THE STATE OF SOUTH CAROLINA
In the Court of Appeals
Appellate Case No. 2016-001140

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
C.A. No. 11-CP-10-387
G. Thomas Cooper, Jr., Circuit Court Judge

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

v.

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.

JOINT FINAL BRIEF OF RESPONDENTS

Morgan S. Templeton
Wall Templeton & Haldrup P.A.
145 King Street, Suite 302 (29401)
Post Office Box 1200
Charleston, South Carolina 29402
(843) 329-9500

Patrick F. Hofer (*pro hac vice*)
Troutman Sanders LLP
401 9th Street, N.W., Suite 1000
Washington, D.C. 20004
(202) 274-2950

Attorneys for Respondent Continental Casualty Company

(Additional Respondents' Counsel on following pages)

Robert H. Hood, Jr., Esq.
Hood Law Firm, LLC
172 Meeting Street
Charleston, SC 29401
(843) 577-1219

Robert Walsh, Esq. (*pro hac vice*)
Thomas M. Going, Esq. (*pro hac vice*)
Patricia Santelle, Esq. (*pro hac vice*)
White and Williams LLP
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia PA 19103-7395
(215) 864-6232

Attorneys for ACE Property & Casualty Insurance Company, U.S. Fire Insurance Company (with respect to policies GLA 284022 and GLA 5400797517), and Century Indemnity Company

R. Scott Wallinger, Jr., Esq.
Christian Stegmaier, Esq.
Collins & Lacy, PC
1330 Lady Street, 6th Floor
Columbia, SC 29211
(803) 256-2660

John S. Favate, Esq. (*pro hac vice*)
Hardin, Kundla, McKeon & Poletto
673 Morris Avenue
Springfield, NJ 07081
(973) 912-5222

Attorneys for United States Fire Insurance Company (Policy No. 5401893627)

J.R. Murphy, Esq.
Adam J. Neil, Esq.
Wesley B. Sawyer, Esq.
Murphy & Grantland, PA
4406 Forest Drive, Suite B
Columbia, SC 29260
(803) 782-4100

Attorneys for Admiral Insurance Company

John T. Lay, Esq.
Laura W. Jordan, Esq.
Gallivan, White & Boyd, P.A.
1201 Main Street, Suite 1200
Columbia, SC 29201
(803) 779-1833

Attorneys for Certain London Market Insurance Companies

R. Michael Ethridge, Esq.
Carlock Copeland
40 Calhoun Street, Ste. 400
Charleston, SC 29401
(843) 727-0307

Wayne Karbal, Esq. (*pro hac vice*)
Paul Parker, Esq. (*pro hac vice*)
Karbal Cohen Economou Silk Dunne, LLC
150 S. Wacker Drive, 17th Floor
Chicago, IL 60606
(312) 431-3700

Attorneys for First State Insurance Company

John C. Bonnie, Esq.
Weinberg Wheeler Hudgins Gunn & Dial
3344 Peachtree Road NE
Suite 2400
Atlanta, GA 30326
(404) 876-2700

Attorneys for Lexington Insurance Company

Edward K. Pritchard, III, Esq.
Pritchard Law Group, LLC
129 Broad Street
Charleston, SC 29401
(843) 722-3300

Richard McDermott, Esq. (*pro hac vice*)
Seth M. Jaffe, Esq. (*pro hac vice*)
Hinkhouse Williams Walsh LLP
180 North Stetson Street, Suite 3400
Chicago, IL 60601
(312) 784-5400

Attorneys for Berkshire Hathaway Specialty Insurance Company (formerly known as Stonewall Insurance Company), Starr Indemnity & Liability Company (formerly known as Republic Insurance Company), Certain Underwriters at Lloyd's, London, Certain Aviva Companies, Certain Winterthur Companies, New London Reinsurance Company Limited, and the Scottish Lion Insurance Company Limited

Elizabeth J. Palmer, Esq.
Rosen, Rosen & Hagood, LLC
151 Meeting Street, Suite 400
Charleston, SC 29401
(843) 577-6726

Molly Poag, Esq. (*pro hac vice*)
Harry Lee, Esq. (*pro hac vice*)
Steptoe & Johnson LLP
1330 Connecticut Ave., NW
Washington, DC 20036
(202) 429-8091

Attorneys for 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)

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Respondents respectfully submit this Joint Final Brief in response to the Final Brief ("Br.") of Appellant PCS Nitrogen, Inc. ("PCS").

I. STATEMENT OF THE ISSUES ON APPEAL

1. Did the trial court correctly conclude on undisputed facts that no insurance policy assignment took place here because (a) the "Assignment of Insurance Benefits" upon which PCS relies sought to assign insurance benefits only "to the extent same may be transferred or assigned;" (b) the policies prohibit assignment of the policies without the consent of the insurer; and (c) no such consent was obtained for the policies at issue, even though consent *was obtained* for assignment of *other* policies?

2. May a policyholder of a general liability insurance policy put a new party into the contractual relationship with the insurer without the insurer's consent, in violation of the contract and settled South Carolina law prohibiting such policy assignment, or is the right to assign without consent, consistent with all prior South Carolina cases, limited to the policyholder's right to receive money already owing from the insurer, that is, money that becomes payable only when the policyholder's liability to claimants has been fixed in an underlying tort suit by judgment or settlement and is thereby no longer contingent?

3. Did the trial court correctly apply settled South Carolina law holding that equity does not step in to recast a corporate transaction as a "*de facto* merger" to impose corporate liabilities on a purchaser of corporate assets, when the purchaser has already been held, as a matter of law, to have *contractually* assumed the seller's liabilities?

II. STATEMENT OF THE CASE

In this insurance coverage case, PCS alleges entitlement to insurance policies to which it is a complete stranger, issued to a corporation called "Columbia Nitrogen Corporation" ("Old CNC"). Contrary to PCS's assertion (Br. at 1), PCS has not been held liable for environmental

clean-up as the "alleged successor" to Old CNC. Rather, on PCS's appeal of the underlying environmental case, the United States Court of Appeals for the Fourth Circuit held that PCS *contractually* assumed Old CNC's liability, *not* that it was Old CNC's successor under corporation law or any theory of succession. PCS claims it contractually obtained Old CNC's insurance rights, but there is no dispute that it did not obtain insurer consent for any assignment, as required by the insurance contracts themselves. PCS nevertheless argues it is entitled to "insured" status under Old CNC's insurance policies. The trial court correctly rejected all of PCS's arguments under South Carolina law.

A. The Insurance Policies

Respondents issued several primary and excess liability insurance policies to Old CNC, covering the period 1966 to 1985. R. pp. 73-183; 586-603; 798-813; 825-66; 880-976; 991-1293; 1303-1439; 1451-89; 1506-1803; 1823-1914; 1923-65; 1977-2196. In quoting policy language, the trial court referred to the language in the Continental policies, but noted that the policies of the remaining Defendants contain similar language, as set forth in their respective Joinders. R. p. 4 n.1.

Continental issued two primary general liability insurance policies to "Columbia Nitrogen Corporation:" Policy No. CCP 9682195, for the policy period January 1, 1973 to January 1, 1974, and Policy No. CCP 9883159, for the policy period January 1, 1974 to February 1, 1975 (the "Continental Policies"). R. pp. 73-183; p. 190 ¶ 17; p. 210 ¶ 17. The "named insured" was defined in the Continental Policies as "Columbia Nitrogen Corporation and Nipro, Inc. and any owned, controlled or affiliated company now or hereafter acquired." R. pp. 89 & 128. Subject to all of their terms and conditions, the Continental Policies stated that Continental would "pay *on behalf of the insured* all sums which *the insured* shall become legally obligated to pay as damages because of A. bodily injury or B. property damage to which this insurance

applies, caused by an occurrence." R. pp. 104 & 132 (emphasis added). The Continental Policies stated, "Assignment of interest under this policy shall not bind [Continental] until its consent is endorsed hereon." R. p. 110; p. 230 ¶ 9; p. 239 ¶ 10.[1]

B. The Corporate History of Columbia Nitrogen Corporation (Old CNC)

The corporate history of Old CNC, laid out below, is undisputed. In simplest terms, Columbia Nitrogen Corporation was incorporated in 1962, and it dissolved in 1986. It did not merge with any other corporation.

Columbia Nitrogen Corporation (Old CNC) was incorporated in Delaware on October 1, 1962. R. p. 230 ¶ 10; p. 239 ¶ 11. Old CNC acquired a site located in the Neck area of Charleston, South Carolina, on June 30, 1966 (the "Charleston Site"). R. p. 187 ¶ 1; p. 231 ¶ 12; p. 240 ¶ 13. The Charleston Site was used for phosphate fertilizer production. R. p. 253 ¶ 14. Old CNC ceased production at the Charleston Site in 1972. R. p. 291 ¶ 12. Old CNC sold the Charleston Site to a third party in 1985. R. p. 231 ¶ 12; p. 240 ¶ 13.

C. PCS's Acquisition of Certain Assets of Old CNC

On or around October 31, 1986, Old CNC entered into a transaction under which it sold certain assets (*not* including the Charleston Site, which it had already sold off in 1985) to a new entity called "CNC Corp." R. p. 231 ¶¶ 16-17; pp. 240-41 ¶¶ 17-18; p. 252 ¶ 11. CNC Corp. was incorporated on September 26, 1986. R. p. 231 ¶ 16; p. 240 ¶ 17. CNC Corp. did not obtain all of Old CNC's assets or assume all of Old CNC's liabilities, R. p. 252 ¶ 12, but obtained certain assets and assumed certain liabilities relating to the "Acquired Business," which was

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[1] The policies issued by all other Respondents contained substantially similar language. R. pp. 603; 810; 829; 864; 896; 917; 958; 964; 1009; 1063; 1108; 1177-78; 1207; 1274-75; 1340; 1386; 1419; 1466; 1489; 1524; 1578; 1623; 1643; 1689-90; 1719; 1784-86; 1827; 1849; 1883; 1925; 1926; 2040; 2072; 2183.

defined as "a business that produces and sells ammonia and nitrogen-based products," R. p. 292 n.1.

Old CNC filed a certificate of dissolution on November 19, 1986. R. p. 231 ¶ 15; p. 240 ¶ 16. Following the dissolution of Old CNC, CNC Corp. changed its name to "Columbia Nitrogen Corporation" ("New CNC"). R. p. 231 ¶ 16; p. 240 ¶ 17.

New CNC merged with a corporation called "Fertilizer Industries, Inc." on or about November 29, 1989. Fertilizer Industries, Inc. changed its name to "Arcadian Corporation" on or about November 30, 1989. Arcadian Corporation merged with PCS in March 1997. R. p. 232 ¶¶ 21-22; p. 242 ¶¶ 22-23.

PCS is therefore the successor-by-merger to "*New* CNC," a corporation that was created on September 26, 1986, after all Respondents' policies had expired. New CNC is not the same corporation as Old CNC, which was incorporated in 1962 and was dissolved in 1986. New CNC similarly did not merge with Old CNC, but simply acquired certain of its assets and assumed certain of its liabilities.

D. PCS's Contentions in the Underlying Litigation

On September 26, 2005, the owner of the Charleston Site, Ashley II of Charleston, LLC ("Ashley II"), filed suit against PCS in federal court, alleging that PCS was liable for environmental remediation at the Charleston Site. R. pp. 317-59. Ashley II alleged that PCS was responsible for environmental liability at the Charleston Site because the terms of the 1986 transaction required it to assume Old CNC's liabilities. R. p. 325. Throughout the *Ashley II* litigation, PCS adamantly and consistently denied that it was the corporate successor to Old CNC or that it had assumed Old CNC's liabilities with respect to the Charleston Site. For example, in the federal district court, PCS disputed at trial that it had assumed the environmental liability arising out of the Charleston Site, saying the "Acquired Business" was limited to an ammonia-

and nitrogen-based fertilizer plant located in Augusta, Georgia, and denying that it was liable for Old CNC's other liabilities under any theory of successorship to corporate liability. R. pp. 299-310.

PCS similarly argued on appeal that it was not the corporate successor to Old CNC under any theory, including a "consolidation or merger" theory or a "substantial continuity" test. R. pp. 360-430, at 384-406 ("PCS Is Not a Successor to CNC").

