into the hands of companies that are best positioned to put them to productive use.

It is an empirical but inevitable question whether, in any particular transaction, the sale of assets will also be accompanied by the transfer of associated liabilities. In at least some instances that require a sale of business assets, it simply is not feasible to separate the business asset from the associated liabilities. For example, a company may be forced to reduce its operational capacity upon the death, disability or departure of one or more principal owners or managers; or an existing business might incur liquidity, competitive, operational or other challenges that impair its ability to manage long-tail liabilities, thus requiring a sale of certain assets and a divestiture of related liabilities. In either case, the assignment of liabilities would reflect a reality-based and market-driven determination that the purchasing entity is better equipped to manage accumulated liabilities associated with the divested asset.

B. Occurrence-Basis Insurance Coverage Is a Critical Business Asset to Protect Against the Costs of Long-Tail Liabilities

Whatever the reason for the divestiture of business assets and liabilities, insurance coverage to defray the risks and costs of long-tail liabilities plays an essential role. Long-tail insurance is typically provided under what is known as "occurrence-basis" coverage. As the Wisconsin Supreme Court has explained, occurrence-basis liability policies cover the costs of defending and settling lawsuits alleging that property damage or bodily injury occurred during the policy period. That is, occurrence-basis policies are "triggered" by the occurrence of property damage or bodily injury during the period of time that the insurance policy is in effect, even if the damage or injury is not discovered until much later. *See,*

e.g., *Plastics Engineering Company v. Liberty Mutual Insurance Company*, 2009 WI 13, 759 N.W.2d 613 (2009).[1]

Occurrence-basis policies are vitally important to companies considering the acquisition of business units that might have generated hazardous wastes or whose products are alleged to have contained dangerous materials such as asbestos. The reason is simple: The value of the business unit is uncertain, because of the risk of future lawsuits over damage or injuries that "occurred" decades ago but that have yet to be discovered. However, if the acquiring company also receives an assignment of rights under the selling company's historical occurrence-basis insurance policies, such policies can be used by the acquiring company to pay or defray the costs of defending and settling lawsuits asserting such liabilities.

Thus, when selling the assets and liabilities of a business unit, it is standard for the selling company to assign rights under historical occurrence-basis policies to the acquiring company. There are two types of potential assignments:

- **Pre-Loss Assignment:** If the named insured under an occurrence-basis policy assigns the policy (or rights under the policy) to a third-party during the pendency of the policy period, then it is possible that property damage or bodily injury could happen after the transfer but before expiration of the policy period. This is known as a "pre-loss" assignment. Insurers are obviously and rightfully concerned about pre-loss assignments, because the assignee of policy rights may have a much different risk profile than the assignor (the original

[1] Occurrence-basis policies stand in contrast to "claims-made" policies, which are triggered by the assertion of a claim (by lawsuit, demand letter or otherwise) during the policy period, even if the conduct that caused the underlying harm, or the harm itself, occurred prior to the date that the claims-made policy went into effect.

policyholder). Thus, the insurer would potentially face much different risks of loss than what it originally signed up for. Consequently, and as discussed below, policies have "anti-assignment" clauses that prohibit assignment of policies without insurer consent.

- **Post-Loss Assignment:** Conversely, if a transfer of the policy or rights under the policy occurs after the policy period has expired, then there is no possibility of any further covered losses occurring after the transfer. This is because the policy applies only to the occurrence of injury or damage during the policy period. Therefore, any transfer of policy rights under the policy that occurs after the policy period expires is, by definition, a "post-loss" assignment.

II. "Anti-Assignment" Clauses Should Not Prevent the post-loss assignment of Corporate Assets and Liabilities, Including Insurance Rights

Amici curiae seek to submit this brief because of the alarming implications of the Circuit Court's decision on the ability of Wisconsin companies to freely transfer assets and liabilities – and on the potential multi-billion dollar consequences that will befall companies that have relied on Wisconsin precedent to engage in such assignments over the last 140 years.

A. The Overwhelming Majority of Courts Permit "Post-Loss" Assignment of Insurance Rights, Even Without Insurer Consent

Most occurrence-basis policies contain what is known as an "anti-assignment" clause, which (at least in the Wausau policies at issue in this case) provides effectively as follows: "Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon . . . ." (R. 97, p. 62; App. 190).

