THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

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

PCS Nitrogen, Inc. ..... Petitioner,

vs.

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

BRIEF OF PETITIONER PCS NITROGEN, INC.

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1. Did the Court of Appeals err in holding—contrary to this Court's prior guidance and the overwhelming consensus in other jurisdictions—that "loss" under an insurance policy means the filing of a lawsuit and not the events giving rise to coverage?

2. Did the Court of Appeals err in affirming the circuit court's conclusion that a party's express assumption of another party's liabilities *precludes* a finding of de facto merger?

INTRODUCTION

In 1986, a corporate predecessor of Petitioner PCS Nitrogen, Inc. ("PCS"), Columbia Nitrogen Company ("New CNC"), acquired all of the assets of Columbia Nitrogen Company ("Old CNC"). (App. at 35–36.) In the transaction, New CNC also acquired, through an explicit assignment, the right to seek coverage under insurance policies purchased by Old CNC for liabilities arising from Old CNC's operations. (*Id.* at 36.)

Years later, PCS was held liable for environmental remediation costs because of Old CNC's ownership and operation of a fertilizer production facility along the Ashley River in Charleston (the "Ashley Site"). (*Id.* at 35–37.) PCS sought insurance coverage for its defense costs and the environmental liabilities arising from the Ashley Site. The insurer Respondents, which had issued policies covering Old CNC's operations, argued that each policy's anti-assignment clause—which prohibits a policyholder from transferring its active insurance *policy* without the insurer's consent—barred coverage. (*Id.* at 37–38.) The Court of Appeals correctly recognized that the anti-assignment clause did not prohibit the post-loss assignment of rights under the policies, but agreed with the insurers and wrongly held that the assignment in this instance was not valid because no "loss" had occurred under the policies at the time of assignment. (*Id.* at 11.) The Court of Appeals incorrectly equated "loss" with the entry of a judgment against the policyholder, instead of recognizing that "loss" under an occurrence-based policy happens at the time of the occurrence giving rise to coverage.

This holding was wrong for several reasons. First, the decision misinterpreted the insurance policies at issue here and held that Old CNC (the original policyholder) was not entitled to "coverage" until after a final judgment. This conclusion was based on a misapplication of the "no action" clause in the policies, a standard provision that restricts when third-party claimants may pursue direct actions against insurers. The Court of Appeals wrongly

used this provision to hold that Old CNC, the policyholder, lacked "coverage" before a final judgment. This holding ignores that at least the primary insurers owed Old CNC obligations, such as the duty to defend, long before a final judgment.

Second, the Court of Appeals ignored this Court's endorsement of the majority rule that post-loss assignments are valid after the occurrence[1] giving rise to coverage. *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 344, 745 S.E.2d 90, 94 (2013) ("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." (quoting 3 *Couch on Insurance* 3d § 35:8 (2011 Rev. Ed.) (emphasis added))). The Court of Appeals' decision is also inconsistent with the overwhelming majority of jurisdictions, which hold that "loss" is synonymous with "occurrence." The majority rule reasons that the insurer's risk does not change once the occurrence has happened. While currently in-force insurance policies cannot be assigned to different parties, once an occurrence or loss has taken place, there is no change to the insurers' risk. The thing being assigned post-occurrence is not an insurance policy, but rather a "chose in action."

Third, the Court of Appeals' holding is bad public policy. If affirmed, the holding will necessarily have a chilling effect on companies buying and selling corporate assets. The rule allowing post-loss assignment of insurance rights promotes economic efficiency, lowers transaction costs, and maximizes wealth creation. This principle is evident in the facts here: if PCS had known it would not be entitled to insurance coverage with respect to the purchased

[1] The policies define an "occurrence" as "bodily injury or property damage which happens during the policy period," and there is no dispute that the relevant occurrence (environmental contamination) predated the assignment of policy rights by several years. (ROA at 73-183, 586-603, 798-813, 825-866, 880-976, 991-1293, 1303-1439, 1451-1489, 1506-1803, 1823-2196.)

assets under the policies bought and paid for by Old CNC, but instead was acquiring significant uninsured environmental and other liabilities, it may not have gone through with the acquisition of the assets of Old CNC, or at least not on the same terms. The Court of Appeals' decision, if allowed to stand, would drastically change the economic calculus of any corporate acquisition taking place in South Carolina and place the State out of step with most other jurisdictions. The Court of Appeals' ruling also grants a windfall to the insurer Respondents by relieving them of the coverage obligations they contractually agreed to provide and for which they received premiums, while depriving acquiring entities with "long tail" exposure of coverage for liabilities they unknowingly assumed and making it more difficult for entities with possible exposure to sell assets for which they believed they had acquired insurance.

