

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

G. Thomas Cooper, Jr., Circuit Court Judge

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

PCS Nitrogen, Inc. Petitioner,

vs.

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

of whom Continental Casualty Company, Admiral Insurance Company, United States Fire 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) and First State Insurance Company, are

Respondents.

REPLY IN FURTHER SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The primary issue raised in the original petition filed by PCS Nitrogen, Inc. (“PCS”) is whether “loss” under an insurance policy happens when (a) events giving rise to coverage occur, or (b) a judgment is rendered against the insured based on those events. Stated more practically, does a “loss” happen when contaminants are released into the environment (or when an individual is injured by a product manufactured or used by the insured, such as asbestos)? Or, does “loss” only happen when the policyholder is sued and held liable—decades later—for environmental clean-up under CERCLA or for products or premises liability arising from a plaintiff’s alleged exposure to asbestos? The vast majority of courts nationwide have held that the “loss” occurs at the time of the event giving rise to coverage—*i.e.*, when damage or injury happens to the environment or the individual—and that policy *rights* may be assigned after that loss, even without insurer consent.¹

This Court previously indicated it would adhere to the majority rule: “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.*, 404 S.C. 337, 745 S.E.2d 90, 94 (2013) (quoting *3 Couch on Insurance* 3d § 35:8 (2011 Rev. Ed.)) (emphasis added). But the Court of Appeals held otherwise in its published opinion in this case.

Under this Court’s prior reasoning, and that of the vast majority of jurisdictions, policy rights may be assigned without insurer consent, as long as the loss—the event giving rise to coverage—occurred before the assignment, regardless of whether a lawsuit has been brought

¹ The policies define an “occurrence” as “bodily injury or property damage which happens during the policy period.” (App. at 73-183, 586-603, 798-813, 825-866, 880-976, 991-1293, 1303-1439, 1451-1489, 1506-1803, 1823-2196.)

against the policyholder or a final judgment has been reached. The Court of Appeals contradicted this rule, incorrectly holding that “loss” equates to a final judgment against the policyholder. (App. at 10, 11.) By so concluding, the Court of Appeals held that PCS was not entitled to coverage rights validly assigned to it by a predecessor company and that the insurers were relieved of their contractual obligations. The Court of Appeals’ holding was wrong for several reasons discussed below and in PCS’s Petition.

These errors warrant this Court’s attention. First, the Court of Appeals’ published decision contradicts this Court’s reasoning in *Narruhn*, which clearly suggests that policy rights may be assigned “after events giving rise to the insurer’s liability have occurred.” *Narruhn*, 745 S.E.2d at 94. Second, the decision will sow unnecessary confusion into insurance law by conflicting with the vast majority of cases nationwide. Third, the Court of Appeals’ holding grants a windfall to the insurer Respondents by relieving them of honoring the coverage obligations they contractually agreed to provide and *for which they received premiums*. Fourth, the Court of Appeals’ rule, if it stands, will necessarily have a chilling effect on companies hoping to buy or sell corporate assets. As other courts have acknowledged, the rule on post-loss assignments promotes economic efficiency, lowers transaction costs, and maximizes wealth creation. This principle is evident in the facts here: if PCS had known it was not actually acquiring the assets it thought it was getting (*i.e.*, insurance rights and benefits) and that it was only acquiring significant environmental liabilities, it may not have gone through with the acquisition of New CNC, or at least not on the same terms. The Court of Appeals’ decision therefore drastically changes the economic calculus of any corporate acquisition taking place in South Carolina and places the State out of step with most other jurisdictions.

ARGUMENT IN REPLY

I. Respondents mischaracterize the straightforward legal issue about “loss” here.

The insurer Respondents’ return is pure misdirection. They devote pages to arguing that “insurance *policies* cannot be transferred without insurer consent.” Return at 15 (upper-case removed, emphasis added). They blatantly mischaracterize PCS’s arguments, saying, “PCS argues that insurance *policies* may be freely transferred to a stranger at any time after ‘loss....’” *Id.* (emphasis added). They argue at length that PCS was seeking a “novation” of insurance *policies*, rather than an assignment of insurance *rights*, and then state the unchallenged position that a party cannot substitute another party to an active *contract*. See Return at 14 (“The issue is whether a court can rewrite a contract to allow a stranger to step into the shoes of one contracting party without the consent of all contracting parties....”),² Then they spend pages and pages knocking down these strawmen. *Id.* at 14–19.

