

# JONES DAY

500 GRANT STREET • SUITE 4500 • PITTSBURGH, PENNSYLVANIA 15219.2514  
TELEPHONE: +1.412.391.3939 • FACSIMILE: +1.412.394.7959

Direct Number: (412) 394-7919  
m.laginsberg@JonesDay.com

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AUG 13 2018

**SC Court of Appeals**

JP338499:amm/1504145025v.2  
943785-620029

August 7, 2018

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

Re: PCS Nitrogen, Inc. v. Continental Cas. Co., et al., Appellate Case No. 2016-001140

Dear Ms. Kitchings:

I write on behalf of Appellant PCS Nitrogen, Inc. in response to the July 24, 2018 letter from Respondent's counsel attaching a recent decision of the Delaware Supreme Court in *Travelers Indem. Co. v. CNH Industrial America, LLC*, No. 420, 2017, 2018 WL 3434562 (Del. July 16, 2018). Counsel incorrectly asserts that the decision "further supports Continental's argument that the nearly-universal rule followed throughout American jurisdictions enforces insurance policy provisions that restrict a policyholder's ability to assign its insurance policies (or right thereunder) to strangers without the insurer's consent." The opinion says no such thing, and in fact recognizes that a number of jurisdictions follow the opposite rule, freely allowing the post-loss assignment of insurance rights despite the presence of an anti-assignment clause in an insurance policy, including two of the three states discussed in the opinion, Wisconsin (*see* Slip Op. at 8, fn. 20) and New York (*see* Slip Op. at 20, fn. 78). As discussed in Appellant's Final Brief, the majority view of the states, consistent with the decisional law of South Carolina, is to permit post loss assignments of insurance policy rights. *See* Appellant's Final Brief at pp. 13-15.

Respondent's counsel goes on to say, without citation to the opinion, that the Delaware Supreme Court rejected the assertion, allegedly made by PCS Nitrogen in this case, that nearly all states treat insurance policies as freely assignable. That statement does not appear in the court's opinion, nor did PCS Nitrogen ever make that argument—PCS Nitrogen did not argue that insurance policies are assignable, but rather that nearly all states permit the post-loss assignment of insurance rights. Importantly, in this case, Columbia Nitrogen Company assigned its rights under the insurance policies, not the policies themselves. *See* Assignment of Insurance Benefits, 2016-001140 Record on Appeal 2233-34.


Counsel next suggests that the Delaware Supreme Court interpreted Delaware law to enforce anti-assignment clauses in insurance policies. The decision does not say that at all. Rather, it says that there is no established law that anti-assignment provisions in insurance contracts are against public policy.

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In a footnote, counsel seems to suggest that Delaware law may apply to this dispute because Columbia Nitrogen Company was a Delaware corporation and PCS Nitrogen is a Delaware corporation. No party to this dispute has ever argued that Delaware law applies. Indeed, Respondents assert throughout their brief on appeal that South Carolina law applies to the parties' dispute, going so far as to state that "[t]he cases from other jurisdictions on which PCS relies are not controlling here... ." Joint Final Brief of Respondents at p. 30. *See also, id.* at pp. 1, 2, 8, 16-17 and 22. Indeed, South Carolina provides that its law will apply to an insurance dispute concerning loss to South Carolina property. S.C. Code Ann. § 36-61-10.<sup>1</sup>

As with the briefing of this matter in this Court and at the trial court, Continental misstates the prevailing law on post-loss assignment. In that regard, PCS Nitrogen stands on its briefing demonstrating that the vast majority of jurisdictions comport with the view expressed by the South Carolina Supreme Court in *Narruhn v. Alea London Ltd.*, 745 S.E.2d 90 (S.C. 2013), upholding the validity of post loss assignments of insurance rights.

Very truly yours,

  
Michael H. Ginsberg

cc: All Counsel of Record (via U.S. Mail)

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<sup>1</sup> Delaware also follows the majority rule allowing for post- loss assignments without regard to anti-assignment provisions in insurance contracts. See *Christiana Care Health Serv. v. PMSLIC Ins.*, Civ. A. No. 14-1420-RGA, 2015 WL 6675537, at \*2 and cases cited therein.

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500 GRANT STREET • SUITE 4500  
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