THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
MAR 12 2020
S.C. 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.

APPENDIX - VOLUME I

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

Michael H. Ginsberg *(pro hac vice)*
Matthew R. Divelbiss *(pro hac vice)*
Jones Day
500 Grant Street, 45th Floor
Pittsburgh, PA 15219
Telephone: (412) 391-3939
mhginsberg@jonesday.com
mrdivelbiss@jonesday.com

Attorneys for Petitioner PCS Nitrogen, Inc.

Counsel for the Respondents:

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)

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)

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.

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)

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)

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
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
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

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

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

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

INDEX TO APPENDIX

Court of Appeals Opinion No. 5699 (filed December 18, 2019).....1

Petition for Rehearing.....13

Order of Court of Appeals Denying Petition for Rehearing.....27

Brief of Appellant.....29

Brief of Respondents.....56

Reply Brief.....115

Record on Appeal.....142

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

PCS Nitrogen, Inc., Appellant,

v.

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

Appellate Case No. 2016-001140

Appeal From Charleston County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5699
Heard March 12, 2019 – Filed December 18, 2019

AFFIRMED

William Howell Morrison, of Haynsworth Sinkler Boyd, PA, of Charleston; and Michael H. Ginsberg and Matthew R. Divelbiss, both of Pittsburgh, PA; all for Appellant.

Morgan S. Templeton, of Wall Templeton & Haldrup, PA, of Charleston, and Patrick F. Hofer, of Washington, D.C., for Respondent Continental Casualty Company; Robert Holmes Hood, Jr., of Hood Law Firm, LLC, of Charleston, and Robert F. Walsh, Patricia B. Santelle, and Thomas M. Going, of Philadelphia, PA, for Respondents United States Fire Insurance Company, ACE Property & Casualty Insurance Company, Century Indemnity Company (f/k/a California Union Insurance Company and Insurance Company of North America); R. Scott Wallinger, Jr. and Christian Stegmaier, of Collins & Lacy, PC, of Columbia, and John S. Favate and Michael Forino, of Springfield, NJ, for Respondent United States Fire Insurance Company; John Robert Murphy, Adam J. Neil, and Wesley Brian Sawyer, of Murphy & Grantland, PA, of Columbia, for Respondent Admiral Insurance Company; John Thomas Lay, Jr. and Laura Watkins Jordan, of Gallivan, White & Boyd, PA, of Columbia, and Helen Franzese, of Greensboro, NC, for Respondent Certain London Market Insurance Companies; Robert Michael Ethridge, of Ethridge Law Group, LLC of Mount Pleasant, and Wayne S. Karbal and Paul Parker, of Chicago, IL, for Respondent First State Insurance Company; John C. Bonnie, of Weinberg Wheeler Hudgins Gunn & Dial, LLC, of Atlanta, GA, for Respondent Lexington Insurance Company; Edward K. Pritchard, III, of Pritchard Law Group LLC, of Charleston, and Richard McDermott and Seth M. Jaffe, of Chicago, IL, for Respondent Certain Underwriters at Lloyd's London, Respondent the Aviva Companies, Respondent the Winterthur Companies, Respondent Berkshire Hathaway Specialty Insurance Company (f/k/a Stonewall Insurance Company), Respondent Starr Indemnity & Liability Company (f/k/a Republic Insurance Company); Elizabeth Janelle Palmer, of Rosen

Rosen & Hagood, LLC, of Charleston, and Harry Lee and Molly Woodson Poag, of Washington, DC, for Respondent 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); and Elizabeth Fraysure Fulton, of Hall Booth Smith, PC, of Mount Pleasant, for Respondents Certain Underwriters at Lloyd's London, the Aviva Companies, the Winterthur Companies, Starr Indemnity & Liability Company (f/k/a Republic Insurance Company).

MCDONALD, J.: In this insurance coverage dispute, PCS Nitrogen, Inc., argues the circuit court erred in finding it was not entitled to coverage rights under Columbia Nitrogen Corporation's (Old CNC) insurance policies issued by Respondents.[1] Specifically, PCS Nitrogen asserts the circuit court erred in finding it was not entitled to coverage rights under either a post-loss assignment of the rights under Old CNC's policies or as the corporate successor of Old CNC via de facto merger. We affirm the circuit court's order granting Respondents' motions for summary judgment.

Facts and Procedural History

From 1966 until 1972, Old CNC operated phosphate fertilizer plants in Charleston (the Charleston Site). From 1966 to 1985, Old CNC purchased primary and excess liability insurance policies from Respondents. Old CNC was the named insured on the policies, which stated, "The company will pay *on behalf of the insured* all sums which the insured shall become legally obligated to pay as damages because of . . . property damage . . . to which this insurance applies, *caused by an*

---

[1] The coverage determination is necessary due to the Fourth Circuit's affirmance of the South Carolina District Court's allocation of responsibility to PCS Nitrogen for Old CNC's superfund liabilities under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675 (2013). *See PCS Nitrogen, Inc. v. Ashley II of Charleston, LLC*, 714 F.3d 161 (4th Cir. 2013).

occurrence . . . ."[2] (emphasis added). The policies further provided, "Assignment of interest under this policy *shall not bind* the company *until its consent is endorsed hereon.*" (emphasis added). Regarding actions against the insurer, the policies stated:

> 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.*
>
> Any person or organization or the legal representative thereof *who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy* to the extent of the insurance afforded by the policy.

(emphasis added).

In October 1986, Old CNC entered into a transaction with CNC Corp. (New CNC) in which it sold some of its assets to New CNC via an acquisition agreement; this transaction did not include the sale of the Charleston Site, which was sold to a third party in 1985. In addition to some of Old CNC's assets, New CNC assumed some of Old CNC's liabilities as detailed in the acquisition agreement, which stated New CNC assumed liabilities related to the "acquired business." The acquisition agreement defined the acquired business as "a business that produces and sells ammonia and nitrogen-based products." Additionally, the acquisition agreement included a document titled "Assignment of Insurance Benefits," which was signed by Old CNC. It stated,

> [B]y an Acquisition Agreement, dated as of October 31, 1986, entered into between [Old CNC] and [New CNC] . . . [Old CNC] has agreed to sell, convey, transfer,

---

[2] This language is from Continental Casualty's policy; however, the circuit court found all of Respondents' policies contained substantially similar language, and the parties do not dispute this finding.

> and assign . . . all of [Old CNC]'s rights, proceeds and other benefits to and under all of [Old CNC]'s insurance policies . . . .
>
> . . . .
>
> [Old CNC] by these presents does hereby transfer and assign to [New CNC], its successors and assigns forever, all of [Old CNC]'s rights, title and interest, legal and equitable, *in the benefits and proceeds* under all of its insurance policies *to the extent the same may be transferred and assigned* . . . .

(emphasis added).

Prior to the closing of the asset sale, Old CNC composed a checklist of tasks that needed to be completed before or on the date of closing. The checklist included a section titled "Documents to be exchanged at Closing." This section stated the parties were to exchange "[a]ssignment of insurance policies *with the consent of the insurance companies endorsed thereon*." (emphasis added).

By letter dated December 6, 1986, the parties summarized the disposition of Old CNC's insurance policies at the closing on November 1, 1986. The letter stated,

> [Old CNC] had insurance coverages as listed on the attached insurance policy schedule as of October 31, 1986. Most all of those policies were cancelled at closing . . . and pre-payments were refunded . . . . In these cases, new separate policies were issued to . . . [New CNC].

According to an attached schedule, New CNC obtained insurer consent and endorsement as to one liability policy[3] and cancelled the remaining policies.

Following the closing of the transaction, Old CNC filed a certificate of dissolution on November 19, 1986. Subsequently, New CNC changed its name to Columbia Nitrogen Corporation. On November 29, 1989, New CNC merged with Fertilizer

---

[3] This insurer is not a party to this appeal.

Industries, Inc., which changed its name to Arcadian Corporation on November 30, 1989. In March 1997, Arcadian Corporation merged with PCS Nitrogen.