E. The Federal Courts' Rulings Regarding PCS's Liability

The issue of whether PCS succeeded to Old CNC's liabilities with respect to the Charleston Site was tried in the underlying *Ashley II* case before the court (C. Weston Houck, J.) without a jury, and the court entered Findings of Fact and Conclusions of Law on September 28, 2007. R. pp. 289-310. The court held that New CNC had contractually assumed any liability of Old CNC not specifically retained by Old CNC, because the Acquisition Agreement stated that the parties intended the transaction to be treated "as if Seller [Old CNC] were to sell and Buyer [New CNC] were to purchase the stock of Seller on the open market." R. pp. 300-02. Based on this, the court concluded, "The intent of DSM [Old CNC's parent company] and old CNC and new CNC's knowledge of that intent support Ashley II's proposition that the Acquired Business includes all of old CNC that was not specifically retained or sold to another entity." R. p. 302.

The court also analyzed whether New CNC had succeeded to Old CNC's corporate liability under corporate succession theories, such as by *de facto* merger, "mere continuation," and fraud, and it concluded that none of these theories applied. R. pp. 305-06. It also considered whether New CNC had succeeded to Old CNC's liabilities under a theory adopted by the Fourth Circuit in an environmental case, called the "substantial continuity" test. R. p. 306. It held that there was "substantial continuity" between Old CNC and New CNC based on the factors used in that test, and that New CNC assumed Old CNC's environmental liability as a result. R. pp. 306-

07. The court also held that the circumstances warranted a conclusion of *de facto* consolidation or merger between the companies under South Carolina law (even though it earlier had expressly rejected the application of the *de facto* merger theory under federal law). R. pp. 308-09.

PCS sought reconsideration of the district court's 2007 ruling after the trial judge recused himself. The district court (Margaret Seymour, J.) denied reconsideration in an order entered June 2, 2009. R. pp. 431-552, at 433 n.2. The district court entered additional findings and conclusions regarding liability and damages in an order entered May 27, 2011. R. pp. 431-552.

PCS appealed, challenging the district court's rulings both as to whether New CNC had contractually assumed Old CNC's liability for the Charleston Site and as to whether New CNC was the corporate successor to Old CNC under any theory. R. pp. 384-406. The Fourth Circuit affirmed only the district court's ruling that New CNC had *contractually* assumed Old CNC's environmental liability. *PCS Nitrogen, Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 174-76 (4th Cir. 2013) (R. pp. 553-68, at 559-61). As the court said, "[W]e must affirm the judgment of the district court holding that in the Agreement New CNC assumed Old CNC's CERCLA liabilities for the site and that PCS is therefore a PRP as a successor to Old CNC's CERCLA liability for the site." *Id.* at 176 (R. p. 561). The Fourth Circuit explicitly did not address the other corporate succession theories used by the district court (the "substantial continuity" test or "consolidation or merger" under South Carolina law). *Id.* at 173 ("The district court held PCS liable as a successor to Old CNC under three theories. We need only address one—that New CNC either unambiguously, or based on extrinsic evidence, assumed Old CNC's liabilities for the site under the 1986 Acquisition Agreement.") (R. p. 559).[2]

[2] As the Fourth Circuit observed in the *Ashley II* matter, a contractual assumption of liability is different and distinct from being a corporate successor. 714 F.3d at 173. It is possible for one

Thus, PCS (as successor to New CNC) was held to have contractually assumed Old CNC's environmental liabilities with respect to the Charleston Site, and the district court's alternative rulings regarding theories of corporate succession—theories PCS itself always denied—were not affirmed on appeal.

F. The Insurance Coverage Case and Contentions of the Parties Below

On January 18, 2011, PCS filed this suit in the Court of Common Pleas, Charleston County, against certain insurers who had issued primary liability insurance policies to Old CNC, alleging that it "has been held to be the successor" to Old CNC and seeking defense and indemnity costs with respect to the *Ashley II* suit. R. p. 33. The case was stayed pending PCS's appeal of the *Ashley II* judgment to the Fourth Circuit. After that appeal concluded, PCS filed a Third Amended Complaint, on March 24, 2015, among other things adding several excess insurers as defendants. R. p. 186.

Continental (joined by all insurers) moved for summary judgment on July 24, 2015, on the ground that, based on the undisputed facts recounted above, PCS was not the "insured" under the insurers' policies and was not entitled to claim rights under them. R. p. 43.[3] Continental

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corporation to agree to assume another corporation's liability without succeeding to all of the second's rights and obligations.

[3] Continental and certain other insurers simultaneously filed another motion for summary judgment based on the "pollution exclusion" contained in their policies. R. pp. 606-50. As the insurers argued, even if PCS could claim rights to coverage under policies issued to a different company, it is clear that the pollution exclusion bars coverage—an issue *PCS has already litigated and lost* under South Carolina law, in seeking coverage with respect to the very same Charleston Site under policies with a pollution exclusion identical to the one found in most of the policies here, issued to another company, Ross Development Corporation. *Ross Devp. Corp. v. PCS Nitrogen, Inc.*, 526 F. App'x 299 (4th Cir. 2013); R. pp. 623-27. Here, the trial court deemed the pollution exclusion motion moot after granting the insurers' motions for summary judgment based on corporate succession. R. pp. 27-28. The pollution exclusion provides an additional basis for summary judgment for many of the insurers. As noted in the trial court's ruling on the pollution exclusion motion, summary judgment is warranted as to Providence

argued that PCS had not been held to be the corporate successor to Old CNC, as the decision on which it relied had been appealed and was not affirmed, leaving it a nullity. Continental further argued that PCS had not received an assignment of Old CNC's insurance rights, as any assignment would require the insurers' consent, which was neither sought nor obtained. Continental showed that South Carolina law upheld provisions in insurance policies restricting assignment of policies without consent, and that the exception permitting assignment of a right to a current money payment did not apply because Old CNC had never made a claim to the insurers and had never been held liable in an underlying suit, such that the insurers never had any payment obligation to Old CNC that could be assigned. Finally, Continental demonstrated that even if PCS were permitted to claim—contrary to its position in the federal courts—that it was successor to Old CNC under an equitable "*de facto* merger" theory, that theory did not apply because New CNC had different management, shareholders and employees from Old CNC, and because it had contractually assumed Old CNC's liabilities, making improper any resort to equity to recast the corporate transaction.

PCS filed an opposition on October 9, 2015. R. p. 2197. PCS did not identify any issues of fact. Indeed, PCS stated the only issue was not factual but legal—enforceability: "[T]he only matter at issue with regard to PCS's rights to Old CNC's insurance interests as to the Ashley site is whether Old CNC's assignment to New CNC is enforceable as a post-loss assignment." R. p. 2209. PCS claimed there was an issue of fact with respect to its alternative argument, regarding "*de facto* merger," as the issue had been tried in the underlying *Ashley II* case, but it failed to identify any facts that needed to be tried, nor could it since the facts of the corporate transaction had been thoroughly established in the *Ashley II* case.

Washington, in any event, as it moved for summary judgment on the basis of the pollution exclusion, and PCS failed to oppose that motion. R. p. 28 n.1.

G. Trial Court's Summary Judgment Order

Following extensive oral argument held on February 2, 2016, the trial court entered an order on March 23, 2016, granting the insurers' motions for summary judgment based on corporate succession.[4] R. p. 2. PCS moved for reconsideration on April 7, 2016, which the trial court denied on May 5, 2016. This appeal followed.

III. ARGUMENT

PCS seeks to claim insurance rights under policies issued to Old CNC, even though:

(1) It concedes it is neither the same corporation as, nor the successor-by-merger to, Old CNC (R. p. 2204);

(2) It concedes that a prior federal court ruling upon which it originally relied to claim it was "successor" to Old CNC is "now non-binding" (R. p. 2217);

(3) The corporate transaction document that it claims effected an assignment of insurance *policies* in fact effected only an assignment of "*benefits and proceeds*" and then only "to the extent the same may be transferred and assigned," a restriction implicitly acknowledging that any assignment could not be made without consent of the insurers here, which PCS concedes was not obtained (R. pp. 2204-05); and

(4) PCS has conceded to other courts that *no* "*de facto* merger" took place here, but now, without explanation as to why the facts or the law require a different result, argues the opposite (R. pp. 399-400).

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[4] PCS submitted a proposed order in which it asked the trial court "*sua sponte*" to grant it summary judgment that it was entitled to claim insurance rights under the insurers' policies. R. p. 2435. Continental, with the concurrence of all defendants, objected to the proposed order on the ground that PCS had not moved for summary judgment, but noted that the fact that PCS believed it was entitled to summary judgment in its favor further demonstrated that there were no issues of fact. R. pp. 2435-36.

These concessions show the lack of merit in PCS's position that it should be allowed to claim insurance coverage under policies issued to a complete stranger. PCS avoids mentioning these concessions in its Brief, preferring to chastise the trial court for failing to adhere to an imaginary "overwhelming legal consensus" (Br. at 4) that it says compels a different result. In fact, as the trial court carefully laid out in its opinion, the law of South Carolina and of nearly every other state recognizes that insurance contracts validly prohibit assignment to new insureds because they are "personal" contracts, establishing a relationship of trust and confidence with a particular insured. Addition of a new insured presents a new and different risk. For this reason, insurance policies cannot be assigned to new insureds without the consent of the insurer. PCS seeks to shoehorn its case into a narrow exception to this rule, allowing an insured to assign its right to money already due-and-owing from an insurer, an exception rooted in the property-law recognition that an owing money payment is a "chose in action"—a fixed sum held in the hands of a third party, which is the personal property of the owner—which the law of property declares may not be restricted from alienation. Yet PCS seeks to have this limited exception swallow the rule and to permit assignment of *all* rights, to put *anyone* into the ongoing contractual relationship with the insurer, at just about *any* time. What PCS attempts is not assignment, but novation, to create a new contract with new parties, which South Carolina law clearly prohibits without the *mutual consent* of all parties.

Perhaps recognizing the weakness of its main argument, PCS clutches at straws to argue that it should be regarded as the "successor" to Old CNC under the equitable theory of "*de facto* merger." Putting aside the fact that, until the insurers moved for summary judgment in this case, PCS for years had consistently *denied* that it was successor to Old CNC under any theory (including *de facto* merger), PCS's alternative argument is baseless. South Carolina recognizes

de facto merger as an equitable remedy for tort victims when a purchaser of corporate assets has *not* assumed corporate liabilities—its purpose is to provide "someone to sue" when the original corporate tortfeasor has sold its assets and dissolved, leaving claimants no remedy. But the theory has no application where, as here, the purchaser of corporate assets (PCS) *has contractually assumed* corporate liabilities, specifically giving claimants "someone to sue." Moreover, that equitable theory cannot be used *to benefit the tortfeasor* to the detriment of third parties (like the insurers here) who were uninvolved in the corporate transaction. PCS's effort to argue otherwise should be seen for what it is: an unjustified means to back into "corporate successor" status for purposes of claiming insurance rights, which PCS raises after arguing (correctly) to other courts that it was not the "corporate successor" at all.

Indeed, PCS's litigation history highlights why its invocation of "public policy" (which it did not raise below) rings hollow. In the underlying environmental case for which PCS seeks coverage, PCS was *adverse* to Old CNC and its corporate affiliates, suing Old CNC's parent company and making sweeping allegations about how Old CNC's "activities at the Charleston Site substantially contributed to the contamination of the Charleston Site property." Having helped establish Old CNC's responsibility for contamination of the Charleston Site, it now turns to Old CNC's insurers arguing they should pay for its costs of *prosecuting* (not defending) Old CNC and for the liability that PCS, as an adverse party, helped prove. This bald conflict of interest shows the incongruity of PCS's position, but it is not unique to this case: It can arise whenever a stranger purchases corporate assets but is sued for corporate liability, as the stranger may have an incentive to prove the corporate seller is at fault to diminish its own culpability, even as it attempts to obtain the seller's insurance rights. Thus, a separation of interests and a consequent increase of risk to the insurer necessarily result when insurance is split from the

insured—as insurers count on the insured's interest in *minimizing or defeating* liability to be perfectly aligned with the insurers' interest in doing so. Insurers do not bargain to permit a stranger to claim coverage even as it attempts to prove the insured liable. This is a fundamental reason insurers do not permit assignment of insurance policies to strangers without consent, and that reason perfectly accords with public policy.

Accordingly, the trial court correctly granted summary judgment to the insurers on the ground that PCS is not an insured under their policies, and its judgment should be affirmed.

