Filed 8/30/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FLUOR CORPORATION, Petitioner, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; HARTFORD ACCIDENT & INDEMNITY COMPANY, Real Party in Interest.	G045579 (Super. Ct. No. 06CC00016) O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Ronald Bauer, Judge. Petition denied.

Latham & Watkins, Brook B. Roberts and John M. Wilson for Petitioner.

No appearance for Respondent.

Gaims, Weil, West & Epstein, Alan Jay Weil; Shipman & Goodwin, James P. Ruggieri and Joshua D. Weinberg for Real Party in Interest.

* * *

There are two corporate Fluors involved in this writ proceeding. We consider whether one Fluor corporation can assign its rights under several liability insurance policies to another Fluor corporation as a result of a complex corporate restructuring. The liability insurer objects based on the Fluors' failure to secure its approval under the consent-to-assignment clauses in the insurance policies.

Ostensibly, this would be an open-and-shut case, at least for purposes of the instant motion for summary adjudication. In *Henkel Corp. v. Hartford Accident & Indemnity Co.* (2003) 29 Cal.4th 934 (*Henkel*), our Supreme Court enforced an identical consent-to-assignment clause under a similar fact pattern. As a result, a company that acquired a policyholder's assets and liabilities could not receive the benefits of the policyholder's "occurrence-based" liability coverage. Since the two *Henkel* corporations retained their separate identities and the claims of the tort claimants had not been reduced to a sum of money due or to become due under the policy, the Supreme Court enforced the policy's consent-to-assignment clause.

Henkel was heavily litigated and closely watched. We cannot reevaluate its wisdom or merits.

But, we are told, the Supreme Court did not have access to all the pertinent facts. Despite the case's high visibility, drawing amicus briefs on both sides, the decision is described as having been "announced in ignorance" as a result of a "remarkable failure of the adversary system." Even the "integrity of that proceeding" is called into question.

Why are we urged to ignore this controlling decisional law? According to petitioner, we must do so because the Legislature has adopted a contrary rule — a "statutory directive" which "conclusively draws the line . . . ."

Petitioner has unearthed this legislative pronouncement in a statute originally enacted in 1872, which provides: "An agreement not to transfer the claim of the insured against the insurer after a loss has happened, is void if made before the

loss . . . ." (Ins. Code, § 520.) It calls this statute a "controlling pronouncement of the law," which announces an "expressed legislative will."

During the 130 years since its enactment, the 1872 statute has been cited only once. No one raised it in *Henkel*. This decision will be the second judicial opinion in the history of the state to even mention the statute, and the first to address it.

There is a logical reason for this obscurity. The 1872 statute can have no bearing as a "clear" or "controlling" legislative expression on the assignability of liability insurance for the simple reason that liability insurance did not exist in 1872. We will not ascribe to the dead hand of the 1872 Legislature controlling power over a medium that had yet to come into being.

I
FACTUAL AND PROCEDURAL BACKGROUND

Petitioner Fluor Corporation (here called Fluor-2) is the second of two corporations named "Fluor Corporation." Fluor-2 was incorporated in the fall of 2000 as the result of a corporate restructuring transaction called a "reverse spinoff." The preexisting Fluor Corporation (here called Fluor-1) was created in 1924.[1]

In the reverse spinoff, Fluor-1 transferred its engineering, procurement, construction and project management services to Fluor-2 as part of a "new strategic direction" to realign Fluor "as a single, highly focused company." Fluor-1 retained various coal mining and energy operations and renamed itself as "Massey Energy

[1] We follow the lead of the California Supreme Court in *Henkel*, *supra*, 29 Cal.4th at page 938, footnote 1, in using the monikers "Fluor-1" and "Fluor-2" to distinguish between the two corporations. At varying times, the parties have used the terms "Old Fluor" and "New Fluor" to make the same distinction. We prefer the Supreme Court's formulation to avoid giving the misimpression that "Old Fluor" no longer is a viable corporate entity. But, as respondent court noted in the June 27, 2011 minute order that is the subject of the instant writ proceeding: "Using those names obviously decides nothing about the merits of these motions."

Company." Fluor-1 and Fluor-2 became independent public companies, with neither having an ownership interest in the other.

