

RECEIVED

MAR 12 2020

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

C.A. No.: 2011-CP-10-00387

PCS Nitrogen, Inc. Petitioner,

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.

PETITION FOR A WRIT OF CERTIORARI

Wm. Howell Morrison
Haynsworth Sinkler Boyd, P.A.
ONE North Main, 2nd Floor
Greenville, SC 29601
Phone: (843) 720-4405
Fax: (843) 722-2266
hmorrison@hsblaw.com

And

Michael H. Ginsberg
Matthew R. Divelbiss
Admitted *Pro Hac Vice*
JONES DAY
500 Grant Street, 45th Floor
Pittsburgh, PA 15219
Phone: (412) 391-3939
Fax: (412) 394-7959
E-mail: mhginsberg@jonesday.com
mrdivelbiss@jonesday.com

ATTORNEYS FOR PETITIONER, PCS NITROGEN, INC.

Other Counsel of Record:

J.R. Murphy, Esq.
Adam J. Neil, Esq.
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
*Attorneys for Respondent Admiral Insurance
Co.*

John S. Favate, Esq.
Hardin, Kundla, McKeon & Ploetto
673 Morris Avenue
Springfield, NJ 07081
(973) 912-5222
*Attorneys for Respondent United States Fire
Ins. Co. (for policy no. 5401893627)*

R. Scott Wallinger, Jr., Esq.
James L. Floyd, III, Esq.
Collins & Lacy, P.C.
P.O. Box 12487
Columbia, SC 29211
(803) 256-2660
*Attorneys for Respondent United States Fire
Insurance Company (for policy no.
5401893627)*

Morgan S. Templeton, Esq.
Wall Templeton & Haldrup, P.A.
P.O. Box 1200
145 King Street, Suite 300 (29401)
Charleston, SC 29402
(843) 329-9500
*Attorney for Respondent Continental Casualty
Co.*

Patrick F. Hofer
Thomas S. Hay
Troutman Sanders LLP
401 Ninth Street, Suite 1000
Washington, DC 20004-2134
(202) 274-2950
*Attorneys for Respondent Continental
Casualty Company*

Robert F. Walsh, Esq.
Thomas M. Going, Esq.
Paul Briganti, Esq.
White and Williams LLP
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103-7395
(215) 864-7000
*Attorneys for Respondent ACE Property &
Casualty Insurance Company and United
States Fire Insurance Company with respect
to policy numbers GLA 284022 and 540-
079751-7 and Century Insurance Company
(k/k/a California Union Insurance Company
and Insurance Company of North America)*

Richard McDermott
Seth M. Jaffe
Hinkhouse Williams Walsh, LLP
180 North Stetson Avenue, Suite 3400
Chicago, IL 60601
(312) 784-5400
*Attorneys for Respondent Certain
Underwriters at Lloyd's of London, Certain
Aviva Companies, Certain Winterhur
Companies, Berkshire Hathaway Specialty
Insurance Company (f/k/a Stonewall
Insurance Company), Starr Indemnity &
Liability Company (f/k/a/ Republic Insurance
Company), New London Reinsurance
Company Limited and The Scottish Lion
Insurance Company Limited (identified as
among the Certain London Insurance
Companies)*

Robert H. Hood, Jr., Esq.
Hood Law Firm, LLC
P.O. Box 1508
Charleston, SC 29402
(843) 577-4435
*Attorneys for Respondents ACE Property &
Casualty Insurance Company and United
States Fire Insurance Company with respect
to policy numbers GLA 284022 and 540-
079751-7 and Century Insurance Company
(k/k/a California Union Insurance Company
and Insurance Company of North America)*

Edward K. Pritchard, III
Pritchard Law Group, LLC
P.O. Box 630
Charleston, SC 29402
(843) 722-3300
*Attorneys for Respondent Certain
Underwriters at Lloyd's of London, Certain
Aviva Companies, Certain Winterhur
Companies, Berkshire Hathaway Specialty
Insurance Company (f/k/a Stonewall
Insurance Company), Starr Indemnity &
Liability Company (f/k/a/ Republic Insurance
Company), New London Reinsurance
Company Limited and The Scottish Lion
Insurance Company Limited (identified as
among the Certain London Insurance
Companies)*

John C. Bonnie
Weinberg Wheeler Hudgins Gunn & Dial,
LLC
3344 Peachtree Road NE, Suite 2400
Atlanta, GA 30326
(404) 876-2700
*Attorney for Respondent Lexington Insurance
Company*

Molly Poag
Harry Lee
Steptoe & Johnson, LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
(202) 429-8091
*Attorneys for Respondent Providence
Washington Insurance Company (as
Successor in Interest by way of Merger to
Seaton Insurance Company, f/k/a Uniguard
Security Insurance Company, f/k/a Uniguard
Mutual Insurance Company)*