A. Standard of Review

" 'An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP.' " *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., L.L.C.*, 409 S.C. 331, 339, 762 S.E.2d 561, 565 (2014) (quoting *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 42, 747 S.E.2d 178, 182 (2013)). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (quotations omitted). "In deciding a Rule 56 motion, the Court must view the facts and inferences, therefrom, in the light most favorable to the nonmoving party." *Bravis v. Dunbar*, 316 S.C. 263, 265, 449 S.E.2d 495, 496 (Ct. App. 1994) (quotations omitted). "Summary judgment is appropriate only when the pleadings, depositions, interrogatory answers, admissions, and affidavits show that there is no genuine issue of material fact." *Id.* "A party opposing a properly supported motion for summary judgment, however, may not rest on the mere allegations or denials of his pleading, but must set forth or point to specific facts showing that there is a genuine issue of material fact." *Id.*

Interpretation of a contract is an issue of law. *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). An insurance policy is interpreted like

other contracts, and "[t]he cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Id.* "An insurance contract is read as a whole document so that 'one may not, by pointing out a single sentence or clause, create an ambiguity.' " *Id.* (quoting *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976)).

B. The Undisputed Facts Show that Old CNC Did Not Assign the Policies

PCS argues that a document executed at the time of the 1986 corporate transaction assigned all of Old CNC's policies to New CNC. Br. at 5-9. In that document, titled "Assignment of Insurance Benefits" ("Assignment"), Old CNC stated that it "does hereby transfer and assign to [New CNC] . . . all of [Old CNC's] rights, title and interest, legal and equitable, *in the benefits and proceeds* under all of its insurance policies *to the extent the same may be transferred and assigned.*" R. p. 2233 (emphasis added). The trial court held that the clear terms of this Assignment, and the conduct of the parties at the time, showed "the parties' understanding that assignment of the Policies in full would require consent of the insurers," R. p. 13, which was neither sought nor obtained.

PCS's arguments that the trial court erred depend on a misleading portrayal of the Assignment document. PCS does not even mention that the Assignment limited its scope to assigning benefits "to the extent the same may be transferred and assigned," a limitation that was the focus of the trial court's holding.[5] This provision reflects the parties' acknowledgement that

[5] Indeed, PCS's argument relies exclusively on language from the "Whereas" recitals of the Assignment, not the operative terms of the Assignment themselves. The operative terms do not attempt to assign all "rights" under Old CNC's policies, but "all of Seller's right, title and interest, legal and equitable, *in the benefits and proceeds* under all of its insurance policies to the extent the same maybe transferred and assigned." Where the recitals of a contract are inconsistent with the clear operative terms, the operative terms prevail. *Musman v. Modern Deb, Inc.*, 56 A.D.2d 752, 753, 392 N.Y.S.2d 24, 26 (1977); *Gwaltney v. Russell*, 984 So. 2d 1125, 1132-33 (Ala. 2007); 17A Am. Jur. 2d Contracts § 383, at 371.

Old CNC did not have carte blanche to assign its rights (contrary to PCS's claims) and that any transfer or assignment was subject to any applicable restrictions. In other words, the parties sought to assign only what could be assigned, and non-assignable rights were not even attempted to be assigned. Here, the policies expressly required the insurers' consent to an assignment of any interests under the policies. *See* note 1 above, p. 3. Moreover, the Assignment (aptly named "Assignment of Insurance *Benefits*") attempts assignment only of rights "in the benefits and proceeds" of the policies and did not attempt to make New CNC a policyholder for all purposes—to assign the policies themselves. R. p. 2233. Thus, the Assignment did not even attempt to do what PCS claims, which is to assign policies to make New CNC an insured.

This conclusion is verified by other contemporaneous documents, upon which the trial court relied and which PCS also does not mention in its brief, which show that Old CNC and New CNC understood that assignment of insurance policies from one to the other was impossible without the consent of the insurers. A checklist of tasks to accomplish to close the sale noted that, at the closing, Old CNC was to provide "Assignment of insurance policies *with the consent of the insurance companies endorsed thereon.*" R. p. 2340 (emphasis added). This shows that the parties understood that insurer consent was needed for assignment of "policies." This is confirmed by a December 6, 1986, letter, summarizing events surrounding the November 1, 1986, closing, which notes that, in fact, most of Old CNC's then-current policies were cancelled, with new policies being issued to New CNC ("the purchaser of Columbia Nitrogen Corporation"), rather than old policies being assigned to it. R. pp. 2354-58. Only those policies that could not be cancelled for a refund of premium were assigned:

> Most all of those policies were cancelled at closing, November 1, 1986, and pre-payments were refunded to Nipro, Inc. and distributed by Nipro, Inc. to the companies according to the original share of premium. In these cases, new separate policies were issued to Nipro, Inc., Synres and to the purchaser of CNC

> [New CNC]. In the cases indicated [below], the prepaid premium was not subject to refund by terms of the policy and so, *the benefits of such prepaid policies were assigned* to Nipro, Inc. and to the purchaser of Columbia Nitrogen Corporation [New CNC]."

R. p. 2354 (emphasis added). The letter lists "Liability Insurance" policies that were assigned, R. pp. 2355-56, and the list does not include any of the policies at issue here. Indeed, the only liability policy that was assigned instead of being canceled (a second level excess policy) was assigned *with the consent of the insurer*. R. p. 2356 ("the underwriter did agree to assign coverage to Nipro, Synres and the purchaser of Columbia Nitrogen Corporation [New CNC]. Such endorsement was received 10/14/86. . . ."). These facts, which were not disputed by PCS Nitrogen, show that New CNC understood it needed insurer consent for assignment of policies, and that it actually obtained such consent from one of the then-current insurers of Old CNC. Yet no consent was sought or obtained for assignment of any of the policies at issue here.

PCS nevertheless argues that the trial court erred in interpreting the Assignment as being limited to "benefits and proceeds" that were then owing, as such an interpretation rendered the Assignment illusory. Br. at 8. This mischaracterizes the trial court's ruling and the record. First, the trial court did not hold that the Assignment assigned "nothing;" it merely held that the Assignment did not assign "benefits and proceeds" with respect to liability for the Charleston Site because, "It is undisputed that no benefits and proceeds were then owing to Old CNC under the Policies here, at least as far as is relevant for the Charleston Site, because no underlying claims had even been asserted against Old CNC." R. p. 13. Other benefits and proceeds under the policies, with respect to other claims against Old CNC, may have already accrued and been owing to Old CNC as of 1986, which the Assignment sought to convey. The fact that no benefits were owing *for this particular claim* under these policies does not mean the Assignment assigned "nothing." Moreover, where the parties intended to assign entire policies they understood the

assignment had to be made with insurer consent—which the parties *in fact obtained* in at least one instance. R. pp. 2354-58, at 2356. Thus the Assignment *was* effective to assign rights in that instance, and the trial court's ruling does not result in the Assignment "assigning nothing."

Accordingly, the trial court correctly concluded that the Assignment on which PCS relies did not attempt to assign the Respondents' policies here, an assignment for which consent was neither sought nor obtained.

C. Even if Old CNC Attempted to Assign All Rights Under its Policies, Any Such Assignment Was Ineffective Absent the Consent of the Insurers

Although the trial court correctly held that Old CNC did not even attempt to assign "policies," but only proceeds to the extent the same could be assigned, PCS argues that the Assignment was effective to assign "policies" without insurer consent, contending that a new insured can be substituted for the old insured, without insurer consent, practically at any time. PCS's argument is completely rejected by South Carolina law.

1. Insurance Contracts Are Personal to the Insured and Cannot Be Assigned Without Insurer Consent

The law recognizes "personal" contracts as those whose purpose is dependent on the character, credit and substance of a specific party for their fulfillment; rights under personal contracts cannot be assigned by that party to third persons, even where the contract does not specifically bar such assignment. *Green v. Camlin*, 229 S.C. 129, 133, 92 S.E.2d 125, 127 (1956) ("Rights arising out of a contract cannot be transferred if they are coupled with liabilities, or if they involve a relationship of personal credit and confidence."); *see also Skipper v. ACE Prop. & Cas. Ins. Co.*, 413 S.C. 33, 37, 775 S.E.2d 37, 38-39 (2015) (disallowing assignment of malpractice claim against lawyer in part because "[t]he relationship between an attorney and a client . . . 'is founded on the trust and confidence reposed by one person in the integrity and fidelity of another.' ") (citation omitted); *see generally* 29 Richard A. Lord, Williston on

Contracts § 74.37 (2003) (discussing non-assignability of rights under contract where confidence in the assignor "is a vital element of the contract").

South Carolina law recognizes that insurance contracts are personal to the insured, and therefore the insured may not assign a policy to third parties without insurer consent. *Silverman v. Dew*, 182 S.C. 457, 189 S.E. 756 (1937). In *Silverman*, the plaintiff in a car accident case obtained judgment against the defendant and executed judgment by attaching and selling the defendant's car, obtaining only $100. He then sought to sue the defendant's automobile insurer for collision coverage for damage to the *car* (not for the insured's liability), saying that the insurance coverage transferred to him when he attached it. The Supreme Court rejected the plaintiff's claim, holding that the insurance policy was "the purely personal contract of insurance between the indemnity company and the defendants," and stating, "The insurance policy being a personal contract, did not run with or attach to the thing insured." *Id.* at 460, 189 S.E. at 757. PCS makes essentially the same argument as the plaintiff in *Silverman*, asserting that it should be entitled to Old CNC's liability insurance because it contractually assumed Old CNC's liability, as if insurance should "run with" the liability. Br. at 5-6 ("PCS is being held liable, as the alleged successor to Old CNC, for property damage alleged to have been caused by Old CNC during the coverage periods. As such, PCS seeks the very coverage for which Respondents accepted premiums. . . ."). *Silverman* rejected that argument even though the damage had occurred prior to the attachment, and the plaintiff was therefore attempting to transfer the policy "post-loss." The court's rejection of the plaintiff's argument makes clear that there is no "post-loss" exception to the contractual prohibition on assignment of insurance.

Moreover, in *Silverman* the Supreme Court rejected a stranger's claim that he should be allowed to step into a contractual relationship with someone else's insurer. Indeed, an insured

cannot unilaterally make a new person or entity an "insured" under the policy without the insurer's consent. *Ligon v. Metropolitan Life Ins. Co.*, 219 S.C. 143, 154-55, 64 S.E.2d 258, 264 (1951) (prohibition on assignment of life insurance policy "obviously refers to a situation where the insured undertakes to assign his policy of insurance during his lifetime"); *see also Hack v. Metz*, 173 S.C 413, 420, 176 S.E. 314, 317 (1934) ("if the assignment be not made with the consent of the [insured] and the insurer, it is void").

In addition, insurance contracts themselves typically prohibit assignment of any interest under the policy without insurer consent, as do the Respondents' policies here. *E.g.* R. p. 110 (Continental Policy). Such prohibitions are enforceable. *Hack*, 173 S.C. at 420, 176 S.E. at 317. "Contract provisions prohibiting the assignment of rights under the contract will ordinarily be upheld, depending on the particular facts and circumstances." 29 Williston on Contracts § 74:22 at 352.

2. The Limited Exception Permitting Assignment of the Right to Insurance Proceeds as a Chose in Action Does Not Apply Here

a) South Carolina Draws a Sharp Distinction Between Assignment of a Policy and Assignment of a Claim

In South Carolina, as in other states, an insured cannot assign all rights under a policy without insurer consent. A limited exception to this rule applies, however, if and when an insurer's contingent contract obligation matures into a current obligation to pay a sum of money—that is, when the thing insured against has occurred and there is no other condition to payment. Then, the law views the right to receive payment as something new: as a debt owing to the insured, or a species of "property" that the common law called a "chose in action."[6] Courts

[6] "Chose" is Law French for "thing." It means "an article of personal property. A chose is a chattel personal, and is either in action [*i.e.*, not in one's possession, but recoverable by an action at law] or in possession." Black's Law Dictionary at 219 (5th ed. 1979). "A 'chose in action' has been variously defined as (1) 'A proprietary right in personam, such as a debt owed by

treat as assignable the insurer's already-accrued obligation to pay a sum of money, notwithstanding a prohibition on assignment in the policy. *See Narruhn v. Alea London Ltd.*, 404 S.C. 337, 344-45, 745 S.E.2d 90, 93-94 (2013). Although the Supreme Court's discussion of the issue in *Narruhn* was dictum (the court said, "we need not reach the issue here," *id.* at 344, 745 S.E.2d at 93-94), it quoted Couch on Insurance as saying, "the assignment before loss involves a transfer of a contractual relationship while the assignment after loss is the transfer of a right to a money claim," *id.* at 344, 745 S.E.2d at 94. Such a right to receive money payment " 'is now a vested claim against the insurer and can be freely assigned or sold like any other chose in action or piece of property.' " *Id.* (quoting 17 Williston on Contracts § 49:126).