On September 26, 2005, Ashley II of Charleston, LLC, then owner of the Charleston Site, filed a declaratory judgment action against PCS Nitrogen in federal court, alleging PCS Nitrogen was liable for environmental remediation at the Charleston Site because New CNC acquired Old CNC's CERCLA liabilities in the 1986 transaction.[4] The district court found PCS Nitrogen liable as a corporate successor to Old CNC under three theories, including a de facto merger theory. *PCS Nitrogen*, 714 F.3d at 172–73. PCS Nitrogen appealed, and the Fourth Circuit affirmed the district court but only as to one theory. *Id.* at 173–76. Specifically, the Fourth Circuit held PCS Nitrogen was liable as a corporate successor to Old CNC because New CNC contractually assumed Old CNC's liabilities via the 1986 transaction. *Id.* at 176.

On March 24, 2015, PCS Nitrogen filed an amended complaint in state court, seeking to enforce its coverage rights under Old CNC's liability insurance policies.[5] Specifically, PCS Nitrogen asserted it was entitled to enforce these rights because (1) Old CNC contractually assigned its insurance rights to benefits and proceeds under the policies to New CNC and (2) it was the corporate successor to Old CNC via de facto merger. Continental Casualty moved for summary judgment; the other carriers joined in this motion. Following a hearing, the circuit court granted summary judgment to Continental Casualty and the other moving insurers. The circuit court found none of the challenged policies were assigned to New CNC because Old CNC did not obtain consent from the insurers as required by the language of the policies and South Carolina law. The court held that because there were no vested claims from prior actions against Old CNC at the time of the assignment, PCS Nitrogen was not entitled to anything under the policies, explaining post-loss assignments were only enforceable if assigning a chose in action. The circuit court additionally found PCS Nitrogen was not entitled to Old CNC's insurance rights under a theory of de facto merger. The

---

[4] In the federal litigation, PCS Nitrogen denied any liability as a corporate successor to Old CNC. *PCS Nitrogen*, 714 F.3d at 171.

[5] PCS Nitrogen originally filed its complaint with the circuit court on January 18, 2011, after the district court held it was liable as Old CNC's corporate successor, but the circuit court stayed the action until PCS Nitrogen's appeal to the Fourth Circuit on the underlying allocation of CERCLA responsibility had concluded.

court explained the de facto merger theory was "legally untenable" because New CNC contractually assumed Old CNC's liabilities; therefore, it was an available party for any potential "creditors of the predecessor." PCS Nitrogen moved for reconsideration, which the circuit court denied.[6]

Standard of Review

"In reviewing a grant of summary judgment, our appellate court applies the same standard as the trial court under Rule 56(c), SCRCP." *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014).

> Summary judgment is proper if, viewing the evidence and inferences to be drawn therefrom in a light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

Id. "We review questions of law de novo." *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 198, 821 S.E.2d 667, 669 (2018). "Because the ambiguity of contracts and statutes are questions of law, we do not view the evidence in any particular light. Rather, we read the contract or statute to determine if its meaning is clear and unambiguous." *Id.*

Law and Analysis

Assignment of Insurance Policies

---

[6] Continental Casualty and certain other insurers simultaneously moved for summary judgment based on a "pollution exclusion" contained in the various policies. The circuit court issued a separate order on these motions, finding the question of the pollution exclusions moot in light of its grant of summary judgment on the carriers' assignment and corporate succession grounds. However, a South Carolina district court, affirmed by the Fourth Circuit, has already resolved the issue of the pollution exclusion adversely to PCS Nitrogen in a related matter. *See Ross Dev. Corp. v. PCS Nitrogen, Inc.*, 526 F. App'x 299 (4th Cir. 2013) (affirming district court's ruling that pollution exclusion applied to bar coverage for underlying CERCLA liability and potential liability in two related actions).

PCS Nitrogen argues the circuit court erred in granting Respondents' motions for summary judgment because New CNC received a valid assignment of Old CNC's insurance coverage rights through the 1986 transaction. Thus—PCS Nitrogen asserts—it is entitled to seek coverage under those policies. PCS Nitrogen claims it was not required to obtain insurer consent for the assignment of the benefits under the policies because these were post-loss assignments made after the environmental contamination of the Charleston Site occurred during the policy terms. PCS Nitrogen contends this argument is supported by the supreme court's reasoning in *Narruhn v. Alea London Limited*, 404 S.C. 337, 343–45, 745 S.E.2d 90, 93–94 (2013) (noting in dicta that "it is generally held that an assignment *after* a loss has already occurred does not require an insurer's consent.").

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Palmetto Mortuary Transp., Inc. v. Knight Sys., Inc.*, 424 S.C. 444, 460, 818 S.E.2d 724, 733 (2018) (quoting *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003)). "If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *Id.* (quoting *Schulmeyer*, 424 S.C. at 460, 818 S.E.2d at 733). "When a contract is unambiguous a court must construe its provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense." *Id.* (quoting *Schulmeyer*, 424 S.C. at 460, 818 S.E.2d at 733). Thus, "[t]his court is 'without authority to alter an unambiguous contract by construction or to make new contracts for the parties.'" *First S. Bank v. Rosenberg*, 418 S.C. 170, 180, 790 S.E.2d 919, 925 (Ct. App. 2016) (quoting *S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008)).

In determining whether the circuit court erred in granting summary judgment, we must look to the terms of the policies and the assignment agreement at issue. Under the policies, Old CNC was the named insured. The policies stated, "The company will pay *on behalf of the insured* all sums which the insured shall become legally obligated to pay as damages because of . . . property damage . . . to which this insurance applies, *caused by an occurrence* . . . ." (emphasis added). The policies further provided, "Assignment of interest under this policy *shall not bind* the company *until its consent is endorsed hereon.*" (emphasis added).

The policies additionally included a section titled "Actions Against Company," which stated:

> 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.*
>
> Any person or organization or the legal representative thereof *who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy* to the extent of the insurance afforded by the policy.

(emphasis added).

The portion of the acquisition agreement titled "Assignment of Insurance Benefits" stated:

> [B]y an Acquisition Agreement, dated as of October 31, 1986, entered into between [Old CNC] and [New CNC] . . . [Old CNC] has 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 . . . .
>
> . . . .
>
> [Old CNC] by these presents does hereby transfer and assign to [New CNC], its successors and assigns forever, all of [Old CNC]'s rights, title and interest, legal and equitable, *in the benefits and proceeds* under all of its insurance policies *to the extent the same may be transferred and assigned* . . . .

(emphasis added).

Although the policies included the aforementioned anti-assignment clause, the majority rule is that such clauses are generally only enforceable *before* a loss occurs. *See* 3 *Couch on Insurance* § 35:8 (3d ed. 2018) ("Although there is some

authority to the contrary, the great majority of courts adhere to the rule that general stipulations in policies prohibiting assignments of the policy, except with the consent of the insurer, apply only to assignments before loss, and do not prevent an assignment after loss, for the obvious reason that the clause by its own terms ordinarily prohibits merely the assignment of the policy, *as distinguished from a claim arising under the policy*, and the assignment before loss involves a transfer of a contractual relationship while the assignment after loss is the transfer of a right to a money claim." (emphasis added)); 17 *Williston on Contracts* § 49:126 (4th ed. 2018) ("As a general principle, a clause restricting assignment does not in any way limit the policyholder's power to make an assignment of the rights under the policy—*consisting of the right to receive the proceeds of the policy*—after a loss has occurred." (emphasis added)); *id.* ("After a loss occurs, the indemnity policy is no longer an executory contract of insurance. 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.").

Our supreme court has noted this principle in prior opinions. *See Narruhn*, 404 S.C. at 343–45, 745 S.E.2d at 93–94 ("Although we need not reach the issue here, it appears the referee did not believe Insurer's approval of the assignment of RKC's rights was required, and we note it is generally held that an assignment *after* a loss has already occurred does not require an insurer's consent."); *Ligon v. Metropolitan Life Ins., Co.*, 219 S.C. 143, 155, 64 S.E.2d 258, 264 (1951) ("It is well stated in 29 Am. Jur., Sec. 506, Page 410: 'General stipulations, in policies, prohibiting assignment thereof, except with the insurer's consent or upon giving some notice, or like conditions, have universally been held to apply only to assignments before loss, and, accordingly, not to prevent an assignment after loss or death, or the maturity of the policy, of the claim or interest in the insurance money then due.'").