Finally, even if this Court shifts from its reasoning in *Narruhn* and chooses not to follow the rule adhered to by the vast majority of jurisdiction, it should still reverse. The Court of Appeals affirmed an erroneous legal conclusion by the circuit court regarding whether PCS is the successor to Old CNC as a result of a de facto merger. The circuit court erroneously held that a party's express assumption of liabilities *precludes* a finding of de facto merger and granted summary judgment on that basis. This Court held the exact opposite: express assumption of liabilities may *prove* a de facto merger. *Brown v. Am. Ry. Exp. Co.*, 128 S.C. 428, 123 S.E. 97, 99 (1924). Summary judgment was therefore improper, but the Court of Appeals failed to correct the circuit court's error. If this Court disagrees with PCS on the post-loss assignment issue, it should nevertheless reverse on the de facto merger issue.

STATEMENT OF THE CASE AND FACTS[2]

PCS is the alleged successor to Old CNC. (App. at 35–36.) Beginning in 1966, Old CNC operated a fertilizer production plant and an acid plant located in Charleston, South Carolina (the "Ashley Site"). (*Id.*); *see also PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161 (4th Cir. 2013). Old CNC ceased operation of the acid plant in 1970 and ceased operation of the fertilizer plant in 1972. (App. at 36.) By January 1981, Old CNC had demolished all remaining structures at the Ashley Site. (*Id.*) It sold the property to a third party in May 1985. (*Id.*) In 1986, more than a year after Old CNC sold the Ashley Site, Old CNC's parent corporations terminated Old CNC's operations and then sold the Old CNC business to CNC Corp. ("New CNC"). (*Id.*) All of Old CNC's insurance rights, benefits, and proceeds were assigned to New CNC on November 6, 1986. (*Id.*) Through a series of mergers, PCS acquired New CNC. (*Id.*)

Much later, Ashley II of Charleston, LLC ("Ashley") sued PCS, seeking a declaratory judgment that PCS was jointly and severally liable under CERCLA[3] for response costs at the Ashley Site. (App. at 35–36); *see also Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, Case No. 2:05-cv-02782 (D.S.C.). Ashley did not allege that PCS itself ever owned or operated a facility at the Ashley Site or that PCS ever sent waste to the Ashley Site. (App. at 36.) In fact, Ashley did not allege that PCS's own conduct was the basis of liability at all. (*Id.*) Rather, Ashley alleged that PCS was liable for the remediation of the Ashley Site solely because of the

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

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

conduct of Old CNC—conduct which occurred over a decade before Old CNC sold it assets to New CNC and assigned its insurance rights, benefits, and proceeds. (*Id.*)

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

PCS then filed this action, seeking insurance coverage from Respondents, insurance companies that issued general liability policies to Old CNC. (App. at 37, 176–87). Those policies covered Old CNC's operations during the period between 1966 and 1984. (App. at 37); *see also* ROA at 73-183, 586-603, 798-813, 825-866, 880-976, 991-1293, 1303-1439, 1451-1489, 1506-1803, 1823-2196 (policies). Each of these policies provided insurance protection, including coverage for defense and indemnification, for Old CNC's liabilities due to property damage caused by an occurrence during the policies' coverage periods. (App. at 37). There is no dispute that the events giving rise to coverage under Old CNC's policies occurred before Old CNC assigned those policy rights. (*Id.*)

On March 23, 2016, the circuit court granted summary judgment to the insurers, holding that PCS was not the successor to Old CNC's coverage rights.[4] (App. at 38). After the circuit court denied PCS's motion for reconsideration, PCS timely appealed on May 26, 2016. (*Id.*) The Court of Appeals affirmed the circuit court's ruling, holding that, at the time of the assignment, no "loss" had taken place under the policy. (App. at 1–12.) The Court of Appeals explicitly recognized that "the property damage insured against—environmental