Paul Parker
Karbali Cohen Economou Silk & Dunne, LLC
150 S. Wacker Drive, Suite 1700
Chicago, IL 60606
(312) 431-3623
*Attorneys for Respondent First State
Insurance Company*

Helen Franzese
Foran Glennon (UK), LLP
11 Leadenhall Street
London, EC3V 1LP
+44 (0) 20 3530 7754
*Attorneys for Respondent Certain London
Market Insurance Companies*

Elizabeth J. Palmer, Esq.
Rosen, Rose & Hagood, LLC
151 Meeting Street, Suite 400
Charleston, SC 29401
(843) 577-6726
*Attorneys for Respondent Providence
Washington Insurance Company (as
Successor in Interest by way of Merger to
Seaton Insurance Company, f/k/a Uniguard
Security Insurance Company, f/k/a Uniguard
Mutual Insurance Company)*

R. Michael Ethridge
Carlock Copeland
40 Calhoun Street, Suite 400
Charleston, SC 29401
(843) 727-0307
*Attorneys for Respondent First State
Insurance Company*

John T. Lay
Laura W. Jordan
Gallivan, White & Boyd, P.A.
1201 Main Street, Suite 1200
Columbia, SC 29201
*Attorneys for Respondent Certain London
Market Insurance Companies*

TABLE OF CONTENTS

	Page
CERTIFICATE OF COUNSEL	1
QUESTIONS PRESENTED.....	2
INTRODUCTION	3
STATEMENT OF THE CASE AND FACTS	4
ARGUMENT.....	6
I. The Court of Appeals misinterpreted when “loss” occurs under a general liability insurance policy.	6
A. The Court of Appeals’ ruling conflicts with this Court’s guidance.....	6
B. The Court of Appeals’ ruling conflicts with the overwhelming nationwide consensus.	8
C. The Court of Appeals’ reliance on the policies’ “no action” clause was misplaced.	12
II. The Court of Appeals affirmed the circuit court’s ruling on de facto merger, which directly conflicts with this Court’s prior decision.....	14
CONCLUSION.....	16

CERTIFICATE OF COUNSEL

Counsel for PCS Nitrogen, Inc. certifies that a petition for rehearing was made on January 2, 2020 and finally denied by the Court of Appeals on February 13, 2020. (App. at 13–28.)

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding—contrary to this Court’s prior guidance and the overwhelming consensus in other jurisdictions—that “loss” under an insurance policy means the filing of a lawsuit and not the events giving rise to coverage?
2. Did the Court of Appeals err in affirming the circuit court’s conclusion that a party’s express assumption of another party’s liabilities *precludes* a finding of de facto merger?

INTRODUCTION

As in many common commercial transactions, a predecessor of Petitioner PCS Nitrogen, Inc. (“PCS”) acquired all of the assets of Columbia Nitrogen Company (“Old CNC”) in 1986. (App. at 35–36.) In the transaction, PCS’s predecessor also acquired, through an explicit assignment, the right to seek coverage under insurance policies purchased by Old CNC for liabilities arising from Old CNC’s operations. (*Id.* at 36.) Years later, PCS was held liable for environmental remediation costs based entirely on Old CNC’s operations. (*Id.* at 35–37.) PCS sought coverage for the underlying lawsuit, but the insurers argued that each policy’s anti-assignment clause barred coverage.¹ (*Id.* at 37–38.) The circuit court agreed, and the Court of Appeals affirmed. (*Id.* at 38, 1–12.) The Court of Appeals correctly recognized that an anti-assignment clause does not bar coverage where “loss” under the policy has already occurred at the time of assignment, but it incorrectly held that “loss” equates to a final judgment against the insured. (*Id.* at 10, 11.) Accordingly, the Court of Appeals ruled that the assignment of insurance policy rights was invalid “[b]ecause no actions were filed against” PCS when the policy was assigned in 1986. (*Id.* at 11.)

The Court of Appeals’ holding conflicts with the prior guidance of this Court and with the vast majority of other jurisdictions that have considered the issue. This Court previously recognized that an insurance policy—with an anti-assignment clause—may be validly assigned to another party as long as the “loss” under the policy has already occurred, *Narruhn v. Alea London Ltd.*, 745 S.E.2d 90, 94 (S.C. 2013), and this Court indicated that “loss” means the

¹ An anti-assignment clause prohibits a policyholder from transferring its active insurance policy to a third party without the insurer’s consent. As explained below, the general rule (as articulated by this Court) is that such provisions do *not* prevent a policyholder from transferring the rights to the insurance policy after the policy period has already ended.

“events giving rise to the insurer’s liability,” not a final judgment against the insured. *Id.* (quoting 3 *Couch on Insurance* 3d S 35.8 (2011 Rev. Ed)). Nearly all courts nationwide agree with this Court’s conclusion: for the purpose of assigning policy rights, “loss” means the events giving rise to coverage. A lawsuit against the insured need not be filed at the time of assignment.