Between 1971 and 1986, real party in interest Hartford Accident & Indemnity Company (Hartford) provided comprehensive liability insurance coverage to Fluor-1 through 11 different policies. These policies were invoked when various Fluor entities were sued for injuries arising out of asbestos-containing materials at sites where Fluor-1 allegedly did business.

Since 1985, Hartford has participated in the defense of these asbestos lawsuits. Between 2001 and 2008, Hartford paid defense and indemnity costs in connection with its defense of the asbestos lawsuits, including a defense of both Fluor-1 and Fluor-2.

In 2006, Fluor-2 initiated the underlying coverage action against Hartford to resolve various coverage disputes, including the designation of the applicable policies, the interpretation of the "completed operations" clause, and Hartford's calculation of Fluor's retrospective premium obligations. Hartford cross-complained, raising other coverage issues.

The parties agreed to stay the litigation for several years to pursue settlement negotiations, which apparently stalled.

In August 2009, Hartford amended its cross-complaint to allege new defenses to coverage. Hartford alleged that only Fluor-1 was its named insured on the policies in question and the policies each contained consent-to-assignment provisions prohibiting any assignment of any interest under the policy without Hartford's written consent. Hartford further alleged that neither Fluor-1 nor Fluor-2 "ever sought or obtained Hartford's consent to the *purported* assignment of insurance rights under the Distribution Agreement." (Italics added.) Hartford sought a declaration that it was neither obliged to defend nor indemnify Fluor-2 for the subject asbestos claims, and it

asked to be reimbursed for defense costs and indemnity payments already made on Fluor-2's behalf.

In February 2011, Fluor-2 filed a motion for summary adjudication to the first and second causes of action of the cross-complaint, based on the asserted invalidity of the consent-to-assignment clauses. Attempting what respondent court called a "preemptive strike," Fluor-2 contended that the consent-to-assignment clauses were void under an 1872 statute, since recodified as Insurance Code section 520, which permitted assignments, with or without insurer consent, after the relevant "loss" occurred.

Fluor-2 claimed the relevant "losses" occurred at least 15 years before the reverse spinoff in 2000. It argued that Insurance Code section 520 "reflects a legislative pronouncement that once the fortuitous event triggering coverage (the property damage under typical first-party coverage, the 'occurrence' under typical third-party liability policies) has happened, the beneficiary of an insurance contract should stand on the same footing as any other [contracting] party entitled to its promisor's performance, and thus have the ability to freely assign such rights."

Hartford opposed the motion by relying upon the California Supreme Court decision in *Henkel, supra*, 29 Cal.4th 934, holding that such consent-to-assignment clauses were valid and enforceable until the loss matured into a liquidated sum. "[T]hese facts sort of fit like a hand in the glove with the *Henkel* case."

Hartford separately filed its own motion for summary judgment or summary adjudication, but its motion is not part of the record in this writ proceeding. Fluor-2 explained that it opposed Hartford's motion because it "required a 'fact-intensive inquiry' as to a number of issues, including whether [Fluor-2] is the 'mere continuation' of its predecessor."

On June 6, 2011, respondent court heard the parties' cross-motions. The court denied Hartford any affirmative relief, noting that Hartford had failed to specify to which causes of action its requested relief was directed. As to Fluor-2, respondent court

declined the opportunity to disregard *Henkel* based on the 1872 statute. "[The Supreme Court] can be dead wrong, but they are still the Supreme Court."

We denied Fluor-2's petition for writ of mandate to direct respondent court to grant its motion for summary adjudication. Fluor-2 filed a petition for review with the California Supreme Court.

In November 2011, the Supreme Court granted the petition for review and directed us to vacate our order denying mandate and to issue an order to show cause why petitioner's requested relief, namely to grant summary adjudication, should not be granted. We complied with the Supreme Court order in December 2011 and issued an order to show cause.

In February 2012, respondent court stayed all proceedings in the underlying action pending resolution of this writ petition.

In April 2012, Fluor-2 filed a request for judicial notice of various documents, including the code commissioners' notes to the 1872 statute, as well as various briefs in several out-of-state cases. Hartford opposed the request as untimely, among other grounds. We grant the request for judicial notice.

