THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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SC Court of Appeals

C.A. No.: 2011-CP-10-00387
Appellate Case No. 2016-001140

PCS Nitrogen, Inc.,.....Appellant,

vs.

Continental Casualty Company, Admiral Insurance Company, United States Fire Insurance Company, ACE Property & Casualty Insurance Company, Certain Underwriters at Lloyd's London, the Aviva Companies, the Winterthur Companies, Certain London Market Insurance Companies, Providence Washington Insurance Company (as Successor in Interest by way of Merger to Seaton Insurance Company, f/k/a Unigard Security Insurance, f/k/a Unigard Mutual Insurance Company), Berkshire Hathaway Specialty Insurance Company (f/k/a Stonewall Insurance Company), Lexington Insurance Company, Starr Indemnity & Liability Company (f/k/a Republic Insurance Company), First State Insurance Company, Century Indemnity Company (f/k/a California Union Insurance Company and Insurance Company of North America),.....Respondents.

APPELLANT'S FINAL REPLY BRIEF

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PRELIMINARY STATEMENT

In *Narruhn v. Alea London*, 745 S.E.2d 90 (S.C. 2013), the Supreme Court recognized the majority rule permitting the free assignment of insurance coverage rights after a loss. At its essence, Respondents' position is nothing more than an attempt to convince this Court to reject the Supreme Court's view as expressed in *Narruhn* and instead adopt an extreme minority position on the issue. Respondents' argument, that only a claim for "money already due-and-owing" is assignable, is incorrect and unsupported. It has been accepted nowhere but Indiana.

Applying the guidance of the Supreme Court to this case reveals the error of the trial court's ruling. Here, the "loss" is pollution at the Charleston Site that caused property damage between 1966 and 1984, allegedly resulting, in part, from Old CNC's operations. In this suit, PCS seeks coverage under Old CNC's insurance policies. Those policies covered liabilities, including property damage, arising from Old CNC's operations between 1966 and 1984. When PCS's predecessor, New CNC, purchased Old CNC on November 3, 1986, Old CNC assigned all rights and benefits under those policies, including the rights to defense and indemnification, to New CNC (PCS's predecessor-by-merger). Thus, the assignment of coverage rights two years after the end of the coverage period necessarily took place after the relevant loss. Accordingly, PCS is entitled to the benefits of defense and indemnification under Respondents' policies for the liabilities at issue here, and reversal is warranted.

ARGUMENT

When the trial court adopted Respondents' proposed opinion, verbatim, as the opinion of the court, it also adopted the many errors in Respondents' proposed opinion. In their brief in opposition, Respondents ask this Court to repeat those errors. First, Respondents argue that the 1986 Assignment of Insurance Benefits was only an assignment of proceeds then-due and owing. This strained interpretation ignores the explicit assignment of "benefits," which necessarily

includes an assignment of the right to assert the benefits of defense and indemnification under the policies. In fact, the recitals of the agreement explicitly provide that the purpose of the agreement is to assign "all of [Old CNC's] rights, proceeds and other benefits." Second, Respondents contend that an assignment of the right to seek defense and indemnification was invalid because only assignments of "money then due" can be assigned. Only one state, Indiana, has adopted this overly restrictive definition of "loss." The overwhelming majority of jurisdictions, consistent with the views of the Supreme Court, hold that liability insurance coverage rights may be freely assigned after the occurrence of a loss (i.e., the injury that gives rise to liability) because the assignment has no impact on the insurer's risk. Finally, Respondents belabor the issue of de facto merger. The Court need not reach this issue. Here too, however, Respondents and the trial court get the law backwards.

I. Old CNC Assigned Its Coverage Rights to New CNC.

Respondents first attempt to avoid their coverage obligations by arguing that the 1986 Assignment of Insurance Benefits is not an assignment of insurance benefits. Instead, they contend that the Assignment only transferred "then-owing proceeds." This argument is meritless.

Respondents begin their opposition by setting up a straw man, arguing that the Assignment of Insurance Benefits did not assign entire policies to New CNC. Whether the Assignment can be read that broadly is beside the point because what the Assignment says is that Old CNC assigned "all of [Old CNC's] rights, proceeds and other benefits" under the policies to New CNC. That broad assignment necessarily includes the contingent future rights to defense and indemnity for the claim at issue here. PCS is only asking Respondents to provide coverage for liabilities caused by Old CNC, the exact benefit provided by the terms of the policies.

