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Case No. S _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FLUOR CORPORATION,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE
Respondent;

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Real Party In Interest.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division Three
Civil Case No. G045579

Following a Grant of Review and Transfer by the Supreme Court of California, Case No. S 196592

Petition from the Superior Court of the State of California for the County of Orange
Case No. 06CC00016, Honorable Ronald Bauer, Presiding

PETITION FOR REVIEW

LATHAM & WATKINS LLP
BROOK B. ROBERTS (STATE BAR NO. 214794)
JOHN M. WILSON (STATE BAR NO. 229484)
600 WEST BROADWAY, SUITE 1800
SAN DIEGO, CALIFORNIA 92101-3375
(619) 236-1234 • FAX: (619) 696-7419
Counsel for Petitioner Fluor Corporation

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A. Issues For Which This Court Granted Review And Transferred to Court of Appeal[1]

1. Should this Court reexamine its decision in *Henkel Corp. v. Hartford Accident & Indemnity Co.* (2003) 29 Cal.4th 934 ("*Henkel*") regarding the enforceability of anti-assignment clauses in third-party liability policies, because it conflicts with Insurance Code section 520 -- which specifically addresses that important issue, but was not called to the Court's attention in *Henkel*?

2. Are anti-assignment clauses in third-party liability policies unenforceable after a "loss has happened," as provided by Insurance Code section 520, or do such clauses remain enforceable even after "loss" if the insured's claim against the insurer has not yet matured into a "chose in action," as this Court ruled in *Henkel*?

B. Additional Issue Raised By Court of Appeal's Decision[2]

3. Is Insurance Code section 520 -- a "General Rule Governing Insurance" -- applicable to third-party liability policies?

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[1] (See Fluor Corporation's Petition for Review, Case No. S 196592 [filed September 19, 2011], at p. 1; Attachment A [Order granting Petition for Review, dated November 16, 2011].)

[2] (See *Fluor Corp. v. Superior Court* (2012) 208 Cal.App.4th 1506, attached hereto as Attachment B.)

II. WHY REVIEW SHOULD BE GRANTED

This Court previously granted Fluor Corporation's ("Fluor") Petition for Review and transferred the case to the Court of Appeal to consider a pivotal question concerning the assignability of rights under third-party liability insurance policies: Namely, whether this Court's decision in *Henkel* discussing the enforceability of anti-assignment clauses should be reconsidered because the Court was not made aware of Insurance Code section 520 -- a statute that voids such clauses after the insured "loss happens."

Henkel construed a typical anti-assignment provision that is standard in insurance policies:

> Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon.

(*Henkel*, *supra*, 29 Cal.4th at p. 943; see, e.g., App. Ex. 2, at p. 1045.[3]) Unaware of the insurance statute limiting their reach, *Henkel* held that these anti-assignment clauses remain enforceable even after the coverage-triggering loss happens, and continue to bar assignments until the policyholder's claim has been reduced to a "chose in action," i.e. "a sum of money due or to become due under the policy." (*Henkel*, *supra*, 29 Cal.4th at p. 944.)

Dictating a contrary rule, section 520 makes the happening of "loss" -- not the maturing of a "chose in action" -- the litmus test for assignability of insurance:

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[3] The term "App. Ex. __, at p. __" refers to the consecutively paginated exhibits submitted to the Court of Appeal with Fluor's Petition for Peremptory Writ of Mandate, filed August 1, 2011.

> An agreement ***not to transfer the claim of the insured against the insurer after a loss has happened, is void*** if made before the loss[.]

(Ins. Code, § 520 [emphasis added].) Without the benefit of section 520's guidance, *Henkel* mistakenly adopted a common law rule at odds with the governing statute.

The parties and amici curiae who appeared in *Henkel* should have brought section 520 to the Court's attention. However, there is no evidence in the *Henkel* decision, or in the record of that case, suggesting that the Court was aware the Legislature had enacted a rule limiting the effect of anti-assignment clauses in insurance policies. *Henkel* thus represents a rare lapse of the adversary system, in which the litigants failed to call the courts' attention to a controlling statute.

Although section 520 would not have changed the result for the *Henkel* parties because the Court also found that they did not intend to assign the insurance rights at issue, the statute has great importance for many other insureds with long-tail losses under occurrence-based liability policies. Virtually none of the assignments of liability insurance rights, which often accompany the purchase and sale of corporate assets, can survive scrutiny under *Henkel*'s "chose in action" standard. Such assignments are typically made years or decades after the policy expires and the coverage-triggering loss has happened. Nevertheless, if the assignment occurs before an actual judgment is entered against the insured (which rarely happens), California insurers now insist that the assignment is barred under *Henkel,* and no coverage exists for the very losses they collected premiums to insure.

By announcing a rule that allows insurers to restrict assignments even after the "loss" occurs, *Henkel* unknowingly undermined a key

protection provided to insureds under section 520. Recognizing the importance of re-examining *Henkel*, this Court unanimously granted Fluor's first Petition for Review, and transferred the case to the Court of Appeal to construe and apply section 520 in the first instance. (See Attachment A.)

On remand, however, the Court of Appeal did not substantively address the issues presented in Fluor's Petition, nor apply section 520 to the occurrence-based liability policies at issue in this case. Instead, the Court adopted a construction of section 520 that neither party espoused. Although Hartford[4] itself ***acknowledged that section 520 sets forth the test for determining the assignability of liability policies after a "loss happens,"*** the Court determined that the statute is only applicable to first-party property policies which were in effect more than 125 years ago.

Refusing to question the applicability of *Henkel* in light of section 520, the Court held that section 520 "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" at the time section 520's predecessor statute was enacted as part of the Civil Code in 1872. (See Attachment B [*Fluor Corp. v. Super. Ct.*, *supra*, 208 Cal.App.4th at p. 1509].) The Court's ruling is thus predicated on the notion that Insurance Code provisions tracing their lineage to the original Civil Code -- even those later adopted as "General Rules Governing Insurance" when the Insurance Code was formulated in 1935 -- do not apply to third-party liability policies.

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[4] Real Party in Interest Hartford Accident & Indemnity Company ("Hartford").

The Court of Appeal's *sua sponte* interpretation of section 520 is fundamentally flawed, and inconsistent with decades of prior case law in which California courts have applied other sections from the same chapter of the Insurance Code to liability policies. There is nothing in the language, purpose or historical development of section 520 that limits its application to first-party policies conceived in the 1800's. Like other sections of the "General Rules Governing Insurance" with the same statutory lineage as section 520, these laws currently apply to all insurance, including liability policies. For example, section 533, which prohibits policyholders from obtaining insurance for "a loss caused by the wilful act of the insured," was also originally enacted as part of the Civil Code in 1872, and later codified in the Insurance Code in 1935. (Ins. Code, § 533.) Although section 533 may have begun life in the Civil Code before liability policies were invented (like section 520), courts have held for more than fifty years that it applies with equal force to ***all*** insurance policies, including third-party liability policies. (See *Arenson v. Nat. Auto. & Casualty Ins. Co.* (1955) 45 Cal.2d 81, 84; *Evans v. Pacific Indemnity Co.* (1975) 49 Cal.App.3d 537, 541.)

