THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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

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

vs.

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

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STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court erred in holding, in contravention of South Carolina Supreme Court precedent, that the assignment of coverage rights for an occurrence-based liability insurance policy is barred even where the assignment occurs after the policy term ends?

2. In the alternative, whether the trial court erred in granting summary judgment to Respondents on the question of whether CNC Corporation (and, therefore, PCS Nitrogen, Inc.) is the successor to Columbia Nitrogen Corporation, where the trial court's decision was predicated on a view of the law that is contrary to controlling precedent?

STATEMENT OF THE CASE

Appellant PCS Nitrogen, Inc. ("PCS") is being held liable as the alleged successor to Columbia Nitrogen Corporation ("Old CNC") for certain of Old CNC's Superfund liabilities. In this insurance coverage action PCS is seeking coverage from Respondents, which are all insurance companies that issued general liability policies to Old CNC that cover the period between 1966 and 1984. *See generally* AppRec31 (complaint). The issue in dispute on appeal is whether PCS is the successor to Old CNC's coverage rights. PCS contends that those coverage rights transferred from Old CNC to CNC Corp. ("New CNC") to PCS. All parties agree that if New CNC was the valid successor to Old CNC's coverage rights, then those rights would have validly transferred from New CNC to PCS. Because Old CNC's coverage rights transferred to New CNC via a valid post-loss assignment PCS is entitled to those coverage rights.

I. Underlying Environmental Matter.

The coverage claim arises out of a lawsuit brought by Ashley II of Charleston, LLC ("Ashley") against PCS in the United States District Court for the District of South Carolina. *See Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, Case No. 2:05-cv-02782 (D.S.C.) ("Ashley Litigation"). In that suit, Ashley sought a declaratory judgment that PCS was jointly

and severally liable for response costs associated with a Superfund Site located in Charleston, South Carolina (the "Ashley Site") pursuant to the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a)(4)(B). *See generally PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161 (4th Cir. 2013).

There was no allegation that PCS itself ever owned or operated a facility at the Ashley Site. There was no allegation that PCS ever sent waste to the Ashley Site. Nor was there any other allegation that PCS's own conduct was the basis of PCS's alleged liability in the Ashley Litigation. Rather, Ashley alleged that PCS was jointly and severally liable for the remediation of the Ashley Site solely due to the conduct of Old CNC.

The trial court in the Ashley Litigation found that beginning in 1966 Old CNC operated a fertilizer production plant and an acid plant at the Ashley Site. *See generally PCS Nitrogen*, 714 F.3d at 169. Old CNC ceased operation of the acid plant in 1970 and ceased operation of the fertilizer plant in 1972. *Id.* By January 1981, Old CNC had demolished all remaining structures at the Ashley Site. *Id.* It sold the property to a third party in May 1985. *Id.* In 1986, more than a year after Old CNC sold the Ashley Site, Old CNC's parent corporations determined to cease operations of Old CNC entirely. *Id.* at 169-70. Accordingly, Old CNC's parents sold the Old CNC business to CNC Corp. ("New CNC") via a series of agreements – including a November 3, 1986 Assignment of Insurance Benefits, pursuant to which all of Old CNC's insurance rights, benefits, and proceeds were assigned to New CNC – leading up to the closing date on November 6, 1986. *Id.* at 170. Immediately upon closing of the acquisition, New CNC changed its name to "Columbia Nitrogen Corporation" – the same name under which Old CNC operated – and Old CNC initiated the process of final liquidation and dissolution. *Id.* By virtue of a series of mergers and acquisitions, PCS Nitrogen, Inc., acquired New CNC. *Id.*

Following a bench trial, the United States District Court for the District of South Carolina held that PCS is jointly and severally liable for the remediation of the Ashley Site. *See generally Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F. Supp. 2d 431 (D.S.C. 2011). The United States Court of Appeals for the Fourth Circuit affirmed the district court's judgment. *See PCS Nitrogen*, 714 F.3d 161.

II. PCS Seeks Insurance Coverage From Respondents.

Respondents issued general liability policies to Old CNC covering the period from 1966 to 1984. *See* AppRec73-183, 586-603, 798-813, 825-866, 880-976, 991-1293, 1303-1439, 1451-1489, 1506-1803, 1823-2196. (policies). Each of these policies provided coverage for the defense and indemnification of Old CNC's liabilities due to property damage caused by an occurrence during the policies' respective coverage periods. *Id.* Upon acquiring information related to Old CNC's insurance program, PCS tendered an insurance claims to Respondents seeking defense and indemnification for PCS's costs related to the Ashley Litigation and related CERCLA liabilities.