Respondents further protest that PCS improperly refers to the recitals of the Assignment to support its interpretation.[1] PCS understands why Respondents would want to ignore the recitals – they preclude Respondents' interpretation. South Carolina courts are, however, required to consider the text of the recitals when interpreting an agreement. *See M&M Group, Inc. v. Holmes*, 666 S.E.2d 262, 266 (S.C. Ct. App. 2008) (holding that a court must give effect to a "whereas clause" or "recital"); *see also Horry v. Frost*, 31 S.C. Eq. 109, 113, 1858 WL 3728 (S.C. Ct. App. Eq. 1858) ("A covenant may be as obligatory when expressed by way of recital as if expressed in the formal part of the agreement."). Accordingly, to the extent there is any ambiguity in the term "benefits and proceeds," the recitals clarify that the Assignment is intended to transfer "all of [Old CNC's] rights, proceeds and other benefits to and under all of [Old CNC's] insurance policies," not merely "then-owing proceeds" as the trial court held.

Of course, even if the Court ignored the fact that the recitals state the parties' intention to transfer "all of [Old CNC's] rights, proceeds and other benefits to and under all of [Old CNC's] insurance policies," Respondents' interpretation of the Assignment is unsupportable. The trial court adopted Respondents' interpretation of the phrase "benefits and proceeds" as applying only to "then-owing proceeds." AppRec14 (Order). But this interpretation improperly renders the term "benefits" superfluous. *See Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 756 S.E.2d 148, 153 (S.C. 2014) ("[A]n interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous." (citations omitted)).

When one accounts for the explicit transfer of the policies' "benefits," the only possible conclusion is that the Assignment of Insurance Benefits included an assignment of the right to

[1] The Assignment provides that Old CNC agreed to sell "all of [Old CNC's] rights, proceeds and other benefits to and under all of [Old CNC's] insurance policies . . . for the purpose of transferring to and vesting in [New CNC] all of [Old CNC's] rights and benefits, including proceeds, in and under its insurance policies." *See* AppRec2233 (Assignment).

seek defense and indemnity under the policies. "One of the most important benefits" of a liability insurance policy "is the assurance that the company will provide the insured with defense and indemnification for the purpose of protecting him from liability." *Kransco v. Am. Empire Surplus Lines Ins. Co.*, 23 Cal. 4th 390, 400-401 (Cal. 2000); *see also PCL Constr. Servs. v. Old Republic Gen. Ins. Co.*, No. 14-cv-3486, 2016 U.S. Dist. LEXIS 106, *9 (D. Colo. Jan. 4, 2016) ("An insurer's obligation to ***defend*** and ***indemnify*** under a liability policy is every bit as much a 'benefit owed directly to or on behalf of' an insured as a claim under flood insurance." (emphasis in original)); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 20 (Tex. 2007) (discussing the insured's "right to a defense benefit under a liability insurance policy").

Finally, Respondents make a series of factual arguments attempting to demonstrate that the Assignment was only intended to assign then-owing proceeds or policies for which Old CNC had obtained the consent of the insurers. Such factual arguments regarding the parties' intent are not proper for resolution at summary judgment. *Wallace v. Day*, 700 S.E.2d 446, 450 (S.C. Ct. App. 2010) ("[T]he determination of the parties' intent at the time they executed the contract is a question of fact that should not have been decided on summary judgment.").

In any event, Respondents are simply wrong as to the import of Old CNC's decision to seek consent for the transfer of the active policies. The fact that Old CNC only sought the insurer's consent for the assignment of its then-active policies simply serves to highlight the distinction drawn by PCS and all relevant authority between an impermissible novation and a permissible assignment of coverage rights. PCS readily acknowledges that consent was required before Old CNC could transfer the then-active policies to New CNC because ***that*** transfer would have changed the insurers' risk resulting in a novation of the policies. That is, by assigning the

active policies to New CNC, Old CNC was asking the insurers to insure a different insured and therefore a different risk, necessitating the insurers' consent. Not so with the expired policies, which are the subject of this appeal. With the expired policies, Old CNC was merely changing the party who could claim the defense and indemnity benefits for Old CNC's liabilities. In those circumstances, as has been explained in PCS's prior briefing and as will be explained further below, there is no need for consent to assignment because such an assignment does not impact the insurer's risk. *See Narruhn*, 745 S.E.2d at 94 (quoting 3 Couch on Insurance 3d § 35:8 (2011 Rev. Ed.)). As of the date those policies expired, the risk to the Respondents was fixed.

II. The Assignment of Coverage Rights Was a Valid, Post-Loss Assignment.

The rule is simply stated: "an assignment ***after*** a loss has already occurred does not require an insurer's consent." *Narruhn*, 745 S.E.2d at 94 (emphasis in original, citations omitted). Respondents' brief in opposition devotes some two dozen pages to obscuring this fact. Through their legerdemain, Respondents attempt to transform the simple rule articulated by the Supreme Court into a rule rejected everywhere in every court to have considered it, except for Indiana. Respondents' interpretation of the post-loss assignment rule requires the Court to ignore the guidance from the Supreme Court, the guidance from the cases cited by the Supreme Court, the guidance from the treatises cited by the Supreme Court, and the persuasive (and nearly unanimous) conclusions of courts that have considered the issue.