The Court of Appeal was understandably reluctant to disturb this Court's decision in *Henkel* without express guidance. As the Justices commented during oral argument, "this case is going" to the Supreme Court where section 520 "will undoubtedly be considered." (See Request for Judicial Notice ["RJN"], Ex. 1 at pp. 6:21-7:21.) However, in its effort to protect *Henkel* from the statute's reach, the Court of Appeal compounded the error by threatening another body of settled case law, and disregarding the statute's intended purpose. As its legislative history shows, section 520 was motivated by a strong policy against forfeiture of insurance benefits: It

outlawed the "grossly oppressive" practice of insurers attempting to avoid assignments after the insured risk happens.[5] Yet that is precisely the result Hartford seeks here by relying on *Henkel.*

The evident conflict between section 520, which measures the enforceability of anti-assignment clauses in liability policies based on when "loss" occurs, and the common law rule of *Henkel*, which measures enforceability based on when a "chose of action" may later arise, should be resolved on the merits. Fluor respectfully requests that its Petition for Review be granted. (See Cal. R. Ct. 8.500(b)(1).)

III. STATEMENT OF THE CASE

Fluor, a publicly owned engineering, procurement, construction, maintenance and project management ("EPC") company, is the plaintiff and cross-defendant in an action in Respondent Superior Court, entitled *Fluor Corp., et al. v. Hartford Accident & Indemnity Co.*, Orange County Superior Court Case No. 06cc00016. Real Party in Interest is defendant and cross-complainant Hartford Accident & Indemnity Company.

This case concerns Fluor's claims for coverage under a series of comprehensive general liability insurance policies issued by Hartford between 1971 and 1985 (the "Policies"), to insure "FLUOR CORPORATION and any subsidiary or affiliated companies, corporations, organizations or other entities as may exist or may be formed or acquired

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[5] (See Fluor's Request for Judicial Notice in support of Reply to Answer to Petition for Peremptory Writ of Mandate, Ex. A [Former Civ. Code, § 2599 (1872); Code Commrs., note foll. Civ. Code, § 2599 (1st ed. 1872, Haymond & Burch, Commrs.-annotators) Vol. II, p. 152].) The Court of Appeal granted Fluor's Request for Judicial Notice. (See Attachment B [*Fluor Corp. v. Super. Ct., supra*, 208 Cal.App.4th at p. 1511].)

hereafter." (E.g., App. Ex. 2, at p. 28.) The Policies were written on an "occurrence" basis, providing that Hartford will defend its insureds against suits alleging bodily injury "caused by an occurrence." (*Id.* at p. 31.) "Occurrence" is defined in the Policies as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the Insured." (*Id.* at p. 89.)

Fluor seeks coverage under the Policies for "long tail" asbestos bodily injury claims arising out of its historical EPC operations. The first of the underlying asbestos suits against Fluor and its subsidiaries and affiliates (the "Fluor Insureds") was filed in 1985. The Fluor Insureds are now actively defending approximately 2,500 asbestos lawsuits in California and other jurisdictions.

In 2000, Fluor Corporation undertook a corporate restructuring (the "Reverse Spinoff") that assigned the insurance rights and obligations associated with the asbestos suits -- including ongoing retrospective premium payments owed to Hartford -- to this Petitioner, a newly-formed company operating under the same name and continuing the same EPC business Fluor had conducted for many decades. After advising Hartford of the transaction in early 2001, the "new" Fluor Corporation continued to work hand in hand with Hartford to defend and resolve the asbestos suits, as it had for the previous 15 years. Hartford continued to defend the "new" Fluor Corporation, make defense and indemnity payments on its behalf, and invoice and collect retrospective premiums from this entity.

This Petition arises because -- three years into this case, which Hartford had always litigated on the basis that Fluor was a proper plaintiff -- Hartford changed course and began to argue that it had been paying

benefits to a party that is not insured under the Policies. In August 2009, Hartford filed a cross-complaint, alleging for the first time that Fluor lacked any right to claim coverage under the Policies because of the standard anti-assignment clauses they contained, which provide that:

> Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon.

(See, e.g., App. Ex. 2, at p. 1045.)[6]

Hartford's new cross-complaint asserted causes of action based on the contention that the Reverse Spinoff was an "assignment of insurance rights" to Fluor made without consent. (App. Ex. 1, at p. 8 [¶ 44].) Specifically, Hartford alleged that, although Fluor and its predecessor had agreed to "transfer the assets and liabilities" relating to the historic EPC business, including "all assets and liabilities related to any insurance policies" which covered the EPC liabilities, Fluor "[n]ever sought or obtained Hartford's consent to the purported assignment of insurance rights[.]" (*Id.* at pp. 7-8 [¶¶ 40-44].)

In February 2011, Fluor moved for summary adjudication of Hartford's First and Second Causes of Action, seeking to establish that the assignment of insurance rights to Fluor alleged in Hartford's cross-complaint was effective regardless of Hartford's consent. (App. Exs. 3, 8.)

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[6] The Hartford anti-assignment clause here is identical to the Hartford anti-assignment clause at issue in *Henkel* (see *Henkel, supra,* 29 Cal.4th at p. 943), and in the vast majority of anti-assignment cases considered by American courts for decades. (E.g., *R.L. Vallee, Inc. v. Am. Internat. Specialty Lines Ins. Co.* (D.Vt. 2006) 431 F.Supp.2d 428, 434; *Smith v. Buege* (W.Va. 1989) 387 S.E.2d 109, 116; *Internat. Rediscount Corp. v. Hartford Accident & Indemnity Co.* (D. Del. 1977) 425 F.Supp. 669, 672.)

The assignment alleged in Hartford's cross-complaint was made more than a decade after the relevant "loss" -- namely, the asbestos bodily injury constituting the "occurrence" triggering the Policies -- happened. (App. Ex. 8, at pp. 2748-2753.). Therefore, Fluor contended that section 520 voids the anti-assignment provisions of the Policies. Hartford opposed Fluor's motion based on *Henkel*.[7]

On June 27, 2011, the Superior Court denied Fluor's motion for summary adjudication (App. Ex. 37), accepting Hartford's argument that "this court is duty-bound to apply *Henkel*, not [section] 520." (App. Ex. 36, at pp. 10911-10912.) The court declined to apply section 520, stating that it simply did "not have th[e] luxury" of disregarding *Henkel*. (App. Ex. 37, at p. 10941.)