In *Narruhn*, the plaintiff had obtained a judgment against the insured nightclub for damages for personal injuries and sought to collect insurance proceeds under the nightclub's liability insurance policy. *Id.* at 339, 745 S.E.2d at 91. The issue was whether the insurer, as a non-party to the supplemental proceedings, could move to set aside the order assigning insurance proceeds. *Id.* The Supreme Court held it could not, but that the insurer could assert all defenses in a separate action to recover the proceeds. *Id.* at 343, 745 S.E.2d at 93. Thus, the insured had already suffered a judgment in an underlying case by the time the assignment was made, and, if the judgment was covered by the insured's liability insurance, the insurer already had a payment obligation to indemnify the insured, which the court stated was a chose in action that could be assigned.

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another person, a share in a joint-stock company, or a claim for damages in tort'; (2) 'The right to bring an action to recover a debt, money, or thing' and (3) 'Personal property that one person owns but another person possesses, the owner being able to regain possession through a lawsuit.' " *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 343 n.3, 745 S.E.2d 90, 93 n.3 (2013) (quoting Black's Law Dictionary at 275 (9th ed. 2009)).

PCS asserts that *Narruhn* supports its position that all policy rights may be assigned "after loss." But *Narruhn* did not involve an assignment of *policies*, meaning assignment to a new entity who sought to substitute itself as the insured for all purposes—which is what PCS seeks here. Br. at 1. The Supreme Court's comment that "an assignment *after* a loss has already occurred does not require an insurer's consent," *id.* at 344, 745 S.E.2d at 94 (emphasis original), in context, referred to assignment of a chose in action for accrued money due, which could be assigned to the claimant, and not the substitution of insureds. Indeed, the court explained its "note," leaving no doubt what it meant: " 'the clause by its own terms ordinarily prohibits merely the assignment of the policy, as distinguished from a claim arising under the policy, and the assignment before loss involves a transfer *of a contractual relationship* while the assignment after loss *is the transfer of a right to a money claim*;' " " 'a vested claim against the insurer . . . can be freely assigned or sold *like any other chose in action* or piece of property.' " *Id.* at 344-45, 745 S.E.2d at 94 (emphasis added; citations omitted). Plainly, the court did not, by its statements, support the notion that the claimant *against* the insured could *become* the "insured" after the assignment. Thus, what *Narruhn* observed, in dictum, was merely that an accrued right to receive a payment from an insurer could be assigned, as it is a chose in action. It *rejected* the contention (made by PCS here) that a *contractual relationship* could be assigned without consent.

In its comments, *Narruhn* was only repeating what other South Carolina cases previously said, which PCS does not rebut. Personal contracts cannot be assigned without consent. *Green v. Camlin*, 229 S.C. 129, 133, 92 S.E.2d 125, 127 (1956). Insurance policies are contracts personal to the insured and cannot be assigned without consent of the insurer. *Silverman v. Dew*, 182 S.C. 457, 460, 189 S.E. 756, 757 (1937). A policyholder may assign only a money claim,

for "insurance money then due," after it has accrued. *Ligon v. Metropolitan Life Ins. Co.*, 219 S.C. 143, 155, 64 S.E.2d 258, 264 (1951). Thus, South Carolina law, as recognized by *Narruhn*, does not permit assignment of insurance policies without insurer consent.

PCS contends that the trial court misapplied *Ligon*, saying that that case stands for the proposition that "insurance policies ***can*** be assigned without insurer consent." Br. at 6. PCS is incorrect. *Ligon*, which involved a life insurance policy, said the *policy*, and its identification of whose life was insured, could *not* be assigned during the insured's lifetime; but the *proceeds* of the policy, due upon the insured's death, could be. 219 S.C. at 154-55, 64 S.E.2d at 264. The full statement of the court's view on this point makes clear that what could be assigned was only "money then due:"

> The provision inserted in the master policy obviously refers to a situation where the insured undertakes to assign his policy of insurance during his lifetime. In our opinion, such a restriction in the insurance policy is not intended to cover a case where the loss has already occurred and where the thing which is being assigned is a claim for a loss. It will be noted that the policy does not state that it might not be assigned after a loss has occurred.
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> It is well stated in 29 Am. Jur., Sec. 506, Page 410: "General stipulations, in policies, prohibiting assignment thereof, except with the insurer's consent or upon giving some notice, or like conditions, have universally been held to apply only to assignments before loss, and, accordingly, not to prevent an assignment after loss *or death, or the maturity of the policy, of the claim or interest in the insurance money then due* * * *."

Id. (emphasis added). Thus, *Ligon* affirms that a "policy" cannot be assigned, and only a chose in action for proceeds when due can be, consistent with other South Carolina cases.

b) An Insured Must Have a Chose in Action to Assign a Chose in Action

As several of the foregoing cases show, cases permitting assignment of a chose in action after an insurance payment was due have typically arisen in the context of fire insurance, and the *event* resulting in the insured's "loss"—the fire—had clearly already occurred. But the chose in

action owing to the insured from the insurer is not the same as the underlying insured *event*, and the insured has to have a chose in action to recover from the insurer before it can assign a chose in action. This was made clear in *Singletary v. Aetna Cas. & Sur. Co.*, 316 S.C. 199, 447 S.E.2d 869 (1994). There, the insured bank had sold, at foreclosure sale, a house damaged by fire, but it had not made a claim against its insurer for the damage, and its financial interest was made whole by selling the house. *Id.* at 200, 447 S.E.2d at 869. The bank had assigned its rights to insurance proceeds to the purchaser of the house, who brought suit against the bank's insurer to recover for the damage. *Id.* The Supreme Court held that since the bank had not made a claim against the insurer and had been made whole by the foreclosure sale, it had no right to insurance proceeds that it could assign to the purchaser: "An assignee of a chose in action can claim no higher rights than his assignor had at the time of the assignment." *Id.* at 201-02; 447 S.E.2d at 870. Thus, if an insured has no right of recovery against its insurer at the time of a purported assignment, it cannot assign that claim to a third party.

In other words, what matters in determining whether the insured has an assignable chose in action is not merely whether the underlying covered event has occurred, but whether the insurer has a payment obligation to the insured—and the insured therefore has a right to receive that payment—at the time the insured assigns that right.

c) In the Context of Liability Insurance, a Chose in Action Accrues Only After a Tort Claimant Obtains a Judgment of Liability Against the Insured for Covered Damages, or After There Has Been a Settlement Among the Claimant, the Insured and the Insurer

The foregoing cases make clear that the insured does not have an assignable chose in action until it has a right to payment from the insurer. With respect to liability insurance, under the terms of the policies and South Carolina law, the insured has a right to payment from its *liability* insurer only when its *liability* accrues: that is, only when a tort claimant obtains a

judgment against the insured for covered damages (or when the insured enters into a settlement with the claimant and the insurer). Continental's policies provide as follows:

> **Action Against Company** No action shall lie against [Continental], unless, as condition precedent thereto, there shall have been full compliance with all of the terms of this policy, *nor until the amount of the insured's obligation to pay shall have been finally determined by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.*

E.g., R. p. 109 (Continental Policy Condition 5) (emphasis added).[7] Thus, the insurers have no payment obligation to the insured until a claimant has obtained a judgment or the parties have settled. In addition, the insurers agreed to indemnify the insured only for "sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which the insurance applies." *Id.* at CCC000208. The insured is so "legally obligated to pay" only when a judgment is entered against it or when it enters into a settlement with the claimant and the insurer. *Park v. Safeco Ins. Co.*, 251 S.C. 410, 413, 162 S.E.2d 709, 710 (1968) (until injured party "establishes liability . . . he has no right to call upon any insurance company alleged to protect [the insured];" "Stated another way, no right to recover can accrue to plaintiff against either insurance company until and unless [the insured] becomes liable to pay."). The insurers' duty to indemnify and the insured's chose in action to recover that indemnity payment therefore do not arise, at a minimum, until there is such a judgment or settlement and all conditions to coverage are met. *See Narruhn*, 404 S.C. at 344-45, 745 S.E.2d at 93-94 (stating, in dictum, that right to payment of liability insurance proceeds could be assigned after insured was held liable in a judgment); 2 Allan D. Windt, *Insurance Claims & Disputes* § 6:6 at 6-159 (6th ed. 2013) ("Third-party liability policies require, as a condition precedent to the insurer's

[7] The policies of the other Respondents contain similar provisions.

liability, that the insured be liable to a third person, by means of either a judgment or a settlement.").

As the case law demonstrates, the real question in determining when an insured may assign rights under an insurance policy, which are otherwise non-assignable, is whether a right has matured into a present right to obtain the insurer's payment, as that right is a form of property (a chose in action), which the law of property declares may not be restrained from alienation. Yet many of the cases addressing assignment of such rights have arisen in the context of first-party insurance (for loss the insured itself suffers, as from fire, wind, theft, etc.), and the insurer's payment obligation arose with the insured-against contingency (the fire damage, the wind damage, the theft). These cases colloquially refer to the event permitting assignment as the "loss," even though in fact the event they are referring to is the insured contingency and the no-longer-contingent insurance payment obligation arising out of it. Thus, although their language may refer to a "post-loss" exception, they stand for a "chose in action" exception.

Nevertheless, those seeking coverage under liability policies, such as PCS here, seek to twist those cases' language to assert that the "loss" permitting assignment under a third-party liability policy is the injury or damage suffered by third-party claimants, even though the insured has no "loss" arising from that injury unless and until it is held liable in a judgment. Through this linguistic sleight-of-hand, they argue that rights under a liability policy may be assigned as soon as underlying third-party injury allegedly occurred.

Yet even if when "loss" occurs were relevant, there is no doubt that "loss," in the context of insurance for liability for injury to third parties, occurs only when the third party obtains a judgment against the insured. The insured contingency, for a *liability* policy, is not a third party's injury; it is the insured's *liability* for that injury. *See Park,* 251 S.C. at 413, 162 S.E.2d

709 at 710 (insurer has no obligation to injured party "until and unless [the insured] becomes liable to pay").[8] Although the third-party claimant's injury is *one* contingency to that obligation, the most salient contingency—that the insured have "become legally obligated to pay"—does not occur until the claimant obtains a judgment, and that contingency may never occur if the claimant does not file suit, if he fails to do so timely, if the law of liability does not provide a remedy, if the claimant fails to satisfy his burden of proof on every element of his claim, or if the insured has valid defenses. In short, there are myriad contingencies beyond the happening of injury that must be fixed for the insured to be liable at all. For liability insurance, therefore, the proper analog to the first-party cases' use of "loss" (the insured contingency, *i.e.*, the fire damage, the wind damage, the theft) as the point when insurance rights may be assigned is when a tort claimant obtains a judgment against the insured. *That* is the insured contingency, and that is when the nature of the relationship changes from insured-insurer, with the insured risk being uncertain and contingent (and subject to increase by the insured's action or inaction), to debtor-creditor, with the insured risk transformed into actuality (and no longer subject to change).

Furthermore, any rule that permits assignment to a new insured of all policy rights as soon as an underlying injury occurs, even if that injury is unknown to the insured or even the claimant at the time (as may be the case with environmental contamination), necessarily increases the risk to the insurer. This is because the assignment, made prior to the determination of the insured's liability, results in a divorce of interests that the insurer counts on being aligned: the insured's and insurer's common interest in defeating liability. For example, the new entity

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[8] The insurer's payment obligation may also arise when the insured, the claimant and the insurer reach a settlement agreement, as that determines the insured's liability without a judgment. Further, the discussion above assumes that the insurance policy covers the liability at issue. Of course, if the insured is held liable in a judgment for injury not covered by a policy, the payment obligation never arises.

may seek to cast blame on the insured for the injury, to avoid or diminish its own liability (as PCS did in the *Ashley II* case[9]), then seek to recover from the insurers *for the liability it helped to establish*. It may even claim (as PCS claims here[10]) that the costs of *prosecuting* claims against the insured should be recoverable from the insurers, even though the policies cover only costs of *defending* the insured. Indeed, an insured who assigns its policies to a corporation that assumes its liability has no interest in *defeating* its own liability, and the new entity/assignee may have an interest in *demonstrating* the original insured's liability to reduce its own. This is a risk for which the insurers did not bargain.