Respondents refused to provide coverage to PCS for the Ashley Litigation. Accordingly, on January 18, 2011, PCS commenced this action against Respondents in the Court of Common Pleas of the County of Charleston. AppRec31(complaint).

On July 24, 2015, Respondent Continental Casualty Company filed a motion for summary judgment on the issue of whether PCS was the successor to Old CNC's coverage rights, which was joined by the other Respondents. AppRec43 (motion). No party disputed that PCS is the successor-by-merger to New CNC. The sole dispute was whether New CNC succeeded to the coverage rights of Old CNC. PCS opposed the motion for summary judgment. AppRec2197 (opposition).

On March 23, 2016, the circuit court granted Respondents' motion for summary judgment and adopted Respondent Continental Casualty Company's proposed order, nearly verbatim, as the opinion of the court. AppRec2 (order); AppRec2400 (proposed order). PCS timely moved for reconsideration of the circuit court's order, arguing that in adopting Continental Casualty Company's proposed order the circuit court committed manifest error of law in that the order was internally inconsistent, contrary to the decisions of the South Carolina Supreme Court, and contrary to the prevailing law governing the corporate successor issues. AppRec2437 (reconsideration motion). The circuit court denied PCS's motion for reconsideration on May 5, 2016. AppRec29 (order). PCS received that order on May 11, 2016, and filed its timely notice of appeal on May 26, 2016.

ARGUMENTS

To support their position before the circuit court, Respondents relied on arguments that are contrary to South Carolina Supreme Court precedent, the overwhelming legal consensus, and South Carolina's public policy. In adopting Respondents' proposed opinion on summary judgment, the circuit court incorporated these significant errors into the opinion of the court and committed reversible error on two issues. First, it erred in holding that the assignment of Old CNC's coverage rights to New CNC was invalid. That PCS is entitled to coverage for these liabilities as a result of a post-loss assignment is supported by South Carolina Supreme Court precedent and the nearly unanimous conclusion of those jurisdictions that have considered the issue. Second, the circuit court erred in granting summary judgment on the de facto merger issue. In ruling on this issue at summary judgment, the circuit court mistakenly reversed the legal test for finding a de facto merger. For these reasons, which will be addressed in further detail below, reversal is warranted.

I. The Standard Of Review Is De Novo.

When the circuit court grants summary judgment on a question of law, the Court of Appeals reviews the circuit court's ruling de novo. *Stoneledge at Lake Keowee Owners' Ass'n v. Clear View Constr.*, 776 S.E.2d 426, 429 (S.C. Ct. App. 2015). A summary judgment ruling will only be upheld where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Southeast Toyota Distribs., LLC v. Jim Hudson Superstore, Inc.*, 693 S.E.2d 33, 35 (S.C. Ct. App. 2010). "Insurance policies are subject to the general rules of contract construction." *Bennett & Bennett Constr., Inc. v. Auto Owners Ins. Co.*, 747 S.E.2d 426, 427 (S.C. 2013) (citing *B.L.G. Enters., Inc. v. First Financial Ins. Co.*, 514 S.E.2d 327, 330 (1999)). The construction of a clear and unambiguous contract is a matter of law for the court. *Lee v. Univ. of S.C.*, 757 S.E.2d 394, 397-98 (S.C. 2014) (reversing decision of the trial court). Accordingly, the circuit court's interpretation of an insurance policy is not entitled to any deference by the Court of Appeals. *Bennett*, 747 S.E.2d at 427.

II. Old CNC's Coverage Rights Validly Transferred Via A Post-Loss Assignment.

On November 3, 1986, Old CNC and New CNC entered into an agreement titled, "Assignment of Insurance Benefits," whereby Old CNC agreed to transfer to New CNC all of its "rights, proceeds and other benefits to and under all of [Old CNC's] insurance policies." AppRec2233 (Assignment of Insurance Benefits). In adopting Respondents' proposed opinion, the circuit court held that this assignment was barred by the anti-assignment clauses contained in Respondents' policies or, alternatively, that the agreement did not actually assign coverage rights. This was error.

Respondents issued occurrence-based general liability insurance policies to Old CNC covering Old CNC's liabilities for property damage caused during the policies' respective coverage periods. 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: coverage for Old CNC's liabilities for property damage caused during the policies' respective coverage periods. Such transfers of coverage rights after a policy period ends, are widely held to be valid notwithstanding an anti-assignment clause because the transfers have no impact on the risk borne by the insurer. *See Narruhn v. Alea London Ltd.*, 745 S.E.2d 90, 94 (S.C. 2013). Here, the Assignment of Insurance Benefits was executed years after each of Respondents' policies expired. As such, the assignment did not affect the insurers' risk. Rather, the assignment simply had the effect of ensuring that Respondents paid the claims they already agreed to cover.