Fluor timely petitioned the Court of Appeal for writ review. The Court issued a *Palma* notice, inviting Hartford to submit an informal response. However, on September 8, 2011, the Court of Appeal summarily denied the petition. Accordingly, Fluor timely petitioned the Supreme

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[7] Hartford separately moved for summary judgment challenging the Fluor Insureds' rights to claim benefits under the Policies. Hartford's motion, which is not at issue in this proceeding, focused on whether Fluor was a "named insured" under the Policies. The Fluor Insureds opposed Hartford's motion by pointing to a series of fact-intensive issues concerning Hartford's consistent course of conduct that would have to be resolved as part of Hartford's claim. For example, because Hartford acknowledged and treated Fluor as an insured for nearly a decade after learning of the purported assignment (including through more than three years of the instant coverage litigation), Fluor asserted several claims and defenses based on estoppel, waiver, modification and effective consent. (See App. Ex. 11, at pp. 3510-3512; App. Ex. 13, at pp. 4898-4901 [¶¶ 12-24].) The Superior Court denied Hartford's motion. (App. Ex. 37.) None of those factual issues will need to be resolved if Fluor is correct that section 520 "void[s]" Hartford's anti-assignment clauses at the time a "loss happens." (Ins. Code, § 520.)

Court for review on September 19, 2011. On November 16, 2011, this Court granted Fluor's Petition for Review, and transferred the case back to the Court of Appeal with directions to vacate its order denying mandate and issue an order to show cause to Respondent Superior Court. (See Attachment A.)

The Court of Appeal heard argument from the parties on July 24, 2012. (See RJN, Ex. 1.) On August 30, 2012, the Court of Appeal issued a decision denying Fluor's Petition for Writ of Mandate. (See Attachment B.) Rather than addressing the issues in Fluor's Petition for which review had been granted, the Court's published decision adopted an interpretation advocated by neither side: The Court held that despite its inclusion in general insurance statutes, section 520 applies only to the limited category of first-party property policies and does not apply to third-party liability policies. The Court reached this unprecedented result despite the fact that other critical laws with precisely the same statutory lineage -- such as the pro-insurer rule of Insurance Code section 533 -- unquestionably apply to third-party liability policies. As detailed below, the Court of Appeal's faulty analysis not only leaves unanswered the issues presented for review, but it compounds the legal confusion by upending settled expectations that general insurance laws apply to first- and third-party policies alike.

While this appeal was wending its way through the appellate courts, every issue that was not dependent on the outcome of this Petition was resolved through a bench trial, and the underlying case is awaiting resolution of the appellate process. The Court should resolve the critical legal issues at the heart of Fluor's previously-granted Petition, and provide certainty that, under Insurance Code section 520, anti-assignment clauses

are invalid after the insured "occurrence" or "loss" happens, and liability policies may then be assigned without insurer consent.

IV. LEGAL DISCUSSION

A. Section 520, A "General Rule Governing Insurance," Applies to Third-Party Liability Policies

Hartford concedes that when the "loss happens," anti-assignment clauses in liability policies are void as a matter of law. Indeed, Hartford framed "the right question" for the appellate courts to consider:

> What is "the appropriate scope of the post-loss exception for an assignment of rights under a third-party liability policy after a loss has happened?"

(Answer-Writ, at p. 6; see also *id.* at p. 43 ["the issue is *when* loss happens" (italics in original)].)[8]

Section 520 provides the answer. The statute is found in Division 1 of the Insurance Code, which sets forth the "General Rules Governing Insurance" that apply to all insurance policies, including the liability policies at issue here and in *Henkel*. It is the first provision found in Chapter 6 of that Division, which chapter is entitled "Loss." Although the statute's roots trace back to the original Civil Code of 1872, it was enacted as section 520 when the Insurance Code was adopted in 1935, and then amended in 1947 to ensure consistency with provisions of the Code dealing with life and disability insurance. The Legislature has since reenacted section 520 annually without change.

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[8] "Answer-Writ" refers to the "Answer of Real Party in Interest Hartford Accident and Indemnity Company to Petition for Peremptory Writ of Mandate or Other Appropriate Relief Filed By Fluor Corporation," filed with the Court of Appeal on February 8, 2012.

Despite its longstanding status in the Insurance Code, section 520 was not considered in *Henkel*, apparently because the parties -- including Hartford -- failed to bring it to the courts' attention.[9] Reluctant to acknowledge this lapse of the adversary process, the Court of Appeal in this case attempted to explain away the error based on a new theory not asserted by either party. According to the Court, the reason no one cited the statute in *Henkel* was because section 520:

> 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.

(Attachment B [*Fluor Corp. v. Super. Ct.*, *supra*, 208 Cal.App.4th at p. 1509].)

Not even Hartford advocated this position, and with good reason: The Court of Appeal's conclusion is flatly contradicted by decades of California jurisprudence.[10] This Court has long recognized that Insurance

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[9] The available record of the *Henkel* action -- including the briefs in the Court of Appeal following the trial court's summary judgment ruling, and ultimately the briefs of the parties and the several *amici curiae* appearing on both sides in this Court -- reveals that section 520 was never cited to any court considering the action. (See App. Ex. 5, at pp. 2048-2533.) Hartford has never explained its failure to cite the statute to the *Henkel* courts, notwithstanding the duty of its counsel to raise controlling authority, favorable or unfavorable.

[10] Hartford has argued since the issue was first presented to the Superior Court that the question is not ***whether*** section 520 applies to liability policies, but ***how*** it should be applied in that context. (See App. Ex. 20 [Hartford's Opposition to Fluor's Motion for Summary Adjudication, filed April 18, 2011], at p. 9916 ["Section 520 and the cases that apply its common law principle deal with the 'loss' that arises under the insurance policy in question, since that is all that the insured can assign to someone else. [. . .] In the context of Section 520, it is clear that 'loss' has its ordinary meaning of 'the insureds' liability.'"]; Answer-

Code section 533 -- a statute with the same lineage as section 520 -- applies to ***all*** insurance policies in California, including liability policies.

Section 533 declares the public policy of the State not to insure policyholders against the consequences of their willful conduct. It appears in the same Division ("General Rules Governing Insurance") and Chapter ("Loss") of the Insurance Code as section 520. Similarly, it was originally codified as section 2629 of the Civil Code, and has remained substantively unchanged since then, even as it was adopted into the Insurance Code in 1935.[11]

As this Court has repeatedly held, Section 533 is an implied exclusionary clause that governs ***all*** policies in California, ***including third-party liability policies***. (See *Arenson, supra,* 45 Cal.2d at p. 84 ["Section 533 of the Insurance Code . . . codifies the general rule that an insurance policy indemnifying the insured against liability due to his own wilful wrong is void as against public policy . . . ."]; *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18 ["[B]y statute, and as a matter of public policy, the insurer may not provide coverage for willful injuries by the insured against a third party. (Ins. Code, § 533.)"].)

Writ at p. 38 ["[A] restriction on assignment after a loss will not be enforced."]; *id.* at p. 39 ["[N]otwithstanding a consent-to-assignment provision, the right to recover under a policy is freely transferable after a loss."]; *id.* at p. 43 ["the issue is *when* loss happens" (italics in original)].)