Therefore, the pivotal inquiry in the case *sub judice* is at what point did the "loss," or as stated in the policy, the "occurrence," triggering coverage occur? *See Moore v. Weinberg*, 373 S.C. 209, 220, 644 S.E.2d 740, 745 (Ct. App. 2007) ("South Carolina jurisprudence has long recognized that a chose in action can be validly assigned in either law or equity."); *Singletary v. Aetna Cas. & Sur. Co.*, 316 S.C. 199, 201–02, 447 S.E.2d 869, 870 (Ct. App. 1994) ("An assignee of a chose in action can claim no higher rights than his assignor had at the time of the assignment."); *id.* at 202, 447 S.E.2d at 870 ("Under South Carolina law, a party is not entitled to receive insurance proceeds in excess of their interest in the property.").

Although the property damage insured against—environmental contamination—occurred during the covered policy terms, the plain language of the policies state that Old CNC was not entitled to coverage "*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." (emphasis added). Because no actions were filed against Old CNC prior to the asset sale with New CNC, the loss insured against—as defined in the terms of these particular policies—had not yet occurred, and thus, no vested claims existed. Therefore, we find no error in the circuit court's determination that the assignments to the benefits and proceeds were pre-loss assignments requiring insurer consent, which was not obtained. Accordingly, the assignment agreement was essentially ineffective, and if PCS Nitrogen wanted to ensure its rights to enforce potential claims under the policies, it should have obtained insurer consent as it did for the liability policy not at issue in this case. *See Schulmeyer*, 353 S.C. at 495, 579 S.E.2d at 134 ("The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language."); *id.* ("Parties to a contract have the right to construct their own contract without interference from courts to rewrite or torture the meaning of the policy to extend coverage."); *Travelers Cas. & Sur. Co. v. U.S. Filter Corp.*, 895 N.E.2d 1172 (Ind. 2008) (where injuries had occurred but not yet been reported at the time of the relevant transactions, they did not constitute transferable choses in action for purposes of coverage when considered in context of consent-to-assign clauses); *Del Monte Fresh Produce (Haw.) Inc. v. Fireman's Fund Ins. Co.*, 117 Haw. 357, 369–70, 183 P.3d 734, 746–47 (2007) (no duty to defend or indemnify in CERCLA fumigant contamination action where attempted assignment by contract was invalid due to failure to obtain insurer consent).

AFFIRMED.[7]

---

[7] PCS Nitrogen further contends the circuit court erred in the analysis of its argument that PCS is entitled to coverage under a "de facto merger" theory. *See Simmons v. Mark Lift Industries*, 366 S.C. 308, 622 S.E.2d 213 (2006) (setting forth the circumstances in which a plaintiff may maintain a product liability claim under a successor liability theory against a successor corporation which has purchased the predecessor's assets). We decline to address this argument because the cases PCS 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. *See Mead v. Beaufort Cty. Assessor*, 419 S.C. 125, 139, 796 S.E.2d 165, 172–73 (Ct. App.

LOCKEMY, C.J., and SHORT, J., concur.

2016) (noting the court may decline to address the merits of a question when appellant provides no legal authority regarding the particular argument).

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.

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Appellant PCS Nitrogen, Inc. ("PCS Nitrogen"), petitions the Court for rehearing of the opinion filed in this case on December 18, 2019. In its opinion, this Court affirmed the trial court's ruling regarding the applicability of the no-assignment clause in the Appellees' insurance policies to bar the assignment by Old Columbia Nitrogen to New

Columbia Nitrogen, PCS's predecessor, of its rights to coverage under insurance policies issued by the Appellees. PCS Nitrogen respectfully submits that Court overlooked or misapprehended the following points[1]:

I. "Loss" in a General Liability Insurance Occurs at the Time of Injury

The Court correctly recognized that the no-assignment clause in a general liability insurance policy does not preclude the post-loss assignment of rights under an insurance policy. *PCS Nitrogen, Inc. v. Cont'l Cas. Co.*, No. 2016-001140, 2019 WL 6884913, at *4 (S.C. Ct. App. Dec. 18, 2019) ("Although the policies included the aforementioned anti-assignment clause, the majority rule is that such clauses are generally only enforceable before a loss occurs."). The Court then addressed the issue: "at what point did the 'loss,' or as stated in the policy, the 'occurrence,' triggering coverage occur?" *Id.* at *5. The Court held that "loss" under the policies could not occur until the insured was subject to a final judgment:

> Because no actions were filed against Old CNC prior to the asset sale with New CNC, the loss insured against—as defined in the terms of these particular policies—had not yet occurred, and thus no vested claims existed.

Id.

In reaching its holding, the Court misapprehended South Carolina precedent, ignored the overwhelming majority of jurisdictions' holdings, and misconstrued the insurance policies at issue here.

---

[1] PCS Nitrogen incorporates its Appellant's Brief and Reply Brief by reference herein. PCS Nitrogen believes each of its arguments should have been addressed and analyzed by this Court.

A. The Court misapprehended the reasoning of the Supreme Court in *Narruhn*.

The Court's holding misapprehended the Supreme Court's reasoning in *Narruhn v. Alea London Ltd.*, 745 S.E.2d 90, 94 (S.C. 2013). *Narruhn*'s discussion of anti-assignment clauses—and whether such clauses prohibit post-loss assignments—was focused on risk to the insurer. Risk is determined by the events giving rise to the insurer's liability—not the amount of a future verdict or judgment. The Supreme Court adopted this rationale by relying on the following explanation from *Couch on Insurance*:

> [T]he great majority of courts adhere to the rule that general stipulations in policies prohibiting the assignments of the policy, except with the consent of the insurer, apply only to assignments before loss, and do not prevent an assignment after loss, for the obvious reason that the clause by its own terms ordinarily prohibits merely the assignment of the policy, as distinguished from a claim arising under the policy, and the assignment before loss involves a transfer of a contractual relationship while the assignment after loss is the transfer of a right to a money claim. 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."**

Narruhn v. Alea London Ltd., 745 S.E.2d 90, 94 (S.C. 2013) (quoting 3 *Couch on Insurance* 3d S 35.8 (2011 Rev. Ed)) (emphasis added).

By quoting the above section of *Couch* and the cases cited therein, the Supreme Court recognized that "loss" equates to the "events giving rise to the insurer's liability," not, as the Court found here, a final judgment or agreement establishing the insured's liability. The rule in *Narruhn* makes sense: Once the events giving rise to liability have occurred, the risk facing the insurer is the same regardless of whether or not the policy rights were assigned to another party.

The *Narruhn* court also relied on *Illinois Tool Works, Inc. v. Commerce & Indus. Ins. Co.*, 962 N.E.2d 1042 (Ill. App. Ct. 2011). The court in *Illinois Tool Works* adopted the same rationale about risk articulated in *Couch*: "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." *Id.* at 1054. Based on that reasoning, the court in *Illinois Tool Works* held that the "loss" was not a final judgment or the filing of a lawsuit; rather, "loss" was the event giving rise to coverage:

> [W]e find 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 Supreme Court's guidance in *Narruhn* shows that "loss" happens when events give rise to the insurer's liability. The Court ignored *Narruhn*'s guidance on post-loss assignments. Under the reasoning of *Narruhn*, the assignment of coverage rights here was valid because the events giving rise to coverage had occurred before the assignment and the risk to the insurers was fixed.

B. The Court ignored the overwhelming majority of cases addressing the post-loss assignment of insurance rights.

Narruhn is not alone. 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, and both courts repudiated the argument that a final dollar amount must be fixed to be assignable.

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. 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:

> We begin by noting that the policies at issue are occurrence policies. They provide coverage based upon liability for an occurrence to which the policy applies. . . . As such, 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 *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.").

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. *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 ("[W]e find 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."); *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.").

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."); *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."); *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.").

For courts adhering to the majority rule[2]—that post-loss assignment can be made in spite of anti-assignment clauses—only one jurisdiction has interpreted "loss" in a similar manner to the Court here. The one outlier is the Indiana Supreme Court. *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"). This Court relied on *Travelers* in reaching its decision, but courts across the country have rejected the reasoning and holding of *Travelers*. It has not been adopted by any out-of-state courts since it was decided. *See Givaudan*, 151 A.3d at 590 ("[I]n the years since *Traveler's Casualty* was 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.").[3]

The Court's reliance on *Traveler's* was misplaced, as was its failure to acknowledge the vast majority of cases that equate "loss" with the event giving rise to coverage.