Accordingly, even if the exception allowing assignments notwithstanding the consent-to-assignment clause were called a "post-loss" exception, the "loss" in the third-party liability insurance context must be the event that fixes the insured contingency, that prevents any split in interest between the insurer and the insured in defeating liability and that eliminates the potential increase in risk to the insurer: a judgment against the insured. As no such judgment was ever entered against Old CNC, even the "post-loss" exception PCS advocates does not apply.

d) PCS Does Not Allege Assignment of a Chose in Action, But Assignment of All Policy Rights in Violation of South Carolina Law

PCS does not allege that Old CNC suffered a judgment covered by liability insurance, for which it had an accrued right to payment from its insurers that it assigned to New CNC. Nor

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[9] For example, in the *Ashley II* litigation, PCS filed a third-party complaint against Old CNC's parent company, Koninklijke DSM, N.V., alleging that "[d]iscovery recently taken in this case has revealed that [Old CNC's] *activities at the Charleston Site substantially contributed to the contamination of the Charleston Site* property and thus rendered [Old CNC] a 'covered person' within the meaning of Section 107(a)(2) of CERCLA." R. p. 271 ¶ 37 (emphasis added).

[10] R. p. 197 ¶ 50(c) (listing, as a cost for which PCS seeks coverage, "[t]he costs to defend itself in the *Ashley II* litigation"). As noted, part of that defense involved seeking to establish that Old CNC's "activities at the Charleston Site substantially contributed to the contamination of the Charleston Site." *See* note 9 above.

could it, as indeed no underlying claim had even been alleged against Old CNC by the time of the 1986 transaction, and Old CNC had not even sought coverage for any claim—so it could not have had an accrued right to insurance recovery that it could transfer to New CNC. Instead, PCS alleges that it received *all* of Old CNC's insurance rights by virtue of an assignment in the 1986 transaction, and it seeks to step into Old CNC's shoes for all purposes as the "insured," including as to a duty to defend. Br. at 1, 15-16. That is not an assignment of a chose in action for money payment, but an assignment of a contractual relationship—an attempt at a novation, to which the insurers did not agree—that is clearly precluded by the contracts and South Carolina law.[11]

Despite *Narruhn's* observation that what can be assigned is a "vested claim" "like any other chose in action or piece of property," 404 S.C. at 345, 745 S.E.2d at 94 (quoting 17 Williston on Contracts § 49:126), PCS does not discuss what a chose in action is or when an insured has one owing from its insurer. Instead, it repeatedly claims the law permits a general "transfer of coverage rights," Br. at 1, 6, 7, 10, without reference to whether the insured has a chose in action. But no South Carolina case supports that proposition, and *Narruhn* in fact rejects it.

The fallacy of PCS's position is revealed in its own inability to articulate just when such a "transfer" is, and is not, permitted. Indeed, PCS identifies four different, and inconsistent, times such a "transfer" is allowed: (1) As soon as the insured pays the premium (presumably *before* the policy period);[12] (2) after the events that give rise to injury occur (which may occur before or during the policy period);[13] (3) after the injury itself occurs (any time during the policy

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[11] See Section III.C.5 below.

[12] Br. at 8 (quoting *Illinois Tool Works v. Commerce & Indus. Ins. Co.*, 962 N.E.2d 1042, 1055-56 (Ill. App. Ct. 2011)).

[13] Br. at 11 ("The Relevant Loss Is The Happening of the Event Giving Rise to Liability"). The fact that PCS says a policy is assignable when an "event giving rise to liability" occurs shows the

period);[14] and (4) any time after the *end* of the policy period.[15] Although PCS offers up these times as when non-assignable policy rights transmute into assignable choses in action, in fact they embrace *all* times before, during and after a policy period, making *all* policy rights assignable *at any time*, plainly contrary to *Narruhn* and all other South Carolina cases. The four different times PCS says its "exception" applies (that is, always) show only how its exception swallows the rule.

Indeed, PCS concedes (perhaps inadvertently) that what the law really permits is "a transfer of the right to collect payment." Br. at 11. Yet it fails to acknowledge that *none* of the four events it identifies gives rise to a right to collect payment. It is *only* when a tort claimant obtains a judgment against the insured that the insured has a right "to collect payment" from the insurer. *Park*, 251 S.C. at 413, 162 S.E.2d at 710 (there is "no right to call upon any insurance company alleged to protect [the insured] . . . until and unless [the insured] becomes liable to pay" as fixed by a judgment). And it is only then that the insured may assign that right.

PCS attempts to buttress its argument with reference to an "example" involving automobile liability insurance. Br. at 10-11. PCS asserts that a driver with a "perfect driving record" may assign his auto policy to "his neighbor who has multiple drunk driving convictions" any time after the policy period is over. *Id.* PCS does not explain why a virtuous insured would

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utter lack of coherence in its position, since the policies cover bodily injury or property damage "which occurs during the policy period," R. p. 108, even if the "event giving rise" to that injury or damage occurred before the policy period. *Joe Harden Builders, Inc. v. Aetna Cas. & Sur. Co.*, 326 S.C. 231, 237, 486 S.E.2d 89, 91 (1997) (trigger of coverage is when injury in fact occurs during policy period, not at time of injury-causing event); *Crossmann Communities, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 54, 717 S.E.2d 589, 596 (2011) (following *Joe Harden*). Thus, under PCS's formulation, policies are assignable *before they are even issued.*

[14] Br. at 12 (" 'once an injury or loss occurs, the chose in action is established' " (quoting *Illinois Tool Works*)).

[15] Br. at 10 ("a transfer of the policy to the neighbor after the policy period runs would not be barred").

have any interest in assigning his policy to a drunkard neighbor, but since the policy covers only injury arising out of the virtuous driver's acts, the transaction would make sense only if the drunkard had assumed the virtuous driver's liabilities. This means, of course, that, if the insured's policy could be assigned to the drunkard neighbor, the insurer would be faced with defending claims with the drunkard sitting at the defense table instead of its insured with the "perfect driving record." The drunkard may not be able to assist in the defense at all—after all, he was not the driver when the accident happened, and he therefore cannot offer testimony—but any testimony he can give can be impeached with his drunk driving convictions. The (new) unsympathetic defendant will be what the jury considers when it renders its verdict, not the paragon the insurer actually insured. Thus, contrary to PCS's claim that "After the policy period is over, the risk is fixed," Br. at 10, in fact, even under PCS's own example, assignment to a stranger *dramatically* increases the risk of a judgment of liability, and therefore dramatically increases the risk of the insurer's indemnity obligation (not to mention the costs of defense).

PCS's example, rather than advancing its case, indeed highlights the impropriety of the rule it advocates. There is no legal interest or public policy served in permitting prudent insureds "freely" to assign their policies *in toto* to careless and irresponsible third parties and saddling insurers with the consequences. Any rule allowing that outcome would necessarily increase risks to insurers, who would have to raise insurance rates *on prudent policyholders* to account for the fact that careless strangers could claim their insurance. Nor is there any public policy served in requiring insurers to enter into an involuntary contractual relationship with any stranger, even if that stranger were merely as risky as, or less risky than, the original insured. For whether a party is worthy of an insurer's backing is uniquely a matter of judgment reserved to the insurer's discretion and its freedom to contract, *or not to contract. See Ashley II of Charleston, L.L.C. v.*

PCS Nitrogen, Inc., 409 S.C. 487, 492, 763 S.E.2d 19, 21-22 (2014) (noting South Carolina's "longstanding regard for parties' freedom to contract"). PCS seeks to deprive insurers of that freedom of contract, under the pretense that it is merely seeking to recover a chose in action, which in fact does not exist.

Yet even if it were possible to conclude, without doubt, that a particular "new insured" is "less risky" than the original insured, a policy assignment still creates additional risk for the insurer, because *now there are two* insureds who can seek coverage, instead of one. In any case where a new party "assumes" the original insured's liability and seeks to have liability insurance assigned to it, *both* the original insured and the new party are subject to suit by claimants: Unless claimants release the original insured, they now have two targets for liability. *See Moore v. Weinberg*, 373 S.C. 209, 218-19, 644 S.E.2d 740, 744-45 (Ct. App. 2007) (novation, "broadly defined as a substitution of a new obligation for an old one, thereby extinguishing the old debt," is possible only if both parties consent; novation held not a defense to tort claim in absence of consent of claimant). What is more, each target can demand that the insurer pay for its defense, even for claims asserted against each other, attempting to prove the other is "at fault" (as happened here). (See note 9 above.) This multiplication of insureds multiplies the insurer's obligations at the same time it creates unbargained-for adversity. PCS's own example therefore proves the infirmity of its argument.

Consequently, there is no basis for PCS's theory that it obtained Old CNC's insurance rights by assignment, and the trial court correctly rejected it.

3. PCS's "Overwhelming Consensus" of Out of State Authority Is Imaginary

The cases from other jurisdictions on which PCS relies are not controlling here, but in any event they either do not support PCS's argument, are distinguishable or are contrary to the

law of the state whose law they purported to apply. PCS claims "the overwhelming majority" of cases supports its position, Br. at 11, while one decision of the Indiana Supreme Court and the trial court "stand athwart this overwhelming consensus," *id.* at 15. In fact, as discussed below, there is a consistent view throughout the decisions, with some errant cases in other jurisdictions failing to follow it: Insurance policies may not be assigned *in toto* to a new insured without insurer consent, but a policyholder may assign only an accrued right to receive money from an insurer as a chose in action. As discussed above, that is precisely South Carolina law as well.

The rule that insurance policies may not be assigned, but a chose in action for money already due may be assignable, is recognized by many other courts. As the Indiana Supreme Court said, "At a minimum, for an insured loss to generate an assignable coverage benefit, it must be identifiable with some precision. It must be fixed, not speculative. . . . A right not currently held is not a chose in action assignable at law. It follows that a chose in action only transfers in these circumstances if it is assigned at a moment when the policyholder could have brought its own action against the insurer for coverage." *Travelers Cas. & Sur. Co. v. U.S. Filter Corp.*, 895 N.E.2d 1172, 1180 (Ind. 2008). *See also Del Monte Fresh Produce (Haw.) Inc. v. Fireman's Fund Ins. Co.*, 117 Haw. 357, 369-70, 183 P.3d 734, 746-47 (2007) (duties to defend and to indemnify cannot be transferred by insured without insurer consent); *Holloway v. Republic Indem. Co.*, 341 Ore. 642, 652, 147 P.3d 329, 335 (2006) (policy "prohibits the assignment of the insured's rights or duties without regard to whether they arose pre-loss or post-loss"); *Keller Foundations, Inc. v. Wausau Underwriters Ins. Co.*, 626 F.3d 871, 875-78 (5th Cir. 2010) (predicting Texas would reject assignment of insurance "by operation of law"); *Ford, Bacon & Davis LLC v. Travelers Ins. Co.*, 635 F.3d 734 (5th Cir. 2011) (same); *Red Arrow Prods. Co. v. Employers Ins. of Wausau*, 607 N.W.2d 294, 302 (Wis. App. 2000) (insurance

policies do not "follow the liability" to entity that had been held successor to insured's environmental clean-up obligations), *review denied*, 612 N.W.2d 733 (Wis. 2000); *EM Indus., Inc. v. Birmingham Fire Ins. Co.*, 141 A.D.2d 494, 496, 529 N.Y.S.2d 121, 123 (1988) (insurer did not "become the plaintiff's insurance carrier by virtue of plaintiff's acquisition of the 'business and properties' " of the insured; rejecting assignment theory), *appeal denied*, 73 N.Y.2d 704, 534 N.E.2d 330 (1989); *Time Fin. Corp. v. Johnson Trucking Co.*, 23 Utah 2d 115, 118, 458 P.2d 873, 875 (1969) (insured could not assign "contractual relationship," but only "money claim"); *Water Applications & Sys. Corp. v. Bituminous Cas. Corp.*, 986 N.E.2d 124 ¶ 60 (Ill. App. 2013) (insurer consent required for assignment of liability insurance policy, under Maryland law).