[4] No party disputed that PCS is the successor-by-merger to New CNC. The sole dispute was whether New CNC succeeded to the coverage rights of Old CNC. PCS opposed the motion for summary judgment. (App. at 2362).

contamination—occurred during the covered policy terms," but it held that, since "no actions were filed against Old CNC prior to the asset sale with New CNC, the loss insured against … had not yet occurred." (*Id.* at 11.) The Court of Appeals thus held that the "loss" insured against is not the event giving rise to coverage but rather a final judgment against the policyholder.[5] (*Id.*)

ARGUMENT

I. The Court of Appeals erred in holding that insurance policy rights may not be assigned until there is a final judgment against a policyholder.

"[I]t is generally held that an assignment *after* a loss has already occurred does not require an insurer's consent." *Narruhn*, 404 S.C. at 344, 745 S.E.2d at 94. The Court of Appeals accepted the proposition that policy *rights* may be transferred after "loss" or "occurrence" under a policy, but erred in defining *when* insurance policy rights become assignable.

The vast majority of jurisdictions hold that policy rights become a freely transferrable "chose in action" (*i.e.*, a property right) once coverage under the insurance policy is triggered by an occurrence. This Court suggested in *Narruhn* that it would follow the majority rule on post-loss assignments. But the Court of Appeals held that policy rights are only assignable after there is a final judgment against the policyholder. That holding is wrong: (1) it clearly misunderstands both policy language and when insurance policy rights become a "chose in

[5] The Court of Appeals' holding was somewhat ambiguous about whether loss occurred after a final judgment or merely the filing of a lawsuit. First, the Court of Appeals held, "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* ….'" (App. at 10) (quoting policy). In the next sentence, however, it stated that "[b]ecause no actions were filed against Old CNC prior to the asset sale with New CNC, the loss insured against … had not yet occurred…." *Id.* Because the Court of Appeals rested its decision on the language of the no-action clause, which refers to a final judgment, the Court of Appeals' holding seemingly equates loss with a final judgment.

action"; (2) it runs counter to an overwhelming nationwide majority, including *Narruhn*'s guidance; and (3) it is bad public policy that grants insurers an unfair windfall and will have a chilling effect on the transfer of corporate assets.

A. The Court of Appeals misunderstood when insurance policy rights become a "chose in action" and misinterpreted the insurance policies' language.

The policies here obligated the primary insurers to defend and indemnify Old CNC for property damage caused by an occurrence and the excess insurers to indemnify Old CNC and reimburse Old CNC for defense costs. (App. 10) ("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" (citing policies) (emphasis removed)). The Court of Appeals correctly recognized that "the property damage insured against—environmental contamination—occurred during the covered policy terms…." *Id.* Therefore, there is no dispute that there was an "occurrence" while Old CNC held the policies. However, in analyzing the Old CNC's ability to assign its policy rights, the Court of Appeals misunderstood when policy rights become a "chose in action" and misapplied a standard "no action" clause to improperly restrict when a policyholder is entitled to coverage.

1. Old CNC's rights to coverage were a freely assignable "chose in action" from the moment of the underlying "occurrence."

The Court of Appeals held that, because no final judgment had been rendered against Old CNC, it had no rights under the policies at the time of assignment. That is not true. After the "occurrence" took place—*i.e.*, the environmental contamination—Old CNC had the legally enforceable right to seek defense and indemnification from its insurers for any liability arising out of that occurrence. Old CNC's right to invoke the insurers' duty to defend was a "chose in action" as this Court has consistently defined that term. In *Narruhn*, this Court explained that a "chose in action" includes "[t]he right to bring an action to recover a debt, money, or thing."