PCS has never argued that the insurance *policies* here were transferred. At the time of PCS’s predecessor’s acquisition of the assets and liabilities of “Old” Columbia Nitrogen, the policies were no longer active: they were Old CNC’s historical policies that covered occurrences during the years they were written—1966 to 1984. The rights under those policies were not assigned until 1986. Nor has PCS argued that insurance *policies* can be transferred to another

² Respondents’ arguments were not simply sloppy phrasing. Their brief is replete with discussion of this strawman argument. See, e.g., Respondents’ Return at 15 (“A chose in action to recover money due is property that can be transferred; a contractual relationship is not.”); *id.* at 16 (“The Court therefore has already rejected PCS’s argument that insurance policies may be transferred to a new insured any time ‘after loss.’”); *id.* (“[A]n insurance policy’s prohibition on transfer of the policy to a new insured is enforceable, and this bar on *policy transfer* applies whether or not ‘loss’ has already occurred.”); *id.* at 18 (“*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.”); *id.* at 22 (“PCS merely argues that policies are fully transferable”).

party without insurer consent. Rather, consistent with this Court's holding in *Narruhn* and the majority of case authority nationwide, PCS has maintained that policy *rights* may be transferred after a loss has occurred.

The absurdity of Respondents' mischaracterization is clear from the dates of the policies themselves: they were issued from 1966 to 1984, and they covered liabilities for bodily injury and property damage caused by an occurrence during the policies' coverage periods. The last policy expired at the end of 1984, but the assignment of policy rights did not happen until years later, after the end of the policy periods. Therefore, no *policies* could have been assigned to PCS—only policy *rights* could have been assigned. *See, e.g., Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co.*, 151 A.3d 576, 592 (2017) (“In the circumstances of this matter involving lapsed policies, the assignment with respect to each is necessarily a claim assignment.”). PCS has never argued that an insurance policy can be assigned without insurer consent, and such an argument would not have been possible here because the coverage periods of the policies had ended. This case “necessarily” involves “a claim assignment.” *Id.*

Respondents' “waiver” argument is a red herring because the “two issue rule” does not apply here.³ Return at 12. The trial court's one-paragraph statement about “novation” was part of the very issue that PCS briefed on appeal—*i.e.*, whether Old CNC validly assigned policy rights to PCS without insurer consent—not a separate ground for affirmance or an “alternate finding of liability.” *Compare Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, 285 (2012) (defendant only appealed finding of liability on two of three separate

³ The novation argument is also wrong as a matter of law. As explained, an insurance policy cannot be transferred after it has expired; by definition, a “novation” requires the substituting of parties to a *policy*, not merely assigning *policy rights*. *See, e.g., McDonald v. S.C. Farm Bureau Ins. Co.*, 336 S.C. 120, 518 S.E.2d 624, 626 (Ct. App. 1999) (discussing a car insurance policy that was transferred from a mother to her son *during the policy period*).

causes of actions), with *In re Estate of Reagan*, 2015 WL 4275465, at *1 (S.C. Ct. App. July 15, 2015) (holding that “two-issue rule” did not apply because the trial court’s decision was “essentially based on one ground alone”). Notably, the Court of Appeals did not even mention this aspect of the trial court’s reasoning. PCS has argued at every stage of this case that it succeeded to Old CNC’s policy *rights*, not to the policies themselves. At most, the trial court’s “novation” comments were part of its rejection of PCS’s argument on the assignment of policy rights. They were not a separate ground “support[ing] affirmance.” *Anderson v. S.C. Dep’t of Highways & Pub. Transp.*, 322 S.C. 417, 472 S.E.2d 253, 255 (1996).

II. The Court of Appeals incorrectly held that “loss” occurs only after a final judgment.

The Court of Appeals accepted the proposition that policy *rights* may be transferred after “loss” under a policy. (App. at 10.) It did so following this Court’s clear statement in *Narruhn*: “it is generally held that an assignment *after* a loss has already occurred does not require an insurer’s consent.” *Narruhn*, 745 S.E.2d at 94; *id.* (“[T]he 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.” (quoting 3 *Couch on Insurance* 3d § 35.8 (2011 Rev. Ed))). So there is no quarrel about whether policy rights can be assigned after a loss. The only question remaining is what constitutes a “loss”? To put it another way, at what point do insurance policy *rights* become a property or a “chose in action”? Is it: (a) when the events giving rise to coverage take place or (b) only later when a lawsuit is filed and a final judgment is reached? The Court of Appeals’ holding that a “loss” occurs only after a final judgment was wrong because it (1) contradicted *Narruhn*’s guidance, (2) ran counter to the overwhelming nationwide consensus, and (3) misinterpreted the policies here. See *Petition*, at 6–14. Nothing in Respondents’ return rebuts these three points.