Several of the cases cited by PCS to claim that a contrary rule applies in fact involved assignment merely of a chose in action for an accrued money payment, not assignment of policies to make a new person or entity an insured. In *Ginsburg v. Bull Dog Auto Fire Ins. Ass'n*, 328 Ill. 571, 572-73, 575, 160 N.E. 145, 145-46 (1928) (which PCS cited to the trial court, but omits to cite here), the insured's car had already been stolen when he assigned the claim for recovery from his insurer. The court held that a claim is assignable after "nothing remains to be done except pay the money." *Id.* at 573, 160 N.E. at 146. The insurer's consent would have been required "if [the claimant] had bought the automobile covered by the policy prior to the time it was stolen and an attempt had been made *to assign the policy*." *Id.* at 575, 160 N.E. at 146 (emphasis added). Instead, after the car was stolen the insured's claim "became a chose in action." *Id. See also Citicorp Indus. Credit, Inc. v. Federal Ins. Co.*, 672 F. Supp. 1105, 1105-07 (N.D. Ill. 1987) (thefts had occurred before assignment of assets to creditor; under Missouri law, "insureds had not assigned the policy at issue, but instead, had assigned a matured claim or

debt, which, like any other chose in action, was assignable"); *Antal's Restaurant, Inc. v. Lumbermen's Mut. Cas. Co.*, 680 A.2d 1386, 1388-89 (D.C. 1996) (fire had occurred; "policies for fire insurance are normally considered 'personal' in nature;" but assignment of claim as "chose in action" permitted because after the fire "the relationship of insured and insurer is now one of 'creditor and debtor' "); *Peck v. Public Serv. Mut. Ins. Co.*, 114 F. Supp. 2d 51, 56 (D. Conn. 2000) (permitting assignment to judgment creditor of bad faith claim against insurer "after the loss has occurred *and a judgment has been obtained* against the insured") (emphasis added); *Kintzel v. Wheatland Mut. Ins. Ass'n*, 203 N.W.2d 799, 804-05 (Iowa 1973) (windstorm damage had occurred; the "assignment followed the windstorm. After the loss was incurred the issue became not an assignment of the policy, but the assignment of a chose in action—the right to compel defendant's payment. . . ."); *Conrad Bros. v. John Deere Ins. Co.*, 640 N.W.2d 231, 237-38 (Iowa 2001) (following *Kintzel*; after windstorm, "the insurer-insured relationship is more analogous to that of a debtor and creditor"); *Egger v. Gulf Ins. Co.*, 588 Pa. 287, 296, 903 A.2d 1219, 1224 (2006) (claimant had entered into settlement agreement with insured prior to verdict, and insured assigned to claimant its claim against insurer; assignment permitted based on Pennsylvania case law stating " 'it is against public policy so to restrict the relation of debtor and creditor by restricting or rendering subject to the control of the insurer an absolute right in the nature of a chose in action' ") (citations omitted). In all of these cases, then, the insurer's payment obligation had accrued, and all that the insured attempted to assign was the right to receive an accrued payment; the insured did not attempt to make a new person or entity an insured. Therefore, these cases conform to South Carolina law and do not support PCS here.

Other cases cited by PCS were federal or intermediate appellate cases that misapplied the state law they claimed to enforce. In *Illinois Tool Works, Inc. v. Commerce & Indus. Ins. Co.*,

962 N.E.2d 1042 (Ill. App. 2011), the Illinois Appellate Court permitted the insured to assign its liability insurance policies to a purchaser of the insured's assets, even though, as noted above, the Supreme Court of Illinois had made clear in *Ginsburg* that an assignment would be effective only as to a chose in action: that is, only when "nothing remains to be done except pay the money." *Ginsburg*, 328 Ill. at 573, 160 N.E. at 146. *Ginsburg* had also stated that consent *would* be required to assign the policy. *Id.* at 575, 160 N.E. at 146. *Illinois Tool Works* simply failed to adhere to this precedent. Indeed, the Appellate Court stated, "There is little distinction between assignment of an insurance policy and assignment of benefits under a policy." 962 N.E.2d at 1054 n.8. Yet, as *Ginsburg* held, there is a significant difference: A policy cannot be assigned without consent, because such an assignment seeks to transfer a contractual relationship; whereas the accrued right to a money payment can be assigned without consent because it is the property of the insured (money already owing) held in the insurer's hands. 328 Ill. at 575, 160 N.E. at 146. That *Illinois Tool Works* failed to appreciate the distinction shows it is not an authoritative statement of Illinois law.[16]

PCS also relies on the intermediate appellate court decision in *Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co.*, 442 N.J. Super. 28, 120 A.3d 959 (App. Div. 2015), without noting that the decision has been accepted for review by the New Jersey Supreme Court. 223 N.J. 404, 125 A.3d 392 (2015). Nor does it address the fact that *Givaudan Fragrances* also is contrary to authority of its state high court, authority which the decision did not discuss. *Flint Frozen Foods, Inc. v. Firemen's Ins. Co.*, 8 N.J. 606, 611, 86 A.2d 673, 675 (1952) ("After a loss

[16] *Illinois Tool Works* also equated a "future claim" for "defense and indemnification" with a "chose in action." 962 N.E.2d at 1055. Yet a chose in action is not a future contingency, but a fixed debt payable to its holder. *Crum v. Sawyer*, 132 Ill. 443, 460, 24 N.E. 956, 960 (1890) (contrasting choses in action, which are "absolutely fixed and *in esse*," with "contingent interests and expectancies"). The fact that the court confused a future contingency with a chose in action makes its analysis all the more unpersuasive.

has occurred a person may not adopt a policy to which he is a stranger and thereby increase the liability of the insurer."). Thus, *Givaudan Fragrances* is also not authoritative.[17]

Of particular note for its failure to adhere to state law is the federal decision in *Ocean Accident & Guar. Co. v. Southwestern Bell Tel. Co.*, 100 F.2d 441 (8th Cir. 1939). *Ocean Accident* is premised on the assertion that a "claim" under a liability insurance policy is an assignable "chose in action" immediately upon the occurrence of a claimant's injury, because "the liability of the [liability insurer] arose immediately upon the happening of the accidents resulting in the injuries." *Id.* at 444-45. Yet that assertion is not supported by any of the cases the court cites. One such case held the opposite, holding that an insurer's obligation under an indemnity policy "did not become fixed . . . until plaintiff had paid the judgment." *Conqueror Zinc & Lead Co. v. Aetna Life Ins. Co.*, 133 S.W. 156, 159 (Mo. App. 1911). Another involved an automobile insurance policy that did not contain a "no action" clause, noting that if such a clause had been included (as it is here, see p. 23 above) the insurer's liability would not attach until there was a judgment against the insured. *Wehrhahn v. Fort Dearborn Cas. Underwriters*, 1 S.W.2d 242, 244 (Mo. App. 1928). Another involved a specific Missouri statute that fixed the insurer's responsibility at the time of the accident,[18] *Schott v. Continental Auto. Ins. Underwriters*, 31 S.W.2d 7, 10 (Mo. 1930), but that case *still* recognized that the insurer had no payment obligation until judgment was entered against the insured, *id.* at 12 ("the obligation on the part of the insurer to pay accrues the moment judgment against the insured has been rendered"). There was therefore absolutely no basis for *Ocean Accident's* assertion that an

[17] PCS relies on *Gopher Oil Co. v. American Hardware Mut. Ins. Co.*, 588 N.W.2d 756 (Minn. Ct. App. 1999), but that case failed to follow precedent of the Supreme Court of Minnesota holding insurance policies are personal to the insured and may not be assigned without consent of the insurer. *Closuit v. Mitby*, 238 Minn. 274, 56 N.W.2d 428 (1953). *Gopher* also relied on *Ocean Accident*, which, as discussed below, improperly construed Missouri law.

[18] There is no such statute here.

insurer has a payment obligation, or that the insured has a chose in action it can assign, immediately upon the happening of an accident. Rather, Missouri law held that the insured had no chose in action for the insurers' payment until a judgment had been entered against it. *Ocean Accident* simply contravened the state law it purported to apply.[19]

Finally, yet other cases upon which PCS relies are clearly distinguishable. *Fluor Corp. v. Superior Court*, 61 Cal. 4th 1175, 354 P.3d 302 (2015), explicitly rested its holding on the court's interpretation of an 1872 California statute, which the court concluded required overturning aspects of its recent precedent in *Henkel Corp. v. Hartford Acc. and Indem. Co.*, 29 Cal. 4th 934, 62 P.3d 69 (2003). *Fluor*, 61 Cal. 4th at 1219, 354 P.3d at 330. No such statute exists here. Moreover, *Fluor* overturned *Henkel* only to the extent it was inconsistent with the views expressed in that opinion. *Fluor*, 61 Cal. 4th at 1180 & 1224, 354 P.3d at 304 & 333. Accordingly, *Henkel's* holding that insurance rights do not transfer "by operation of law" to a

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[19] *Ocean Accident* also relied on *Ross v. American Empl. Liab. Ins. Co.*, 56 N.J. Eq. 41, 38 A. 22 (Ct. Ch. 1897), but that case addressed what priority, in equity, to give competing claims made by insureds against an insolvent insurer's remaining assets and did not involve assignability at all. *Id.* at 42, 38 A. at 22. In addition, the policy language interpreted in *Ross* was completely different from the policy language at issue here. In *Ross*, the insuring agreement covered damages "with which the insured may be *legally charged*." *Id.* (emphasis added). By contrast, Continental's (and other insurers') policies here apply to sums that the insured "shall become legally obligated to pay." See p. 24 above. The distinction is critical, because the court in *Ross* interpreted the "legally charged" language as attaching the insurer's obligation at the time of the accident, since the insured could be "legally charged" with liability then, with a judgment being "a mere judicial ascertainment of the intrinsic character of the occurrence which determined the liability of the insured." 56 N.J. Eq. at 44, 38 A. at 23. Later New Jersey cases recognize, however, that the language in the policies at issue here—"sums the insured shall become legally obligated to pay"—*requires* that liability be fixed by a judgment or settlement before the insurer has a payment obligation. *Nakonieczny v. Commonwealth Cas. Co.*, 111 N.J.L. 137, 142-43, 167 A. 213, 215 (Sup. Ct. 1933) (policy promising "to pay all sums which the assured shall become liable to pay" "entitled the assured to sue the insurer after a final judgment had been recovered against him on a claim covered by the policy"); *Viddish v. Hartford Acc. and Indem. Co.*, 41 N.J. Super. 221, 225, 124 A.2d 607, 609 (App. Div. 1956) (same). Thus *Ross* and *Ocean Accident* provide no support for concluding that an insurer's payment obligation is fixed at the time of an underlying accident under the policy language at issue here, or that policy rights are assignable then.

new corporate entity that assumes some of the insured's tort liability—precisely what happened here—remains good law. *Henkel*, 29 Cal. 4th at 941-43, 62 P.3d at 73-74.[20]

Fluor also cited many non-California cases, but as shown here these cases either permitted assignment of actual choses in action (not full policies) or failed to adhere to the law of the state they purported to apply (particularly *Ocean Accident*). Also, in conducting its analysis of the California statute, the decision made a critical mistake: It misread the New York precedents upon which the California statute was predicated as not requiring a judgment *against the insurer* to permit assignment of *an accrued right to payment*. 61 Cal. 4th at 1205, 354 P.3d at 320-21. The question of whether the insured had a judgment against the insurer was irrelevant in those cases: since they involved first-party fire insurance, not third-party liability insurance, they had no need to discuss a "judgment" at all. Rather, the issue was whether the insurer had a payment obligation, and in the first-party context such a payment obligation arises upon the happening of covered property damage or other casualty—the insurer's payment obligation arises then whether or not the insured later obtains a judgment to enforce it. Thus, the court's reliance on those cases as not requiring a "judgment" to allow assignment misread what they stood for. By contrast, a third-party liability insurer's payment obligation does not arise until a tort claimant obtains *an underlying judgment against the insured*, as the court's own precedents establish. *Certain Underwriters at Lloyd's, London v. Superior Court (Powerine I)*, 24 Cal. 4th 945, 958, 16 P.3d 94, 102 (2001) ("the duty to indemnify can arise only after damages are fixed in their amount"); *Javorek v. Superior Court (Larson)*, 17 Cal. 3d 629, 641, 552 P.2d 728, 737-

[20] PCS cites *B.S.B. Diversified Co. v. American Motorists Ins. Co.*, 947 F. Supp. 1476 (W.D. Wash. 1996), but that court was obliged to follow the Ninth Circuit's decision in *Northern Ins. Co. v. Allied Mut. Ins. Co.*, 955 F.2d 1353 (9th Cir. 1992), which purported to apply Washington and California law. But *Northern Insurance's* "by operation of law" theory was rejected by the Supreme Court of California in *Henkel*, and that aspect of *Henkel* was not overturned by *Fluor*. *B.S.B.* therefore provides no authority.

38 (1976) ("The insurer has no duty to pay until the insured becomes 'legally obligated to pay as damages' a sum of money. In other words, State Farm has no liability to pay until defendants' liability has been determined. If it is determined that they have no liability, the insurer's liability never accrues."). To the extent *Fluor* holds otherwise, it contravenes South Carolina law. *Park*, 251 S.C. at 413, 162 S.E.2d at 710.[21]

Another case cited by PCS actually rejects assignment of insurance policies "by operation of law." *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 112 Ohio St. 3d 482, 490-93, 861 N.E.2d 121, 129-30 (2006). *Pilkington* also did *not* hold that that the duty to defend could be assigned at all, failing to reach a majority on that issue. *Id.* at 483, 861 N.E.2d at 123.[22]

In sum, all of the cases upon which PCS relies either permitted only assignment of a chose in action (not assignment of policies to a new insured), failed to adhere to the state law they interpreted, or are inconsistent with South Carolina law. They provide no authority for a rule of "free assignment of policies" that PCS seeks.