II

THIS COURT IS DUTY-BOUND TO FOLLOW *HENKEL*, WHICH DOES NOT CONTRADICT ANY EXPRESS LEGISLATIVE POLICY

An influential law review article used citation analysis to determine whether and why the California Supreme Court is the most followed state high court in the United States. (See Dear & Jessen, "*Followed Rates" and Leading State Cases, 1940-2005* (2007) 41 U.C. Davis L.Rev. 683.)

This writ petition presents a more startling question: Should a recent California Supreme Court decision be followed in California?

Fluor-2 says we can ignore *Henkel* because the opinion contravenes Insurance Code section 520. According to Fluor-2,"[w]here the common law — even as

announced by our Supreme Court — conflicts with a controlling statute, the trial court, and this Court must apply the statute to resolve cases governed by it." "The necessary relief can, and should, be granted without offense to *stare decisis.*"

The Supreme Court's issuance of a grant and transfer signifies the high court's determination that the matter is appropriate for appellate review, but it does not constitute a direction for us to ignore, limit, or reexamine *Henkel.* Nor does it restrict our review of respondent court's order denying summary adjudication to a specific legal issue. "The Supreme Court's transfer order does not mean petitioners are correct on the merits or that a writ should issue, but rather we should reconsider the matter and file an opinion. We may reach the same result as we did upon our first consideration of the case . . . ." (*Desert Outdoor Advertising v. Superior Court* (2011) 196 Cal.App.4th 866, 872.)

We proceed to examine the Supreme Court's decision in *Henkel,* and whether, as Fluor-2 contends, Insurance Code section 520 trumps it.

A. *The Supreme Court's Decision in Henkel Is On Point and Cannot Be Distinguished*

Fluor-2 floods us with criticism of the Supreme Court's decision in *Henkel, supra,* 29 Cal.4th 934 as a "controversial decision," a "senseless jumble," an "impediment to corporate transactions," and "an ill-advised forfeiture of insurance rights." Hartford is equally stalwart in its defense of *Henkel*, arguing "*Henkel* has far more than the weight of *stare decisis* on its side." "Hartford's coverage obligations remain with its insured [Fluor-1]; for the reasons the Supreme Court noted in *Henkel,* Hartford should not be forced to undertake the burden of extending coverage to [Fluor-2], an entity Hartford never agreed to cover."

Henkel is not the "outlier" that Fluor-2 characterizes. Nationally, the reaction of the few other jurisdictions to have considered *Henkel* is mixed. (Most states have not addressed the issue at all.)[2]

All of this is beside the point. Despite its rhetoric, Fluor-2 says it does not ask us to revisit or limit *Henkel.* "But Fluor did not, and does not here, ask for an order overruling *Henkel* or second-guessing the wisdom of that Court's analysis of the common law."

We agree. We have neither the power nor the inclination to reverse *Henkel*. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *Gwartz v. Superior Court* (1999) 71 Cal.App.4th 480, 481 ["Stare decisis and all that stuff"].)

We also agree with respondent court that *Henkel* directly applies to the Hartford policies. Indeed, the language of the consent-to-assignment clause is identical — not a surprising coincidence since Hartford also was the insurer in *Henkel.*

The Hartford consent-to-assignment clause provides: "Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon." (See also *Henkel, supra,* 29 Cal.4th at p. 943.)

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[2] In *Travelers Casualty & Surety Co. v. United States Filter Corp.* (Ind. 2008) 895 N.E.2d 1172, 1179, the Supreme Court of Indiana followed *Henkel's* reasoning, distinguishing between first party claims, involving "instantly incurred loss, such as that resulting from windstorm or fire," and third party claims, which involve injuries, which may be unreported or even unrealized "for years." "The California Supreme Court's logic in *Henkel* seems about right. At a minimum, for an insured loss to generate an assignable coverage benefit, the loss must be identifiable with some precision. It must be fixed, not speculative. [Citation.] We doubt that much, if any, authority exists for the proposition that an 'unliquidated inchoate potential for coverage' can be freely transferred without the insurer's consent." (*Id.* at p. 1180.)

The Supreme Court of Ohio rejected *Henkel* as to the duty to indemnify, but was unable to provide a definitive answer as to the duty to defend. (*Pilkington North America, Inc. v. Travelers Casualty & Surety Co.* (Ohio 2006) 861 N.E.2d 121.)