First, the Court of Appeals' decision contradicted *Narruhn* because this Court clearly indicated that "loss" equates to events giving rise to liability:

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, 745 S.E.2d at 94 (quoting 3 *Couch on Insurance* 3d § 35.8 (2011 Rev. Ed)) (emphasis added).

This Court *could* have stated that a no-assignment clause can only be disregarded once a judgment against the insured has been reached. But it did not say that. Rather, as the above quotation makes clear, policy rights can be transferred after the event giving rise to coverage has happened. The policy is not transferred under such a scenario, only rights to coverage for losses which were caused by the original policyholder. In *Narruhn*, this Court also relied on out-of-state cases that equate "loss" with the events giving rise to coverage, not with a judgment against the insured. See *Illinois Tool Works, Inc. v. Commerce & Indus. Ins. Co.*, 962 N.E.2d 1042, 1055 (Ill. App. Ct. 2011) (holding that "loss" equates to events giving rise to coverage, not to the filing of a lawsuit based on those events); *Kintzel v. Wheatland Mut. Ins. Ass'n*, 203 N.W.2d 799, 804–05 (Iowa 1973) (defining a "windstorm," the event giving rise to coverage, as "the loss," and explaining that "after the loss was incurred the issue became not an assignment of the policy, but the assignment of a chose in action").⁴

⁴ Instead of relying on the cases cited in *Narruhn*, the Court of Appeals relied on *Travelers Cas. & Sur. Co. v. United States Filter Corp.*, 895 N.E.2d 1172, 1180 (Ind. 2008), which held that "for an insured loss to generate an assignable coverage benefit, the loss must be identifiable with some precision." (App. at 11.) This was error. *Travelers* at odds with *Narruhn* and the majority rule. *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"); *Fluor Corp. v. Superior Court*, 354 P.3d 302, 327 n.46 (Cal. 2015).

The rule articulated in *Narruhn* makes sense. If the original policyholder transfers its liabilities to a corporate successor (as happened here), then it should also be able to assign the insurance rights that cover those very liabilities. The insurer's risk does not change; the only difference the assignment makes is the identity of the person collecting the insurance—*i.e.*, who is seeking coverage for the loss *caused by the original policyholder*—and not the obligation of the insurer, which would have to pay for the loss in either case. *See, e.g., Givaudan*, 151 A.3d at 591–92 (“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.”). The assignment of Old CNC's policy rights, therefore, was the assignment of a chose in action: it was the right of the corporate successor to access insurance policies that covered events giving rise to coverage from when those policies were active and held by the original insured, which in no way altered the risk undertaken by the insurers at the time the policies were issued.

Second, the vast majority of courts agree with PCS's position—and with the language of *Narruhn*—in holding that “loss” occurs when the events giving rise to coverage take place. *See* Petition at 8–12; *Fluor*, 354 P.3d at 328–29 (“[W]e 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.”); *Givaudan*, 151 A.3d at 591 (“[T]he relevant event giving rise to coverage is the loss event, not the entry of a judgment fixing the amount of damage for that loss.”); *In re Viking Pump, Inc.*, 148 A.3d 633, 652 (Del. 2016) (“The Excess Insurers' potential liability arose at the time of injury.”); *Illinois Tool Works*, 962 N.E.2d at 1055 (holding that “loss” was the “contamination of the ... property, an occurrence”); *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.* 861 N.E.2d 121, 123 (Ohio 2006) (“A chose in action

arises under an occurrence-based insurance policy at the time the loss occurred.”); *Egger v. Gulf Ins. Co.*, 903 A.2d 1219, 1229 (Pa. 2006) (“[T]he obligation of Gulf to provide excess coverage ... arose on the date of the occurrence....”).