A. Post-Loss Assignments Are Valid and Enforceable.

Notwithstanding Respondents' protests, the majority rule governing assignments of coverage rights, as articulated by the Supreme Court, is that "an assignment ***after*** a loss has already occurred does not require an insurer's consent." *Narruhn*, 745 S.E.2d at 94 (emphasis in original, citations omitted). Lest there be any doubt in the meaning of the rule, the Supreme Court identified a number of secondary authorities and decisions of other jurisdictions to guide

the analysis of this statement. *See id.* Each confirms that no consent is required to assign coverage rights following the injury that gives rise to liability.

Of particular note is *Illinois Tool Works, Inc. v. Commerce & Indus. Ins. Co.*, 962 N.E.2d 1042 (Ill. App. Ct. 2011), a case cited by the *Narruhn* Court, and each of the secondary authorities it identified, as stating the majority rule. *See* 3 Couch on Ins. § 35:8 (3d ed. 2016) (citing *Illinois Tool Works* at note 2); 17 Williston on Contracts § 49:126 (4th ed. 2016) (citing *Illinois Tool Works* at note 2); 44 Am Jur 2d Insurance § 776 (2016) (citing *Illinois Tool Works* at note 2). *Illinois Tool Works* presents, in all relevant respects, identical facts to this case. In connection with a 1998 asset sale, Binks R&D assigned the "benefits, including all rights to defense and indemnity coverage, under any and all policies of liability insurance" to Illinois Tool Works. *Illinois Tool Works*, 962 N.E.2d at 1049. Five years later, Illinois Tool Works was sued as the successor to Binks for pollution caused by Binks, at least in part, between 1976 and 1984. Illinois Tool Works sought coverage for the defense of that pollution action from the insurers that covered Binks between 1976 and 1984. The insurers denied coverage. The trial court granted judgment in favor of the insurers. The court of appeals, however, reversed.

The court of appeals held that "notwithstanding the existence of an anti-assignment or consent provision, a policy may be assigned after a loss without notice to or consent of the insurer." *Id.* at 1054 (citations omitted). Such post-loss assignments are valid, according to the court, because "assignment after loss is not the assignment of the policy but the assignment of a claim or debt – a chose in action." *Id.* (citations omitted). The court of appeals held that the "loss" was the happening of the injury giving rise to liability, as PCS argues, and not "when the third party obtains a judgment against the insured," as Respondents argue:

> [T]he 'loss' here was not the [underlying] suit, which was filed in 2003 and a defense to which could, therefore, not have been

> assigned in 1998 since the suit did not yet exist. Rather, the loss was Binks' contamination of the [underlying plaintiff's] property, an occurrence for which Binks had bought defense and indemnification coverage. ***Once an injury or loss occurs, the chose in action is established and assignable without the consent of the insurer.***

Id. at 1055 (emphasis added). Here, as in *Illinois Tool Works*, the injury for which Old CNC has purchased liability coverage happened ***prior*** to the assignment and, thus, the assignment was an assignment of a chose in action, namely the right to assert its rights to defense and indemnification. *See, e.g.*, *Narruhn*, 745 S.E.2d at 93 n.3 (defining a chose in action as "[t]he right to bring an action to recover a debt, money, or thing").

Respondents dismiss this authority as contrary to Illinois law. Of course, it is not. *Illinois Tool Works* is nothing more than the application of longstanding Illinois authority permitting post-loss assignments from the context of first-party property policies to third-party liability policies because such assignments do not increase the insurer's risk. *See, e.g.*, *Ginsburg v. Bull Dog Auto Fire Ins. Ass'n of Chicago*, 160 N.E. 145, 146 (Ill. 1928) ("The reason of the [anti-assignment provision] is, that the company might be willing to write a risk for one person of known habits and character and not for another person of less integrity and prudence, but after loss this reason no longer exists."). Moreover, the Supreme Court identified *Illinois Tool Works* as stating the majority rule on whether post-loss assignments are valid, and the decision has been identified as stating the majority rule by each of the secondary authorities on which *Narruhn* relied.

The other two cases cited by *Narruhn* concern first-party insurance policies (a mortgage insurance policy and a homeowner's insurance policy); as such, the facts of those cases are not as clearly on point. Both cases, however, are consistent with the reasoning of *Illinois Tool Works* and rejected attempts to require an insurer to consent to the assignment of coverage rights

"until a claimant has obtained a judgment or the parties have settled." *Compare* Opposition Brief at 24 *with Kintzel v. Wheatland Mut. Ins. Assoc.*, 203 N.W.2d 799, 805 (Iowa 1973) (holding assignment "[a]fter the loss was incurred" was valid even if "the amount may not yet be definitely ascertained" (internal quotation omitted)); *Young v. Chicago Fed. Savings & Loan Ass'n*, 535 N.E.2d 977, 980-81 (Ill. App. Ct. 1989) (holding that an "[a]n insurance policy that is assigned after a claim arises ... results in an assignment of a chose in action" and citing explaining that anti-assignment clauses "do not prevent an assignment after loss").