The Court of Appeals’ ruling—in a published opinion—implicates a legal issue of major importance and should be considered by this Court pursuant to Rule 242(b)(3), SCACR because it directly conflicts with this Court’s reasoning in *Narruhn* and with the vast majority of other state courts. (App. at 1–12.) Further, as discussed below, the Court of Appeals affirmed the circuit court’s grant of summary judgment despite the circuit court’s incorrect legal conclusion regarding de facto mergers—a legal finding that conflicts with this Court’s prior decisions. (*Id.* at 11 n.7.) Each of these issues warrants a grant of discretionary review by this Court.

STATEMENT OF THE CASE AND FACTS²

PCS is the alleged successor to Old CNC for Old CNC’s liabilities. (App. at 35–36.) In 1966 Old CNC operated a fertilizer production plant and an acid plant at a Superfund Site located in Charleston, South Carolina (the “Ashley Site”). (*Id.*); *see also PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161 (4th Cir. 2013). Old CNC ceased operation of the acid plant in 1970 and ceased operation of the fertilizer plant in 1972. (App. at 36.) 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 terminated Old CNC’s operations and then sold the Old CNC business to CNC Corp. (“New CNC”). (*Id.*) All of Old CNC’s insurance rights,

² PCS Nitrogen incorporates its statement of the case and facts from its Appellant’s brief. (App. 29–55.)

benefits, and proceeds were assigned to New CNC on November 6, 1986. (*Id.*) Through a series of mergers and acquisitions, PCS acquired New CNC. (*Id.*)

Much later, Ashley II of Charleston, LLC (“Ashley”) sued PCS, seeking a declaratory judgment that PCS was jointly and severally liable under CERCLA³ for response costs at the Ashley Site. (App. at 35–36); *see also Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, Case No. 2:05-cv-02782 (D.S.C.). Ashley did not allege that PCS itself ever owned or operated a facility at the Ashley Site or that PCS ever sent waste to the Ashley Site. (App. at 36.) In fact, Ashley did not allege that PCS’s own conduct was the basis of liability at all. (*Id.*) Rather, Ashley alleged that PCS was liable for the remediation of the Ashley Site solely due to the conduct of Old CNC—all of which occurred before Old CNC’s insurance rights, benefits, and proceeds were assigned. (*Id.*)

At a federal bench trial, PCS was found jointly and severally liable for the remediation of the Ashley Site. (App. at 37); *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F. Supp. 2d 431 (D.S.C. 2011). The judgment was affirmed on appeal. (App. at 37); *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161 (4th Cir. 2013).

PCS then filed this action, seeking insurance coverage from Respondents, insurance companies that issued general liability policies to Old CNC. (App. at 37); *see also* ROA at 31 (complaint). Those policies cover the period between 1966 and 1984. (App. at 37); *see also* ROA at 73-183, 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

³ CERCLA is the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9607(a)(4)(B).

the policies' coverage periods. (App. at 37). There is no dispute that the events giving rise to coverage under Old CNC's policies occurred before Old CNC assigned those policy rights. (*Id.*)

On March 23, 2016, the circuit court granted summary judgment to the insurers, holding that PCS was not the successor to Old CNC's coverage rights.⁴ (App. at 38). After the circuit court denied PCS's motion for reconsideration, PCS timely appealed on May 26, 2016. (*Id.*) The Court of Appeals affirmed the circuit court's ruling, holding that, at the time of the assignment, no "loss" had taken place under the policy. (App. at 1–12.) The Court of Appeals explicitly recognized that "the property damage insured against—environmental contamination—occurred during the covered policy terms," but it held that, since "no actions were filed against Old CNC prior to the asset sale with New CNC, the loss insured against ... had not yet occurred." (*Id.* at 11.) The Court of Appeals thus held that the "loss" insured against is not the event giving rise to coverage but rather a final judgment (or at least the filing of a lawsuit). (*Id.*)

ARGUMENT

I. The Court of Appeals misinterpreted when "loss" occurs under a general liability insurance policy.

The Court of Appeals' holding conflicts with the prior guidance of this Court and with the vast majority of other jurisdictions, which recognize "loss" in an insurance policy means the events giving rise to the insurer's liability, not a final judgment against the insured or the filing of a lawsuit. This conflict warrants a grant of discretionary review by this Court.

⁴ 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).