The circuit court's contrary decision resulted in multiple reversible errors. ***First***, the circuit court ruled that Old CNC did not assign its coverage rights to New CNC. AppRec13 (order). Yet, the record shows that Old CNC transferred to New CNC "all of [Old CNC's] rights, proceeds and other benefits to and under all of [Old CNC's] insurance policies." AppRec2233 (Assignment). ***Second***, the circuit court relied on *Ligon v. Metropolitan Life* for the proposition that insurance policies are personal to the insured and cannot be assigned without insurer consent. AppRec14 (order). In fact, that case stands for the proposition that insurance policies ***can*** be assigned without the insurer's consent. ***Third***, the circuit court relied on the South Carolina Supreme Court's decision in *Narruhn v. Alea London Ltd.*, for the proposition that the sole exception to the rule against policy assignment (which it erroneously stated as noted above) was that only assignments of a "judgment or settlement" are valid. AppRec17 (order). Nothing in *Narruhn* supports this conclusion. To the contrary, *Narruhn* acknowledges the widely held rule that after the end of the policy term the assignment of an occurrence-based liability insurance policy is valid because such a post-loss assignment does not increase the

insurer's risk. ***Fourth***, the circuit court held that even if the duty to indemnify could be assigned, the duty to defend cannot be. AppRec17 n.3 (order). The authority on which the circuit court relied, however, does not address this question in any way and the relevant authority consistently upholds such assignments. ***Fifth***, the court's decision violates South Carolina's public policy.

A. Old CNC Unambiguously Transferred Its Coverage Rights.

The contract by which Old CNC transferred its coverage rights to New CNC is explicit and unambiguous. Titled, "Assignment of Insurance Benefits," the contract provides that Old CNC agreed to transfer to New CNC all of its "rights, proceeds and other benefits to and under all of [Old CNC's] insurance policies." AppRec2233 (Assignment of Insurance Benefits). The agreement further states that it was entered "for the purpose of transferring to and vesting in [New CNC] all of [Old CNC's] rights and benefits, including proceeds, in and under its insurance policies" and that Old CNC "agreed to sell, convey, transfer, and assign . . . all of [Old CNC's] rights, proceeds and other benefits to and under all of [Old CNC's] insurance policies." *Id.* Notwithstanding this unambiguous language, the circuit court adopted Respondents' assertion that the document titled, "Assignment of Insurance Benefits," did not assign any insurance rights or benefits to New CNC. Instead, the circuit court held that the parties only intended to transfer "then-owing proceeds." AppRec14 (order). Because no then-owing proceeds existed, the circuit court concluded, nothing was assigned. *Id.*

There is nothing in the Assignment of Insurance Benefits that in any way limits the assignment to "then-owing proceeds." Indeed, if proceeds were the only rights being transferred, there would have been no need for the contract to separately identify the transferred assets as "all of" Old CNC's "***rights***, proceeds ***and other benefits***" under its insurance policies. AppRec2233 (emphasis added). The circuit court's interpretation improperly renders the terms "rights" and "other benefits" meaningless. Such an interpretation is contrary to the South Carolina rules of

construction and must be rejected. *Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 756 S.E.2d 148, 153 (S.C. 2014) ("[A]n interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous." (citation omitted)).

In addition to being contrary to the rules of construction, Respondents' interpretation, adopted by the circuit court, is belied by reason. The circuit court held that nothing was assigned in the agreement. Corporations do not, however, enter assignment agreements for the purpose of assigning nothing. The only sensible interpretation is that the agreement means what it says, and that it transfers "all of Seller's rights and benefits, including proceeds, in and under its insurance policies." AppRec2233 (Assignment of Insurance Benefits).

The transfer of "all of Seller's rights and benefits" necessarily included Old CNC's contingent future rights, such as the contingent right to assert claims for defense and indemnity for liabilities arising from past losses. Contrary to the circuit court's order, a "conditional right may be subject to assignment," including the contingent right to "future performance," even before the condition occurs. *Moore v. Weinberg*, 644 S.E.2d 740, 746 (S.C. Ct. App. 2007) (citing Restatement (Second) of Contracts § 320; 4 A. Corbin, Corbin on Contracts § 874 (1951)). *Illinois Tool Works*, cited by the South Carolina Supreme Court in *Narruhn* for the proposition that insurance coverage rights are assignable, directly addressed this issue, holding that the contingent right to defense and indemnification, "should a third-party suit based on that loss arise," was freely assignable in equity:

> What Binks assigned plaintiff was Binks' then-present conditional right to the insurance proceeds, to its right to defense and indemnification should a third-party suit based on that loss arise. A valid assignment of a conditional right is enforceable in equity. Binks' conditional right to defense and indemnification against third-party suit for covered occurrences existed as soon as it paid its premium. This right was not dependent on whether or when the insurers' duty to defend a particular suit was triggered, i.e.,

> dependent on whether a third party actually filed suit against Binks for a covered occurrence. Filing of a third-party suit impacted whether Binks would need to assert its right to defense and indemnification, not whether that right existed.