---

[2] 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). The South Carolina Supreme Court—and this Court's own decision here—have opted for the majority rule that permits post-loss assignment of insurance coverage benefits. *PCS Nitrogen, Inc.*, 2019 WL 6884913, at *4.

[3] This Court also inappropriately relied on *Del Monte Fresh Produce (Hawaii), Inc. v. Fireman's Fund Ins. Co.*, 183 P.3d 734, 746–47 (Haw. 2007), a case from the minority of jurisdictions that rigidly enforce consent-to-assignment clauses and prohibit even post-loss assignments without insurer consent. This Court's opinion—relying on *Narruhn*— rejected the minority view and stated that "the majority rule is that [anti-assignment] clauses are generally only enforceable before a loss occurs." *PCS Nitrogen, Inc.*, 2019 WL 6884913, at *4. Given this rejection of the minority view, it is unclear what value *Del Monte* can have to the Court's conclusion.

C. The Court misconstrued the policies at issue.

The Court misinterpreted the policies' no-action clause. Under the policies, the no-action clause does not require the insurer to pay third-party claimants until there has been a final judgment against the insured:

> 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.*

Id. at *4. This Court misconstrued that clause to mean that a "loss" equates to a final judgment: "Old CNC was not entitled to coverage '*until the amount of the insured's obligation to pay shall have been finally determined by judgment against the insured....*'" *Id.* at *5. The Court's interpretation is wrong for three reasons.

First, the Court's seeming truism is incorrect as a matter of insurance law: the insured is entitled to coverage, such as for defense costs, 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....").

Second, the provision is not relevant to the issue of when "loss" occurs under the policies. 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 § 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.

The South Carolina Supreme Court has explained 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 relate to when "loss" occurs.

Third, the Court's interpretation conflates the timing of payments—when an insurer is obligated to pay for loss—with when "loss" occurs. Other courts have rejected similar attempts by insurers to link timing of final judgment with the date of loss. *Givaudan*, 151 A.3d at 582 (rejecting insurers' argument that "a post-loss claim becomes assignable only when there has been a judgment against the insurer ...."); *In re Viking Pump, Inc.*, 148 A.3d at 652 (Del. 2016) ("We do not find persuasive the Excess Insurers' argument that the anti-assignment provisions bar the transfers because 'the asbestos personal-injury claims for which Viking and Warren now seek coverage were in no sense "fixed" or "measurable" at the time of the purported assignments because they had yet to be asserted.'"); *Arrowood Indem. Co. v. Atl. Mut. Ins. Co.*, 96 A.D.3d 693, 695 (N.Y. App. Div. 2012) ("Travelers' contention—that since the plaintiffs in the

underlying action did not sue until after the sale, no 'chose in action' existed at the time that could have been assigned by St. Louis to Kerry—is unavailing.").

Courts hold that "loss" occurs at the time of injury regardless of when payment may be due. *See, e.g., One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749 (Dist. Ct. App. 2015). In *One Call*, the insurer relied on a policy provision that "[l]oss will be paid" after "entry of a final judgment" to argue that "at the time the assignment was executed, the insured had nothing to assign because at that time there were no benefits due and owing to the insured under the policy." *Id.* at 753–54. The court held that the "provision falls far short of creating a contractual bar to assignment" because the provision "merely addresses the timing of the payment." *Id.* at 754. The court therefore held "that an assignable right to benefits accrues on the date of the loss, even though payment is not yet due under the loss payment clause." *Id.* The no-action clause here was not a bar to assigning coverage rights *after* the events giving rise to coverage.

II. The Court Misunderstood the Factual Evidence Regarding the Assignment of Certain Policies with Consent of the Insurer and Improperly Made Factual Findings

Narruhn, the other courts across the country, and the commentators have all recognized that the transfer of a currently in-force insurance policy cannot be effective without the insurer's consent. *See Narruhn*, 745 S.E.2d at 94. To allow such an assignment would change the risk for which the insurer had contracted. *Givaudan*, 151 A.3d at 583 ("[A]nti-assignment clauses aim to prevent the insurer from bearing an unanticipated risk...."). The record evidence here demonstrates that Old CNC sought the consent to assignment from an insurer whose policy was in effect at the time of the asset transfer. Yet the Court appears to rely on the request for consent and a closing checklist as evidence that New CNC believed it needed insurer consent to assign rights under policies that had expired before the date of the asset transfer. *PCS Nitrogen*, 2019

WL 6884913, at *2 ("Prior to the closing of the asset sale, Old CNC composed a checklist of tasks that needed to be completed before or on the date of closing."). The Court misapprehended the evidence about which there is no record testimony. The Court's mention of and possible consideration of that evidence is improper.

III. If PCS Is the Successor to Old CNC by De Facto Merger, the Policies Would Transfer by Operation of Law

At the trial court, PCS Nitrogen argued that the issue of de facto merger raised issues of fact which precluded summary judgment. Nevertheless, the trial court granted summary judgment on the basis of its determination that PCS Nitrogen was not the de facto successor to Old CNC, despite that fact that the United States District Court had previously held that PCS Nitrogen *was* the de facto successor to Old CNC.[4] PCS Nitrogen argued that questions of fact precluded summary judgment. As discussed in PCS Nitrogen's principal brief, the fact that PCS Nitrogen assumed liabilities *supports* the finding of de facto merger. Appellant's Final Br. at 20. The trial court held the opposite and, in so doing, misstated the holdings of the cases it cited. *Id.*

In footnote 7 of this Court's opinion, the Court stated that it is declining to address the argument that PCS Nitrogen succeeded to Old CNC's insurance rights as the de facto successor to Old CNC. The Court asserted 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." *PCS Nitrogen*, 2019 WL 6884913, at *5 n.7. The Court's statement misunderstands the argument. The issue of the transfer of insurance coverage is not complicated. If PCS Nitrogen is the successor to Old CNC, then all the rights and obligations of Old CNC would transfer to PCS

[4] The de facto merger issue was not decided by the Fourth Circuit.

Nitrogen, 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."). Since this is a basic principle of corporate law, PCS Nitrogen did not believe it necessary to identify cases specifically applying the principle to the insurance context. But such cases do exist. *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).

IV. The Decisions of the District Court and the Fourth Circuit Did Not Involve Old CNC's or PCS's Operations, Conduct, or Policies

In footnote 6, the Court 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 Nitrogen. *PCS Nitrogen*, 2019 WL 6884913, at *2 (citing *Ross Dev. Corp. v. PCS Nitrogen, Inc.* 526 App'x 299 (4th Cir. 2013). That case involved PCS' claims against the prior owner of the Charleston property, not Old CNC's operations at the facility. And the decision regarding insurance coverage and the pollution exclusion related to the policies pursuant to which Ross was seeking coverage—not the Old CNC policies. To the extent footnote 6 can be read as a determination on the pollution exclusion with respect to the Old CNC policies, the Court must reconsider because those policies and Old CNC's conduct was not at issue in the *Ross* litigation.

CONCLUSION

For these reasons and those contained in its briefs, PCS Nitrogen urges the Court to grant rehearing in this matter, reverse the circuit court's order on Respondent's motion for summary judgment, and remand this matter to the circuit court.

Dated: January 2, 2020

Respectfully submitted,

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 APPELLANT, PCS NITROGEN, INC.

The South Carolina Court of Appeals

PCS Nitrogen, Inc., Appellant,

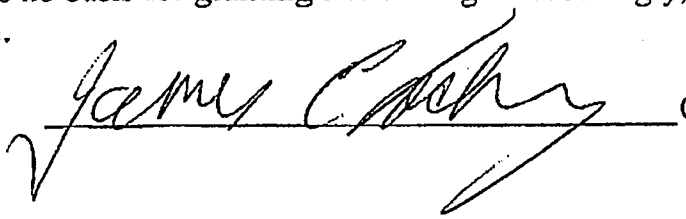
v.