[11] (See *Cal. Casualty Management Co. v. Martocchio* (1992) 11 Cal.App.4th 1527, 1531 ["Insurance Code section 533 has existed without substantive change in the law of this state since it was codified as Civil Code section 2629 in 1873-1874."]; *Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 499, fn. 30 ["The first clause of [now section 533], exonerating an insurer 'for a loss caused by the wilful act of the insured,' has survived without amendment since its enactment in 1872."].)

Courts have previously reviewed the historical development of section 533 -- which parallels the development of section 520 -- and explained why it ***must*** apply to liability policies:

> Plaintiffs next contend that section 533 of the Insurance Code should not apply to liability insurance policies at all. At the urging of both parties in their excellent briefs on the subject, we have considered the historical background of insurance development generally and of section 533 of the Insurance Code in particular. It is significant that the first clause of section 533 of the Insurance Code, providing that an insurer is not liable for a loss caused by the wilful act of the insured, has remained absolutely unchanged since its first enactment as section 2629 of the 1872 Civil Code. (See History and Development of Insurance Law in California, Introduction to West's Cal. Ins. Code, p. XLI.) An amendment in 1873 made no change in the provisions with which we are here concerned. There were no other amendments. The provision was placed into the Insurance Code unchanged in 1935, and it has remained unamended in the succeeding years. In this long span of time, many changes have taken place in types and forms of insurance and the Legislature was aware of these. Having made no changes in the law in question, the Legislature obviously intended it to continue to apply in accordance with its clear and unambiguous wording.

(*Evans, supra,* 49 Cal.App.3d at p. 541.)

Under the Court of Appeal's decision here, the foregoing authorities are erroneous and should be overturned "for the simple reason that liability insurance did not exist in 1872." However, the fact that liability insurance may not have existed in 1872 is of no moment. Courts do not assume that "the Legislature was prescient enough" to "exclude" from the scope of its statutory commands things which had not yet come into existence. (*O'Grady v. Super. Ct.* (2006) 139 Cal.App.4th 1423, 1461.) That is especially true in this context, since the Legislature adopted section 520 as

a "General Rule[] Governing Insurance" when it enacted the Insurance Code ***in 1935*** -- a time when liability insurance was well known. (See *Aronson v. Frankfurt Accident & Plate Glass Ins. Co.* (1908) 9 Cal.App. 473; *Ocean Accident & Guarantee Corp. v. Southwestern Bell Telephone Co.* (8th Cir. 1939) 100 F.2d 441, 444-445.)

There is simply no authority to support the novel proposition that section 520 is limited to "marine, fire, and property damage" policies, while section 533 (which has a virtually identical history) is not. Yet this is precisely the irreconcilable result upon which the Court of Appeal's denial of Fluor's Petition for Writ of Mandate is necessarily based. Review should be granted to ensure consistency in the Court's jurisprudence, and to protect against the unintended adverse consequences that would flow from the Court of Appeal's decision. (Cal. R. Ct. 8.500(b)(1).)

B. Section 520 Supersedes *Henkel*'s Conflicting Common-Law Holding

1. Statutory Law Controls Over Common Law

There can be no legitimate dispute that section 520 governs liability insurance policies. Accordingly, the Court of Appeal was obliged to apply the statute to Fluor's Petition, even if it compelled a different result than this Court reached in *Henkel* applying the common law.

"The will of the supreme power is expressed: (a) By the Constitution; (b) By Statutes." (Civ. Code, § 22.1.) "The organic law is the constitution of government and is altogether written. Other written laws are denominated statutes. The written law of this State is therefore contained its Constitution and statutes . . ." (Code Civ. Proc., § 1897.) Judicial decisions are "unwritten law." (*Id.*, § 1899.)

It is axiomatic that when a common-law decision conflicts with a statute, the statute takes precedence. (E.g., *California Bank v. Schlesinger* (1958) 159 Cal.App.2d Supp. 854, 865 ["[S]tatute law must control whether [] cases are in harmony therewith or not."].)[12] As the Civil Code provides: "The [C]ode establishes the law of this State respecting the subjects to which it relates[.]" (Civ. Code, § 4.)

If the adversary process does not call a controlling statute to the courts' attention and the common law develops in ignorance of the legislative rule, California courts are duty-bound to promptly correct the error. (See *Myers v. City & County of San Francisco* (1871) 42 Cal. 215, 217 ["The statute supersedes the common law rule, and must control."].)[13] This ensures the integrity of the judicial system. With that aim, this Court should reconsider *Henkel* in light of the protection that section 520 provides to Fluor and other claimants.

2. *Henkel* Did Not Measure the Enforceability of Anti-Assignment Clauses Against the "Loss" Test Mandated by Section 520

Henkel plainly did not analyze the validity of anti-assignment clauses in the terms required by section 520. Instead, the majority and

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[12] The Court of Appeal incorrectly reversed this rule. (See Attachment B [*Fluor Corp. v. Super. Ct.*, *supra*, 208 Cal.App.4th at p. 1513 ("We have neither ***the power*** nor the inclination to reverse *Henkel*." [emphasis added])].)

[13] (See also *Franklin Capital Corp. v. Wilson* (2007) 148 Cal.App.4th 187, 193, 210 ["While the case law . . . is extensive, we must remember that the right . . . is set forth in a statute, and all permutations of circumstances on the subject flow from that statute. . . . [¶] [A different rule] might be an excellent judicial policy and indeed we might adopt it ourselves if writing in vacuum. But it's not what the Legislature said."].)

dissent agreed on the universal common law principle that, at some point, anti-assignment provisions in insurance policies become unenforceable regardless of whether the insurer consents. However, the Justices parted ways on whether that line should be drawn at the point when the coverage-triggering "loss" happens, or later when the policyholder's claim against the insurer is subsequently "reduced to a sum of money due or to become due under the policy" (i.e., a "chose in action"). (*Henkel*, *supra*, 29 Cal.4th at p. 944; compare *id.* at p. 947 [dis. opn. of Moreno, J.].) That common-law debate between the majority and dissent should have been irrelevant, because section 520 conclusively draws the line at the time the loss happens:

> 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.)

Although the time of "loss" is dispositive under section 520, the word "loss" does not appear once in the *Henkel* majority opinion. (See *Henkel*, *supra*, 29 Cal.4th at pp. 938-944.) This is unsurprising in light of the majority's decision to reject the common law rule urged by Justice Moreno (in dissent) and Justice Croskey (at the Court of Appeal) -- that "loss" is the proper benchmark for measuring the enforceability of anti-assignment clauses. The majority declined to analyze the question of when anti-assignment clauses become invalid in terms of "loss" because it concluded that when a "loss happens" was *immaterial* to when a "chose in action" later arises.