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[21] For this reason, *Egger* is also distinguishable. It rested its holding on the conclusion that the insurer's payment obligation could arise before a judgment against the insured in the underlying case. 588 Pa. at 298-99, 903 A.2d at 1225-26. But *Park* holds that a liability insurer's payment obligation does *not* accrue until the insured is held liable in a judgment. *Park*, 251 S.C. at 413, 162 S.E.2d at 710. *Egger* therefore is at odds with South Carolina law.

[22] The opinion in *Pilkington* demonstrated remarkable division among the justices, with no answer to the certified questions posed receiving more than four (out of seven) votes. The split in the opinion may be summarized as follows: Three justices would have followed *Henkel* and hold that insurance rights are contractual and cannot be transferred by operation of law, and that they cannot be assigned without consent of the insurers, either, as they are not a chose in action for money due. At the other end of the spectrum, two justices would have rejected *Henkel* and allowed liability insurance rights to "follow the liability" whether or not they have matured into a chose in action. And in the middle, two justices would have held that the right to indemnity, but not defense, is a chose in action that is assignable by the insured once the "covered loss" occurs; but if liability is assumed by contract, insurance does not convey by operation of law.

4. The Duty to Defend May Never Be Assigned

Given the consistent holding of South Carolina courts, and of courts elsewhere, that an insured can assign only a right to insurance money already due and owing, as a chose in action, *a fortiori* an insured cannot assign its right to have the insurer defend it in a tort action, because the insurer's duty cannot be reduced to a sum of money. *Javorek v. Superior Court (Larson)*, 17 Cal. 3d 629, 644-45, 552 P.2d 728, 740 (1976) (duty to defend is "an obligation to provide personal services [and] is not capable of transfer") (citation omitted); *Robinson v. Shearer & Sons, Inc.*, 429 F.2d 83, 86 (3d Cir. 1970) (same); *Hart v. Cote*, 145 N.J. Super. 420, 425-26, 367 A.2d 1219, 1222 (Law Div. 1976) (following *Javorek*; declining to permit attachment of insurer's potential defense obligation as a "debt" because "the obligation would not arise in law until a judgment has been entered against the insured"). PCS's effort to argue to the contrary relies exclusively on the out-of-state decisions refuted above.

In *Javorek*, the California Supreme Court extensively analyzed when the duty to defend arises and held that it does not arise at the time of the underlying accident or before any underlying suit is filed. "Prior to the commencement of the underlying action, there was a mere executory promise to defend which might never have ripened into a present duty had the action never been filed." 17 Cal. 3d at 644, 552 P.2d at 239-40. Moreover, the court noted, the duty to defend could never ripen into a transferable debt:

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

Id. at 644-45, 552 P.2d at 780 (quoting *Robinson,* 429 F.2d at 86) (citations omitted). Thus, the court rejected both the notion that the duty to defend could be transferred to a stranger and the notion that it could be converted into a transferable debt or chose in action. The insurer cannot be compelled to defend a stranger, and as a result there is nothing that can be transferred or sold.

Javorek, Robinson and *Hart* cannot be distinguished on the ground that they did not involve assignment. Each involved an attempt to *attach* an insurer's duty to defend, as if it were "property" of the insured, which the plaintiff sought to use to obtain *quasi in rem* jurisdiction over the defendant in a plaintiff-friendly jurisdiction with which the defendant otherwise had no contacts.[23] *Javorek, Robinson* and *Hart* reject that theory on the ground that the duty to defend is not "property" of the insured that can be *involuntarily* transferred by attachment. By the same token, the duty to defend is not "property" of the insured that can be *voluntarily* transferred by assignment.

5. PCS Seeks to Force a Novation, Which South Carolina Law Forbids

At its root, PCS's theory of "assignment" does not involve assignment of contract rights at all, but depends on a wholly distinct premise, which is substituting the original party to a contract with a new one, such that the new party can claim all rights, and has all obligations, of the old party. PCS's true theory thus seeks a novation of the Respondents' policies, substituting itself for Old CNC for all purposes. "[N]ovation is the substitution *by mutual agreement*, of one debtor, or one creditor, for another whereby the old debt is extinguished. . . ." *Greenwood Cotton Mills v. Pace*, 172 S.C. 531, 539, 174 S.E. 473, 476 (1934) (emphasis original). *See also Moore v. Weinberg*, 373 S.C. 209, 218, 644 S.E.2d 740, 744 (Ct. App. 2007) (same).

[23] That theory, which had been accepted by some states, was ruled unconstitutional by the United States Supreme Court in *Rush v. Savchuk*, 444 U.S. 320 (1980), as it deprived defendants and their insurers of due process.

Yet South Carolina law is crystal clear that substituting contract parties by novation cannot be done without the consent of the original parties to the contract. "There can be no novation unless both parties so intend." *Adams v. B&D, Inc.*, 297 S.C. 416, 419, 377 S.E.2d 315, 317 (1989). " 'Novation exists only by reason *of an agreement and in the absence of such an agreement there can be no novation. . . . The sole intention of the obligor that the existing contract should be discharged by the new agreement is not sufficient; the creditor must concur in this.*' " *Greenwood*, 172 S.C. at 540, 174 S.E. at 476 (quoting 46 C.J. Novation at 573-74) (emphasis original). *See also Moore*, 373 S.C. at 218, 644 S.E.2d at 744 ("There can be no novation unless both parties so intend.").

The trial court noted that what PCS really sought was novation, and that "an attempt by one party to force a novation on the other party to a contract will excuse the latter." R. p. 22 n.5.[24] PCS raises no argument to challenge the trial court's conclusion, and it is thereby law of the case. *Stephens v. CSX Transp. Inc.*, 415 S.C. 182, 201, 781 S.E.2d 534, 544 (2015) (unappealed grounds of trial court decision become law of the case); *Proctor v. Whitlark & Whitlark, Inc.*, 415 S.C. 318, 333, 778 S.E.2d 888, 896 (2015) (unappealed grounds become law of the case, requiring affirmance). Indeed, PCS cannot raise any argument on this score because the facts are undisputed and the law is clear: PCS seeks to substitute itself as a party to the insurance policies here, a novation that cannot occur "unless both parties so intend," which they did not. For this reason alone, the judgment should be affirmed.

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[24] Attempting to assume the *duties*, as well as obtain the rights, of one party to a contract is not "assignment" at all, as the duties under a contract can never be assigned away without the consent of the party to whom they are owed. *Segars v. Segars*, 279 S.C. 564, 569, 310 S.E.2d 156, 158 (Ct. App. 1983). "Novation is the word appropriate for such a changed relation, and an attempt by one party to force a novation on the other party to a contract will excuse the latter." 29 Williston on Contracts § 74:37 at 466.

6. PCS's Appeal to Public Policy Has No Merit

Lacking any factual or legal argument in its favor, PCS resorts to an appeal to public policy, by which it seeks to nullify all of the law laid out above. PCS made no such argument to the trial court and did not preserve it for appeal; it therefore should not be considered.[25] *Buist v. Buist*, 410 S.C. 569, 574, 766 S.E.2d 381, 383 (2014) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.") (citation omitted).[26]

Even if PCS's public policy arguments were considered, however, they have no merit. The public policy of South Carolina favors the enforcement of contracts as written; it prohibits courts from rewriting contracts. "Parties to a contract have the right to construct their own contract without interference from courts to rewrite or torture the meaning of the policy to extend coverage." *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). *Schulmeyer* rejected the insured's appeal to "public policy" as a means to rewrite an insurance policy: "Rather, this Court is required to give effect to the plain meaning of the words in an unambiguous contract." *Id.* at 497, 579 S.E.2d at 134. As the Supreme Court said: "[T]his Court has held that it would violate public policy to allow a court to insert a [contractual] limitation where none existed," as it "would add a term to the contract that the parties neither negotiated nor agreed to," and "such an extension 'would essentially re-write the parties' contract, a service the courts of South Carolina do not perform.' " *Poynter Investments, Inc. v.*

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[25] Although PCS did make a "windfall" argument based on the insurers' receipt of premiums (different from its current "windfall" argument), it did not raise a "public policy" argument, including any argument that granting the insurers' motion would impair cleanup efforts or result in a restraint on trade.

[26] In contrast, an appellate court has discretion to address any additional sustaining grounds for the judgment, shown by the record, raised by the respondent. *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

Century Builders of Piedmont, Inc., 387 S.C. 583, 587-88, 694 S.E.2d 15, 17-18 (2010) (citation omitted). Rewriting the policies is what PCS seeks here, to strike in its entirety the contractual provision prohibiting assignment of interest under the policies without the consent of the insurer. Far from requiring that outcome, public policy in fact prohibits it.

Moreover, enforcing the policies so that the insurers' obligations extend only to their insured and not to a stranger does not result in a "forfeiture." As the trial court noted, the insurers have not "walked away" from their insured. R. p. 21. If Old CNC had been sued, and if its liability were covered, the insurers would pay.

> Yet it is undisputed that PCS Nitrogen did not sue Old CNC, even though it sued Old CNC's parent companies, DSM N.V. and DSM Chemicals North America, Inc., and ultimately lost its claims against them. *PCS Nitrogen, Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 176 n.4 (4th Cir. 2013). There may be reasons why PCS Nitrogen could not sue Old CNC, but those reasons relate to Old CNC's liability. PCS Nitrogen's problem therefore is a liability problem, not an insurance problem. It may not seek to upend South Carolina law to obtain insurance to which it is not entitled to circumvent that problem. Holding PCS Nitrogen to the consequences of the law of liability does not provide the insurers a windfall.

R. p. 21.

Nor does denying PCS status of an "insured"—a status to which it is not entitled—impair efforts to remediate the environment. PCS is part of the Potash Corporation of Saskatchewan, Inc., a multi-national fertilizer producer and the largest potash company in the world.[27] Together with other parties found responsible for clean-up of the Charleston Site, it has the means to pay for the clean-up, and it has told its shareholders that it "does not believe that its future obligations with respect to these facilities and sites are reasonably likely to have a material adverse effect on

[27] 2015 Annual Report to Shareholders of Potash Corporation of Saskatchewan and Subsidiaries, at cover, 106, 158 (available at http://www.potashcorp.com/investors/financial_reporting /annual/).

its consolidated financial statements."[28] Thus, holding that PCS is not the insured under the Respondents' policies will have no effect on whether the Charleston Site will be cleaned up by PCS and others—it will be.[29]

Finally, enforcing the policy language and South Carolina law will not result in a "restraint on trade." PCS's prime support for this extraordinary argument is a treatise by Jeffrey Stempel, a professor at the University of Nevada-Las Vegas. PCS fails to disclose Mr. Stempel's background. He has acknowledged that views he has published critical of enforcing the consent-to-assignment provision in insurance policies were formed in part as a paid expert working for policyholders. As Mr. Stempel disclosed in a law review article that criticizes the Supreme Court of California's ruling in *Henkel*, "Some of my views on insurance coverage issues relating to asbestos claims were formed in the course of examining those issues as an expert witness or consultant, primarily for policyholders who manufactured, sold or used asbestos in some form." Jeffrey W. Stempel, "Assessing the Coverage Carnage: Asbestos Liability and Insurance after Three Decades of Dispute," 12 Conn. Ins. L.J. 349, 349 n.* (2006). At a minimum, therefore, whether his analysis is objective is open to question. Even so, the fact that jettisoning insurance contract language may "lower transaction costs" and may be more convenient for the corporations who seek to engage in sophisticated reorganizations does not mean it is in the public interest. As noted above, forcing insurers into contracts with strangers necessarily

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[28] *Id.* at 158.

[29] In any event, most of the respondents' policies contain pollution exclusions, which exclude coverage for property damage arising out of the discharge of pollutants, unless the discharge was sudden and accidental, as discussed in the brief and joinders filed in support of the pollution exclusion motion in this case. R. pp. 606-50. Notably, PCS has already litigated and lost its argument that identical pollution exclusions in other insurers' policies do not apply to this very site. *See Ross Devp. Corp. v. PCS Nitrogen, Inc.*, 526 F. App'x 299 (4th Cir. 2013). Accordingly, the policies with pollution exclusions would not provide coverage for the cleanup of the Charleston Site in any event. This further weakens PCS's argument that affirming the ruling below could impede the cleanup effort.

increases their risk, for which they will have to account by raising rates on prudent policyholders. Public policy clearly discourages that result.