In *Henkel,* the insured spun off one of its two distinct product lines (involving metalworking chemicals) into a separate, newly created corporation, with the second corporation assuming by contract the assets and the liabilities of the first corporation insofar as they related to metalworking activities. Although the insurers provided liability coverage to the pre-spinoff corporation during the time that various workers were exposed to metallic chemicals and sustained bodily injuries, they relied on the consent-to-assignment clauses in their policies to deny coverage to the second corporation.

Like Fluor-2, the plaintiff in *Henkel* argued it was entitled to coverage because the liability insurance policies were written on an "occurrence" basis, thereby fixing the insurer's coverage obligations when the tort claimants were injured as a result of their exposure. (*Henkel, supra,* 29 Cal.4th at p. 944.) "According to Henkel, in this case there is no additional *risk* because the injury occurred before the assignment and the assignment does not affect either liability or policy limits." (*Id.* at p. 945.)

Our Supreme Court disagreed. After surveying over a century of California decisional law as well as treatises and other commentaries, the court concluded that consent-to-assignment clauses are generally valid and enforceable until the time that claims had been "reduced to a sum of money due or to become due under the policy." (*Henkel, supra,* 29 Cal.4th at p. 944.) Because the predecessor corporation still existed, the court recognized 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." (*Id.* at p. 945.)

As in *Henkel,* the mere fact that the events giving rise to liability — exposure to asbestos — took place before the reverse spinoff does not automatically

expand the universe of insureds with whom Hartford owes a relationship to include both Fluor-1 and Fluor-2.

B. *The 1872 Statute Does Not Constitute an Express Legislative Pronouncement Regarding the Assignability of Liability Insurance Policies that Undercuts This Court's Duty to Follow Henkel*

Rather than asking us to reconsider *Henkel*, Fluor-2 wants us to disregard *Henkel* because of the Supreme Court's failure to "apply the written law of this State as enacted by the Legislature, which the Supreme Court was not made aware of, and did not consider." According to Fluor-2, *Henkel* is not precedent because it was a "case decided in ignorance of statute . . . ."

Fluor-2 purports to find this express legislative pronouncement regarding a corporation's right to transfer liability insurance assets in Insurance Code section 520, which provides: "An agreement not to transfer the claim of the insured against the insurer after a loss has happened, is void if made before the loss . . . ."

Fluor-2 interprets Insurance Code section 520 to invalidate consent-to-assignment clauses in liability insurance policies after the insured "occurrence" has taken place. It argues, "[o]nce the insured risk is realized (has occurred or happened), the policy favoring free transfer of property rights outweighs the insurer's interest in restricting the transfer of policy benefits prior to the happening of the insured 'occurrence.' *This is the sound policy enacted by the Legislature in section 520*, which stands in stark contrast to the majority's decision in *Henkel* [, *supra,*] 29 Cal.4th 934." (Italics added.)

According to Fluor-2, Insurance Code section 520 is "squarely controlling" and provides the "rule of decision in this case, and therefore the rule the Superior Court was bound to follow in ruling on Fluor's motion." Because *Henkel*, as an announced rule of common-law decision, "conflicts" with section 520, Fluor-2 says we must follow the "expressed legislative will," not *Henkel*, which "necessarily committed legal error."

Fluor-2 calls section 520 a "bright line rule set forth by the Legislature" that cleans up the "uncertainty and disarray" "unnecessarily" created by *Henkel*.

Insurance Code section 520 was first enacted in 1872 as Civil Code section 2599. The provision was recodified verbatim as Insurance Code section 520 when the Insurance Code was enacted in 1935. (Stats. 1935, ch. 145, p. 510.)

Insurance Code section 520 is one of the more obscure provisions of the California codes. No court has ever relied on it, and it has been cited only once, in passing, in *Gillis v. Sun Ins. Office, Ltd*. (1965) 238 Cal.App.2d 408, a first party property insurance case involving an assignment of coverage after portions of the insured property (a water side restaurant) were damaged in a violent windstorm. The statute is unmentioned in either treatise or commentary.