To avoid the rule articulated in *Narruhn*, Respondents seek to redefine "loss" to mean "when the third party obtains a judgment against the insured," reasoning that their policies are only triggered when liability is definitively established. Opposition Brief at 26. This reasoning is belied by the fact that Respondents' policies include a duty to defend that, by definition, requires Respondents to respond long before a claim is ever reduced to judgment (and indeed, even if a claim is never reduced to judgment).

Further, Respondents offer no supporting authority for their definition of "loss." Courts reaching this question in the context of the assignment of third party liability policies nearly universally agree with PCS that "loss" arises "when personal injury or property damage results during the term of the policy, even though the dollar amount of the liability continues to be unascertained until later established." *Fluor Corp. v. Superior Court*, 61 Cal. 4th 1175, 1207 (Cal. 2015) (collecting cases). These courts correctly reason that while the ***amount*** of liability is not determined at the time of injury, the underlying cause of action (which is the thing insured by the policies) is fixed upon the happening of the injury. *See, e.g., Olah v. Baird*, 567 F.3d 1207, 1214 (10th Cir. 2009) (upholding post-loss assignment where assignment occurred after the alleged malpractice took place because "[e]ven though we do not know in this case ***if*** ultimate

liability will ever be imposed . . . we do know that ***if*** liability is imposed, the moment it fixed was the moment the accident occurred" (emphasis in original)). This principle was explained in the seminal case of *Ocean Accident & Guarantee Corp. v. Southwestern Bell Tel. Co.*, 100 F.2d 441 (8th Cir. 1939):

> The recovery of the judgment against the insured by the injured party is not the injury against which the insurer insures him, but it is the liability for the consequences of the accident against which he is insured, and of which liability the judgment is a mere test or mode of proof. . . . [I]n the case of a judgment against the party insured under one of these policies for damages for the result of an accident, the liability, though legally fixed at that time, relates back to the accident itself. In contemplation of law the insured either was or was not, from the first, liable for the consequence of the accident; and the presumption is that the result of an investigation of the facts was never doubtful from the first, and always sure to result according to the actual fact.

Id. at 447 (internal citations and quotations omitted).

Respondents attempt to dismiss *Ocean Accident* as contrary to the law of Missouri based on its strained interpretation of three cases predating the first election of Franklin Roosevelt. None of the cases identified by Respondents contradict the holding of *Ocean Accident*, which cited those cases merely to explain the difference between "a contract of indemnity against liability rather than a contract of indemnity against loss." Moreover, *Ocean Accident* continues to be recognized as stating the law of Missouri ***today***. *E.g.*, *Korte Constr. Co. v. Deaconess Manor Assn.*, 927 S.W.2d 395, 403 (Mo. App. 1996) (upholding the assignment of contract rights pursuant to the rule articulated in *Ocean Accident* and describing the reasoning of *Ocean Accident* at length); *Magers v. Nat'l Life & Acc. Ins. Co.*, 329 S.W.2d 752, 756 (Mo. 1959).

Ocean Accident is not, however, merely the law of Missouri or the Eighth Circuit. Last year the California Supreme Court in *Fluor Corp. v. Superior Court*, 61 Cal. 4th 1175 (Cal. 2015), conducted a nationwide survey of current cases that considered the question presented

here, namely, the validity of assignments of coverage rights under third party liability policies. That survey "reveal[ed] that *Ocean Accident*'s influence has continued and indeed grown." *Id.* at 1213 (collecting cases). In fact, the California Supreme Court found that the "rule of *Ocean Accident* – voiding consent clauses as applied to post-loss assignment of rights to invoke liability insurance coverage, and imposing no requirement that the matter first be reduced to a sum of money due," has been adopted by every jurisdiction that has considered the issue with the exception of Indiana. *Id.* (collecting cases).

Notably, a federal district court in South Carolina applying South Carolina law considered that contrary Indiana decision, rejected it, and adopted the reasoning advanced by PCS here. *See Cincinnati Ins. Co. v. Crossmann Cmtys. of N.C.*, 09-CV-1379, 2013 U.S. Dist. LEXIS 43349, at *19, *23 (D.S.C. Mar. 27, 2013) (acknowledging insurer's reliance on *Travelers Cas. & Sur. Co. v. U.S. Filter Corp.*, 895 N.E.2d 1172 (Ind. 2009), but holding that "the anti-assignment clause in the Harleysville Policy does not bar Beazer's claims for coverage"). Although that case concerned the transfer of policies pursuant to a merger rather than an assignment agreement, the court held that the post-loss transfer of coverage rights was valid because "[t]he scope of th[e] risk assumed by Harleysville was not expanded by virtue of the mergers." *Id.* at *24. The court found that because the policy only covered "'property damage' during its policy period (ending August 29, 1998) caused by an 'occurrence,'" the 2002 merger did not expand the insurer's risk because any property damage "was fixed" as of the expiration of the policy period in 1998 and the plaintiff only sought "the duty to indemnify and duty to defend for which the Policy provides." *Id.* This is the precise reasoning underlying the South Carolina Supreme Court's articulation of the post-loss assignment rule.