A. The Court of Appeals' ruling conflicts with this Court's guidance.

This Court has previously discussed anti-assignment clauses at length, explaining that “it is generally held that an assignment *after* a loss has already occurred does not require an insurer’s consent.” *Narruhn v. Alea London Ltd.*, 745 S.E.2d 90, 94 (S.C. 2013). This Court relied on *Couch on Insurance* and a number of other authorities that recognized that “loss” equates to events giving rise to coverage. The reason for this is that “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.* (quoting 3 *Couch on Insurance* 3d § 35.8 (2011 Rev. Ed)). Therefore, once the events giving rise to coverage have occurred, the risk to the insurer is unchangeable—regardless of who now holds the rights to policy proceeds:

The 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 Insurance* 3d § 35.8 (2011 Rev. Ed)). The risk is the same whether or not a lawsuit has been filed at the time of assignment.

In *Narruhn*, this Court relied on *Illinois Tool Works, Inc. v. Commerce & Indus. Ins. Co.*, 962 N.E.2d 1042 (Ill. App. Ct. 2011), a case which held that “loss” equates to events giving rise to coverage, not to the filing of a lawsuit based on those events. *Id.* at 1054. The *Illinois Tool Works* court explicitly found that “loss” under the policy was environmental contamination of property, which occurred during the policy term, and not the filing of a lawsuit, which did not occur until five years after the policy had been assigned:

[W]e find that the “loss” here was not the Enssle suit, which was filed in 2003 and a defense to which could, therefore, not have been assigned in 1998 since the suit did not yet exist. Rather, the loss was Binks’ contamination of the Enssles’ property, an occurrence for which Binks had bought defense and indemnification coverage.

Id. at 1055.

The focus in both *Couch on Insurance* and *Illinois Tool Works* was on the insurer's risk. Anti-assignment clauses prevent policyholders from assigning policies to riskier parties. But once the policy period has ended, the risk cannot possibly change. *Illinois Tool Works*, 962 N.E.2d at 1054 (“The risks do not change or increase after the period expires or if an assignee rather than the named insured seeks coverage for losses. The final dollar amount of the defense/liability might be in question under a third-party policy but the underlying risk is the same.”).

The Court of Appeals' ruling directly conflicts with this Court's reasoning in *Narruhn* and the authority cited therein. Despite acknowledging that “the property damage insured against—environmental contamination—occurred during the covered policy terms,” the Court of Appeals nevertheless held that “the loss insured against...had not yet occurred” because “no actions were filed against Old CNC” at the time of assignment. (App. at 11.) The Court of Appeals' decision ignores this Court's recognition in *Narruhn* that “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 94 (quoting 3 *Couch on Insurance* 3d § 35.8 (2011 Rev. Ed)).

B. The Court of Appeals' ruling conflicts with the overwhelming nationwide consensus.

Narruhn is not an isolated case. Nearly all courts have held that the relevant event giving rise to coverage is the event from which the loss arises, not an entry of a judgment fixing the amount of damage for that event. Most recently, the Supreme Courts of California and New Jersey addressed this precise issue, both courts explicitly holding that “loss” occurs at the time of injury or property damage. Both courts repudiated the argument that a final dollar amount must

be fixed to be assignable—or that a lawsuit must be filed before policy rights are assigned.

In *Fluor Corp. v. Superior Court*, 354 P.3d 302 (Cal. 2015), the California Supreme Court surveyed the law throughout the United States and noted the majority rule that “loss” occurs at the time of injury or property damage:

[T]he majority common law rule that under third party liability policies, “loss” arises at the time of the “occurrence” that results in injury or damage, *even though the dollar amount of that loss may be unknown and unknowable until much later*, and allow assignment of the right to invoke coverage at any time after that loss.

Fluor Corp. v. Superior Court, 354 P.3d 302, 332 n.51 (emphasis added). In *Fluor*, the court also noted, in a discussion of past cases, that “we repeatedly employed and equated the term ‘loss,’ not with a judgment or settlement for a sum of money ... but as synonymous with occurrence of bodily injury and property damage.... Plainly ... we did not contemplate that loss occurred only upon judgment or approved settlement for a sum of money.” *Id.* at 328–29 (citing *Montrose Chem. Corp. v. Admiral Ins. Co.*, 913 P.2d 878 (Cal. 1995)).

The New Jersey Supreme Court also held that “loss” occurs at the time of the event giving rise to coverage. *Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co.*, 151 A.3d 576 (N.J. 2017). The court in *Givaudan* rejected the insurers’ argument that “a post-loss claim becomes assignable only when there has been a judgment against the insurer or a settlement between the insured and the insurer.” *Id.* at 582. The court held instead that a loss occurs when the event giving rise to coverage takes place: “the relevant event giving rise to coverage is the loss event, not the entry of a judgment fixing the amount of damage for that event.” *Id.* at 591.