D. The Trial Court Correctly Concluded No *De Facto* Merger Occurred

The discussion above shows that PCS did not obtain any assignment of Old CNC's policies, as the Assignment itself made no attempt to assign policies *in toto*, and any assignment was ineffective absent the consent of the insurers. PCS thus resorts to a last-ditch argument that it might be the "*de facto* merger" successor to Old CNC, and it was wrong of the trial court to hold that it is not.[30]

PCS consistently argued to the federal courts that it was *not* the corporate successor to Old CNC, including under a "*de facto* merger" theory. R. pp. 384-406 ("PCS Is Not a Successor to CNC"). Without articulating any change in the facts or law that would justify a change in its position, it now argues the opposite. The Court should agree with the arguments PCS made to the federal courts and should reject its opportunistic change in position.

PCS claims that the trial court erred in ruling that no *de facto* merger occurred here because it "misapprehended the law of de facto merger." Br. at 20.[31] It claims the law of *de facto* merger applies even where a purchaser of corporate assets has specifically assumed the tort

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[30] PCS argued to the trial court that "it has been held" to be the corporate successor to Old CNC. R. p. 33 ¶ 1. Conceding that the federal district court ruling upon which it relied is "now non-binding," R. p. 2217, as it was not affirmed on appeal, PCS now apparently abandons that argument, as it does not make it here.

[31] PCS does not actually attempt to show here (just as it did not show the trial court) that it *is* the successor-by-merger to Old CNC under any theory. To do so it would have to show that New CNC purchased all of the assets of Old CNC and had the same employees, management, directors and shareholders of Old CNC after the transaction, which it did not. R. pp. 295, 305. PCS merely argues that the trial court erred in holding that no *de facto* merger can occur where the asset purchaser expressly assumes liability. That argument is incorrect, but even if so, the trial court's ruling can be affirmed on the independent ground, shown of record, that these other factors necessary to demonstrate merger under any theory are wholly absent. Rule 220(c), SCACR.

liabilities of the corporate seller, citing *Brown v. American Ry. Exp. Co.*, 128 S.C. 428, 123 S.E. 97 (1924). Yet the language PCS quotes as the "holding" of that case is in fact the Supreme Court's discussion of the *evidence* in a different case, not its holding on South Carolina law. As relevant to PCS's claim, the court said:

> In the *Brabham Case* the result reached was predicated upon the view *that the evidence admitted in that case* was susceptible of no other reasonable inference than that the Southern Express Company had gone out of existence, leaving no one to be sued by its creditors and no property to satisfy its debts; *that it had become consolidated with or merged* in the American Railway Express Company; and *that liability for the payment of claims outstanding against it had been expressly or impliedly assumed* by the American Railway Express Company.

Brown, 128 S.C. at 433, 123 S.E. at 99 (emphasis added). In other words, the court characterized *Brabham* as involving evidence that the old corporation "had become consolidated or merged" with the new corporation, and *thereby* liability for claims "had been expressly or impliedly assumed" by the new corporation—not the other way around. *Brown* did not hold that "*de facto* merger" can occur when the new corporation expressly assumes liability—indeed, *Brown* noted that *Brabham* involved an old corporation that "had gone out of existence, leaving no one to be sued by its creditors." *Id.* Contrary to PCS's argument, therefore, *Brown* and *Brabham* impose liability on a purchaser of corporate assets *where the liabilities have not otherwise been assumed.* Indeed, that is the entire purpose of the *de facto* merger theory.

To leave no doubt on this score, *Brown* laid out the law as follows:

> In the absence of statute, in order to render a purchasing company liable for the debts of the selling corporation, it must appear: (a) ***That there was an agreement to assume such debts***; (b) the circumstances surrounding the transaction must warrant a finding that there was a consolidation of the two corporations; (c) or that the purchasing corporation was a mere continuation of the selling corporation; ***or*** (d) that the transfer was pretensive of the transaction fraudulent in fact.

128 S.C. at 431, 123 S.E. at 98-99 (emphasis added).[32] Thus, express assumption and "surrounding circumstances" (or *de facto* merger) were *alternative* theories. Simply put, there is no need for an alternative "*de facto* merger" theory in a particular case if "there was an agreement to assume such debts" in the first place.[33]

Here, the trial court ruled (1) that although PCS claimed there was an issue of fact, it identified none; (2) that PCS raised no argument on the law to rebut the Respondents' argument, effectively conceding the merit of the Respondents' position; and (3) that the "surrounding circumstances" or *de facto* merger analysis under South Carolina law "looks at whether 'the purchaser had bought all the assets of the seller,' with 'no express agreement that the purchaser would be responsible,' and had otherwise 'acquired and taken over the business of the [seller].' " R. pp. 22, 25 (quoting *Huggins v. Commercial & Savings Bank*, 141 S.C. 480, 506-07, 140 S.E. 177, 185-86 (1927) and citing *Brown*). Thus, the trial court's ruling perfectly accorded with South Carolina law as enunciated in *Brown* and *Huggins*.[34] Because it is undisputed that PCS contractually assumed the environmental liabilities of Old CNC, South Carolina law does not

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[32] As *Brown* recognized, the theory that the purchaser of corporate assets could be held liable for corporate debts in the absence of express assumption is an equitable theory. *Brown*, 128 S.C. at 432, 123 S.E. at 99 ("If [the purchaser] takes the benefit, it must, as has so often been said, take the burden, which equitably attaches, with it.") (citation omitted). But while equity may bind a party to the corporate transaction, it cannot adversely affect non-parties to the transaction (such as the insurers here): "[E]quitable maxims do not operate to place burdens on individuals made party to a particular transaction through no fault or expressed interest of their own, or, as in this case, through the fault and mistake of others." *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 426 n.1, 746 S.E.2d 35, 38 n.1 (2013). Thus, even if *de facto* merger applied to PCS, it does not bind the insurers.

[33] Indeed, as an equitable theory, *de facto* merger cannot displace the legal theory of contractual assumption: "equity follows the law." *Wachovia*, 303 S.C. at 426 n.1, 746 S.E.2d at 38 n.1.

[34] The Supreme Court reaffirmed *Brown* as the law of South Carolina in *Simmons v. Mark Lift Indus., Inc.* 366 S.C. 308, 312, 622 S.E.2d 213, 215 (2005).

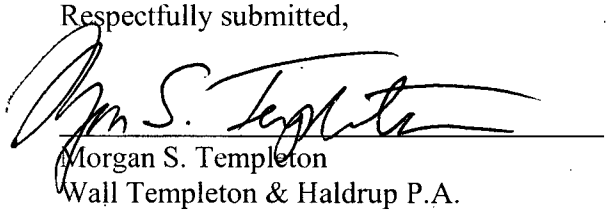
make PCS the successor to Old CNC under a "*de facto* merger" theory, and PCS may not claim Old CNC's insurance rights through that ruse.

IV. CONCLUSION

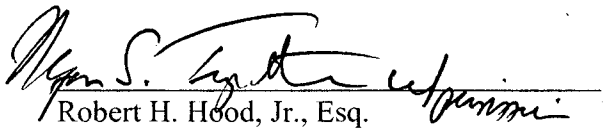
All of PCS's arguments boil down to attempts to rewrite contracts (to which it is not even a party) and to rewrite South Carolina law. The trial court, in its careful and extensive opinion, saw through PCS's efforts and rejected its arguments. As the trial court's opinion is thoroughly supported by settled South Carolina law and the undisputed facts, the judgment below should be affirmed.

Dated: October 28, 2016

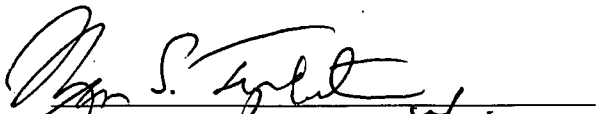
Respectfully submitted,



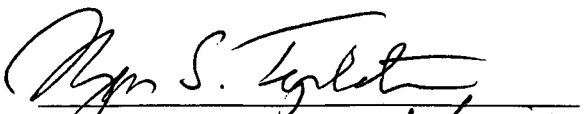
Morgan S. Templeton
Wall Templeton & Haldrup P.A.
Patrick F. Hofer (*pro hac vice*)
Troutman Sanders LLP
Attorneys for Respondent Continental Casualty Company



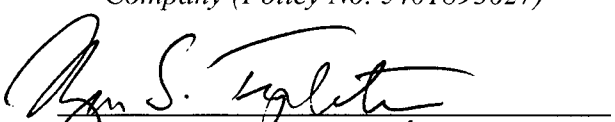
Robert H. Hood, Jr., Esq.
Hood Law Firm, LLC
Robert Walsh, Esq. (*pro hac vice*)
Thomas M. Going, Esq. (*pro hac vice*)
Patricia Santelle, Esq. (*pro hac vice*)
White and Williams LLP
Attorneys for ACE Property & Casualty Insurance Company, U.S. Fire Insurance Company (with respect to policies GLA 284022 and GLA 5400797517), and Century Indemnity Company



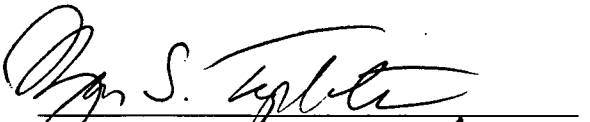
R. Scott Wallinger, Jr., Esq.
Christian Stegmaier, Esq.
Collins & Lacy, PC
John S. Favate, Esq. (*pro hac vice*)
Hardin, Kundla, McKeon & Poletto
Attorneys for United States Fire Insurance Company (Policy No. 5401893627)



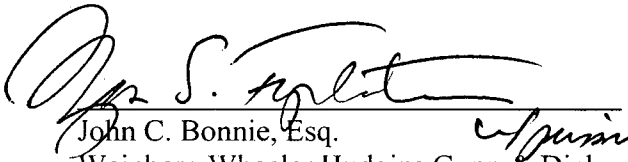
J.R. Murphy, Esq.
Adam J. Neil, Esq.
Wesley B. Sawyer, Esq.
Murphy & Grantland, PA
Attorneys for Admiral Insurance Company



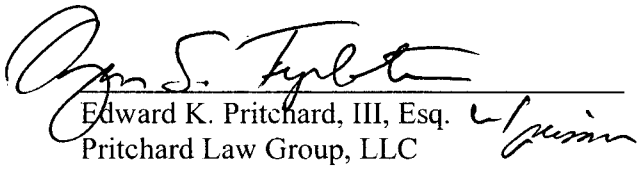
John T. Lay, Esq.
Laura W. Jordan, Esq.
Gallivan, White & Boyd, P.A.
Attorneys for Certain London Market Insurance Companies



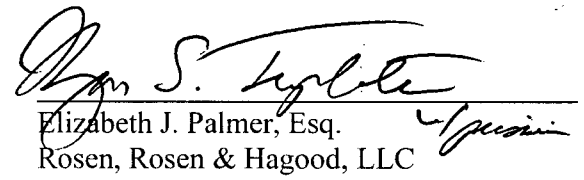
R. Michael Ethridge, Esq.
Carlock Copeland
Wayne Karbal, Esq. (*pro hac vice*)
Paul Parker, Esq. (*pro hac vice*)
Karbal Cohen Economou Silk Dunne, LLC
Attorneys for First State Insurance Company



John C. Bonnie, Esq.
Weinberg Wheeler Hudgins Gunn & Dial
Attorneys for Lexington Insurance Company



Edward K. Pritchard, III, Esq.
Pritchard Law Group, LLC
Richard McDermott, Esq. (*pro hac vice*)
Seth M. Jaffe, Esq. (*pro hac vice*)
Hinkhouse Williams Walsh LLP
Attorneys for Berkshire Hathaway Specialty Insurance Company (formerly known as Stonewall Insurance Company), Starr Indemnity & Liability Company (formerly known as Republic Insurance Company), Certain Underwriters at Lloyd's, London, Certain Aviva Companies, Certain Winterthur Companies, New London Reinsurance Company Limited, and the Scottish Lion Insurance Company Limited



Elizabeth J. Palmer, Esq.
Rosen, Rosen & Hagood, LLC
Molly Poag, Esq. (*pro hac vice*)
Harry Lee, Esq. (*pro hac vice*)
Steptoe & Johnson LLP
Attorneys for 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)