Respondents attempt to muddle this clear rule by arguing that the definition of loss adopted by the vast majority of courts, and advocated by PCS, "swallows the rule." Their contention is premised on the erroneous claim that PCS is unable to articulate "just when a 'transfer' is, and is not, permitted." Opposition at 29. To be clear, PCS's position is identical to the majority position articulated by the Supreme Court: a transfer of coverage rights is permissible post-loss. In the context of liability insurance policies, such as those at issue here, this means that a transfer is permissible after the happening of the personal injury or property damage during the coverage period, and is necessarily permissible after the policies expire (as no additional covered injuries can possibly occur after the end of the coverage period).

Respondents' contention that PCS has identified four different times that such a transfer is allowed is false. First, they say PCS alleged that coverage rights may be transferred as soon as the insured pays the premium. Nowhere does PCS argue this. Second, they say that PCS argues that coverage rights may be transferred "after the events that give rise to injury occur (which may occur before or during the policy period)." Again, nowhere does PCS argue this. Respondents point to a heading, in which PCS states that the "relevant loss is the happening of the event giving rise to liability." As PCS explained in the argument following that heading, the event giving rise to liability is the injury, which necessarily must occur during the coverage period. Third, Respondents identify "the injury itself" as the event, after which, coverage rights may be assigned. Respondents are correct. That is when nearly all courts agree that coverage rights under a liability policy may be assigned. Finally, Respondents identify "any time after the end of the policy period" as the point at which coverage rights may be assigned. They are correct. Importantly, however, Respondents are willfully mistaken in calling this a different point in time from "after the injury." The policies only cover liabilities for injuries that take place during the

coverage period. Thus, "any time after the end of the policy period" is just another way of saying "after the injury." In short, Respondents contend PCS identified four separate events after which coverage rights may be transferred. Sweeping aside the misstatements and mischaracterizations reveals only one event: the happening of the injury. Because these coverage rights were assigned after the happening of the injury (after the end of the coverage period), the transfer was valid under South Carolina law. Accordingly, reversal is warranted.

B. An Unambiguous Consensus Favors PCS's Position.

Respondents, quarreling with *Narruhn*, Couch on Insurance, Williston on Contracts, American Jurisprudence, and the California Supreme Court, attempt to dispute that their view is in the distinct minority. Their efforts consist largely of errors, mischaracterizations, and unfounded declarations of the "real" laws of the many states whose courts have ruled consistently with PCS's position. The relevant cases fall into two broad categories: (1) cases in which assignments without consent are permitted only after a claim has been reduced to money damages (Respondents' position); and (2) cases in which assignments without consent are permitted after the injury giving rise to liability occurred (PCS's position).[2] A review of the cases reveals that there is scant support for Respondents' position.

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[2] Arguably there is a third category of cases, namely, cases in which assignment without consent is always barred. These cases can be disregarded in their entirety, as even Respondents must concede they are contrary to South Carolina law. Even if one did not disregard them, Respondents identify just three states that adopt this view: Texas, Hawaii, and Maryland. *See Keller Found. v. Wausau*, 626 F.3d 871, 874 (5th Cir. 2010) (noting that "Texas courts . . . diverge from [the] majority and enforce non-assignment clauses even for assignments made post-loss"); *Del Monte Fresh Produce Inc. v. Fireman's Fund Ins. Co.*, 117 Haw. 357, 369-70 (Haw. 2007) (holding all assignments barred, whether pre- or post-loss); *Clay v. Gov. Emps. Ins. Co.*, 356 Md. 257, 260 (Md. 1999). Respondents claim that Oregon also follows this position; however, in 2009, the Ninth Circuit, applying Oregon law, held that while some policy language has been held to bar all assignments, post-loss assignments were valid based on policy language identical to that contained in Respondents' policies. *See Alexander Mfg. v. Ill. Union Ins. Co.*, 560 F.3d 984, 988 (9th Cir. 2009).

1. Only Indiana Supports Respondents' View of Post-Loss Assignments.

The first category of cases, those cases that hold post-loss assignments only apply to assignments of "then-owing proceeds" includes just one jurisdiction, Indiana. *See Travelers*, 895 N.E.2d 1172. Respondents attempt to argue that Utah falls into this category. However, the case cited by Respondents, *Time Finance Corp. v. Johnson Trucking Co.*, 458 P.2d 873 (Utah 1969), does not support their position. That case, concerning a first-party claim, held that a post-loss assignment was enforceable. *Id.* at 875. Moreover, a Tenth Circuit case from 2009, applying Utah law, explicitly followed the *Ocean Accident* rule. *See Olah*, 567 F.3d at 1214 (explicitly relying on *Ocean Accident* in upholding a post-loss assignment).