This conclusion, as in the authority this Court cited in *Narruhn*, was based on an analysis of risk to the insurer: “[P]ost-loss assignments do not further the purpose of the anti-assignment clause, which is to protect the insurer from increased liability, because, after the 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.* at 591 (internal quotations marks and citations omitted). The court explained:

Here, the right to insurance coverage for the “occurrence” of environmental contamination was assigned to Fragrances after the policies had expired. The loss event occurred during the policy periods. The risk of exposure that was contractually undertaken by the insurer occurred prior to the assignment, and it occurred due to the actions or inactions of the entity that the insurer insured when that loss event occurred. Accordingly, we hold that this assignment after the insured-against occurrence took place and after the conclusion of the policy period is an assignment of a post-loss claim.

Id. at 591–92 (internal citations omitted). In reaching this result, the *Givaudan* court explicitly held that it did not matter that the assigned post-loss claims had not been “reduced to judgment.”

Id. at 592. “The fact that the environmental claim will require time to sort out liability and damages resulting therefrom does not alter our conclusion. Other claims involving losses that have occurred, but which cannot be determined with precision, do not alter the conclusion that the assignment must be honored.” *Id.*

Nearly all courts nationwide have held that an assignment of insurance rights is valid if it takes place after the event giving rise to coverage—even if the liability has not been reduced to a judgment, and even if no lawsuit has been filed. *See In re Viking Pump, Inc.*, 148 A.3d 633, 652 (Del. 2016) (“The Excess Insurers’ potential liability arose at the time of injury. That the precise amount of liability was not identifiable at the time of assignment did not alter the Excess Insurers’ obligation to insure the risks for which they contracted.”); *Illinois Tool Works*, 962 N.E.2d at 1055 (holding that “loss” was not the filing of a lawsuit but rather the “contamination of the ... property, an occurrence” covered by the policy); *Williams v. Am. Sec. Ins. Co.*, No. 16-

6254, 2017 WL 4347673, at *2 (E.D. Pa. Sept. 29, 2017) (“The assignable right accrues at the date of loss, even though payment may not yet be due.”).⁵

Only one jurisdiction has reached the same conclusion as the Court of Appeals here.⁶ *See Travelers Cas. & Sur. Co. v. United States Filter Corp.*, 895 N.E.2d 1172, 1180 (Ind. 2008) (holding that “for an insured loss to generate an assignable coverage benefit, the loss must be identifiable with some precision”). The Court of Appeals relied on *Travelers*, but that opinion has been widely discredited. (App. at 11.) Courts across the country have rejected the reasoning and holding of *Travelers*, and it has not been adopted by any other out-of-state courts since it was decided. *See Givaudan*, 151 A.3d at 590 (“[I]n the years since *Traveler’s Casualty* was

⁵ As recognized in *Narruhn*, the focus is on risk, not on the amount of any future verdict. *See Public Utility Dist. No. 1 of Klickitat County v. International Ins. Co.*, 881 P.2d 1020, 1027 (Wash. 1994) (“After the 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. The assignments in this case occurred long after the activities giving rise to liability.”); *In re Archdiocese of Saint Paul & Minneapolis*, 579 B.R. 188, 201(Bankr. D. Minn. 2017) (“Allowing an insured to assign its right to the proceeds of an insurance policy after a loss has occurred does not hurt the insurer or increase its financial exposure because its obligation become fixed when the loss occurred.”); *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.* 861 N.E.2d 121, 129 (Ohio 2006) (“The losses are fixed at the time of the occurrence. We see no reason to deviate from the standard rule on this issue, and thus we hold that the chose in action as to the duty to indemnify is unaffected by the anti-assignment provision when the covered loss has already occurred.”); *Parker’s Classic Auto Works, Ltd. v. Nationwide Mut. Ins. Co.*, 215 A.3d 1084, 1086 (Vt. 2019) (“An anti-assignment clause is meant to protect the insurer from unaccounted risk posed by an assignee, designated unbeknownst to the insurer, before a covered loss occurs.”); *Egger v. Gulf Ins. Co.*, 903 A.2d 1219, 1229 (Pa. 2006) (“Accordingly, we determine that whether or not the assignment was made prior to the jury verdict is irrelevant, as the obligation of Gulf to provide excess coverage, in the event of damages exceeding the limits of the primary policy, arose on the date of the occurrence in 1997. The assignment changed only the identity of the party who was entitled to recover under the Gulf policy, in the event an excess verdict was obtained.”).

⁶ A small minority of states “enforce consent-to-assignment clauses even more strictly ... by failing to recognize any post-loss exception to those clauses (even, apparently, as to claims that ... have been reduced to a money judgment).” *Fluor*, 354 P.3d at 327 n.46 (citing four cases from minority jurisdictions). That line of authority is not relevant here, since this Court—as well as the Court of Appeals here—have followed the majority rule that permits post-loss assignment of insurance coverage benefits. (App. at 9–10.)

decided, no out-of-state case has followed its holding that a “loss must be identifiable with some precision and must be fixed, not speculative.”); *Fluor*, 354 P.3d at 327 n.46 (“In the intervening nearly seven years, this aspect of the Indiana Supreme Court’s decision has been followed by no out-of-state decision and by only one lower court of that state, in related litigation.”).