Over the last 20 years – and, indeed, over the last 140 years – such anti-assignment clauses have given rise to an important interpretational question: Do

such clauses apply only to "pre-loss" assignment of interest, or do they also require that a policyholder obtain insurer consent to "post-loss" assignments? As reflected in the opening brief of Appellant, the overwhelming majority of jurisdictions around the country – including Wisconsin – have consistently held that anti-assignment clauses apply solely to *pre-loss* assignments. *See* Pepsi Opening Brief at 4; *see also Fluor Corp. v. Superior Court*, 354 P.3d 302, 322-27 & n.41 (Cal. 2015) ("overwhelming majority of cases" refuse to apply anti-assignment clauses to post-loss assignments).

Notably, until the Circuit Court decision below, Wisconsin was widely regarded as being among those jurisdictions that declined to apply anti-assignment clauses to post-loss assignments. *See, e.g., Fluor*, *supra* (*citing Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136, 10 N.W. 91, 95-96 (Wis. 1881)) (noting that Wisconsin permits post-loss assignments without insurer consent).[2]

The California Supreme Court's citation to *Alkan* is indicative that Wisconsin has long been regarded as a jurisdiction that has never applied anti-assignment clauses to bar post-loss assignment of rights. This is particularly pertinent to assignments of policy rights occurring in transactions happening before the issuance of the Circuit Court's decision, because the settled understanding of Wisconsin companies – including the transactions involving assets and liabilities of "old" and "new" Waukesha Foundry Company, Inc. in 1968, 1974, 1987, 1988, 1990, and

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[2] The Circuit Court relied upon *Red Arrow Prods. Co. v. Employers Ins. of Wausau*, 2000 WI App 36, 233 Wis. 2d 114, 607 N.W.2d 294 (2000), a case that did not involve any purported assignment of insurance rights but, instead, examined the circumstances in which rights and liabilities transfer by operation of law. Notably, in its magisterial examination of precedent across the United States – including decisions both enforcing and refusing to enforce anti-assignment clauses to post-loss assignments – the California Supreme Court's decision in *Fluor* did not deem *Red Arrow* to be pertinent, and instead treated *Alkan* as stating Wisconsin law.

2019 –occurred in a legal environment in which no Wisconsin court had invoked an anti-assignment clause to deny effect to a post-loss assignment of insurance rights.

B. Wisconsin Businesses Face Substantial Adverse Consequences if the Circuit Court Decision Is Permitted to Stand

The adverse consequences of the Circuit Court's decision, if it became the settled law of Wisconsin, are difficult to overstate.

Destruction of Settled Expectations: Wisconsin has long been a major center of manufacturing and industry, with commercial activities that have given rise to literally billions of dollars in claims asserting environmental, asbestos, and other long-tail claims. For companies like Appellant that acquired business assets and liabilities of these historic manufacturing and industrial companies, one of the principal assets that made the transaction feasible – that is, an assignment of concomitant rights under historical occurrence-basis insurance policies – would prove illusory if post-loss assignments without insurer consent are retroactively disallowed. These Wisconsin employers' losses will be the windfall gain of the insurance companies, each of whom long ago banked the premium dollars and (but for the happenstance of a corporate transaction) would have been responsible for covering the identical defense and settlement of these long-tail claims.[3]

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[3] In the seminal *Fluor* decision, the California Supreme Court extensively discussed the reliance of policyholders and their transactional counterparties on the long-standing understanding that state law permitted post-loss assignments without insurer consent:

> In fact, the parties in this matter—including, significantly, Hartford itself—for decades implicitly operated under the influence and understanding of [*Ocean Acci. & Guarantee Corp. v. Southwestern Bell Tel. Co.*, 100 F.2d 441 (8th Cir. 1939)], and the widely accepted industry practice of allowing postloss assignment of rights to invoke liability coverage. As observed *ante,* at page 7 and footnote 5, following the original Fluor's assignment of assets and liabilities to Fluor–2, between 2002 and 2008 ***Hartford treated Fluor–2 as entitled to invoke coverage relating to third party injuries that had predated the assignment,*** and, indeed, during those seven

Appellant's particular situation – involving corporate transactions dating back for than half a century – illustrates the magnitude of the concern. The Circuit Court's ruling, if permitted to stand, would upend decades of expectations around the effectiveness of literally thousands of corporate transfers of businesses, including productive assets, related liabilities, and concomitant rights to occurrence-basis coverage that the acquiring entities reasonably relied on to mitigate the liabilities.