The Wisconsin case on which Respondents rely did not include an assignment at all. That case was evaluating whether coverage rights would follow a liability under a product line successor theory even in the absence of an assignment and does not address the question presented here. *Red Arrow Prods. Co. v. Emps. Ins. of Wausau*, 607 N.W.2d 294, 299 (Wis. App. 2000) ("New Red Arrow was never assigned the Wausau policies under its sale agreement with Old Red Arrow. . . . New Red Arrow does not dispute this fact.").

Finally, Respondents argue New York law supports their position. However, the case they cite only held that an assignment of "business and properties" was not an assignment of coverage rights. *See EM Industries, Inc. v. Birmingham Fire Ins. Co.*, 141 A.D.2d 494, 496 (N.Y. App. Div. 1988).[3] Further, courts applying New York law have ***permitted*** post-loss assignments whether judgment has been imposed or not. *See, e.g., Beazley Ins. Co. ACE Am. Ins. Co.*, 150 F. Supp. 3d 345, 358 (S.D.N.Y. 2015) (applying New York law). Indeed, on September 12, 2016, the Delaware Supreme Court, applying New York law, held that New York

[3] Notably, *EM Industries*, identifies *Ocean Accident* as the authority that establishes the assignment theory.

follows the "majority rule" in permitting post-loss assignments. *In re Viking Pump*, 2016 Del. LEXIS 474, Slip. Op. at 22 (Del. Sept. 12, 2016). That case concerned an assignment of coverage rights for asbestos liabilities that occurred after the underlying plaintiffs had been exposed to the insured's asbestos-containing products, but before the plaintiffs had asserted any claims. The insurers made the exact argument Respondents make here, namely, that the "loss" was not "'fixed' or 'measurable' at the time of the purported assignments" because the underlying claims had not been resolved or even asserted when the assignments were made. *Id.*, Slip. Op. at 24. The Delaware Supreme Court rejected this contention, holding that the anti-assignment clauses were ineffective because the "insurance rights accrued," and were freely assignable, "once parties were injured by significant exposure to asbestos during the operative policy periods and prior to the assignments." *Id.*

2. Respondents' Attempt to Distinguish PCS's Authority Fails.

The remaining cases fall into category two, allowing post-loss assignments of coverage rights following the injury caused by an occurrence during the coverage period. The cases cited by PCS in its opening brief speak for themselves. PCS points out, by way of example, only a few of the many errors that pervade Respondents' attempts to distinguish the overwhelming authority identified by PCS (in addition to the errors identified above). First, three weeks before Respondents declared in their opposition brief that the New Jersey Appellate Division's decision in *Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co.*, 442 N.J. Super. 28 (App. Div. 2015), was contrary to New Jersey law, another panel of the New Jersey Appellate Division expressly followed *Givaudan* and approved a post-loss assignment of coverage rights. *See Haskell Props., LLC v. Am. Ins. Co.*, No. A-1452-14-T2, 2016 N.J. Super. Unpub. LEXIS 1836, at *13-*16 (App. Div. Aug. 4, 2016).

Second, Respondents cite *Citicorp Indus. Credit, Inc. v. Federal Ins. Co.*, 672 F. Supp. 1105 (N.D. Ill. 1987), as a case that did not follow the *Ocean Accident* rule. *Citicorp*, however, was explicitly premised on *Ocean Accident* and upheld a post-loss assignment on that very basis. *Id.* at 1107 ("The reasoning in *Magers* and *Ocean Accident* applies equally to this case."). Indeed, the court held that to restrict a post-loss assignment "would wreak an unconscionable result." *Id.*

Third, Respondents are correct that the Ohio Supreme Court rejected the transfer of coverage under a product line successor theory of liability, i.e., without an assignment. That court, however, expressly rejected Respondents' theory that a transfer of coverage rights is valid only after "the claim has been reduced to a sum of money owed." *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 112 Ohio St. 3d 482, 486 (Ohio 2006). Instead, the court adopted PCS's position and held that "a chose in action arises under an occurrence-based insurance policy at the time of the covered loss . . . [t]he lack of a specifically defined amount of recovery is not fatal to the determination that a chose exists." *Id.* at 486-87.