Insurance Code section 520's obscurity survived through the appellate proceedings in *Henkel*. Despite *Henkel's* notoriety, and the national attention it drew, no litigant or amici so much as mentioned the supposed centrality of section 520, either before or after the decision's issuance. Fluor-2 is mystified by this omission and can offer no rational explanation for this "failure of the adversary system" which it characterizes as both "remarkable" and "unique." "[Fluor-2] has been unable to identify another instance in which the parties, numerous *amici curiae*, the trial court, a Court of Appeal [citation], and finally our Supreme Court, all failed to identify a California statute squarely controlling the legal issue presented in a case — much less a case of major economic importance and national visibility." (Fn. omitted.)

We have a more mundane explanation why Insurance Code section 520 has remained hidden for so long. There is less to the statute's supposed significance regarding assignability of liability insurance than meets the eye.

It is a fundamental doctrine of statutory interpretation that statutes are to be construed in the context in which they were written. "Statutes are documents having practical effects. It is therefore improper to construe them in the abstract, without taking

into consideration the historical framework in which they exist." (2B Sutherland, Statutory Construction (7th ed., 2008) § 49:1 at p. 7; see also *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387 [historical context as a factor in statutory interpretation].)

For these reasons, the California Supreme Court in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 816-819, declined to expansively interpret ambiguous language in another 1872 statute (Civ. Code § 1714) to support the conclusion that the Legislature intended to "uniformly apportion damages according to fault." (*Li* at p. 818.) *Li* refused to ascribe such far-reaching intentions, given the fact that "in 1872 there was no American jurisdiction applying concepts of true comparative negligence for general purposes and the only European jurisdictions doing so were Austria and Portugal." (*Id.* at p. 819, fn. omitted.) Instead, *Li* left it to the courts to judicially adapt existing law "to changing circumstances and conditions." (*Id.* at p. 821.)

Insurance Code section 520, as we have noted, was first adopted in 1872, when the industrial revolution and California statehood were in their childhood, seven years before California adopted its current constitution in 1879. At the time, liability insurance did not even exist as a concept. Insurance provided protection against first party marine, fire, and property damage losses.

As such, the concept of "loss," to which the 1872 statute referred, is easily identifiable for first-party property damage coverage. Before a "loss" such as a ship sinking or a burned building takes place, insurers have a vested interest in their personal relationships with the named insureds, and a legally-recognized need to prevent nonconsensual assignments to less responsible insureds. "The insurer has a right to know, and an interest in knowing, for whom he stands as insurer. He may be willing to insure one person and unwilling to insure another, while the owner of a particular parcel of property. He may have confidence in the honesty and prudence of the one in

protecting the property and thereby lessening the risk, and may have no confidence in the other." (*Bergson v. Builders' Ins. Co*. (1869) 38 Cal. 541, 545.)

After a first party loss, however, the insurer's need to consent dissipates, because any assignment is only of money already due under the contract. (See *Vierneisel v. Rhode Island Ins. Co*. (1946) 77 Cal.App.2d 229 [house destroyed by fire before close of escrow; affirming assignment by sellers to buyers of right to recover proceeds under fire insurance policy].) That is why, according to the code commissioners' note to the 1872 statute, a covenant or agreement in an insurance policy against an assignment following such a first-party loss "is grossly oppressive." (2 Ann. Civ. Code (1st ed, 1872, Haymond & Burch Commrs. — annotators 1872 ed.) p. 152.)

Third party liability policies present more problematic concepts of "loss." Does liability insurance provide protection for the "loss" sustained by insureds when they are subjected to a judgment for money damages and the indemnity policy becomes "a vested claim against the insurer and can be freely assigned or sold like any other chose in action or piece of property"? (See 17 Williston on Contracts (4th ed. 2000) § 49:126, p. 125.) Or, as the one dissenting justice argued in *Henkel*, does the "loss" take place much earlier when the victim of the insured's conduct sustains bodily injury or property damage? (*Henkel, supra*, 29 Cal.4th at p. 948 (dis. opn. of Moreno, J.).)

About this definitional question, the 1872 Legislature cared not a whit. To the 1872 Legislature, the idea of third party liability insurance was as alien as other yet-unborn developments, like the Internet (commercialized in the 1990's), Orange County (split from Los Angeles County in 1889), and the California Court of Appeal (established by constitutional amendment in 1904). Fluor-2 concedes that liability insurance did not exist in 1872; at oral argument, its counsel called liability insurance a "different animal" than first party coverage.