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

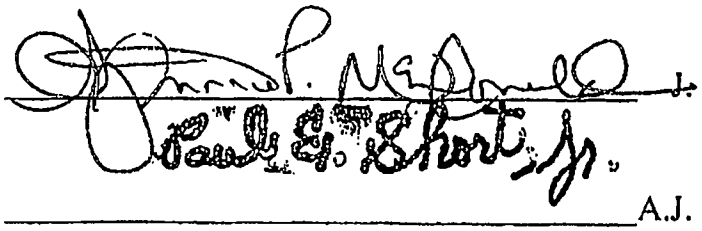
Appellate Case No. 2016-001140

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.



A.J.

Columbia, South Carolina

FILED

February 13, 2020

cc:
William Howell Morrison, Esquire
John Robert Murphy, Esquire
Adam J. Neil, Esquire
R. Scott Wallinger, Jr., Esquire
Morgan S. Templeton, Esquire
Robert Holmes Hood, Jr., Esquire
Edward K. Pritchard, III, Esquire
John C. Bonnie, Esquire
Elizabeth Janelle Palmer, Esquire
Michael H. Ginsberg, Esquire
Matthew R. Divelbiss, Esquire
John S. Favate, Esquire
Patricia B. Santelle, Esquire
Robert F. Walsh, Esquire
Thomas M. Going, Esquire
Patrick F. Hofer, Esquire
Harry Lee, Esquire
Wayne S. Karbal, Esquire
Paul Parker, Esquire
Michael Forino, Esquire
Elizabeth Fraysure Fulton, Esquire
Richard McDermott, Esquire
Seth M. Jaffe, Esquire
Robert Michael Ethridge, Esquire
Helen Franzese, Esquire
Mary Woodson Poag, Esquire
Christian Stegmaier, Esquire
Laura Watkins Jordan, Esquire
John Thomas Lay, Jr., Esquire
Wesley Brian Sawyer, Esquire

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.

APPELLANT'S FINAL BRIEF

Wm. Howell Morrison (S.C. Bar No. 4016)
Haynsworth Sinkler Boyd, P.A.
134 Meeting Street, 3rd Floor
Charleston, SC 29401
Phone: (843) 720-4405
hmorrison@hsblawfirm.com

Michael H. Ginsberg
Matthew R. Divelbiss
Admitted *Pro Hac Vice*
Jones Day
500 Grant Street, 45th Floor
Pittsburgh, PA 15219
Phone: (412) 391-3939
mhginsberg@jonesday.com
mrdivelbiss@jonesday.com

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 1

I. Underlying Environmental Matter. 1

II. PCS Seeks Insurance Coverage From Respondents. 3

ARGUMENTs 4

I. The Standard Of Review Is De Novo. 5

II. Old CNC's Coverage Rights Validly Transferred Via A Post-Loss Assignment. 5

A. Old CNC Unambiguously Transferred Its Coverage Rights. 7

B. Anti-Assignment Clauses Do Not Apply To Post-Loss Assignments. 9

C. The Relevant Loss Is The Happening Of The Event Giving Rise To Liability. 11

D. The Duty To Defend Is Freely Assignable. 15

E. Public Policy Favors PCS's Interpretation Of Post-Loss Assignments. 16

1. Forfeiture Of Insurance Is Against Public Policy. 17

2. Voiding Coverage Impairs Efforts To Remediate The Environment 18

3. Voiding Coverage Is An Improper Restraint On Trade. 19

III. Granting Summary Judgment On The De Facto Merger Issue Was Unwarranted. 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Antal's Restaurant v. Lumbermen's Mut. Cas. Co.,
680 A.2d 1386 (D.C. 1996) 15

Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.,
2007 U.S. Dist. LEXIS 73417 (D.S.C. Sept. 28, 2007) 20

Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.,
791 F. Supp. 2d 431 (D.S.C. 2011) 3

Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.,
Case No. 2:05-cv-02782 (D.S.C.) 1, 2, 3, 20

B.L.G. Enters., Inc. v. First Financial Ins. Co.,
514 S.E.2d 327 (1999) 5, 6

B.S.B. Diversified Co. v. Am. Motorists Ins. Co.,
947 F. Supp. 1476 (W.D. Wash. 1996) 15

Beard v. S.C. Coastal Council,
403 S.E.2d 620 (S.C. 1991) 17

Bennett & Bennett Constr., Inc. v. Auto Owners Ins. Co.,
747 S.E.2d 426 (S.C. 2013) 5

Brown v. Am. Ry. Exp. Co.,
123 S.E. 97 (S.C. 1924) 20

Cent. Tablet Mfg. Co. v. United States,
417 U.S. 673 (1974) 13

Citicorp Indus. Credit, Inc. v. Fed. Ins. Co.,
672 F. Supp. 1105 (N.D. Ill. 1987) 15

Conrad Bros. v. John Deere Ins. Co.,
640 N.W.2d 231 (Iowa 2001) 14

Continental Ins. v. Northeastern Pharm.,
842 F.2d 977 (8th Cir. 1988) 18

Egger v. Gulf Ins. Co.,
588 Pa. 287 (Pa. 2006) 14

Elliott Co. v. Liberty Mut. Ins. Co.,
434 F. Supp. 2d 483 (N.D. Ohio 2006) 14, 17

Elliott v. Snyder,
143 S.E.2d 374 (S.C. 1965) 17

Fluor Corp. v. Superior Court,
354 P.3d 302 (Cal. 2015) 13, 14, 15, 16

Ford Motor Co. v. Ins. Co. of N. Am.,
35 Cal. App. 4th 604 (Cal. App. 2d Dist. 1995) 18

Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co.,
442 N.J. Super. 28 (App. Div. 2015) 14, 16

Gopher Oil Co. v. Am. Hardware Mut. Ins. Co.,
588 N.W.2d 756 (Minn. Ct. App. 1999) 14, 16, 17

Henkel Corp. v. Hartford Accident & Indemnity Co.,
62 P.3d 69 (Cal. 2003) 13, 14, 19

Huggins v. Commercial & Sav. Bank,
140 S.E. 177 (S.C. 1927) 20

Ill. Tool Works v. Commerce & Indus. Ins. Co.,
962 N.E.2d 1042 (Ill. App. Ct. 2011) 8, 12, 14, 16

In re Ambassador Ins. Co.,
965 A.2d 486 (Vt. 2008) 14

Javorek v. Superior Court,
17 Cal. 3d 629 (1976) 15

Ken Moorhead Oil Co. v. Federated Mut. Ins. Co.,
476 S.E.2d 481 (S.C. 1996) 17, 18

Lee v. Univ. of S.C.,
757 S.E.2d 394 (S.C. 2014) 5

Leksi, Inc. v. Fed. Ins. Co.,
736 F. Supp. 1331 (D.N.J. 1990) 18

Ligon v. Metro. Life Ins. Co.,
64 S.E.2d 258 (S.C. 1951) 6, 9

Mapco Alaska Petroleum v. Central Nat. Ins. Co.,
795 F. Supp. 941 (D. Alaska 1991) 18

Moore v. Weinberg,
644 S.E.2d 740 (S.C. Ct. App. 2007) 8

Narruhn v. Alea London Ltd.,
745 S.E.2d 90 (S.C. 2013) ..... passim

Nat'l Fire Ins. Co. of Hartford v. Brown & Martin Co., Inc.,
726 F. Supp. 1036 (D.S.C. 1989) 17

Ocean Acc. v. Sw Bell,
100 F.2d 441 (8th Cir. 1939) 15, 16

Olah v. Baird,
567 F.3d 1207 (10th Cir. 2009) 14

Osprey, Inc. v. Cabana Ltd. Pshp.,
532 S.E.2d 269 (S.C. 2000) 9

PCS Nitrogen Inc. v. Ashley II of Charleston LLC,
714 F.3d 161 (4th Cir. 2013) 2, 3

Peck v. Public Serv. Mut. Ins. Co.,
114 F. Supp. 2d 51 (D. Conn. 2000) 14

Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.,
112 Ohio St. 3d 482 (Ohio 2006) 14