The Court of Appeals’ reliance on *Traveler’s* was misplaced and in direct opposition to prior guidance from this Court, as was its failure to acknowledge the vast majority of cases that hold “loss” to be the event giving rise to coverage. Because the Court of Appeals’ ruling conflicts with *Narruhn* and with the growing consensus that “loss” occurs at the time of injury, this Court should grant discretionary review.

C. The Court of Appeals’ reliance on the policies’ “no action” clause was misplaced.

In reaching its conclusion about when “loss” occurs, the Court of Appeals misconstrued another policy provision, a standard “no action” clause. (App. at 8–11.) The no-action clause does not relate to when “loss” occurs and is not relevant to the issue of assignment. Rather, the no-action clause relates to when an insurer must pay *third-party claimants*—i.e., not until there has been a final judgment against the insured—but it does not govern when the insurer must provide coverage to the insured. The clause provides:

No action shall lie against the company, 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.

(App. at 9) (quoting policies) (emphasis omitted).⁷ The Court of Appeals incorrectly relied on this provision to find that a “loss” equates to a final judgment: “Old CNC was not entitled to

⁷ The above-quoted provision was a standard no-action clause in the 1973 standard Insurance Services Office, Inc. (ISO) CGL policy. Insurance Coverage of Construction Disputes

coverage ‘until the amount of the insured’s obligation to pay shall have been finally determined by judgment against the insured....’” (App. at 11) (emphasis omitted).

The Court of Appeals wrongly interpreted this provision to apply to when the insurer is required to provide coverage *to the insured*. But this Court has recognized that a no-action clause merely limits the ability of *third parties*—those injured by the insured—from recovering against the insurer until a final judgment has been reached in a suit between the insured and the third party. *Sexton v. Harleysville Mut. Cas. Co.*, 130 S.E.2d 475, 479 (S.C. 1963) (explaining that “the recovery of a judgment against the insured was a condition precedent to [a third-party injured party’s] right of recovery against the insurer,” and therefore “***the injured party had no right of action*** by garnishment to proceed against the insurer to collect under the policy, without obtaining a judgment ***against the insured***.” (emphasis added)). *See also Paxton & Vierling Steel Co. v. Great Am. Ins. Co.*, 497 F. Supp. 573, 582 (D. Neb. 1980) (“The typical no action clause is pertinent only in regulating direct actions brought by claimants against insurance companies on the basis of the insured’s liability.”). The no-action clause does not govern the insurer’s coverage obligations to the insured. And, as a matter of insurance law, it could not: the insured *is* entitled to coverage, such as for defense costs, well before there is a final judgment. *See* 7A Couch on Ins. § 105:8A (“A no-action clause does not bar an insured’s cause of action against the insurer for failure to defend the injury action....”).

§ 5:9 (2d ed.). The provision was intended to “prevent the damaged third party from suing the insurer directly”; “to prevent the insured from making collusive settlements with the damaged party at the expense of the insurer”; and “to avoid prejudicing the defense of the case by allowing the jury to know that the insured has coverage.” *Id.* As this explanation makes clear, the no-action clause has nothing to do with when “loss” occurs under a policy.

Because the no-action clause does not relate to when “loss” occurs, the Court of Appeals erred when it relied on this provision to reach a conclusion that conflicts with this Court’s decision in *Narruhn*.

II. The Court of Appeals affirmed the circuit court’s ruling on de facto merger, which directly conflicts with this Court’s prior decision.

PCS argued before the circuit court that the issue of de facto merger raised issues of fact which precluded summary judgment. PCS argued that evidence in the record supported a ruling that PCS was the de facto successor to Old CNC. One fact supporting such a conclusion was PCS’s express assumption of Old CNC’s liabilities. A further support for PCS’s de facto merger theory was that the United States District Court had previously held that PCS *was* the de facto successor to Old CNC.⁸ *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F. Supp. 2d 431, 480 (D.S.C. 2011) (“PCS is a ‘person’ subject to CERCLA liability because it is the successor of a corporation that owned and operated the facility when hazardous substances were disposed of.”).

Despite this, the circuit court here held on summary judgment that PCS was not the de facto successor to Old CNC. In reaching holding, the circuit court mistakenly inverted the legal test for a finding of de facto merger and incorrectly held that a party’s express assumption of liabilities *precludes* a finding of de facto merger. *See* COA at 25 (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, according to this Court, a finding of merger *is* warranted where the evidence shows that “*liability for the payment*

⁸ The de facto merger issue was not decided by the Fourth Circuit.

of claims outstanding against [the seller] had been expressly or impliedly assumed by the [purchaser].” See Brown, 123 S.E. at 99 (emphasis added). The circuit court got it backwards, holding that liabilities can only be transferred to a successor entity where the parties do not intend to transfer liabilities to a successor entity.