Courts that have considered *Henkel* in determining when anti-assignment clauses become unenforceable recognize that the Supreme

Court plainly distinguished "loss" from "chose in action" (i.e., when a claim is subsequently reduced to a "sum of money due"):

> Under California law [i.e., *Henkel*], assignment of insurance benefits may violate an anti-assignment provision, ***even if such assignment took place after the insurance loss***, if the claim against the policy has not been "reduced to a sum of money due or to become due under the policy."

(*In re Thorpe Insulation Co.* (C.D. Cal. Sept. 21, 2010, No. CV 10-1493) 2010 U.S. Dist. LEXIS 104196, *10 [quoting *Henkel*; emphasis added], revd. on other grounds, *Motor Vehicle Casualty Co. v. Thorpe Insulation Co.* (9th Cir. Cal. 2012) 677 F.3d 869; accord *Negri v. Nationwide Mutual Ins. Co.* (N.D. W.Va. Oct. 24, 2011, No. 5:11cv3) 2011 U.S. Dist. LEXIS 123083, *19-20 [*Henkel* "found even post-loss assignment of policy rights to be non-assignable"]; *Sandburg Fin. Corp v. Nat. Union Fire Ins. Co.* (S.D. Tex. July 25, 2011, No. H-10-2332) 2011 U.S.Dist. LEXIS 81398, *16 [describing *Henkel*'s holding as: "a post-loss, pre-judgment assignment without consent is prohibited"].)[14]

Tellingly, Hartford eventually conceded this crucial point:

> The dissent put the "loss" issue front and center, as had the earlier decision of the Court of Appeal. ***The majority adopted a different analysis***.

(Answer-Writ, at p. 6 [emphasis added].) The "different analysis" that the

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[14] (See also Stempel, *Assessing the Coverage Carnage: Asbestos Liability and Insurance After Three Decades of Dispute* (2006) 12 Conn. Ins. L.J. 349, 459 ["In California, it is no longer enough for the loss event to have taken place in order for an insurance policy to become assignable (even in the face of anti-assignment or consent requirement language in the policy). Instead, ***the loss must not only have taken place but must 'have been reduced to a sum of money due or to become due under the policy***.'" (quoting *Henkel*, emphasis added)].)

Henkel majority adopted was ***not*** the one mandated by the Legislature, which establishes the time that "loss happens" as the critical point when anti-assignment clauses become "void" as a matter of law. (See Ins. Code, § 520; cf. *California Bank, supra,* 159 Cal.App.2d Supp. at p. 865 ["[S]tatute law must control whether [] cases are in harmony therewith or not."].)

Because the parties in *Henkel* failed to cite the governing statute, this Court should reexamine the issue applying the test mandated by section 520.

C. This Court Should Confirm that Anti-Assignment Clauses in Occurrence-Based Third-Party Liability Insurance Policies are Void After the Coverage-Triggering "Loss" Has "Happened"

When analyzed through the proper prism of section 520, the key issue raised by this Petition is easily framed: At what point does a "loss happen" in an occurrence-based liability policy, rendering subsequent assignments valid?

The insurance industry explicitly intended the term "occurrence" to "identify the time of ***loss***" for the purposes of third-party liability policies. (Elliott, The New Comprehensive General Liability Policy (Schreiber ed. 1968) Practicing Law Institute, Liability Insurance Disputes, 12-5 [emphasis added].) Therefore, it is not surprising that California's insurance jurisprudence, including this Court's seminal decisions in *Montrose* and *Continental*,[15] confirms that "loss" arises in an occurrence-

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[15] (*Montrose Chem. Corp. of Cal. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645; *State v. Continental Ins. Co.* (2012) 55 Cal.4th 186.)

based liability policy when an underlying claimant suffers "bodily injury" or "property damage."[16]

In *Montrose*, this Court repeatedly equated "loss" with the underlying event that triggers coverage.[17] (See, e.g., *Montrose, supra,* 10 Cal.4th at pp. 654-655 [defining the relevant "losses" as the "***continuous or progressively deteriorating bodily injury and property damage that occurred*** during the successive policy periods"]; *id.* at p. 679 [describing

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[16] In the courts below, Hartford has attempted to escape the long line of authority and the admission of the insurance industry itself concerning the time when "loss" happens under a CGL policy by pointing to a provision of the Insurance Code that delineates the "Classes of Insurance" subject to the Insurance Commissioner's regulatory jurisdiction. (See Ins. Code, § 108 ["Liability insurance includes: (a) Insurance against loss resulting from liability for injury . . . ."].) However, section 108 merely describes the commercial instrument (insurance) that is used to protect policyholders against the risk that their acts will cause damage to another for which the policyholder is responsible. "Loss" is the expression of the claimant's "injury" that is shifted to a tortfeasor through "liability." That liability attaches, and the claimant's "injury" becomes the policyholder's "loss," at the moment the insured event ("occurrence" of "bodily injury" or "property damage") happens.

[17] The Court of Appeal unfairly maligns Fluor for "flood[ing] [the Court] with criticism of the Supreme Court's decision in *Henkel*" (Attachment B [*Fluor Corp. v. Super. Ct.*, *supra*, 208 Cal.App.4th at p. 1512]), by relying on a series of incomplete quotations taken out of context. For example, far from referring to *Henkel* as a "senseless jumble," Fluor merely pointed out that the term "loss," as it was long ago defined by this Court, cannot be reconciled with Hartford's contention that "loss" in a third-party liability policy is the equivalent of *Henkel*'s "chose in action against the insurer." (See Fluor's Petition for Peremptory Writ of Mandate, at pp. 56-57 [discussing *Montrose*].) Improperly substituting "chose in action against the insurer" for "loss" -- two entirely different terms that the *Henkel* Court implicitly recognized happen at different points -- each time the latter appears in *Montrose* would muddle the Court's discussion in that case so as to make it indecipherable.

the "insurer's obligation to indemnify an insured for *manifested* losses" (citation omitted)].)[18]

Moreover, the Court recently reaffirmed that settled understanding of "loss" in *Continental.* In ruling that "the policies at issue obligate the insurers to pay all sums for property damage . . . as long as some of the continuous property damage occurred while each policy was 'on the loss'" (*Continental, supra*, 55 Cal.4th at p. 200), the Court again equated "loss" with the underlying event that triggers coverage. For cases of "continuous" or "long-tail loss," the Court held:

> [T]he principles announced in [*Montrose* and *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 55–57] apply to the insurers' indemnity obligations in this case, so long as the ***insurers insured the State during the property damage itself***.

(*Id.* at p. 191 [emphasis added]; see also *id.* at p. 197 ["[A]s long as the property is insured at some point during the continuing damage period, the insurers' indemnity obligations persist until the loss is complete, or terminates."]; *id.* at p. 198 ["The fact that all policies were covering the risk at some point during the property loss is enough to trigger the insurers' indemnity obligation."]; *id.* at p. 201 ["[The] insurer reasonably expects to pay for property damage occurring during a long-tail loss it covered[.]"].)