Ill. Tool Works v. Commerce & Indus. Ins. Co., 962 N.E.2d 1042, 1055-56 (Ill. App. Ct. 2011) (citations omitted).

In short, the "Assignment of Insurance Benefits," was just that: an assignment of insurance benefits. Interpreting this agreement as transferring nothing, as the circuit court did, is contrary to the unambiguous text of the agreement and contrary to South Carolina law.

B. Anti-Assignment Clauses Do Not Apply To Post-Loss Assignments.

The circuit court went on to hold that, even if Old CNC did agree to transfer its coverage rights to New CNC, said transfer would be invalid because "insurance contracts are personal to the insured, and therefore the insured may not assign the policy to third parties without insurer consent." AppRec14 (order). This is incorrect. The circuit court relied on *Ligon v. Metropolitan Life* for this proposition; however, in *Ligon* the South Carolina Supreme Court ***refused to enforce a restriction on the assignment of an insurance policy***, holding that "such a restriction in the insurance policy is not intended to cover a case where the loss has already occurred." *Ligon v. Metro. Life Ins. Co.*, 64 S.E.2d 258, 264 (S.C. 1951).

In fact, "contract rights are freely assignable today, unlike in medieval times." *Osprey, Inc. v. Cabana Ltd. P'shp.*, 532 S.E.2d 269, 277 (S.C. 2000). "While the general rule regards liability and indemnity policies as nonassignable personal contracts, assignment is valid following occurrence of the loss insured against and is then regarded as chose in action rather than transfer of actual policy." 3 Couch on Ins. § 34:25 (West 2015). The South Carolina Supreme Court in *Narruhn v. Alea London*, 745 S.E.2d 90 (S.C. 2013), similarly explained that

"it is generally held that an assignment [of insurance coverage rights] ***after*** a loss has already occurred does not require an insurer's consent." *Id.* at 94 (emphasis in original).

"As a general principle, a clause restricting assignment [in an insurance policy] does not in any way limit the policyholder's power to make an assignment of the rights under the policy after a loss has occurred. It 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 (4th ed. 2000)). This is because "[t]he purpose of a no assignment clause is to protect the insurer from increased liability, and after events giving rise to the insurer's liability have occurred, the insurer's risk cannot be increased by a change in the insured's identity." *Id.* (quoting 3 Couch on Ins. § 35:8 (2011 Rev. Ed.); collecting cases). Thus, where an assignment does not increase the risk to the insurer, an anti-assignment clause will not prevent the policyholder from transferring his coverage rights to a successor entity. *Id.* (collecting cases).

The rule is illustrated by an example. A driver with a perfect driving record could not transfer his active automobile liability insurance policy to his neighbor who has multiple drunk driving convictions. This is because the actuarial risk that the neighbor will incur liability is greater than that of the original policyholder, and the insurer would have demanded higher premiums before issuing a policy to the neighbor to account for that greater risk.

After the policy period is over, however, the risk is fixed. Transferring an automobile liability policy that only covers liability arising from accidents that occurred during the coverage period cannot create any additional risk to the insurer after the policy period has run, whatever the character of the assignee. Any liability covered by the policy would have been caused by the conduct of the original policyholder – the party whose risk the insurer agreed to cover. As such, a transfer of the policy to the neighbor after the policy period runs would not be barred by an

anti-assignment clause because the transfer would simply result in the liabilities caused by the original insured being reimbursed to a different party. It is, in effect, nothing more than a transfer of the right to collect payment rather than a change in the risk being insured.

This is the precise situation presented in this appeal. Respondents' policies covered Old CNC's liability for property damage caused by occurrences taking place between 1966 and 1984. The transfer of coverage rights did not occur until November 3, 1986, some two years after the last policy period expired. PCS is being held liable for the remediation of the Ashley Site as the alleged successor to Old CNC. In short, PCS is seeking coverage for Old CNC's liability for property damage alleged to have been caused by Old CNC between 1966 and 1984 – the exact risk Respondents agreed to insure. Accordingly, the anti-assignment clauses contained in the policies cannot, as a matter of law, bar coverage. *See generally Narruhn*, 745 S.E.2d at 94.