Not until the 1880's was the first policy of liability insurance written in America, when an English company with a Massachusetts branch wrote a policy to cover

bodily injuries accidentally sustained by an insured's employees. (See discussion in 2 Dunham, The Business of Insurance (1912) Liability Insurance: Historical Sketch, p. 191; see also 1 Appleman on Insurance 2d (Holmes ed. 1996), § 3.3, p. 353.) The first mention of "liability insurance" does not appear in a California judicial opinion until 1908. (*Aronson v. Frankf. etc. Ins. Co.* (1908) 9 Cal.App. 473 [involving indemnity to an insured arising out of an elevator accident].)

Fluor-2 argues that the recodification, undertaken in 1935, of the original 1872 statute as Insurance Code section 520 somehow transmogrified the provision into a "bright line rule" regarding *liability* insurance. It states, "Although third-party liability insurance was unknown at the time of the statute's inclusion in the Civil Code of 1872, the same was not true when it was reenacted as Section 520 of the new Insurance Code in 1935 and then amended in 1947. Section 520 thus clearly applies to liability policies."

Not so. As the Legislature itself expressed, the wholesale migration of insurance-related provisions from the Civil Code to the Insurance Code was not intended to effectuate a substantive change in the law. Thus, Insurance Code section 2 provides: "The provisions of this code in so far as they are substantially the same as existing statutory provisions relating to the same subject matter shall be construed as restatements and continuations thereof, and not as new enactments."

Even so, liability policies began purely as *indemnity* contracts, focused on protecting the insureds from liability, "with no purpose more expansive than protecting the insured's assets. The insurer's duty to indemnify was not activated until the insured actually paid a judgment." "Based on this 19th and early 20th century insurance provision, the liability insurance contract was in the strictest sense an 'indemnity' contract. The contract indemnified only the insured, and gave no actionable contract rights to a third-party claimant. So even an insured could not directly recover from the liability insurer until an actual loss occurred by the insured paying a tort or other judgment." (1 Appleman on Insurance 2d, *supra*, § 3.3, p. 350.)

Moreover, the Insurance Code itself defined "loss," in the context of liability insurance, as loss resulting from the insured's liability to the injured person, *not* the injury or harm to the underlying claimant. In this regard, Insurance Code section 108 provides: "Liability insurance includes: [¶] (a) Insurance against loss resulting from *liability* for injury, fatal or nonfatal, suffered by any natural person, or resulting from . . . damage to property . . . ." (Italics added.)

In 1947, Insurance Code section 520 was further amended, but the 1947 amendment related solely to life insurance. There is nothing in the 1947 amendment or anywhere else in section 520 that articulates legislative policy pertaining to the assignment of liability policies or at what stage the right to policy proceeds were freely assignable notwithstanding a consent-to-assignment provision in the policy. (See Stats. 1947, ch. 904, p. 2103, § 1.)

It is true, as Fluor-2 notes, that certain types of liability insurance have focused upon the concept of "occurrence" as trigger-points for an insurer's defense and indemnity obligations because that is the point at which the underwritten risk materializes. (*Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 655 (*Montrose*).) Thus, Fluor-2 extensively quotes from various sources within the insurance industry, including the Secretary of the National Bureau of Casualty Underwriters and various superior court briefs by liability insurers in states like New Jersey, Illinois, and Oregon for the interpretation that "'loss' in an occurrence-based liability policy happens at the time of the tort claimant's injury, which gives rise to the insured's liability (in other words, the time of the 'occurrence')." "This triggering event is the 'loss' addressed by [Insurance Code] section 520."

In *State of California v. Continental Ins. Co.* (Aug. 9, 2012, S170560) ___Cal.4th ___ [2012 Cal. LEXIS 7324] (*Continental*), our Supreme Court expanded on complex questions of liability insurance coverage for long-tail claims, involving progressive damage that takes place slowly over a long period of time and over multiple

consecutive policy periods. As in *Montrose*, the court looked to whether the insurance policies in question covered the risk when the continuing property damage "occurred," and then looked to the language of the policies to determine whether insurers should be held liable for losses before or after their respective policy periods, and whether those policies for a continuous long-tail loss should be "stacked."