The Courts of Appeal have followed that interpretation. For example, in *Westoil Terminals Co. v. Harbor Ins. Co.* (1999) 73 Cal.App.4th 634, 641-642, the court was presented with a claim for

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[18] See also *Montrose, supra,* 10 Cal.4th at p. 697 (Baxter, J., concurring) ("In the third party context, the relevant risk is the insured's act or omission, and the resulting damage, injury, or ***loss to another***, which together form the basis of legal liability against the insured." [emphasis added]).

coverage arising from pollution that had happened in the 1970's under policies for which the benefits had been assigned in the 1980's. The court held that the insured "loss" was the "occurrence" of contamination that caused damage to third-party property and so gave rise to the insured's liability:

> In the matter before us, ***the loss occurred during the policies' periods in the early 1970's***. The transfer of the policies to Westoil Partnership in 1986 was well after the loss . . . Inasmuch as the loss occurred in the early 1970's, any transfer of the policies in 1986 did not in any fashion increase the risk to respondents. . . .

(*Westoil, supra*, 73 Cal.App.4th at p. 641-42 [emphasis added].)[19]

Similarly, in *Employers Ins. Co. of Wausau v. Travelers Indemnity Co.* (2006) 141 Cal.App.4th 398, the Court explained that third-party liability insurers'

> obligation to their insured arose long ago: long before the *Jensen-Kelly* releases and the *Avila* and *Arlich* actions were filed. (*Fireman's Fund, supra,* 65 Cal.App.4th at p. 1304, 77 Cal.Rptr.2d 296 ["Primary coverage provides immediate coverage upon the 'occurrence' of a 'loss' or the 'happening' of an 'event' giving rise to liability"]; see generally *Montrose Chemical Corp. v. Admiral Ins. Co., supra,* 10 Cal.4th at p. 645, 42 Cal.Rptr.2d 324, 913 P.2d 878 [analyzing "trigger of coverage" question in context of continuous or progressive injury from environmental contamination].) ***At the time of loss, each insurer had a potential obligation to defend and indemnify Whitman against claims that might arise from a toxic discharge.***

(*Id.* at p. 405 [emphasis added].)

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[19] The *Henkel* majority opinion itself approvingly cited *Westoil*, albeit for a different purpose. (*Henkel, supra*, 29 Cal.4th at p. 944.)

These decisions recognize that, in the context of third-party liability policies, the events within the policyholder's control that must occur to give rise to coverage have all taken place at the time that fortuitous event happens.[20] It is at the point when that "fortuity (i.e., the 'occurrence' or 'accident') has happened and the third party has been injured by the insured's conduct, [that] liability coverage becomes implicated." (*Chu v. Canadian Indemnity Co.* (1990) 224 Cal.App.3d 86, 95.)

Indeed, it is the presence of risk that makes the relationship between underwriter and policyholder one of insurance. When that risk subsequently disappears upon the happening of an "occurrence," there is no longer an "insured risk," but a "loss." At that moment, the insurance contract has lost its aleatory character, and section 520 allows the policyholder to freely assign its rights.

Given this received understanding of the term "loss" by insurers and courts alike, the *Henkel* majority opinion did not dispute Justice Moreno's interpretation of "loss" in the third-party liability insurance context. As is now apparent, however, section 520 makes "loss" the test, and reflects the same rule that Justice Moreno argued flows from the

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[20] Under "occurrence"-based policies, the happening of an "occurrence" is referred to as the "trigger" of coverage. As the Supreme Court explained in *Montrose*:

> In the third party liability insurance context, "trigger of coverage" has been used by insureds and insurers alike to denote ***the circumstances that activate the insurer's defense and indemnity obligations under the policy***.

(*Montrose*, *supra*, 10 Cal.4th at p. 655 [emphasis added].) Although the insurer's obligation to perform -- to defend and/or indemnify -- may not be immediately due, it has been "activated" by the "occurrence." This triggering event is the "loss" addressed by section 520.

common law: Anti-assignment clauses are unenforceable if they restrict the assignment of rights after the "occurrence" happens, regardless of whether that loss has been further "reduced to a sum of money due or to become due under the policy" at the time of the assignment. (*Henkel*, *supra*, 29 Cal.4th at p. 944.)

D. Significant Harms Flow from Failing to Enforce Section 520

Buyers and sellers of businesses should be able to conduct efficient transactions and realize the benefits of insurance written to cover their liabilities -- benefits they are being denied under the rule of *Henkel*. Because section 520 is now being cited to legitimately question *Henkel*, litigants will continue to petition the courts urging them to apply the governing statute. However, as this case demonstrates, lower courts will understandably hesitate to enforce section 520 in the face of this Court's pronouncement of the common law:

> [HARTFORD COUNSEL]: . . . This Court, of course, is bound to apply Supreme Court precedent. . . . This Court is not free to disregard *Henkel*, even if it thinks that the Supreme Court got it wrong in *Henkel*, which it didn't really get wrong . . . .
>
> THE COURT: You know, you've told me that[,] that's not an issue. They can be dead wrong, but they are still the Supreme Court.

(App. Ex. 36, at pp. 10911-10912.)

> JUSTICE RYLAARSDAM: Well, do we have even the authority to say, "Well, the Supreme Court did wrong so we'll go the other way?" Maybe we'll—
>
> [FLUOR COUNSEL]: I think the answer to that question, Justice Rylaarsdam, is yes.

> JUSTICE RYLAARSDAM: Well, I think the answer to that question is no.
>
> [FLUOR COUNSEL]: Well, under California law, statutory law controls, regardless of whether the Supreme Court may declare the common law to be something different. And in this case, the Henkel court did not consider the governing statute or the overriding principle that supports --
>
> JUSTICE RYLAARSDAM: Well, it seems to me when you file your petition for re-hearing, that argument will undoubtedly be considered. I mean, your petition for hearing in the supreme court.
>
> [FLUOR COUNSEL]: I think that's right. And that's precisely the issue that was teed up in Fluor's petition for relief.
>
> JUSTICE RYLAARSDAM: That's where this case is going in any event; right?
>
> [FLUOR COUNSEL]: I think that's probably right, Your Honor. I think that ultimately the supreme court is going to be the arbiter of what it did or didn't do in the Henkel decision.

(RJN, Ex. 1 at pp. 6:21-7:21; accord Attachment B [*Fluor Corp. v. Super. Ct.*, *supra*, 208 Cal.App.4th at p. 1508 ("We cannot reevaluate [*Henkel*'s] wisdom or merits.")].)

V. CONCLUSION

This Petition presents a question of great importance to insurers, insureds and tort claimants. The Legislature has provided a rule which fosters the orderly, predictable conduct of corporate transactions and assignment of liability insurance rights. Rather than addressing the merits of Fluor's Petition, the Court of Appeal's decision simply sows more confusion by holding that Insurance Code provisions adopted from the original Civil Code, such as section 520, do not govern liability policies. This flawed conclusion not only undermines the plain language, history and

purpose of section 520, but contradicts decades of settled case law where similar provisions, such as section 533, have been consistently applied to liability policies.