Respondents' remaining efforts rely on taking out-of-context quotations from the many courts that approve of post-loss assignments in an attempt to create the impression that those cases do not support PCS's position. A clear example of this practice is its treatment of the Pennsylvania Supreme Court's decision in *Egger v. Gulf Ins. Co.*, 903 A.2d 1219 (Pa. 2006). In *Egger*, the insured entered into a settlement agreement with the injured party and assigned its rights to collect against its excess insurer in the event of a verdict beyond the primary policy. *Id.* at 1221. The court held that the assignment was valid despite the insurer's lack of consent because it occurred "post-loss." *Id.* at 1229. Importantly, the case ***did not*** turn on the existence of a settlement or judgment. As explained by the Pennsylvania Supreme Court "a 'loss' is the

occurrence of the event, which creates the liability of the insurer. The event that occasioned the liability of Gulf, was the 'Occurrence' to which the policy applied; i.e., the bodily injury that Foulke caused to Egger on September 5, 1997." *Id.* at 1226 (internal citations and quotations omitted). Respondents' contrary interpretation of *Egger* is fantasy.

Respondents remaining efforts to construct a Potemkin village of support for its theory similarly wither the moment the decisions are actually reviewed.

C. The Duty to Defend, Like the Duty to Indemnify, Is Assignable.

In their brief in opposition, Respondents repeat their argument that the duty to defend may never be assigned. Respondents cite zero cases that actually hold or even imply that this is the law.[4] Instead, Respondents cite a California case and a New Jersey case, both from 1976, about whether *in rem* personal jurisdiction may be asserted over the duty to defend. *See Javorek v. Superior Court*, 552 P.2d 728, 740 (Cal. 1976); *Hart v. Cote*, 367 A.2d 1219, 1222 (N.J. Law. Div. 1976). As outlined in PCS's opening brief, these cases have nothing to do with whether the duty to defend can be assigned. Indeed, Respondents fail to even acknowledge that both the California Supreme Court (in 2015) and the New Jersey Appellate Division (in 2015) explicitly held that after the happening of the injury giving rise to liability, the duty to defend is freely assignable. *See Fluor*, 61 Cal. 4th at 1224 ("[A]fter personal injury (or property damage) resulting in loss occurs within the time limits of the policy, an insurer is precluded from refusing to honor an insured's assignment of the right to invoke defense or indemnification coverage regarding that loss."); *Givaudan*, 442 N.J. Super. at 40 (reversing the trial court and upholding

[4] PCS has not found any case that supports Respondents' position. The case that comes closest is *Pilkington*, which upheld post-loss assignments (i.e., assignments after the injury giving rise to liability) of the duty to indemnify but could not reach a majority on the question of whether the duty to defend was similarly transferrable. *Pilkington*, 112 Ohio St. 3d at 483.

the assignment of the duty to defend and indemnify). The trial court's adoption of Respondents' wholly unsupportable argument was error.

D. The Trial Court's Decision Undermines the State's Interests.

Respondents contend that PCS is precluded from arguing that the trial court's decision barring post-loss assignment of coverage rights undermines legitimate state interests because it did not raise these public policy considerations below. Respondents are incorrect. PCS argued at length to the trial court that Respondents' theory on post-loss assignment – and the trial court's adoption of Respondents' proposed opinion – was incorrect, contrary to South Carolina law, contrary to the law of nearly every jurisdiction that had considered the issue, and would result in the insurers gaining an improper windfall. *E.g.*, AppRec2216, 2438, 2444. Pointing out that the trial court's decision also undermines legitimate state interests "is not a distinct argument, but merely adds nuance to the inquiry engaged in by" the court below. *State v. Phillips*, 416 S.C. 184, 194 (S.C. Apr. 20, 2016).

Further, Respondents ignore that PCS cited a number of judicial decisions to the trial court that made these exact arguments. *See, e.g., Elliott Co. v. Liberty Mut. Ins. Co.*, 434 F. Supp. 2d 483, 491 (N.D. Ohio 2006) (holding that enforcing an anti-assignment clause in the context of a post-loss assignment was against public policy because it resulted in the forfeiture of coverage) (cited in PCS's brief in opposition to summary judgment); *Gopher Oil Co. v. Am. Hardware Mut. Ins. Co.*, 588 N.W.2d 756, 763-64 (Minn. Ct. App. 1999) (holding that enforcing an anti-assignment clause after the contamination giving rise to liability took place would provide the insurer with "the windfall of not having to insure an occurrence that it received premiums for covering") (cited in PCS's brief in support of reconsideration). As such, there is no merit to Respondents' waiver argument.

Respondents are also wrong on the substance of their public policy arguments. First, Respondents argue that their position does not result in forfeiture of coverage because they would insure Old CNC if Old CNC were to resurrect itself and claim coverage rights (and presumably rescind its assignment of those rights to New CNC). Whatever the merits of this assertion (and it is dubious), Respondents indisputably walked away from their coverage obligations. They accepted insurance premiums to provide for the defense and indemnification of liabilities of Old CNC arising from injuries during the coverage period. PCS is seeking defense and indemnification for liabilities of Old CNC arising from injuries during the coverage period – the exact obligations for which Respondents accepted payment. Courts consistently hold that permitting insurers to walk away from such obligations is, in fact, an improper forfeiture of insurance and refuse to enforce anti-assignment clauses on this basis. *See e.g.*, *Elliott*, 434 F. Supp. 2d at 491; *Gopher Oil*, 588 N.W.2d at 763-64.