R.C. McEntire & Co. v. E. Foods, Inc.,
702 F.2d 471 (4th Cir. 1983) 20

S.C. Tax Com. v. Met. Life Ins. Co.,
221 S.E.2d 522 (S.C. 1975) 17

Southeast Toyota Distribs., LLC v. Jim Hudson Superstore, Inc.,
693 S.E.2d 33 (S.C. Ct. App. 2010) 5

Stevens Aviation, Inc. v. DynCorp Int'l LLC,
756 S.E.2d 148 (S.C. 2014) 7

Stoneledge at Lake Keowee Owners' Ass'n v. Clear View Constr.,
776 S.E.2d 426 (S.C. Ct. App. 2015) 5

Travelers Cas. & Sur. Co. v. United States Filter Corp.,
895 N.E.2d 1172 (Ind. 2008) 13

United States v. Davis Mem'l Hosp.,
956 F.2d 1163 (4th Cir. 1992) 20

United States v. Ellen,
961 F.2d 462 (4th Cir. 1992) 18

Viking Pump, Inc. v. Century Indem. Co.,
2 A.3d 76 (Del. Ch. 2009) 19

STATUTES

42 U.S.C. § 9607(a)(4)(B) 2, 3, 16

OTHER AUTHORITIES

4 A. Corbin, Corbin on Contracts § 874 (1951) 8

17 Williston on Contracts § 49:126 (4th ed. 2000) 9

1 Stempel on Insurance Contracts, § 3.15 (2010) 19

3 Couch on Ins. § 34:25 (West 2015) 9

3 Couch on Ins. § 35:8 (2011 Rev. Ed.) 10, 11

Restatement (Second) of Contracts § 320 8

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

Respectfully submitted,

Wm. Howell Morrison
Haynsworth Sinkler Boyd, P.A.
134 Meeting Street, 3rd Floor
Charleston, SC 29401
Phone: (843) 720-4405
Fax: (843) 722-2266
hmorrison@hsblawfirm.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
mhginsberg@jonesday.com
mrdivelbiss@jonesday.com

ATTORNEYS FOR APPELLANT
PCS NITROGEN, INC.

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

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

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

v.

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

JOINT FINAL BRIEF OF RESPONDENTS

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

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

Attorneys for Respondent Continental Casualty Company

(Additional Respondents' Counsel on following pages)

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

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

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

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

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

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

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

Attorneys for Admiral Insurance Company

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

Attorneys for Certain London Market Insurance Companies

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

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

Attorneys for First State Insurance Company

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

Attorneys for Lexington Insurance Company

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

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

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

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

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

Attorneys for Providence Washington Insurance Company, (as Successor in Interest by way of Merger to Seaton Insurance Company, f/k/a Unigard Security Insurance, f/k/a Unigard Mutual Insurance Company)

TABLE OF CONTENTS

I. STATEMENT OF THE ISSUES ON APPEAL 1

II. STATEMENT OF THE CASE 1

A. The Insurance Policies 2

B. The Corporate History of Columbia Nitrogen Corporation (Old CNC) 3

C. PCS's Acquisition of Certain Assets of Old CNC 3

D. PCS's Contentions in the Underlying Litigation 4

E. The Federal Courts' Rulings Regarding PCS's Liability 5

F. The Insurance Coverage Case and Contentions of the Parties Below 7

G. Trial Court's Summary Judgment Order 9

III. ARGUMENT 9

A. Standard of Review 12

B. The Undisputed Facts Show that Old CNC Did Not Assign the Policies 13

C. Even if Old CNC Attempted to Assign All Rights Under its Policies, Any Such Assignment Was Ineffective Absent the Consent of the Insurers 16

1. Insurance Contracts Are Personal to the Insured and Cannot Be Assigned Without Insurer Consent 16

2. The Limited Exception Permitting Assignment of the Right to Insurance Proceeds as a Chose in Action Does Not Apply Here 18

a) South Carolina Draws a Sharp Distinction Between Assignment of a Policy and Assignment of a Claim 18

b) An Insured Must Have a Chose in Action to Assign a Chose in Action 21

c) In the Context of Liability Insurance, a Chose in Action Accrues Only After a Tort Claimant Obtains a Judgment of Liability Against the Insured for Covered Damages, or After There Has Been a Settlement Among the Claimant, the Insured and the Insurer 22

d) PCS Does Not Allege Assignment of a Chose in Action, But Assignment of All Policy Rights in Violation of South Carolina Law 26

3. PCS's "Overwhelming Consensus" of Out of State Authority Is Imaginary 30

4. The Duty to Defend May Never Be Assigned 39

5. PCS Seeks to Force a Novation, Which South Carolina Law Forbids 40

6. PCS's Appeal to Public Policy Has No Merit 42

D. The Trial Court Correctly Concluded No *De Facto* Merger Occurred 45

IV. CONCLUSION 48

TABLE OF AUTHORITIES

Cases

Adams v. B&D, Inc., 297 S.C. 416, 377 S.E.2d 315 (1989) 41

Antal's Restaurant, Inc. v. Lumbermen's Mut. Cas. Co., 680 A.2d 1386 (D.C. 1996) 33

Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 409 S.C. 487, 763 S.E.2d 19 (2014) 30

B.S.B. Diversified Co. v. American Motorists Ins. Co., 947 F. Supp. 1476 (W.D. Wash. 1996) 37

Bravis v. Dunbar, 316 S.C. 263, 449 S.E.2d 495 (Ct. App. 1994) 12

Brown v. American Ry. Exp. Co., 128 S.C. 428, 123 S.E. 97 (1924) 46, 47

Buist v. Buist, 410 S.C. 569, 766 S.E.2d 381 (2014) 42

Certain Underwriters at Lloyd's, London v. Superior Court (Powerine I), 24 Cal. 4th 945, 16 P.3d 94 (2001) 37

Citicorp Indus. Credit, Inc. v. Federal Ins. Co., 672 F. Supp. 1105 (N.D. Ill. 1987) 32

Closuit v. Mitby, 238 Minn. 274, 56 N.W.2d 428 (1953) 35

Conqueror Zinc & Lead Co. v. Aetna Life Ins. Co., 133 S.W. 156 (Mo. App. 1911) 35

Conrad Bros. v. John Deere Ins. Co., 640 N.W.2d 231 (Iowa 2001) 33

Crossmann Communities, Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 717 S.E.2d 589 (2011) 28

Crum v. Sawyer, 132 Ill. 443, 24 N.E. 956 (1890) 34

Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433 (2003) 12

Del Monte Fresh Produce (Haw.) Inc. v. Fireman's Fund Ins. Co., 117 Haw. 357, 183 P.3d 734 (2007) 31

Egger v. Gulf Ins. Co., 588 Pa. 287, 903 A.2d 1219 (2006) 33, 38

EM Indus., Inc. v. Birmingham Fire Ins. Co., 141 A.D.2d 494, 529 N.Y.S.2d 121 (1988), *appeal denied*, 73 N.Y.2d 704, 534 N.E.2d 330 (1989) 32

Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., L.L.C., 409 S.C. 331, 762 S.E.2d 561 (2014) 12

Flint Frozen Foods, Inc. v. Firemen's Ins. Co., 8 N.J. 606, 86 A.2d 673 (1952) 34

Fluor Corp. v. Superior Court, 61 Cal. 4th 1175, 354 P.3d 302 (2015) 36, 37

Ford, Bacon & Davis LLC v. Travelers Ins. Co., 635 F.3d 734 (5th Cir. 2011).....31

Ginsburg v. Bull Dog Auto Fire Ins. Ass'n, 328 Ill. 571, 160 N.E. 145 (1928) 32, 34

Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co., 442 N.J. Super. 28, 120 A.3d 959 (App. Div. 2015), *cert. granted*, 223 N.J. 404, 125 A.3d 392 (2015) 34

Gopher Oil Co. v. American Hardware Mut. Ins. Co., 588 N.W.2d 756 (Minn. Ct. App. 1999) 35

Green v. Camlin, 229 S.C. 129, 92 S.E.2d 125 (1956).....16, 20

Greenwood Cotton Mills v. Pace, 172 S.C. 531, 174 S.E. 473 (1934).....40, 41

Gwaltney v. Russell, 984 So. 2d 1125 (Ala. 2007) 13

Hack v. Metz, 173 S.C 413, 176 S.E. 314 (1934) 18

Hart v. Cote, 145 N.J. Super. 420, 367 A.2d 1219 (Law Div. 1976) 39

Henkel Corp. v. Hartford Acc. and Indem. Co., 29 Cal. 4th 934, 62 P.3d 69 (2003).....36, 37