For the foregoing reasons, Fluor respectfully requests that review be granted.

DATED: October 9, 2012

LATHAM & WATKINS LLP
Brook B. Roberts
John M. Wilson

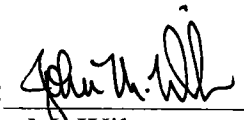
By: _____
John M. Wilson
Attorneys for Petitioner
Fluor Corporation

CERTIFICATION OF COMPLIANCE WITH RULES OF COURT

Petitioner's counsel certifies that this brief meets the requirements of the California Rules of Court. It has been prepared in 13-point Times New Roman typeface and consists of a total of 7,232 words, as counted by the word-processing program (Microsoft Word) used to generate this Petition, exclusive of the Tables and Certification.

DATED: October 9, 2012

LATHAM & WATKINS LLP
Brook B. Roberts
John M. Wilson

By: 
John M. Wilson

Attorneys for Petitioner
Fluor Corporation

Court of Appeal, Fourth Appellate District, Division Three - No. G045579
S196592

IN THE SUPREME COURT OF CALIFORNIA
En Banc

FLUOR CORPORATION, Petitioner,

v.

SUPERIOR COURT OF ORANGE COUNTY, Respondent;

HARTFORD ACCIDENT & INDEMNITY COMPANY, Real Party in Interest.

The petition for review is granted.

The matter is transferred to the Court of Appeal, Fourth Appellate District, Third Division, with directions to vacate its order denying mandate and to issue an order directing the superior court to show cause why the relief sought in the petition should not be granted.

Cantil-Sakauye
Chief Justice

Kennard
Associate Justice

Baxter
Associate Justice

Werdegar
Associate Justice

Chin
Associate Justice

Corrigan
Associate Justice

LIU
Associate Justice

Analysis
As of: Oct 09, 2012

FLUOR CORPORATION, Petitioner, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; HARTFORD ACCIDENT & INDEMNITY COMPANY, Real Party in Interest.

G045579

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

208 Cal. App. 4th 1506*; *2012 Cal. App. LEXIS 937

August 30, 2012, Opinion Filed

PRIOR HISTORY: [**1]
Petition for a writ of mandate to challenge an order of the Superior Court of Orange County, No. 06CC00016, Ronald L. Bauer, Judge.
Fluor Corporation v. S.C. (Hartford Accident & Indemnity Company), 2011 Cal. LEXIS 12107 (Cal., Nov. 16, 2011)

DISPOSITION: Petition denied.

CASE SUMMARY:

PROCEDURAL POSTURE: In a case involving two corporate entities with the same name, petitioner corporation #2 filed a petition for writ of mandate to direct respondent, the Orange County Superior Court, California, to grant its motion for summary adjudication.

OVERVIEW: The issue in this case was whether corporation #1 could assign its rights under several liability insurance policies to corporation #2 as a result of a "reverse spinoff." The court concluded that *Ins. Code, § 520*, which was enacted in 1872, had no bearing as a "clear" or "controlling" legislative expression on the assignability of liability insurance because liability insurance did not exist in 1872. At the time the statute was enacted, insurance provided protection against first party marine, fire, and property damage losses. The decision in Henkel Corp. v. Hartford Accident & Indemnity Co. directly applied to the policies at issue. The court saw nothing in *§ 520* or in Henkel to support corporation #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 addition, there remained a fact intensive inquiry as to whether corporation #2 legally retained an interest in the policies as a mere continuation of corporation #1. These mixed questions of law and fact demonstrated why issuance of a peremptory writ was premature at this stage of the ongoing litigation.

OUTCOME: The petition for writ of mandate was denied.

LexisNexis(R) Headnotes

Insurance Law > Bad Faith & Extracontractual Liability > Assignment of Claims
[HN1] See *Ins. Code, § 520.*

Governments > Legislation > Interpretation
[HN2] 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.

Insurance Law > Bad Faith & Extracontractual Liability > Assignment of Claims
Insurance Law > Property Insurance > Obligations > Losses
[HN3] The concept of "loss" 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 it stands as insurer. The insurer may be willing to insure one person and unwilling to insure another, while the owner of a particular parcel of property. The insurer 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. 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. That is why a covenant or agreement in an insurance policy against an assignment following such a first-party loss is grossly oppressive.

Governments > Legislation > Interpretation
Insurance Law > General Overview
[HN4] See *Ins. Code, § 2.*

Insurance Law > General Liability Insurance > General Overview
Insurance Law > Property Insurance > Coverage > Property Damage
[HN5] See *Ins. Code, § 108.*

Insurance Law > Bad Faith & Extracontractual Liability > Assignment of Claims
Insurance Law > General Liability Insurance > Occurrences
[HN6] In Henkel Corp. v. Hartford Accident & Indemnity Co., the California Supreme Court rejected the view that under an occurrence-based liability policy, policy benefits can be assigned without consent once the event giving rise to tort liability against the insured has occurred.

Governments > Courts > Authority to Adjudicate
Governments > Legislation > Interpretation
Governments > State & Territorial Governments > Legislatures
[HN7] A court cannot, in the exercise of its power to interpret, rewrite the statute. That is a legislative and not a judicial function.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

In a case involving two corporate entities with the same name, corporation # 2 filed a petition for writ of mandate to direct the superior court to grant its motion for summary adjudication. The issue in this case was whether corporation # 1 could assign its rights under several liability insurance policies to corporation # 2 as a result of a "reverse spinoff." (Superior Court of Orange County, No. 06CC00016, Ronald L. Bauer, Judge.)

The Court of Appeal denied the petition for writ of mandate. The court concluded that *Ins. Code, § 520*, which was enacted in 1872, had no bearing as a "clear" or "controlling" legislative expression on the assignability of liability insurance because liability insurance did not exist in 1872. At the time the statute was enacted, insurance provided protection against first party marine, fire, and property damage losses. The decision in *Henkel Corp. v. Hartford Accident & Indemnity Co.* directly applied to the policies at issue. The court saw nothing in *§ 520* or in *Henkel* to support corporation # 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 addition, there remained a fact intensive inquiry as to whether corporation # 2 legally retained an interest in the policies as a mere continuation of corporation # 1. These mixed questions of law and fact demonstrated why issuance of a peremptory writ was premature at this stage of the ongoing litigation. (Opinion by Ikola, J., with O'Leary, P. J., and Rylaarsdam, J., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Insurance Contracts and Coverage § 77--Liability Insurance--Assignability--Reverse Spinoff.--In a case in which the issue was whether a corporation could assign its rights under several liability insurance policies to another corporation as a result of a "reverse spinoff," *Ins. Code, § 520*, which was enacted in 1872, had no bearing as a "clear" or "controlling" legislative expression on the assignability of liability insurance because liability insurance did not exist in 1872.