Next, Respondents contend that restricting assignments of coverage rights to assignments that take place after a claim has been reduced to a sum of money due will not impair the state's interests in remediating the environment because PCS has the means to pay for the cleanup of the Charleston Site even in the absence of insurance. Even if this were true, PCS is not the only company that will be impacted by this decision, and the Charleston Site is not the only environmental site that will require remediation. Respondents do not and cannot dispute that restricting the transferability of insurance coverage for environmental liabilities will inhibit the willingness of successor corporations to accept such liabilities. Nor do they dispute the long-recognized fact that the functioning of environmental remediation statutes is reliant on the availability of insurance to help defray remediation costs. *See, e.g.*, *The Cost And Availability of Pollution Insurance*, U.S. General Accounting Office at 2 (Oct. 1988) (explaining that "Congress

has . . . become concerned that the nation's ability to manage and safely dispose of its hazardous waste could be seriously jeopardized if appropriate insurance is unavailable").

Finally, in opposing PCS's argument that restrictions on the right to transfer coverage rights result in a restraint on trade, Respondents limit themselves to launching *ad hominem* attacks on one of the authors whose treatise PCS cited. *Compare* Opposition at 45-46, *with* 1 Stempel on Insurance Contracts, § 3.15[D] at 3-125-26 (2010). Respondents do not, in any way, address the judicial opinions that reached the identical conclusion. *See, e.g., Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76, 105 n.92 (Del. Ch. 2009); *Henkel Corp. v. Hartford Acc. & Indem. Co.*, 62 P.3d 69, 80-81 (Cal. 2003) (Moreno, dissenting). Nor are Respondents able to muster any substantive argument in response to the authorities cited in PCS's brief. Opposition at 45-46.

Respondents' own public policy argument is meritless. They argue public policy favors strict enforcement of anti-assignment clauses. The Supreme Court, however, has rejected the antiquated view that contract rights could not be assigned. *Osprey, Inc. v. Cabana Ltd. P'shp.*, 532 S.E.2d 269, 277 (S.C. 2000) ("[C]ontract rights are freely assignable today, unlike in medieval times."); *see also* Restatement (Second) of Contracts § 322 (explaining that "as assignment has become a common practice, the policy which limits the validity of restraints on alienation has been applied" to anti-assignment provisions). Indeed, Respondents do not dispute that South Carolina does not enforce anti-assignment clauses after a loss. Thus, the dispute here is not whether anti-assignment clauses are always enforced. Respondents admit they are not. The question is only whether this case presents a post-loss assignment. Accordingly, while significant state interests are impaired by the trial court's ruling, Respondents identify no competing interests furthered by that decision.

III. The Trial Court's De Facto Merger Ruling Adopted Respondents' Incorrect Statement Of The Law.

Ultimately, this Court need not reach the de facto merger issue because, as is explained above, the assignment of coverage rights was valid irrespective of whether the Court finds there was a de facto merger. Even on this issue, however, the trial court committed an error of law.

Much like their argument on post-loss assignment, on the de facto merger issue, Respondents present a superficially appealing argument that gets the law exactly backwards. Stripped of its bluster, Respondents' argument is that a finding of successor liability requires a finding that there was no agreement by the successor to accept such liability. This is not the law. In fact, the "transfer of assets and assumption of liabilities ***are the essence of corporate consolidation or merger***." *Stephenson Finance Co. v. S.C. Tax Com.*, 130 S.E.2d 72, 76 (S.C. 1963) (emphasis added); *see also Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1424-25 (7th Cir. 1993) (Posner, J.) ("And when one corporation is merged into another, the acquiring corporation gets the liabilities of the acquired one along with the assets. If it did not, the transaction would be a sale of assets rather than a merger." (internal quotations omitted)); *Knoll Pharm. Co. v. Auto. Ins. Co.*, 167 F. Supp. 2d 1004, 1010 (N.D. Ill. 2001) (holding that "the assumption of liabilities is often considered to be the distinguishing factor between a merger and an asset purchase agreement"). As such, the trial court committed legal error in adopting Respondents' proposed opinion on this issue.

CONCLUSION

An assignment of coverage rights after the happening of the injury giving rise to liability is enforceable under South Carolina law, with or without the insurer's consent. The trial court's contrary decision is inconsistent with the guidance of the Supreme Court and the holdings of the

vast majority of decisions of other courts. Accordingly, PCS respectfully requests that the Court reverse the trial court's decision and remand this matter for further proceedings.

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