Windfall to Insurers: Importantly, when asserting the anti-assignment defense, insurers do not dispute that they would need to cover the original policyholder for the long-tail claims at issue; instead, the insurers seek a financial reprieve from responsibility for these historical losses, due solely to the societally desirable act of the original policyholder transferring a business unit (including assets and liabilities) to another entity that can make more productive use of those assets. In this way, insurers – having already collected and invested premiums, and having reserved sums to pay for "Incurred But Not Reported" long-tail losses – suddenly enjoy a multi-billion dollar windfall. Thus, it is a consistent judicial theme if "an insurer [is permitted] to avoid its contractual obligations by prohibiting all post-loss assignments, we could be granting the insurer a windfall." *Conrad Bros. v. John Deere ins. Co.,* 640 N.W.2d 231 (Iowa 2001). As presciently observed by Justice Moreno in a dissent that 12 years later became the law of California, a

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> years charged Fluor–2 nearly $5 million in "retrospective premiums" under the assigned insurance policies. It was not until 2009—six years after the decision in [*Henkel Corp. v. Hartford Accident & Indem. Co.*, 29 Cal. 4th 934 (Cal. 2003)]—that Hartford for the first time asserted that assignment of claims for defense and indemnification coverage under its policies had been improperly made without its consent and hence was ineffective. This conduct further demonstrates that until insurers recently began to disallow and contest such assignments, there was little cause for insureds to think about, much less rely on, [Cal. Ins. Code § 520].

Fluor, 61 Cal. 4th at 1222-23 (emphasis added).

prohibition on post-loss assignments "allows insurers to secure an unfair windfall." *See Henkel v. Hartford Accid. & Indem. Co.,* 29 Cal. 4th 934, 952 (2003) (Moreno, J., dissenting).

Interference With Future Productive Transfers: A prohibition on post-loss assignments would also chill the ability of Wisconsin companies to engage in future corporate transactions. As noted at the outset, it is often infeasible (economically, legally or practically) for a selling company to retain environmental, asbestos or other long-tail liabilities. For example, a family-owned business may have lost one or more the principal owner-operators of the company and, without a sale, would not be able to continue the business as a going concern. Similarly, the fortunes of a diversified business might have deteriorated to the point that it cannot manage either the assets or the historical liabilities, requiring divestiture of one or more business units in order to continue to operate the remaining businesses. In either case, the public-policy implications of the Circuit Court decision are troubling, because Wisconsin companies that are looking to divest business assets will have far fewer options (and sometimes no meaningful options) or will receive much less favorable terms than potential sellers of comparable businesses in other states.

C. The *Fluor/Henkel* Cases Confirm the Important Public Policy Reasons for Permitting Post-Loss Assignments Without Requiring Insurer Consent

While courts around the country have devoted tens of thousands of words discussing the enforceability of anti-assignment clauses to post-loss assignments, one particular opinion stands out, not just for the clarity, comprehensiveness and balance of its analysis, but also for the context in which it arose. *See Fluor, supra,* 61 Cal. 4th 1175. It merits extended consideration.

Fluor is seminal not simply because of its endorsement of post-loss assignment of policy rights without insurer consent – although among cases

nationally, *Fluor* sets forth the most comprehensive and balanced consideration of post-loss assignments. *Fluor* also stands out as a remarkable judicial reversal, even a *mea culpa*, by the California Supreme Court. Twelve years earlier, in *Henkel v. Hartford Accid. & Indem. Co.,* 29 Cal. 4th 934 (2003), the same court had issued an outlier decision that broke new ground by holding that anti-assignment clauses would be enforced even as to post-loss assignments. *Henkel* inflicted grave economic consequences on the thousands of California companies that had entered into transactions expecting assigned historical policies to offset assumed liabilities.