Narruhn, 404 S.C. at 344 n.3, 745 S.E.2d at 93 n.3 (quoting Black's Law Dictionary 275 (9th ed. 2009)). "Chose in action" is a very broad term that includes "rights to receive insurance proceeds." 73 C.J.S. Property § 13 ("Various matters are considered choses in action, including rights to be paid under a contract, notes, other financial instruments, rights to bring an action to recover money damages, and rights to receive insurance proceeds.")*; see also Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 861 N.E.2d 121, 126, (Ohio 2006) ("A chose in action is merely a term (albeit a somewhat vague one) for the right established at the time of the loss."); 45 C.J.S. Insurance § 749 ("Essentially, therefore, an insurance policy that is assigned after a claim arises is an assignment of the policy proceeds; such a transaction results in an assignment of a chose in action which does not require the insurer's consent."). Because Old CNC had the right to seek defense and indemnity for any liability after the occurrence, those rights constituted a chose in action under the policies once the "occurrence" of environmental contamination took place.

This is consistent with how courts across the country, including the United States Supreme Court, have treated insurance policy rights after an occurrence. *See Cent. Tablet Mfg. Co. v. United States*, 417 U.S. 673, 685 (1974) ("With a fire loss, the obligation to pay arises upon the fire…. 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."). In *Narruhn*, this Court relied on cases holding that insurance policy rights become a chose in action after the occurrence giving rise to coverage. *See Narruhn*, 404 S.C. at 345, 745 S.E.2d at 94 (citing *Young v. Chicago Fed. Sav. & Loan Ass'n*, 535 N.E.2d 977, 980–81 (Ill. App. 1989) ("An insurance policy that is assigned after a claim arises is an assignment of the policy proceeds;

such a transaction results in an assignment of a chose in action which does not require the insurer's consent."), and *Kintzel v. Wheatland Mut. Ins. Ass'n,* 203 N.W.2d 799, 804–05 (Iowa 1973) (rejecting an insurer's contention that an insurance policy was not assignable without its consent, and stating, "[a]fter the loss was incurred, the issue became *not an assignment of the policy,* but the assignment of a chose in action....")).

Insurance rights become choses in action at the moment an "occurrence" under the policy takes place. In *Givaudan*, the New Jersey Supreme Court defined the "loss event" as the "environmental contamination occurrence." *Givaudan Fragrances Corp. v. Aetna Cas. & Surety Co.*, 151 A.3d 576, 591, 593 (N.J. 2017) ("[T]he 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)); *id.* ("An insurer may not limit an insured's ability to assign his or her rights under a policy after the occurrence of an event which gives rise to the insurer's liability." (quoting 5 *Appleman Insurance Law & Practice* § 3425 (2d ed. 2011))). Insurance rights for that environmental contamination became choses in action from the moment of the occurrence. *Id.* at 593 ("[T]he post-loss assignment of the environmental claims pertaining to the site should not be treated differently from the assignment of any other chose in action."). It did not matter that liability and damages had not been determined at the time of assignment. *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.").

Similarly, in *Pilkington*, the Ohio Supreme Court held that occurrence policies "provide coverage for claims resulting from injury or damage that is based upon an occurrence during the policy period, regardless of when the claim is made." 861 N.E.2d at 126 (holding "the insurer's

coverage obligation in an occurrence policy arises **at the time of the occurrence**" and "a chose in action arises under an occurrence-based insurance policy at the time of the covered loss," even if there is no "specifically defined amount of recovery"). *Id.* (emphasis added). "[T]he courts that have considered this issue have overwhelmingly concluded that **once an insured occurrence has transpired, the insured's claim then ripens into a chose in action**, a type of personal property, which, pursuant to fundamental principles of debtor-creditor relationships, may not, ordinarily, be restrained from alienability." *Wehr Constructors, Inc. v. Assurance Co.*, 384 S.W.3d 680, 685 (Ky. 2012) (emphasis added) (footnote omitted).