PCS then raised the de facto merger issue on appeal, but the Court of Appeals declined to address the argument, asserting that “the cases PCS Nitrogen cites do not address the question of insurance coverage, and it is unclear how a finding of successor liability under a de facto merger theory would provide access to coverage rights under Respondents’ policies.” (App. at 11 n.7.) The Court of Appeals’ statement misunderstands the argument: If PCS is the successor to Old CNC, then *all* the rights and obligations of Old CNC would transfer to PCS, including its rights to insurance coverage. 19 C.J.S. Corporations § 899 (“A new corporation created by consolidation or merger succeeds to all the rights, powers, and privileges of the original corporations, including causes of action and contract rights.”). This basic principle of corporate law applies to the insurance context. *See, e.g., Total Waste Mgmt. Corp. v. Commercial Union Ins. Co.*, 857 F. Supp. 140, 150 (D.N.H. 1994) (explaining that “courts have found insurance coverage is transferred by operation of law” because “a surviving corporation in a merger transaction succeeds to the rights and benefits belonging to the merged corporation”) (collecting cases). The Court of Appeals thus affirmed an incorrect conclusion of law by the circuit court—a conclusion that directly conflicts with this Court’s prior decisions—which warrants consideration by this Court.⁹

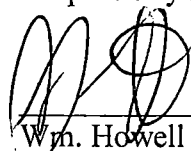
⁹ In footnote 6, the Court of Appeals suggested that decisions by the United States District Court for the District of South Carolina and the Fourth Circuit in a “related matter” addressed the pollution exclusion and ruled adversely to PCS. (App. at 7 n.6) (citing *Ross Dev. Corp. v. PCS Nitrogen, Inc.* 526 App’x 299 (4th Cir. 2013)). That case involved PCS’s claims against the prior owner of the Charleston property, not Old CNC’s operations at the facility. The

CONCLUSION

The Court of Appeals' ruling on when "loss" occurs under an insurance policy conflicts with this Court's prior rulings and goes against the overwhelming nationwide consensus. In addition, the Court of Appeals also affirmed a conclusion of law by the circuit court that directly conflicts with this Court's prior decisions on de facto merger. PCS therefore asks this Court to grant review of all questions presented and consider this appeal fully on the merits.

Dated: March 11, 2020

Respectfully submitted,

 w/ permission
for Howell Morrison

Wm. Howell Morrison
Haynsworth Sinkler Boyd, P.A.
ONE North Main, 2nd Floor
Greenville, SC 29601
Phone: (843) 720-4405
Fax: (843) 722-2266
hmorrison@hsblaw.com

And

Michael H. Ginsberg
Matthew R. Divelbiss
Admitted *Pro Hac Vice*
JONES DAY
500 Grant Street, 45th Floor
Pittsburgh, PA 15219
Phone: (412) 391-3939
Fax: (412) 394-7959
E-mail: mhginsberg@jonesday.com
mrdivelbiss@jonesday.com

ATTORNEYS FOR PETITIONER, PCS
NITROGEN, INC.

decision regarding insurance coverage and the pollution exclusion related to the policies pursuant to which Ross was seeking coverage—not the Old CNC policies at issue here. To the extent footnote 6 can be read as a determination on the pollution exclusion with respect to the Old CNC policies, the Court of Appeals was in error, since those policies and Old CNC's conduct were not at issue in the *Ross* litigation.

RECEIVED

MAR 12 2020

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

C.A. No 2011-CP-10-00387

PCS Nitrogen, Inc. Petitioner,

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.

PROOF OF SERVICE

I certify that I have served the Petitioner’s Petition for Writ of Certiorari on all attorneys
of record by depositing a copy of it in the United States Mail, postage prepaid, on March 12, 2020,
addressed to all attorneys as shown below:

J.R. Murphy
Adam J. Neil
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorneys for Respondent Admiral Insurance Co.

John S. Favate
Michael J. Forino
Hardin, Kundla, McKeon & Ploetto
673 Morris Avenue
Springfield, NJ 07081
(973) 912-5222
Attorneys for Respondent United States Fire Ins. Co. (for policy no. 5401893627)

Patrick F. Hofer
Thomas S. Hay
Troutman Sanders LLP
401 Ninth Street, Suite 1000
Washington, DC 20004-2134
(202) 274-2950
Attorneys for Respondent Continental Casualty Company

Robert F. Walsh
Thomas M. Going,
Paul Briganti
Patricia B. Santelle
White and Williams LLP
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103-7395
(215) 864-7000
Attorneys for Respondent ACE Property & Casualty Insurance Company and United States Fire Insurance Company with respect to policy numbers GLA 284022 and 540-079751-7 and Century Insurance Company (k/k/a California Union Insurance Company and Insurance Company of North America)

R. Scott Wallinger, Jr.
James L. Floyd, III
Christian Stegmaier
Collins & Lacy, P.C.
P.O. Box 12487
Columbia, SC 29211
(803) 256-2660
Attorneys for Respondent United States Fire Insurance Company (for policy no. 5401893627)

Morgan S. Templeton
Wall Templeton & Haldrup, P.A.
P.O. Box 1200
145 King Street, Suite 300 (29401)
Charleston, SC 29402
(843) 329-9500
Attorney for Respondent Continental Casualty Co.