[Cal. Insurance Law & Practice (2012) ch. 47, § 47.07.]

(2) Statutes § 19--Construction--Context.--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.

(3) Insurance Contracts and Coverage § 64--Property Damage--Assignment--Loss.--The concept of "loss" 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 it stands as insurer. The insurer may be willing to insure one person and unwilling to insure another, while the owner of a particular parcel of property. The insurer 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. 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. That is why a covenant or agreement in an insurance policy against an assignment following such a first party loss is grossly oppressive.

(4) Insurance Contracts and Coverage § 77--Liability Insurance--Assignment--Without Consent.--In *Henkel Corp. v. Hartford Accident & Indemnity Co.*, the Supreme Court rejected the view that under an occurrence-based liability policy, policy benefits can be assigned without consent once the event giving rise to tort liability against the insured has occurred.

(5) Statutes § 20--Construction--Judicial Function--Rewriting of Statute.--A court cannot, in the exercise of its power to interpret, rewrite the statute. That is a legislative and not a judicial function.

COUNSEL: [*1508] 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. Ruggeri and Joshua D. Weinberg for Real Party in Interest.

JUDGES: Opinion by Ikola, J., with O'Leary, P. J., and Rylaarsdam, J., concurring.

OPINION BY: Ikola

OPINION

IKOLA, J.--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 [129 Cal. Rptr. 2d 828, 62 P.3d 69]* (*Henkel*), our Supreme Court enforced an identical consent-to-assignment clause under a similar fact pattern. As a result, [**2] 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 curiae 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 ... ."

[*1509] Petitioner has unearthed this legislative pronouncement in a statute originally enacted in 1872, which provides: "An agreement not [**3] 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.

(1) 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 [**4] Fluor-1) was created in 1924.[1]

> 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."

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 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) [**5] provided comprehensive liability insurance [*1510] 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 [**6] 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 [**7] 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."

[*1511] 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 [**8] 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 [**9] request for judicial notice.

II

THIS COURT IS DUTYBOUND 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 [*1512] 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 [**10] 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 [127 Cal. Rptr. 3d 158]*.)

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 [**11] coverage to [Fluor-2], an entity Hartford never agreed to cover."

[*1513] *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]

> 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 [**12] answer as to the duty to defend. (*Pilkington North America, Inc. v. Travelers Casualty & Surety Co. (2006) 112 Ohio St.3d 482 [2006 Ohio 6551, 861 N.E.2d 121].*)

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 [20 Cal. Rptr. 321, 369 P.2d 937]*; *Gwartz v. Superior Court (1999) 71 Cal.App.4th 480, 481 [83 Cal. Rptr. 2d 865]* ["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 *Henkel, supra, 29 Cal.4th at p. 943.*)

In *Henkel*, the insured spun off one of its two distinct product lines (involving metalworking chemicals) into a separate, [**13] 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 prespinoff 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, [*1514] 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 [**14] 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 [**15] 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: [HN1] "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 [*1515] 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, [**16] *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 [47 Cal. Rptr. 868]*, a first party property insurance case involving an assignment of coverage after portions of the insured property (a waterside restaurant) were damaged in a violent windstorm. The statute [**17] 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 curiae 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.

[HN2] **(2)** It is a fundamental doctrine of statutory interpretation that statutes are to be construed in the context [**18] in which they were written. "Statutes are [*1516] 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 Singer & Singer, Statutes and Statutory Construction (7th ed., 2008) § 49:1, p. 7; see *Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal.3d 1379, 1387 [241 Cal. Rptr. 67, 743 P.2d 1323]* [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 [119 Cal. Rptr. 858, 532 P.2d 1226]*, 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, [**19] 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.

(3) As such, [HN3] 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 [**20] 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 [175 P.2d 63]* [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 [*1517] statute, a covenant or agreement in an insurance policy against an assignment following such a first party loss "is grossly oppressive." (Code commrs., note foll. 2 Ann. Civ. Code, § 2599 (1st ed., 1872, Haymond & Burch, commrs.-annotators) 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"? (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 [**21] 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. Frankfort etc. Ins. Co. (1908) 9 Cal.App. 473 [99 P. 537]* [**22] [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 [*1518] not intended to effectuate a substantive change in the law. Thus, *Insurance Code section 2* provides:[HN4] "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 [**23] more expansive than protecting the insured's assets. The insurer's duty to indemnify was not activated until the insured actually paid a judgment." (1 Appleman on Insurance 2d, *supra*, § 3.3, p. 350.) "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." (*Ibid.*)

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: [HN5] "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. [**24] 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 § 1, p. 2103.)

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 [42 Cal. Rptr. 2d 324, 913 P.2d 878]* (*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 [**25] by *[Insurance Code] section 520.*"

[*1519] In *State of California v. Continental Ins. Co. (2012) 55 Cal.4th 186 [145 Cal. Rptr. 3d 1, 281 P.3d*

1000] (*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 [**26] 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.).)

(4) Justice Moreno's six colleagues, however, disagreed about *Montrose*'s relevancy to consent-to-assignment provisions. As we have discussed,[HN6] *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 [**27] 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 [*1520] briefed or argued the statute's applicability. In the absence of an express legislative directive, stare decisis controls.

(5) 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. [HN7] "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 [3 Cal. Rptr. 2d 536]* [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] [**28] 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 [**29] 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. [*1521]

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).*)

O'Leary, P. J., and Rylaarsdam, J., concurred.

PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 600 West Broadway, Suite 1800, San Diego, CA 92101-3375.

On October 9, 2012, I served the following document described as:

PETITION FOR REVIEW

by serving a true copy of the above-described document in the following manner:

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Executed on October 9, 2012, at San Diego, California.

Elisa Carlucci

SERVICE LIST

Alan Jay Weil, Esq. Jeffrey B. Ellis, Esq. Gaims, Weil, West & Epstein, LLP 1875 Century Park East, Suite 1200 Los Angeles, CA 90067-2513 Telephone: (310) 407-4500 Facsimile: (310) 277-2133 ajweil@gwwe.com jellis@gwwe.com Counsel for Hartford Accident and Indemnity Company	James P. Ruggeri, Esq. (pro hac vice) Tara Plochocki, Esq. Joshua Weinberg, Esq. Shipman & Goodwin LLP 1133 Connecticut Avenue, NW Washington, D.C. 20009 Telephone: (202) 469-7750 Facsimile: (202) 469-7751 jruggeri@goodwin.com tplochocki@goodwin.com jweinberg@goodwin.com Counsel for Hartford Accident and Indemnity Company
Office of the Clerk California Court of Appeal, Fourth Appellate District, Division Three 601 W. Santa Ana Blvd. Santa Ana, California 92701	Superior Court of California, County of Orange, Dept. CX 103 Hon. Ronald L. Bauer 751 West Santa Ana Blvd. Santa Ana, CA 92701