Somewhat inconsistently, the Court of Appeals recognized that "the property damage insured against—environmental contamination—occurred during the covered policy terms," but then equated "the 'occurrence,' triggering coverage" with a final judgment. (App. at 11.) It held that "the loss insured against … had not yet occurred" at the time of assignment, even though the property damage had occurred. (App. at 10, 11.) In doing so, the Court of Appeals appeared to draw a distinction between the terms "occurrence" and "loss." Other courts have rejected such a distinction and defined loss as synonymous with occurrence. *See 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)); *Fluor Corp. v. Superior Court*, 354 P.3d 302, 328 (Cal. 2015) ("[W]e repeatedly employed and equated the term 'loss,' … as synonymous with occurrence of bodily injury and property damage."); *In re Viking Pump, Inc.*, 148 A.3d 633, 652 (Del. 2016) ("The Excess Insurers' potential liability arose at the time of injury."); *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…."). The authority quoted by this Court in *Narruhn* likewise equated "loss" with the "events giving rise" to liability. *Narruhn*, 404 S.C. at 344–45, 745 S.E.2d at 94 (quoting 3 *Couch on Insurance* 3d § 35:8 (2011 Rev. Ed.)); *Illinois Tool Works, Inc. v. Commerce & Indus. Ins. Co.*, 962 N.E.2d 1042, 1055 (Ill. App. Ct. 2011) (holding that "loss" was the "contamination of the … property, an occurrence").

The Court of Appeals also misapplied how this Court has defined the term "trigger of coverage." It asked "at what point did the … the 'occurrence,' triggering coverage occur?" (App. at 10).[6] It then answered that question by stating that "Old CNC was not entitled to coverage" until after a final judgment, seemingly holding that the "trigger of coverage" under a general liability policy is when a third-party claimant obtains a final judgment against an insured. This reasoning overlooks this Court's precedent that general liability policies provide coverage from the moment of occurrence (*i.e.*, injury or property damage), not merely after there is a final judgment: "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, 236, 486 S.E.2d 89, 91 (1997).

[6] The Court of Appeals' language could also be read to suggest that an "occurrence" is synonymous with a final judgment. Such a conclusion is inconsistent with the policies and the way this Court has defined the term "occurrence." The policies clearly define "occurrence" as "bodily injury or property damage which happens during the policy period." (App. at 10.) In addition, this Court has interpreted similar policy language to mean that an occurrence takes place at the time of injury. *Boggs v. Aetna Cas. and Sur. Co.*, 272 S.C. 460, 252 S.E.2d 565, 567 (1979) ("We conclude the allegedly negligent location of the house on the lot which created the exposure to a condition which resulted in property damage constituted an 'occurrence.'"). To the extent the Court of Appeals equated an "occurrence" with a final judgment, this conclusion was wrong.

A "chose in action" accrues at the time of injury or property damage. The vast majority of courts have rejected similar attempts by insurers to claim that a chose in action does not exist until after a final judgment against the policyholder. *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*, 148 A.3d at 652 ("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….").

Old CNC's rights to seek defense and indemnity came into existence as soon as the environmental contamination occurred. Those policy rights were, accordingly, freely assignable choses in action after that time. *Robinson v. Saxon Mills*, 124 S.C. 415, 117 S.E. 424, 426 (1923) ("It is unquestionably true that a right of action for a tort which has affected property, real or personal, may be assigned."); *Evans v. Watkins*, 112 S.C. 419, 100 S.E. 153, 154 (1919) ("The right of action being an injury to property, was assignable."); *see also* S.C. Jur. *Assignments* § 19 (2006) ("A chose in action is the right of proceeding in a court to procure the payment of a sum of money, or the right to recover a personal chattel or a sum of money by action.... In South Carolina a chose or thing in action is statutorily included in one's personal property and is assignable."). As described below (section I.B), the vast majority of courts agree that after a policy "occurrence," policy rights are freely assignable choses in action.

2. The Court of Appeals misapplied a standard "no action" clause to define when a policyholder is entitled to coverage.

To justify its erroneous conclusion about when policy rights become a chose in action, the Court of Appeals misconstrued a separate policy provision, a standard "no action" clause. (App. at 8–11.) A no-action clause restricts third-party claimants from seeking recovery directly under an insurance policy without first obtaining a judgment against the policyholder:

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

(App. at 9) (quoting policies) (emphasis omitted).[7] The Court of Appeals wrongly interpreted this provision to apply to when the insurer is required to provide coverage of any kind to the policyholder. (App. at 11) ("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….'").