Holloway v. Republic Indem. Co., 341 Ore. 642, 147 P.3d 329 (2006) 31

Huggins v. Commercial & Savings Bank, 141 S.C. 480, 140 S.E. 177 (1927) 47

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) 42

Illinois Tool Works, Inc. v. Commerce & Indus. Ins. Co., 962 N.E.2d 1042 (Ill. App. 2011) 34

Javorek v. Superior Court (Larson), 17 Cal. 3d 629, 552 P.2d 728 (1976) 38, 39, 40

Joe Harden Builders, Inc. v. Aetna Cas. & Sur. Co., 326 S.C. 231, 486 S.E.2d 89 (1997).....28

Keller Foundations, Inc. v. Wausau Underwriters Ins. Co., 626 F.3d 871 (5th Cir. 2010).....31

Kintzel v. Wheatland Mut. Ins. Ass'n, 203 N.W.2d 799 (Iowa 1973) 33

Ligon v. Metropolitan Life Ins. Co., 219 S.C. 143, 64 S.E.2d 258 (1951) 18, 21

Moore v. Weinberg, 373 S.C. 209, 644 S.E.2d 740 (Ct. App. 2007) 30, 40, 41

Musman v. Modern Deb, Inc., 56 A.D.2d 752, 392 N.Y.S.2d 24 (1977) 13

Nakonieczny v. Commonwealth Cas. Co., 111 N.J.L. 137, 167 A. 213 (Sup. Ct. 1933).....36

Narruhn v. Alea London Ltd., 404 S.C. 337, 745 S.E.2d 90 (2013).....19, 20, 23, 27

Northern Ins. Co. v. Allied Mut. Ins. Co., 955 F.2d 1353 (9th Cir. 1992) 37

Ocean Accident & Guar. Co. v. Southwestern Bell Tel. Co., 100 F.2d 441 (8th Cir. 1939) 35

Park v. Safeco Ins. Co., 251 S.C. 410, 162 S.E.2d 709 (1968) 23, 25, 28, 38

PCS Nitrogen, Inc. v. Ashley II of Charleston LLC, 714 F.3d 161 (4th Cir. 2013) 6

Peck v. Public Serv. Mut. Ins. Co., 114 F. Supp. 2d 51 (D. Conn. 2000) 33

Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co., 112 Ohio St. 3d 482, 861 N.E.2d 121 (2006) 38

Poynter Investments, Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 694 S.E.2d 15 (2010) 43

Proctor v. Whitlark & Whitlark, Inc., 415 S.C. 318, 778 S.E.2d 888 (2015) 41

Red Arrow Prods. Co. v. Employers Ins. of Wausau, 607 N.W.2d 294 (Wis. App. 2000), *review denied*, 612 N.W.2d 733 (Wis. 2000) 32

Robinson v. Shearer & Sons, Inc., 429 F.2d 83 (3d Cir. 1970) 39

Ross Devp. Corp. v. PCS Nitrogen, Inc., 526 F. App'x 299 (4th Cir. 2013) 7, 44

Ross v. American Empl. Liab. Ins. Co., 56 N.J. Eq. 41, 38 A. 22 (Ct. Ch. 1897) 36

Rush v. Savchuk, 444 U.S. 320 (1980) 40

Schott v. Continental Auto. Ins. Underwriters, 31 S.W.2d 7 (Mo. 1930) 35

Schulmeyer v. State Farm Fire and Cas. Co., 353 S.C. 491, 579 S.E.2d 132 (2003) 12, 13, 42

Segars v. Segars, 279 S.C. 564, 310 S.E.2d 156 (Ct. App. 1983) 41

Silverman v. Dew, 182 S.C. 457, 189 S.E. 756 (1937) 17, 20

Simmons v. Mark Lift Indus., Inc. 366 S.C. 308, 622 S.E.2d 213 (2005) 47

Singletary v. Aetna Cas. & Sur. Co., 316 S.C. 199, 447 S.E.2d 869 (1994) 22

Skipper v. ACE Prop. & Cas. Ins. Co., 413 S.C. 33, 775 S.E.2d 37 (2015) 16

Stephens v. CSX Transp. Inc., 415 S.C. 182, 781 S.E.2d 534 (2015) 41

Time Fin. Corp. v. Johnson Trucking Co., 23 Utah 2d 115, 458 P.2d 873 (1969) 32

Travelers Cas. & Sur. Co. v. U.S. Filter Corp., 895 N.E.2d 1172 (Ind. 2008) 31

Viddish v. Hartford Acc. and Indem. Co., 41 N.J. Super. 221, 124 A.2d 607 (App. Div. 1956) 36

Wachovia Bank, N.A. v. Coffey, 404 S.C. 421, 746 S.E.2d 35 (2013) 47

Water Applications & Sys. Corp. v. Bituminous Cas. Corp., 986 N.E.2d 124 (Ill. App. 2013) 32

Wehrhahn v. Fort Dearborn Cas. Underwriters, 1 S.W.2d 242 (Mo. App. 1928) 35

Other Authorities

17A Am. Jur. 2d Contracts § 383 13

2 Allan D. Windt, *Insurance Claims & Disputes* § 6:6 (6th ed. 2013) 23

29 Richard A. Lord, Williston on Contracts 17, 18, 41

Black's Law Dictionary (5th ed. 1979) 18

Jeffrey W. Stempel, "Assessing the Coverage Carnage: Asbestos Liability and Insurance after Three Decades of Dispute," 12 Conn. Ins. L.J. 349 (2006) 44

Rules

South Carolina Appellate Court Rules, Rule 220(c) 45

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

I. STATEMENT OF THE ISSUES ON APPEAL

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

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

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

II. STATEMENT OF THE CASE

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

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

A. The Insurance Policies

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

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

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

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

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

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

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

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

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

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

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

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

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

D. PCS's Contentions in the Underlying Litigation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

G. Trial Court's Summary Judgment Order

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

III. ARGUMENT

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

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

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

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

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

---

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

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

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

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

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

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

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

A. Standard of Review

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

---

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

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

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

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

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

---

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[18] There is no such statute here.

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

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

---

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

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

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

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

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

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

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

---

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

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

4. The Duty to Defend May Never Be Assigned

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

---

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

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

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

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

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

R. p. 21.

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

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

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

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

---

[28] *Id.* at 158.

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

---

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

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

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

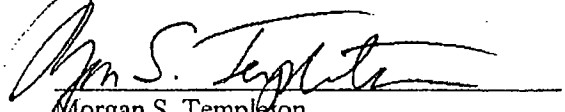
make PCS the successor to Old CNC under a "*de facto* merger" theory, and PCS may not claim Old CNC's insurance rights through that ruse.

IV. CONCLUSION

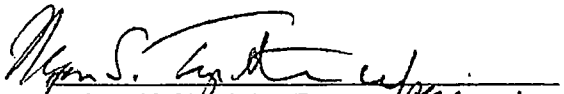
All of PCS's arguments boil down to attempts to rewrite contracts (to which it is not even a party) and to rewrite South Carolina law. The trial court, in its careful and extensive opinion, saw through PCS's efforts and rejected its arguments. As the trial court's opinion is thoroughly supported by settled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

Dated: October 28, 2016

Respectfully submitted,



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



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

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

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

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

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

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

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

Elizabeth J. Palmer, Esq.
Rosen, Rosen & Hagood, LLC
Molly Poag, Esq. (*pro hac vice*)
Harry Lee, Esq. (*pro hac vice*)
Steptoe & Johnson LLP
Attorneys for Providence Washington Insurance Company, (as Successor in Interest by way of Merger to Seaton Insurance Company, f/k/a Unigard Security Insurance, f/k/a Unigard Mutual Insurance Company)

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.