In *Fluor,* the California Supreme Court admitted that its decision in *Henkel "*has not been well received." *See Fluor,* 61 Cal. 4th 1222, *citing* Scales, *Following Form: Corporate Succession and Liability Insurance* (2011) 60 DePaul L.Rev. 573, 581–582 (criticizing *Henkel* for "giving excessive weight to the insurer's contract rights at the expense of the insured's contract rights, and insufficient weight to related corporate law and tort principles"). In addition to scholarly criticisms, the Court acknowledged that *Henkel* "has met a similar fate in practice guides." [4] *Fluor,* 61 Cal. 4th at 1222. As set forth in note 4, this criticism

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[4] As examples of the practical criticism inflicted on *Henkel,* the California Supreme Court cited to:

- 1 Stempel on Insurance Contracts, *supra,* § 3.15[D], pp. 3–118.1 through 3–127 (described by Court as "extensively critiquing *Henkel* in six respects and concluding that the case "may become an outlier decision apart from the mainstream");
- Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2013) 7:430.7, p. 7A– 164 (described by Court as "observing that because 'substantial injuries had allegedly occurred *prior* to the assignment to Henkel, the transfer had no effect on the insurer's coverage risk and its consent arguably should not have been necessary');
- DiMugno & Glad, California Insurance Law Handbook (2014) § 44:6, p. 1232 (described by Court as "asserting that the decision is 'difficult to reconcile' with

zeroed in on the devastating impact on corporate transactions that would ensue from both a retroactive and prospective prohibition on post-loss assignments.

After a comprehensive review of decisions, policy considerations, commentary and legal argument of the parties and *amici curiae*, the California Supreme Court took the unusual step of reversing itself. While the spark that caused the court to reconsider its position was the discovery of an ancient statute (Cal. Civ. Code § 520, dating to the 1880s) that had been overlooked during the briefing and argument of *Henkel,* that statute was only the starting point for a comprehensive reexamination of the entire question, from public-policy and common law perspectives, of the merits of the post-loss assignment issue.

Chief among the considerations that inspired its reversal, the Court noted that among the many cases that considered *Henkel* in other jurisdictions, "all but one either implicitly or explicitly disagree with *Henkel,* and follow the majority common law rule that under third party liability policies, 'loss' arises at the time of the 'occurrence' that results in injury or damage, even though the dollar amount of that loss may be unknown and unknowable until much later, and allow assignment of the right invoke coverage at any time after that loss." *Id.,* n. 51. The California Supreme

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Montrose, supra, 10 Cal.4th 645, 42 Cal.Rptr.2d 324, 913 P.2d 878, and that '[s]uccessor corporations are likely to find it exceedingly difficult, if not impossible, to purchase insurance for injuries that have already occurred before the successor's purchase of the business' ***and this will 'inhibit[ ] corporate reorganization or sale***') (emphasis added);

- 1 Cal. Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2014) § 2.2A, p. 2– 3 (characterized by Court as "describing *Henkel*'s holding and asserting: 'It is clear that the insurers owe *someone* a duty of defense and indemnification under their policies for injuries occurring while they were in effect. Permitting the successor to receive the policy benefits does not increase the insurers' risk.'").

Court particularly focused on the same considerations of free transferability of corporate assets that are of principal concern to *amici curiae*.

Leaving no question where it was headed, and why, the Court opened its opinion with an explicit statement of the critical public policy implicated in the ability of policyholders to assign coverage rights on a post-loss basis:

> The principle reflected in [the overwhelming majority of] cases—precluding an insurer, after a loss has occurred, from refusing to honor an insured's assignment of the right to invoke policy coverage for such a loss—has been described as a venerable one, borne of experience and practice, ***facilitating the productive transformation of corporate entities, and thereby fostering economic activity***.

Id. at 1182 (emphasis added).