The no-action clause does not relate to when a policyholder is entitled to coverage rights under the policy but instead governs when a third-party claimant may assert a direct action against an insurer. 7A *Couch on Insurance* 3d § 105:7 ("With respect to the insurer, a no-action clause eliminates suits by persons who have not been able to establish that they had legally valid claims against the particular insured."); *see also Paul Holt Drilling, Inc. v. Liberty Mut. Ins. Co.*,

[7] This 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.). This specific 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.*

664 F.2d 252, 254 (10th Cir. 1981) ("The purposes of the no action clause are to prevent nuisance suits against the insurance company and to prevent an injured party or an insured from bringing the insurance company into the underlying litigation with possible resultant prejudice." (citing *St. Louis Dressed Beef & Provision Co. v. Maryland Cas. Co.*, 201 U.S. 173, 182-83 (1906))); *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.").

This Court, interpreting a no-action clause nearly identical to the one here, has explained the no-action "provision of the contract is for the benefit of the injured party who can exercise the rights therein given by compliance with the conditions stated in this paragraph of the contract." *Pharr v. Canal Ins. Co*., 233 S.C. 266, 276, 104 S.E.2d 394, 399 (1958).[8] No-action clauses relate to policy benefits sought by third-parties who are not "named" in the insurance contract itself. *Id.*; *see also Sexton v. Harleysville Mut. Cas. Co*., 242 S.C. 182, 189, 130 S.E.2d 475, 479 (1963) (explaining that "the recovery of a judgment against the insured was a condition precedent to [an injured third 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)); *Travelers Indem. Co. v. Canal Ins. Co.*, 254 S.C. 92, 94–95, 173 S.E.2d 656, 657–58 (1970) (explaining that the "the standard 'no action clause'" of a general liability insurance policy

[8] The no-action clause in *Pharr* provided: "'No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.'" *Pharr*, 233 S.C. at 275, 104 S.E.2d at 399 (quoting policy).

"confers on an injured person the right to recover on the policy" but also "imposes the condition precedent that no action shall lie against the insurer unless such person shall have secured a judgment or agreement as described in the policy").[9] The Court of Appeals improperly applied the no-action clause to Old CNC's direct rights under the policy to determine when Old CNC experienced an insurable loss event under the policy.

There is an even more basic reason why the no-action clause cannot have the meaning ascribed by the Court of Appeals. For an insurer that owes a duty to defend, that defense obligation begins as soon as an action is filed against the policyholder, not merely once there has been a final judgment. *Town of Duncan v. State Budget & Control Bd.*, 326 S.C. 6, 16 n.14, 482 S.E.2d 768, 773 n.14 (1997) ("An insurer's duty to defend depends on an initial or apparent potential liability…."); *Sloan Constr. Co. v. Cent. Nat. Ins. Co. of Omaha*, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977) ("[T]he duty to defend exists regardless of the insurer's ultimate liability to the insured."). Old CNC had the right to seek coverage in the form of the duty to defend after the "occurrence," not merely after a final judgment. *Nationwide Mut. Ins. Co. v. Simmonds*, 315 S.C. 404, 407, 434 S.E.2d 277, 278 (1993) (explaining that the duty to defend "is separate and distinct from its obligation to pay a judgment rendered against an insured" (internal quotation marks omitted)). This distinct aspect of coverage is a key right policyholders pay for when they obtain certain insurance policies. *Id.* ("The defense of such suits by the insurer is a

[9] The no-action clause in *Travelers* followed nearly the same language as the provision here: "The policy … contains the standard 'no action clause' which provides that no action shall lie against the company unless, as a condition precedent thereto, 'the amount of the obligation of the insured to pay shall have been finally determined by either judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.'" *Travelers*, 254 S.C. at 94, 173 S.E.2d at 657 (quoting policy).

valuable right of the insured for which he pays and to which he is entitled by the very words of the policy.").

The Court of Appeals wrongly held that "Old CNC"—the *original* policyholder—"was not entitled to **coverage**" until a final "'judgment against the insured'" had been entered. (App. at 11) (quoting policy's "no action" clause) (emphasis added). 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 else in this country. *See* 7A *Couch on Insurance* 3d § 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…."); *Wilbanks Sec., Inc. v. Scottsdale Ins. Co.*, 215 F.Supp.3d 1196, 1200 (W.D. Okla. 2016) ("[T]o give effect to the no action clause would eliminate in its entirety any obligation by [insurer] to fulfill its duty to defend until such time as the insured has failed to prevail in the underlying action.").