Respondents blatantly misrepresent these holdings, stating—without citation to the actual cases—that “[m]any of the cases addressing assignment of insurance rights have arisen in the context of first-party insurance” and that the rule is different for third-party insurance: “in the context of insurance for liability the insured contingency arises only when the third party obtains a judgment against the insured.” Return at 20–21. A review of the cases PCS cited proves that is untrue—they deal with third-party liability policies. See *Fluor*, 354 P.3d at 332 n.51 (“[T]he majority common law rule [is] 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....” (emphasis added)); *Illinois Tool Works*, 962 N.E.2d at 1053 (“[O]nce an insurance policy has been executed, those elements are no longer material and all that remains to be done under the policy is to pay the amount due, if any. This is true whether the policy is a first-party insurance policy or a third-party insurance policy.” (citations omitted)); *Givaudan*, 151 A.3d at 587 (analyzing “assignment transfers rights under a third-party liability policy”). In other words, the issue addressed by those cases was *precisely* the issue here: under a *third-party* liability policy, does “loss” happen at the moment of the event giving rise to coverage (*i.e.*, injury to the third party) or does it only occur after the insured has been held liable for a third-party judgment? Respondents’ attempt to factually distinguish these cases fails.

Respondents then further misrepresent the holdings of these cases. Respondents claim, without any support, that “those seeking coverage under liability policies, such as PCS here,

misconstrue those cases 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.” Return at 20. This is wrong. The majority of states addressing this issue have found the exact opposite. As explained in *Illinois Tool Works*, cited in *Narruhn*, policy rights can be assigned before a third-party claim is filed because the policyholder owns the rights, regardless of whether it will ever assert them:

Binks had entered into valid contracts of insurance, including the policies at issue here. The policies provided that, in exchange for Binks’ payment of premiums, it received the right to be defended and indemnified by the insurers for qualifying occurrences happening during the policy periods, no matter when such defense or indemnification might be needed. Granted, Binks’ rights were not yet due at the time of the assignment and might never become due if no third-party claim based on the occurrences was ever filed. **But Binks clearly owned those rights, whether or not it ever needed to assert them, and it could properly assign them.**

Illinois Tool Works, 962 N.E.2d at 1049–50 (emphasis added).

The case law is clear. Rights arising under insurance policies may be validly assigned without insurer consent as long as *the events giving rise to coverage* have already occurred at the time of assignment. Moreover, courts in most jurisdictions have rejected the very argument Respondents have advanced here. *See, e.g., Givaudan*, 151 A.3d at 592 (“Anti-assignment clauses or similar consent-to-assignment provisions have been held over and over not to erect a barrier to assignment of post-loss claims that are not reduced to judgment.”); *Fluor*, 354 P.3d at 334 (holding assignment of insurance rights valid “even without consent by the insurer—and even though the dollar amount of the loss remains unknown or undetermined until established later by a judgment or approved settlement”).

Third, the Court of Appeals misinterpreted the policies when it construed the “no action” clause to define when “loss” occurs. As explained in PCS’s petition, the no-action clause has

nothing to do with when “loss” occurs under the policy. *See* Petition at 12–13. A no-action clause prevents direct suits against the insurer by third parties, but it does not limit the insured from seeking coverage. *See, e.g., Travelers Indem. Co. v. Canal Ins. Co.*, 254 S.C. 92, 173 S.E.2d 656, 657–58 (1970) (holding that, under the terms of a no-action clause, an insurer could not be liable in a subrogation suit by *another* insurer where the policyholder was never subject to a final judgment). Broadly speaking, the Court of Appeals misunderstood what third-party liability policies insure *against*, which is “loss” that a third party sustains at the hands of the policyholder. *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500, 502 (Ct. App. 1990), *aff’d*, 414 S.E.2d 118 (S.C. 1992) (“Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party.”). This misunderstanding led the Court of Appeals to conclude that the no-action clause defines when “loss” occurs under a policy and limits the ability to access policy rights by the very party who owns those rights. The no-action clause does no such thing.

The Court of Appeals’ opinion also contradicts basic insurance law principles (and this Court’s holdings) on insurer duties. The Court of Appeals here pronounced:

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....”