APPELLANT'S FINAL REPLY BRIEF

Wm. Howell Morrison (S.C. Bar No. 4016)
Haynsworth Sinkler Boyd, P.A.
134 Meeting Street, 3rd Floor
Charleston, SC 29401
Phone: (843) 720-4405
hmorrison@hsblawfirm.com

Michael H. Ginsberg
Matthew R. Divelbiss
Admitted *Pro Hac Vice*
Jones Day
500 Grant Street, 45th Floor
Pittsburgh, PA 15219
Phone: (412) 391-3939
mhginsberg@jonesday.com
mrdivelbiss@jonesday.com

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

Page

Preliminary Statement 1

Argument 1

I. Old CNC Assigned Its Coverage Rights to New CNC 2

II. The Assignment of Coverage Rights Was a Valid, Post-Loss Assignment 5

A. Post-Loss Assignments Are Valid and Enforceable 5

B. An Unambiguous Consensus Favors PCS's Position 12

1. Only Indiana Supports Respondents' View of Post-Loss Assignments 13

2. Respondents' Attempt to Distinguish PCS's Authority Fails 14

C. The Duty to Defend, Like the Duty to Indemnify, Is Assignable 16

D. The Trial Court's Decision Undermines the State's Interests 17

III. The Trial Court's De Facto Merger Ruling Adopted Respondents' Incorrect Statement Of The Law 20

Conclusion 20

TABLE OF AUTHORITIES

Page(s)

CASES

Alexander Mfg. v. Ill. Union Ins. Co.,
560 F.3d 984 (9th Cir. 2009) 12

Beazley Ins. Co. ACE Am. Ins. Co.,
150 F. Supp. 3d 345 (S.D.N.Y. 2015) 13

Chaveriat v. Williams Pipe Line Co.,
11 F.3d 1420 (7th Cir. 1993) 20

Cincinnati Ins. Co. v. Crossmann Cmtys. of N.C.,
09-CV-1379, 2013 U.S. Dist. LEXIS 43349 (D.S.C. Mar. 27, 2013) 10

Citicorp Industrial Credit, Inc. v. Federal Ins. Co.,
672 F. Supp. 1105 (N.D. Ill. 1987) 15

Clay v. Gov. Emps. Ins. Co.,
356 Md. 257 (Md. 1999) 12

Del Monte Fresh Produce Inc. v. Fireman's Fund Ins. Co.,
117 Haw. 357 (Haw. 2007) 12

Egger v. Gulf Ins. Co.,
903 A.2d 1219 (Pa. 2006) 15, 16

Elliott Co. v. Liberty Mut. Ins. Co.,
434 F. Supp. 2d 483 (N.D. Ohio 2006) 17, 18

EM Industries, Inc. v. Birmingham Fire Ins. Co.,
141 A.D.2d 494 (N.Y. App. Div. 1988) 13

Fluor Corp. v. Superior Court,
61 Cal. 4th 1175 (Cal. 2015) 8, 9, 10, 16

Ginsburg v. Bull Dog Auto Fire Ins. Ass'n of Chicago,
160 N.E. 145 (Ill. 1928) 7

Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co.,
442 N.J. Super. 28 (App. Div. 2015) 14, 16

TABLE OF AUTHORITIES
continued

Page(s)

Gopher Oil Co. v. Am. Hardware Mut. Ins. Co.,
588 N.W.2d 756 (Minn. Ct. App. 1999) 17, 18

Hart v. Cote,
367 A.2d 1219 (N.J. Law. Div. 1976) 16

Haskell Props., LLC v. Am. Ins. Co.,
No. A-1452-14-T2, 2016 N.J. Super. Unpub. LEXIS 1836 (App. Div. Aug. 4, 2016) 14

Henkel Corp. v. Hartford Acc. & Indem. Co.,
62 P.3d 69 (Cal. 2003) 19

Horry v. Frost,
31 S.C. Eq. 109, 1858 WL 3728 (S.C. Ct. App. Eq. 1858) 3

Illinois Tool Works, Inc. v. Commerce & Indus. Ins. Co.,
962 N.E.2d 1042 (Ill. App. Ct. 2011) 6, 7

In re Viking Pump,
2016 Del. LEXIS 474, Slip. Op. at 22 (Del. Sept. 12, 2016) 14

Javorek v. Superior Court,
552 P.2d 728 (Cal. 1976) 16

Keller Found. v. Wausau,
626 F.3d 871 (5th Cir. 2010) 12

Kintzel v. Wheatland Mut. Ins. Assoc.,
203 N.W.2d 799 (Iowa 1973) 8

Knoll Pharm. Co. v. Auto. Ins. Co.,
167 F. Supp. 2d 1004 (N.D. Ill. 2001) 20

Korte Constr. Co. v. Deaconess Manor Assn.,
927 S.W.2d 395 (Mo. App. 1996) 9

Kransco v. Am. Empire Surplus Lines Ins. Co.,
23 Cal. 4th 390 (Cal. 2000) 4

Lamar Homes, Inc. v. Mid-Continent Cas. Co.,
242 S.W.3d 1 (Tex. 2007) 4

TABLE OF AUTHORITIES
continued

Page(s)

M&M Group, Inc. v. Holmes,
666 S.E.2d 262 (S.C. Ct. App. 2008) 3

Magers v. Nat'l Life & Acc. Ins. Co.,
329 S.W.2d 752 (Mo. 1959) 9, 15

Narruhn v. Alea London,
745 S.E.2d 90 (S.C. 2013) ..... passim

Ocean Accident & Guarantee Corp. v. Southwestern Bell Tel. Co.,
100 F.2d 441 (8th Cir. 1939) 9, 10, 13, 15

Olah v. Baird,
567 F.3d 1207 (10th Cir. 2009) 8, 13

Osprey, Inc. v. Cabana Ltd. Pshp.,
532 S.E.2d 269 (S.C. 2000) 19

PCL Constr. Servs. v. Old Republic Gen. Ins. Co.,
No. 14-cv-3486, 2016 U.S. Dist. LEXIS 106 (D. Colo. Jan. 4, 2016) 4

Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.,
112 Ohio St. 3d 482 (Ohio 2006) 15, 16

Red Arrow Prods. Co. v. Emps. Ins. of Wausau,
607 N.W.2d 294 (Wis. App. 2000) 13

State v. Phillips,
416 S.C. 184 (S.C. Apr. 20, 2016) 17

Stephenson Finance Co. v. S.C. Tax Com.,
130 S.E.2d 72 (S.C. 1963) 20

Stevens Aviation, Inc. v. DynCorp Int'l LLC,
756 S.E.2d 148 (S.C. 2014) 3

Time Finance Corp. v. Johnson Trucking Co.,
458 P.2d 873 (Utah 1969) 13

Travelers Cas. & Sur. Co. v. U.S. Filter Corp.,
895 N.E.2d 1172 (Ind. 2009) 10, 13

TABLE OF AUTHORITIES
continued

Page(s)

Viking Pump, Inc. v. Century Indem. Co.,
2 A.3d 76 (Del. Ch. 2009) 19

Wallace v. Day,
700 S.E.2d 446 (S.C. Ct. App. 2010) 4

Young v. Chicago Fed. Savings & Loan Assoc.,
535 N.E.2d 977 (Ill. App. Ct. 1989) 8

OTHER AUTHORITIES

17 Williston on Contracts § 49:126 (4th ed. 2016) 6

1 Stempel on Insurance Contracts, § 3.15[D] (2010) 19

3 Couch on Insurance 3d § 35:8 (2011 Rev. Ed.) 5, 6

Am Jur 2d Insurance § 776 (2016) 6

The Cost And Availability of Pollution Insurance, U.S. General Accounting
Office at 2 (Oct. 1988) 18

Restatement (Second) of Contracts § 322 19

PRELIMINARY STATEMENT

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Post-Loss Assignments Are Valid and Enforceable.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. An Unambiguous Consensus Favors PCS's Position.

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

Dated: November 4, 2016

Respectfully submitted,

Wm. Howell Morrison
Haynsworth Sinkler Boyd, P.A.
134 Meeting Street, 3rd Floor
Charleston, SC 29401
Phone: (843) 720-4405
Fax: (843) 722-2266
hmorrison@hsblawfirm.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
mhginsberg@jonesday.com
mrdivelbiss@jonesday.com

ATTORNEYS FOR APPELLANT
PCS NITROGEN, INC.