Finally, other courts have held that "no action" clauses in insurance policies do not bar post-occurrence assignment of policy rights. *Bell v. Federal Ins. Co.*, No. 06-4748, 2007 WL 2493113, at *2 (D. Minn. 2007) (rejecting insurer's argument that assigned coverage rights were "barred pursuant to the … policy's 'no action' and 'no assignment' clauses" and holding "any assignment would be akin to an after-loss assignment of proceeds, which is permissible"); *Paxton & Vierling*, 497 F. Supp. at 582 (stating insurer argument that no-action clause prevented assignment of policy rights was "frivolous and amounts to no more than an effort to smokescreen its already weak positions," and holding that "the no action clause simply is not relevant in this declaratory judgment action, which was brought only to determine the defendant's duty to defend plaintiff" policyholder).

B. The majority of courts nationwide recognize that policy rights may be assigned after an occurrence.

The Court of Appeals' ruling conflicts with the overwhelming nationwide consensus that the relevant event giving rise to coverage is the occurrence from which the loss arises, not an entry of a judgment fixing the amount of damage for that occurrence. Most courts have rejected the argument—raised by the insurers here and accepted by the Court of Appeals below—that a final judgment (or fixed dollar amount) must be in place before policy rights are assignable.

1. This Court's analysis in *Narruhn* shows that insurance policy rights are transferrable after an "occurrence" triggering coverage.

In *Narruhn*, this Court recognized that "loss" occurs at the time of injury under a general liability policy, not when a final judgment is rendered for that injury. *Narruhn*, 404 S.C. at 344–45, 745 S.E.2d at 94. This Court explained that "it is generally held that an assignment *after* a loss has already occurred does not require an insurer's consent," and then relied on *Couch on Insurance* and several other authorities holding that "loss" equates to events giving rise to coverage. *Id.* This Court recognized "the assignment before loss involves a transfer of a contractual relationship while the assignment after loss is the transfer of a right to a money claim." *Id.* (quoting 3 *Couch on Insurance* 3d § 35.8 (2011 Rev. Ed)).

This Court also relied on *Illinois Tool Works, Inc. v. Commerce & Indus. Ins. Co.*, 962 N.E.2d 1042 (Ill. App. Ct. 2011), which held that "loss" equates to events giving rise to coverage. *Id.* at 1054. The *Illinois Tool Works* court explicitly found that "loss" under the policy was environmental contamination of property occurring during the policy term, even though a lawsuit was not filed until five years after the policy had been assigned:

> [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. This Court's reliance on these authorities indicates that policy rights are assignable any time after a covered "occurrence."

2. The overwhelming nationwide majority holds, with *Narruhn*, that policy rights may be transferred after an "occurrence."

In *Fluor Corp. v. Superior Court*, the California Supreme Court surveyed the law throughout the United States and noted the majority rule that a policyholder possesses the "right to invoke coverage" any time after an occurrence under the policy:

> [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**, and allow assignment of the right to invoke coverage at any time after that loss.

Fluor, 354 P.3d at 332 n.51 (emphasis added). In *Fluor*, the court also noted 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 similarly held that "loss" occurs at the time of the event giving rise to coverage. *Givaudan*, 151 A.3d at 591. The court in *Givaudan* rejected the insurers' argument that "a post-loss claim becomes assignable only when there has been a judgment against the insurer or a settlement between the insured and the insurer." *Id.* at 582. The court held instead that a loss occurs when the event giving rise to coverage takes place: "the relevant event giving rise to coverage is the loss event, not the entry of a judgment fixing the amount of damage for that loss." *Id.* at 591. In reaching this result, the *Givaudan* court explicitly held that it did not matter that the assigned post-loss claims had not been "reduced to

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

The court in *Illinois Tool Works*, cited with approval in *Narruhn*, held that policy rights could be assigned before a third-party claim is filed because the policyholder owns the rights, regardless of whether it will ever assert them. *Illinois Tool Works*, 962 N.E.2d at 1049–50. The policyholder paid premiums and thus "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." *Id.* at 1050. This was true even though the policyholder's 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." *Id.* The policyholder "clearly owned those rights, whether or not it ever needed to assert them, and it could properly assign them." *Id.*