But this evolution of liability coverage, as articulated in *Montrose* and *Continental*, came nearly a century after the 1872 legislation. Moreover, Fluor-2's so-called "'occurrence' test" was rejected by the Supreme Court in *Henkel*, drawing Justice Moreno's lone dissent, which suggested the "date of injury" as the more appropriate measure when a loss is established. "As explained below, under the policies at issue in this case, a chose in action is established on the date of *injury*, which is when the loss occurs." (*Henkel, supra*, 29 Cal.4th at p. 948 (dis. opn. of Moreno, J.).) Justice Moreno explicitly relied on *Montrose, supra*, 10 Cal.4th at page 669, to support his reasoning regarding the assignability of the liability insurance policies at issue: It "is unclear how the majority's understanding that the policy benefits are assignable only after they are reduced to a monetary sum can be reconciled with *Montrose*." (*Henkel*, at p. 949 (dis. opn. of Moreno, J.).)

Justice Moreno's six colleagues, however, disagreed about *Montrose*'s relevancy to consent-to-assignment provisions. As we have discussed, *Henkel* rejected the view that "under an occurrence-based liability policy [citation], policy benefits can be assigned without consent once the event giving rise to [tort] liability [against the insured] has occurred." (*Henkel, supra*, 29 Cal.4th at p. 944.) *Henkel* instead focused on when the *insured* has sustained a cause of action for breach of the insurance contract: "Defendants had not breached any duty to defend or indemnify [the named insured], so [the named insured] could not assign any cause of action for breach of such duty." (*Ibid.*)

We cannot gainsay this determination by our state's highest court. Neither *Montrose* nor *Continental* changes our analysis.

Here is the nub. The 1872 Legislature drew no bright lines and made no controlling pronouncements about liability insurance, or about how "loss" in the context of such policies is to be defined. We see nothing in Insurance Code section 520 or in *Henkel* to support Fluor-2's assumption that the Supreme Court would have reached a different result had the parties in that appeal briefed or argued the statute's applicability. In the absence of an express legislative directive, stare decisis controls.

If Fluor-2 wants to recast the 1872 statute to account for the evolution of modern liability insurance policies on an "occurrence" basis, it should direct its attention to the Legislature. "A'"court cannot, . . . in the exercise of its power to interpret, rewrite the statute. . . . That is a legislative and not a judicial function."'" (*Estate of Sanders* (1992) 2 Cal.App.4th 462, 476 [declining to interpret statute to compel DNA testing to prove paternity in probate proceedings].) "The reexamination of the law that [appellant] urges on the basis of [modern] advances must come from the Legislature." (*Ibid.*) If the rule of law in *Henkel* is to be vitiated, the Legislature in the 21st century, not the Legislature in the 19th century, must do it.

III
THE PARTIES HAVE NOT PROPERLY PLACED INTO ISSUE WHETHER FLUOR-1 ASSIGNED THE POLICIES TO FLUOR-2

As a separate reason for denying the petition, Hartford argues that Fluor-2, as the moving party for summary adjudication, failed to establish the absence of a triable issue of material fact whether Fluor-1 assigned the Hartford policies to Fluor-2.

Fluor-2 counters that Hartford's second amended cross-complaint never placed this matter into issue. Instead, Hartford, under its own characterization, sought a declaration that "*to the extent that* [*Fluor-2*] *might contend that it was assigned rights to the policies by* [*Fluor-1*], such a purported assignment was invalid because neither

[Fluor-1] nor [Fluor-2] ever sought or obtained Hartford's consent to assignment of the policies, as required by the Hartford policies." (Italics added.) Hartford now calls these "hypothetical facts."

This is one point on which both parties happen to agree. There remains, in Fluor-2's words, a "fact intensive inquiry" whether Fluor-2 legally retained an interest in the Hartford policies as a "mere continuation" of Fluor-1 or otherwise.

Given our holding that Insurance Code section 520 does not abrogate the Supreme Court decision in *Henkel*, we see no reason to enmesh ourselves in this thicket. These mixed questions of law and fact remain with the trial court and are unaffected by our opinion in this writ proceeding. But they do demonstrate why issuance of a peremptory writ is premature at this stage of the ongoing litigation.

IV
DISPOSITION

The petition for writ of mandate is denied. Hartford is entitled to costs in this writ proceeding. This court having issued an order to show cause, the decision in this writ proceeding is final 30 days after filing. (Cal. Rules of Court, rule 8.490(b).)

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.