Robert H. Hood, Jr.
Hood Law Firm, LLC
P.O. Box 1508
Charleston, SC 29402
(843) 577-4435
Attorneys for Respondents ACE Property & Casualty Insurance Company and United States Fire Insurance Company with respect to policy numbers GLA 284022 and 540-079751-7 and Century Insurance Company (k/k/a California Union Insurance Company and Insurance Company of North America)

Richard McDermott
Seth M. Jaffe
Hinkhouse Williams Walsh, LLP
180 North Stetson Avenue, Suite 3400
Chicago, IL 60601
(312) 784-5400
Attorneys for Respondent Certain Underwriters at Lloyd's of London, Certain Aviva Companies, Certain Winterthur Companies, Berkshire Hathaway Specialty Insurance Company (f/k/a Stonewall Insurance Company), Starr Indemnity & Liability Company (f/k/a/ Republic Insurance Company), New London Reinsurance Company Limited and The Scottish Lion Insurance Company Limited (identified as among the Certain London Insurance Companies)

Molly Poag
Harry Lee
Steptoe & Johnson, LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
(202) 429-8091
Attorneys for Respondent Providence Washington Insurance Company (as Successor in Interest by way of Merger to Seaton Insurance Company, f/k/a Uniguard Security Insurance Company, f/k/a Uniguard Mutual Insurance Company)

Paul Parker
Wayne S. Karbal
Karbal Cohen Economou Silk & Dunne, LLC
150 S. Wacker Drive, Suite 1700
Chicago, IL 60606
(312) 431-3623
Attorneys for Respondent First State Insurance Company

Edward K. Pritchard, III
Elizabeth F. Fulton
Pritchard Law Group, LLC
P.O. Box 630
Charleston, SC 29402
(843) 722-3300
Attorneys for Respondent Certain Underwriters at Lloyd's of London, Certain Aviva Companies, Certain Winterthur Companies, Berkshire Hathaway Specialty Insurance Company (f/k/a Stonewall Insurance Company), Starr Indemnity & Liability Company (f/k/a/ Republic Insurance Company), New London Reinsurance Company Limited and The Scottish Lion Insurance Company Limited (identified as among the Certain London Insurance Companies)

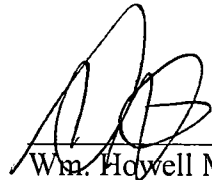
John C. Bonnie
Weinberg Wheeler Hudgins Gunn & Dial, LLC
3344 Peachtree Road NE, Suite 2400
Atlanta, GA 30326
(404) 876-2700
Attorney for Respondent Lexington Insurance Company

Elizabeth J. Palmer
Rosen, Rose & Hagood, LLC
151 Meeting Street, Suite 400
Charleston, SC 29401
(843) 577-6726
Attorneys for Respondent Providence Washington Insurance Company (as Successor in Interest by way of Merger to Seaton Insurance Company, f/k/a Uniguard Security Insurance Company, f/k/a Uniguard Mutual Insurance Company)

Helen Franzese
Foran Glennon (UK), LLP
11 Leadenhall Street
London, EC3V 1LP
+44 (0) 20 3530 7754
*Attorneys for Respondent Certain London
Market Insurance Companies*

R. Michael Ethridge
Carlock Copeland
40 Calhoun Street, Suite 400
Charleston, SC 29401
(843) 727-0307
*Attorneys for Respondent First State
Insurance Company*

John T. Lay
Laura W. Jordan
Gallivan, White & Boyd, P.A.
1201 Main Street, Suite 1200
Columbia, SC 29201
*Attorneys for Respondent Certain London
Market Insurance Companies*

 w/ permission
for Howell Morrison

Wm. Howell Morrison
Haynsworth Sinkler Boyd, P.A.
ONE North Main, 2nd Floor
Greenville, SC 29601
Phone: (843) 720-4405
Fax: (843) 722-2266
hmorrison@hsblaw.com

And

Michael H. Ginsberg
Matthew R. Divelbiss
Admitted *Pro Hac Vice*
JONES DAY
500 Grant Street, 45th Floor
Pittsburgh, PA 15219
Phone: (412) 391-3939
Fax: (412) 394-7959
E-mail: mhginsberg@jonesday.com
mrdivelbiss@jonesday.com

Attorneys for Petitioner PCS Nitrogen, Inc.