C. The Relevant Loss Is The Happening Of The Event Giving Rise To Liability.

At summary judgment below, Respondents attempted to muddle this clear law by contending that the relevant "loss" in the context of a valid, post-loss assignment does not occur until a third party obtains a judgment against the insured, a position adopted by the circuit court. *See* AppRec17 (order). This conclusion, however, cannot be reconciled with *Narruhn*. It is also directly contrary to the authority on which the South Carolina Supreme Court relied in *Narruhn*, contrary to the most prominent insurance law commentators, and contrary to the overwhelming majority of jurisdictions that have considered the issue.

In *Narruhn*, the South Carolina Supreme Court observed that a post-loss assignment is generally held to be permissible because "[t]he purpose of a no assignment clause is to protect the insurer from increased liability, and ***after events giving rise to the insurer's liability have occurred***, the insurer's risk cannot be increased by a change in the insured's identity." *Narruhn*, 745 S.E.2d at 94 (emphasis added) (quoting 3 Couch on Ins. 3d § 35:8 (2011 Rev. Ed.) and

collecting cases). The cases cited by the Supreme Court similarly focus the inquiry on whether the transfer occurred before or after the events giving rise to liability, regardless of when or whether a claim was filed or judgment was entered against the insured. *Id.*

Of particular note is *Illinois Tool Works*, which the South Carolina Supreme Court cited for the proposition "that an assignment ***after*** a loss has already occurred does not require an insurer's consent." *Narruhn*, 745 S.E.2d at 94 (emphasis in original). *Illinois Tool Works* presents nearly identical facts as this action. In connection with a 1998 asset sale, Binks R&D assigned "the benefits, including all rights to defense and indemnity coverage, under any and all policies of liability insurance" to Illinois Tool Works. *Ill. Tool Works*, 962 N.E.2d at 1049. Five years later, Illinois Tool Works was sued as the successor to Binks for pollution caused by Binks, at least in part, between 1976 and 1984. Illinois Tool Works sought coverage for the defense of that pollution action from the insurers that covered Binks between 1976 and 1984, but the insurers denied coverage. In the coverage litigation that followed, the trial court granted summary judgment in favor of the insurers. The court of appeals, however, reversed.

The appellate court held that "notwithstanding the existence of an anti-assignment or consent provision, a policy may be assigned after a loss without notice to or consent of the insurer." *Id.* at 1054 (citations omitted). Such post-loss assignments are valid, according to the court, because "assignment after loss is not the assignment of the policy but the assignment of a claim or debt – a chose in action." *Id.* The court of appeals held that "the 'loss' was not the [underlying] suit, which was filed in 2003 and a defense to which could, therefore, not have been assigned in 1998 since the suit did not yet exist." *Id.* at 1055. Instead, the court held that the "loss" was the environmental contamination that occurred during the coverage periods. *Id.* It

concluded that "***[o]nce an injury or loss occurs, the chose in action is established and assignable without the consent of the insurer***." *Id.* (emphasis added).

The United States Supreme Court has interpreted "loss" exactly in accord with PCS, the South Carolina Supreme Court, and *Illinois Tool Works*, explaining:

> With a fire loss, the obligation to pay arises upon the fire. Unlike an executory contract to sell, the casualty cannot be rescinded. Details, including even the basic question of liability, may be contested, ***but the fundamental contractual obligation that precipitates the transformation from tangible property into a chose in action consisting of a claim for insurance proceeds is fixed by the fire***. Although the parties remain free to arrive at an acceptable settlement, the obligation itself has come into being.

Cent. Tablet Mfg. Co. v. United States, 417 U.S. 673, 685 (1974) (emphasis added).

Further, just last year, the California Supreme Court conducted a nationwide survey of a century of common law jurisprudence regarding the validity of post-loss assignments of liability insurance coverage rights, the very question at issue here. *See Fluor Corp. v. Superior Court*, 354 P.3d 302, 321-27 (Cal. 2015). The California Supreme Court concluded that "the overwhelming majority of courts" hold that, for the purpose of determining whether an assignment occurs pre- or post-loss, "an insured loss occurs or happens ***at the time of injury during the policy period***, and well before there might be any judgment or approved settlement for a sum of money." *Id.* at 328 (emphasis in original).