In the analytic portion of its opinion, *Fluor* acknowledged criticism that it had erred in *Henkel* "by giving excessive weight to the insurer's contract rights at the expense of the insured's contract rights, and insufficient weight to related corporate law and tort principles." *Id.* at 1222 n. 52. The Court also enunciated the public policy concern that "'[s]uccessor corporations are likely to find it exceedingly difficult, if not impossible, to purchase insurance for injuries that have already occurred before the successor's purchase of the business" and this will "inhibit[ ] corporate reorganization or sale.'" *Id.*

Importantly, the *Fluor* Court also discussed the public-policy concerns expressed by Justice Moreno in his widely-cited dissent in *Henkel*. *See id.* at 1191 and n. 13. *See also Henkel*, 29 Cal. 4th at 946 *et seq.* (Moreno, J., dissenting). Because of their pertinence to the issues presented, it is worth considering at length Justice Moreno's observations about the essential connection between post-loss assignability and the efficient functioning of private enterprise:

> Moreover, the majority's conclusion could restrict corporate restructuring, reorganization, merger, or sale. If an insurance policy contains a no-assignment clause, an insured is barred from assigning the benefits of presale insurance coverage unless a claim has been reduced to a monetary sum, or unless the insurer had breached a duty at the time of assignment. Under the majority's decision, a predecessor company cannot assign the right to recover for presale injuries that have occurred, but for which no claim has yet been brought, without the consent of the insurer. Yet under our prior case law, liability for presale injuries that have occurred, but for which no claim has been brought, *can* be transferred to the successor company. … Even if a successor corporation does not expressly assume the liabilities of its predecessor by contract, as in this case, the successor corporation is still subject to the risk of being sued for the pretransfer torts of a predecessor. This is because liability can, in some cases, be imposed on the successor company as a matter of law, even in the face of a contractual provision excluding the assumption of liability for presale torts. …
>
> A successor company would not be inclined to assume this risk of liability for the torts of a predecessor without also receiving the benefits of the predecessor's insurance coverage for presale occurrences. It is highly unlikely that a successor company would be able to obtain insurance coverage for injuries *that have already occurred* before the successor's acquisition of the business. Therefore, the only realistic way in which a successor corporation can obtain insurance coverage for the torts of its predecessor is if the predecessor is able to assign its insurance coverage benefits to the successor. The majority's decision, however, allows insurance companies the ability to veto this necessary assignment of benefits by inserting a no-assignment clause into the insurance policy. Such a rule will have the effect of inhibiting corporate reorganization or sale.
>
> Mergers, sales, and corporate restructurings are commonplace. They should not, in themselves, serve to destroy an insured's rights to

> coverage for activities that occurred prior to the merger, sale, or other transaction. Yet this is what the majority concludes. By allowing insurers to veto the assignment of benefits for which coverage has been triggered, but for which a claim has not yet been brought, insurers can retain the premiums paid by the insured while escaping their coverage obligations.

Henkel, 29 Cal. 4th at 952-53 (Moreno, J., dissenting) (citations omitted).

Justice Moreno, in dissent, was proven correct. The California Supreme Court changed course and now permits post-loss assignment of occurrence-basis policies. *Amici curiae* urge this Court to take the same course.

CONCLUSION

In sum, this case presents an opportunity for the Court of Appeals to protect the Wisconsin economy, by ensuring that the employers of this State are not encumbered by the retroactive and prospective consequences of a rule invalidating post-loss assignment of occurrence-basis policy rights. For the reasons set forth above, *amici curiae* urge this Court to reverse the decision of the Circuit Court and to hold that anti-assignment provisions in occurrence-basis policies do not prevent a policyholder from assigning post-loss policy rights without insurer consent.

Respectfully submitted,

September 17, 2021

Electronically signed by *Raj Patel*

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief of Wisconsin Manufacturing & Commerce and Emerson Electric Co., as *Amici Curiae* In Support of Appellant complies with type-volume limits and is proportionately spaced using a roman style typeface of 14-point and conforms to the rules in Wis. Stats. §§809.19(8)(b) and (c). The length of this brief is 4,575 words and 13 pages.

Dated: September 17, 2021

Electronically signed by Raj Patel
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Counsel for *Amici Curiae* Wisconsin Manufacturing & Commerce and Emerson Electric Co.

CERTIFICATE OF SERVICE

I, Raj Patel, hereby certify that on September 17, 2021, I electronically filed the foregoing brief of Wisconsin Manufacturing & Commerce and Emerson Electric Co., as *Amici Curiae* In Support of Appellant with the Clerk of the Court for the State of Wisconsin Court of Appeals, District II, and served a copy of same by email and by United States Mail upon counsel of record for all parties to this proceeding.

Electronically signed by Raj Patel
Raj Patel