(App. at 11) (emphasis added). This reading of the policies ignores that an insurer owes a duty to defend—one of two distinct aspects of insurance “coverage”—from the very moment there is potential liability against the policyholder. *See Town of Duncan v. State Budget & Control Bd.*, 326 S.C. 6, 482 S.E.2d 768, 773 n.14 (1997) (“An insurer’s duty to defend depends on an initial or apparent potential liability....”); *Sloan Const. Co. v. Cent. Nat. Ins. Co. of Omaha*, 269 S.C. 183, 236 S.E.2d 818, 820 (1977) (“[T]he duty to defend exists regardless of the insurer’s ultimate liability to the insured.”). Under the Court of Appeals’ reasoning, no policyholder

would be entitled to *any* coverage—including for defense costs—until *after* a final judgment against it. (App. at 11). This plainly is not the law in South Carolina, or anywhere.

The Court of Appeals' reasoning further ignores that this Court has consistently defined "loss" to arise directly out of an "occurrence."⁵ This Court has stated broadly that "[t]he word 'loss' in connection with insurance ... is a comprehensive term and means any injury, destruction or damage resulting from the occurrence of the contingency insured against." *Smith v. Ramsey*, 244 S.C. 168, 135 S.E.2d 849, 851 (1964) (citing 44 C.J.S. Insurance Section 49). That is, "loss" is the thing arising out of an occurrence, not an ultimate judgment against the policyholder. The Court of Appeals' statement that "actions ... filed against" the original policyholder were "the loss insured against" (App. at 11) misreads well-established authority by this Court. For example, in discussing allocation under various third-party liability policies, this Court explained: "we construe the standard CGL policy to require that each insurer cover only that portion of a *loss* attributable to property damage that *occurred* during its policy period." *Crossmann Communities of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589, 603 (2011) (emphasis added). To hold that "loss" under the policies here did not occur until a final judgment ignores the way this Court has consistently defined the term.

This conclusion comports with other courts that have defined loss to arise directly from an occurrence, a conclusion which applies in the assignment-of-policy-rights context. *See Fluor*, 354 P.3d at 328 ("In the process of reaching these determinations concerning the trigger of the insurers' duty to defend, we repeatedly employed and equated the term 'loss,' *not* with a

⁵ There is no dispute, even under the Court of Appeals' decision, that the "occurrence" here was the environmental contamination, which occurred during the policy periods. (App. at 11) ("[T]he property damage insured against—environmental contamination—occurred during the covered policy terms.").

judgment or settlement for a sum of money ... but as synonymous with occurrence of bodily injury and property damage....”); *Givaudan*, 151 A.3d at 591 (“We begin by noting that the policies at issue are occurrence policies. They provide coverage based on 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 loss.” (internal citations omitted)).

Finally, the Court of Appeals ignored this Court’s holdings on what constitutes a “trigger of coverage” under a general liability policy. The Court of Appeals framed the issue as follows:

[T]he 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?

(App. at 11.). It went on to conclude that coverage was not triggered until after a final judgment against the insured. *Id.* In so reasoning, the Court of Appeals ignored this Court’s holding that “coverage is triggered at the time of an injury-in-fact and continuously thereafter to allow coverage under all policies in effect from the time of injury-in-fact during the progressive damage.” *Joe Harden Builders, Inc. v. Aetna Cas. & Sur. Co.*, 326 S.C. 231, 486 S.E.2d 89, 91 (1997). Simply put, under third-party liability policies, it is injury by a third-party that triggers the duty of the insured to provide coverage. The Court of Appeals would delay the trigger of coverage until after a policyholder is subject to a final judgment.

III. This Court’s intervention is necessary.

This Court should grant the Petition in order to make clear when “loss” occurs under a general liability policy. As explained above, the Court of Appeals’ published decision, holding that “loss” only occurs after a final judgment against the policyholder, contradicts this Court’s reasoning in *Narruhn*. That alone merits consideration by this Court under Rule 242(b)(3), SCACR. But there are other practical considerations for granting the Petition.

First, the patent disagreement between *Narruhn* and the decision below will generate confusion in similar cases. Moreover, the Court of Appeals joined a minority of one when it followed the reasoning of *Travelers Cas. & Sur. Co. v. United States Filter Corp.*, 895 N.E.2d 1172, 1180 (Ind. 2008), an opinion that has been widely discredited. *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....”).