The court observed that it was "aware of only one out-of-state exception to this line of authority, and that decision has not been followed by any other jurisdiction."[1] *Id.* at 327. Notably, the one contrary decision it identified was an Indiana Supreme Court case that relied on

[1] A small minority of states also hold that assignments are invalid in all circumstances, even assignments after a loss has been reduced to a money judgment. *See generally Fluor*, 354 P.3d at 327 n.46. Not even Respondents, however, have argued that South Carolina would adopt this position.

the California Supreme Court's earlier decision in *Henkel Corp. v. Hartford Accident & Indemnity Co.*, 62 P.3d 69 (Cal. 2003). *See Travelers Cas. & Sur. Co. v. United States Filter Corp.*, 895 N.E.2d 1172, 1180 (Ind. 2008). With little more analysis than, "The California Supreme Court's logic in *Henkel* seems about right," the Indiana court held that assignments without consent are not permitted until after they have been reduced to a sum of money due, as Respondents contend. *Id.* Subsequently, however, the California Supreme Court unanimously overruled the *Henkel* decision in *Fluor*. *Fluor*, 354 P.3d at 334.

Accordingly, on the issue of post-loss assignments of coverage rights, a national consensus has emerged that after the occurrence of the accident or injury that gives rise to liability during the policy period, the coverage rights for the liability arising from that event are freely assignable. *See, e.g., Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co.*, 442 N.J. Super. 28, 39 (App. Div. 2015) ("[T]he fact that some claims may not have been asserted by those allegedly harmed by the Givaudan Corporation's actions during a policy period of one of the subject policies does not affect the validity of the assignment. Defendants' obligation to provide coverage to the party deemed to be an insured under the policies arose at the time of the loss. Although the precise amount of defendants' liability may not be known, defendants' obligation to insure the risk in accordance with their respective policies was not altered by the assignment."); *Fluor Corp.*, 354 P.3d at 328; *Olah v. Baird*, 567 F.3d 1207, 1214 (10th Cir. 2009); *In re Ambassador Ins. Co.*, 965 A.2d 486, 491 (Vt. 2008) (holding that under an occurrence-based policy, the insurer's potential liability to indemnify the insured "***arose when parties were injured by [the insured's] products***" (emphasis added)); *Ill. Tool Wks*, 962 N.E.2d at 1050; *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 112 Ohio St. 3d 482, 486 (Ohio 2006); *Egger v. Gulf Ins. Co.*, 588 Pa. 287, 295 (Pa. 2006); *Elliott Co. v. Liberty Mut. Ins. Co.*,

434 F. Supp. 2d 483, 491 (N.D. Ohio 2006); *Conrad Bros. v. John Deere Ins. Co.*, 640 N.W.2d 231, 237 (Iowa 2001); *Peck v. Public Serv. Mut. Ins. Co.*, 114 F. Supp. 2d 51, 56 (D. Conn. 2000); *Gopher Oil Co. v. Am. Hardware Mut. Ins. Co.*, 588 N.W.2d 756, 763-64 (Minn. Ct. App. 1999) (holding that "***loss occurs at the time of contamination***," observing that "[t]he great majority of courts follow this distinction between risk and loss and allow an insured to assign a loss" despite a standard consent-to-assignment clause (emphasis added)); *Antal's Restaurant v. Lumbermen's Mut. Cas. Co.*, 680 A.2d 1386, 1388 (D.C. 1996); *B.S.B. Diversified Co. v. Am. Motorists Ins. Co.*, 947 F. Supp. 1476, 1480-81 (W.D. Wash. 1996); *Citicorp Indus. Credit, Inc. v. Fed. Ins. Co.*, 672 F. Supp. 1105, 1106-07 (N.D. Ill. 1987); *Ocean Acc. v. Sw Bell*, 100 F.2d 441, 446 (8th Cir. 1939) (holding "***under a liability policy such as the one under consideration, the liability, the loss and the cause of action arise simultaneously with the happening of the accidental injury***" (emphasis added)). Only the Indiana Supreme Court and the trial court in this action stand athwart this overwhelming consensus.

The policies cover liabilities only for accidents that occur during the coverage period. The policies do not provide coverage for any additional accidents arising after the end of their respective policy periods. Because the assignment between Old CNC and New CNC occurred two years after the last coverage period ran, the assignment of Old CNC's coverage rights necessarily occurred "post-loss." Therefore, the assignment was valid, and reversal is warranted.

D. The Duty To Defend Is Freely Assignable.

The circuit court also adopted Respondents' argument that even if an obligation to indemnify may be assigned, the duty to defend is never assignable. Yet, the authority cited by the circuit court for this conclusion is a California case concerning whether *quasi in rem* jurisdiction could attach to the duty to defend. *See* AppRec17 n.3 (order) (citing *Javorek v. Superior Court*, 17 Cal. 3d 629 (1976)). The decision says ***nothing*** about whether the duty to

defend can be assigned. At a minimum, it was error for the circuit court to rely on a California decision that does not address the assignment of coverage rights ***in any way***, especially given that the California Supreme Court explicitly held just last year that the duty to defend was, in fact, freely assignable after the happening of the injury during the policy period. *Fluor*, 61 Cal. 4th at 1224.

On the other hand, cases that allow the assignment of the duty to defend are legion. *See, e.g., id.* ("[A]fter personal injury (or property damage) resulting in loss occurs within the time limits of the policy, an insurer is precluded from refusing to honor an insured's assignment of the right to invoke ***defense or indemnification*** coverage regarding that loss." (emphasis added)); *Givaudan*, 442 N.J. Super. at 40 (reversing the trial court and upholding the assignment of the duty to defend and indemnify); *Ocean Accident*, 100 F.2d at 444-46 (holding that the insurer owed the post-loss assignee of a liability policy a duty to defend); *Ill. Tool Works*, 962 N.E.2d 1042 (reversing the trial court and holding that an insurer had a duty to defend and indemnify the assignee of a liability insurance policy in a CERCLA action, notwithstanding that the rights were assigned prior to the initiation of that action); *Gopher Oil*, 588 N.W.2d at 763 (collecting cases and holding that the successor corporation was entitled to a defense and indemnification of CERCLA claims based on the original insured's polluting activity).

There is no authority in South Carolina law for the proposition that the duty to defend is not assignable. Nor is there any support identified in the circuit court's decision. Reversal is warranted on this issue.

E. Public Policy Favors PCS's Interpretation Of Post-Loss Assignments.

Finally, in addition to being contrary to the terms of the agreement, the law of South Carolina, and the laws of the overwhelming consensus of jurisdictions that have considered the issue, Respondents' position, adopted by the circuit court, is contrary to South Carolina's public

policy. First, it improperly results in a forfeiture of coverage, awarding a windfall to Respondents. Second, it undermines CERCLA's statutory scheme and South Carolina's interest in ensuring the availability of funds to remediate toxic waste sites. Third, enforcing anti-assignment clauses, in these circumstances, results in an impermissible restraint of trade without any reasoned justification.

1. Forfeiture Of Insurance Is Against Public Policy.

First, adopting Respondents' view of post-loss assignments would effectively forfeit coverage and grant Respondents an improper windfall. "Both in law and equity forfeitures are abhorred." *S.C. Tax Com. v. Met. Life Ins. Co.*, 221 S.E.2d 522, 523 (S.C. 1975). As such, it is the longstanding policy of South Carolina's courts to avoid forfeitures where possible. *See Nat'l Fire Ins. Co. of Hartford v. Brown & Martin Co., Inc.*, 726 F. Supp. 1036, 1040 (D.S.C. 1989) (collecting cases). "Forfeitures are not favored in law and Courts will seize upon even slight evidence to prevent one." *Elliott v. Snyder*, 143 S.E.2d 374, 375 (S.C. 1965).

"To find that an insurance company is not obligated to provide coverage to a party that is liable for a risk the insurance company promised to insure against and for which they were paid an agreed premium would result in an unfair windfall to the insurance company." *Elliott Co.*, 434 F. Supp. 2d at 496 (internal quotation omitted). Respondents accepted premiums to cover the exact liabilities for which PCS is seeking coverage: Old CNC's liabilities for property damage alleged to have been caused by occurrences during the coverage period. Voiding these coverage rights would serve no purpose beyond providing Respondents with an improper windfall while violating South Carolina's policy against forfeiture of contract rights. *See, e.g.*, *Gopher Oil*, 588 N.W.2d at 763-64 (refusing to enforce no-assignment clause after the contamination giving rise to liability took place because such a result would provide "an insurer . . . the windfall of not having to insure an occurrence that it received premiums for covering").

2. Voiding Coverage Impairs Efforts To Remediate The Environment.

Second, Respondents' proposed forfeiture of insurance would undermine a significant government interest in the remediation of the environment. "The protection of public health and the environment serves broad societal interests." *Ken Moorhead Oil Co. v. Federated Mut. Ins. Co.*, 476 S.E.2d 481, 489 (S.C. 1996); *see also Beard v. S.C. Coastal Council*, 403 S.E.2d 620, 622 (S.C. 1991) ("[T]he protection of the coastal environment is a substantial State interest."). Similarly, "Congress has determined that harm to the environment – even absent imminent threats to public health, welfare, or safety – is a public policy concern of the greatest magnitude." *United States v. Ellen*, 961 F.2d 462, 468 (4th Cir. 1992).