Second, the Court of Appeals’ decision grants a windfall to the insurers. Here, the insurers agreed to provide coverage for the defense and indemnification of liabilities due to property damage caused by an occurrence during the policies’ coverage periods. (App. at 37.) In exchange, the policyholder, Old CNC, paid premiums to the insurers. Had Old CNC continued to exist, then the insurers would unquestionably still be required to provide coverage. As other courts have recognized, relieving the insurers of their contractual duty to provide coverage gives them a windfall for completely arbitrary reasons. *See Conrad Bros. v. John Deere Ins. Co.*, 640 N.W.2d 231, 237–38 (Iowa 2001) (“[I]f we permitted an insurer to avoid its contractual obligations by prohibiting all post-loss assignments, we could be granting the insurer a windfall.”); *Gopher Oil Co. v. Am. Hardware Mut. Ins. Co.*, 588 N.W.2d 756, 764 (Minn. Ct. App. 1999) (“Consistent with the assignment-of-loss theory, the policy’s exclusion should not be read in such a manner as to entitle an insurer to the windfall of not having to insure an occurrence that it received premiums for covering.”); *Fluor*, 354 P.3d at 330 (“The postloss rule prevents an insurer from engaging in unfair or oppressive conduct—namely, precluding assignment of an insured’s right to invoke coverage under a policy attributable to past time periods for which the insured had paid premiums.”). The New Jersey Supreme Court best described the rationale for this rule:

The environmental contamination occurrence—and resultant loss—took place during the relevant policy periods. The assignment does not alter the insurers' liability for indemnifying the underlying insured event. The loss event has occurred. It is no more, and no less, as a result of Flavors's assignment of its rights under the respective policies to Fragrances. Fragrances now holds those rights. The insured loss is one that is fixed. Once transferred, that loss remains static—a property right now held by the assignee, Fragrances. The claim that must be honored by the insurers is defined by the policy applicable to each insurer for the occurrence that took place under the terms of each insurance policy while the policy was in effect.

Givaudan, 151 A.3d at 593.

Third, the Court of Appeals' decision will have a chilling effect on businesses, particularly those hoping to buy or sell other businesses, because the decision changes the economic calculus of any acquisition taking place in South Carolina. Courts that have adopted the majority rule regarding post-loss assignments have identified it as “a venerable rule that arose from experience in the world of commerce,” which “has been acknowledged as contributing to the efficiency of business by minimizing transaction costs and facilitating economic activity and wealth enhancement.” *Fluor*, 354 P.3d at 330.

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—which is why the courts have crafted it over the years even though it appears to contradict the clear text of many insurance policies and the courts' expressed fidelity to contract language. The post-loss exception to the general rule of restricted insurance assignability is a venerable rule borne of experience and practicality. That is why courts have adopted it.

Id. at 330 (quoting *1 Stempel On Insurance Contracts* (3d ed. 2014) at § 3.159[D], pp. 3–125 to 3–126). Simply put, the rule proposed by PCS has a long and well-reasoned history, is vital for economic efficiency, and has no downside, since it merely holds insurers to contractual terms they agreed to and for which they received premiums. *Id.* (“The postloss rule prevents an insurer

from engaging in unfair or oppressive conduct—namely, precluding assignment of an insured’s right to invoke coverage under a policy attributable to past time periods for which the insured had paid premiums.”).

IV. The *de facto* merger issue also merits this Court’s attention.

In placing its seal of approval on the circuit court’s decision, the Court of Appeals held that, even though PCS expressly assumed Old CNC’s rights and liabilities, it was not a *de facto* successor to Old CNC’s insurance rights. The circuit court plainly misread this Court’s holding in *Brown v. Am. Ry. Exp. Co.*, 128 S.C. 428, 123 S.E. 97, 99 (1924), and in fact got *Brown*’s holding backwards. A federal district court has already held—over PCS’s objection—that PCS was the *de facto* successor to Old CNC, meaning that PCS succeeded to *all* Old CNC’s liabilities and rights, including insurance rights. PCS has already been held liable for Old CNC’s actions, but the Court of Appeals’ decision means PCS cannot access the insurance rights it assumed along with those liabilities—insurance benefits specifically designed to cover exactly those liabilities. This too warrants this Court’s review.

CONCLUSION

This case, notwithstanding its long history in terms of transactions and prior litigation, presents a simple issue relating to whether policy rights bought and paid for by PCS’s predecessor are available to PCS. To date, Respondents have been successful in redirecting attention away from this simple question, resulting in a published opinion from the Court of Appeals that is in conflict with this Court’s precedent on this point. This Court should exercise its discretion to consider this case and correct these errors for all the reasons set forth here and in the petition.

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Respectfully submitted,

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