"[R]equiring owners and operators to exhaust their insurance . . . is reasonably related to the legitimate governmental purpose of protecting the environment and preserving public health." *Ken Moorhead Oil*, 476 S.E.2d at 489; *see also Ford Motor Co. v. Ins. Co. of N. Am.*, 35 Cal. App. 4th 604, 613-614 (Cal. App. 2d Dist. 1995) (quoting *Leksi, Inc. v. Fed. Ins. Co.*, 736 F. Supp. 1331, 1334-35 (D.N.J. 1990)); *Continental Ins. v. Northeastern Pharm.*, 842 F.2d 977, 985 (8th Cir. 1988) ("the broad issue of the availability of liability insurance coverage under standard-form CGL policies for the costs of cleaning up hazardous waste sites is a question of substantial importance . . . to the public"); *MAPCO Alaska Petroleum v. Central Nat. Ins. Co.*, 795 F. Supp. 941, 944 (D. Alaska 1991); *The Cost And Availability of Pollution Insurance*, U.S. General Accounting Office at 2 (Oct. 1988) (explaining that "Congress has . . . become concerned that the nation's ability to manage and safely dispose of its hazardous waste could be seriously jeopardized if appropriate insurance is unavailable").

Environmental laws only function if liabilities come to rest with existing and solvent companies. If insurance coverage rights cannot be transferred along with liabilities, corporations will be less likely to accept the environmental liabilities of predecessor corporations and those

corporations that do accept environmental liabilities may be unable to fund a large-scale cleanup. Accordingly, the circuit court's ruling limiting the availability of insurance for liabilities the insurers contracted to cover is likely to result in a dirtier environment, more taxpayer dollars used for remediation efforts, or both.

3. Voiding Coverage Is An Improper Restraint On Trade.

Finally, both courts and commentators have recognized that following Respondents' position on post-loss assignment would hamstring economic activity by "inhibiting corporate reorganization or sale." *See, e.g., Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76, 105 n.92 (Del. Ch. 2009). As one commentator explained:

> [A] major rationale for commercial insurance is to facilitate economic activity and growth by providing risk management protection for economic actors. . . . In the modern American economy, mergers, acquisitions, and sales are part of corporate life. For the most part, economists approve of this activity because it allows the marketplace to allocate resources to their most profitable uses. To the extent that insurance protection (for past but possibly unknown losses) may be more freely assigned as part of corporate recombinations, this lowers transaction costs and facilitates economic activity and wealth enhancement. Consequently, the general rule permitting post-loss assignment is a good rule.

1 Stempel on Insurance Contracts, § 3.15[D] at 3-125-26 (2010); *see also Henkel*, 62 P.3d at 80-81 (Moreno, dissenting). While anti-assignment clauses may be defensible where the transfer of coverage rights occurs pre-loss, after the policy periods end and the risk is fixed, there is no justification supporting such an economically inefficient restraint on trade.

III. Granting Summary Judgment On The De Facto Merger Issue Was Unwarranted.

If this Court reverses the circuit court on the post-loss assignment issue, it need not reach the question of whether the circuit court erred in granting summary judgment on the question of whether PCS is the successor-by-merger to Old CNC. If the Court of Appeals does reach this

issue, however, reversal is warranted because the circuit court erred as a matter of law in concluding that an assumption of liabilities forecloses a finding of de facto merger when, in fact, the South Carolina Supreme Court has reached the opposite conclusion.

In ruling on summary judgment the court misapprehended the law of de facto merger. The circuit court held that a party's express assumption of liabilities ***precludes*** a finding of de facto merger. *See* AppRec25 (order). In fact, the cases cited by the circuit court stand for the opposite conclusion. *See Brown v. Am. Ry. Exp. Co.*, 123 S.E. 97, 99 (S.C. 1924); *Huggins v. Commercial & Sav. Bank*, 140 S.E. 177, 186 (S.C. 1927); *United States v. Davis Mem'l Hosp.*, 956 F.2d 1163 (Table) (4th Cir. 1992)). Indeed, the South Carolina Supreme Court has held that a finding of consolidation or merger is warranted where the evidence shows, among other things, that "***liability for the payment of claims outstanding against [the seller] had been expressly or impliedly assumed by the [purchaser]***." *See Brown*, 123 S.E. at 99 (emphasis added).

In ruling on the de facto merger issue, the circuit court held that liabilities can only be transferred to a successor entity where the parties do not intend to transfer liabilities to a successor entity. This formulation of the law (adopted from Respondents' proposed opinion), is the exact opposite of what the South Carolina Supreme Court has actually held. Thus, if the Court of Appeals reaches this issue, reversal is warranted.

CONCLUSION

For the reasons stated more fully above, PCS respectfully requests that this Court reverse the circuit court's order on Respondents' motion for summary judgment and remand this matter to the circuit court.

Dated: November 4, 2016

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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

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

vs.

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

CERTIFICATE OF COUNSEL

I hereby certify that the Appellant's Final Brief complies with Rule 211(b).

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