The Supreme Court of Vermont rejected the argument that "loss" requires a final judgment, explaining that the insurer's "potential liability to insure Green arose when parties were injured by Green's products." *In re Ambassador Ins. Co., Inc.*, 965 A.2d 486, 491 (Vt. 2008). As here, "Green's insurance coverage from Ambassador was an occurrence-based policy, which means that a claim is deemed to exist or arise at the time of the incident, so long as the incident occurred during the policy period, even if the claim is not reported until after the policy period expired." *Id.* (internal alterations and quotation marks omitted). *See also In re Viking Pump*, 148 A.3d at 652 ("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."); *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.").

The Court of Appeals' false distinction between "loss" and "occurrence" ignores the overwhelming weight of these holdings from other jurisdictions, which recognize that the two terms are treated synonymously in this context and that a chose in action comes into being after a policy occurrence, not after a final judgment. Only one other jurisdiction has reached the same conclusion as the Court of Appeals here. *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"). Courts across the country have rejected the reasoning and holding of *Travelers*, and it has not been followed or adopted by any other jurisdiction since it was decided. *See Givaudan*, 151 A.3d at 590; *Fluor*, 354 P.3d at 327 n.46.

3. The majority rule makes sense: Insurer risk does not change after the occurrence giving rise to coverage.

The majority rule described above recognizes that an insurer's risk does not change once an occurrence has taken place, even if the insurance rights relating to that occurrence are assigned. Once the policy period has ended, the insurer's risk is fixed. The only difference an assignment makes is the name to be written on the check, *i.e.*, who is seeking coverage for the loss caused by the original policyholder. It does not change the obligation of the insurer, which would have to pay for the loss in either case.[10]

[10] Anti-assignment clauses prevent policyholders from assigning policies to parties for whom the insurer has not had the opportunity to assess, or underwrite, the risks. *Fluor*, 354 P.3d at 329 ("The recognized rationale for enforcing a consent-to-assignment clause is to protect an

Allowing post-loss assignments thus serves the useful purpose of connecting a policy's coverage during the applicable period to the insured loss. "An assignment of a loss does not expand the risk to cover other activities; it only allows a change in the identity of the insured to reconnect the policy's coverage to the insured loss." *Gopher Oil Co. v. Am. Hardware Mut. Ins. Co.*, 588 N.W.2d 756, 763 (Minn. Ct. App. 1999). This solves a very common problem arising out of the buying and selling of corporate assets. "This transfer of liability addresses the problem created when an insurer becomes liable at the time there is an accident or occurrence covered under the policy but the loss is enforced against a successor owner." *Id.* In other words, 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 it purchased to cover those very liabilities.

This Court correctly recognized this risk-based rationale in *Narruhn* when it relied on the following analysis from Couch on Insurance:

> 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, 404 S.C. at 344, 745 S.E.2d at 94 (quoting 3 *Couch on Insurance* 3d § 35.8 (2011 Rev. Ed)) (emphasis added). This Court also relied on *Illinois Tool Works*, which explained that "[t]he 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." 962 N.E.2d at

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insurer from bearing a risk or burden relating to a loss that is greater than what it agreed to undertake when issuing a policy.")

1054. Once the loss event—the occurrence giving rise to coverage—has taken place, the insurer continues to insure the same risk for which it was paid premiums.

The majority of other courts rely on this same risk-based rationale for permitting post-loss assignment of policy rights. The New Jersey Supreme Court held that "post-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." *Givaudan*, 151 A.3d at 591 (internal citations omitted). The "loss event" in that case—like here, the occurrence of environmental contamination—happened before the policy rights were assigned and were due to actions of the policyholder that the insurer had agreed to insure. *Id.* "[T]he right to insurance coverage for the 'occurrence' of environmental contamination was assigned … after the policies had expired. The loss event occurred during the policy periods." *Id.* at 591. Because of this, there was no change in risk to the insurer because the liability "occurred due to the actions or inactions of the entity that the insurer insured …." *Id.* at 591–92. This is precisely the situation faced by PCS.

There is no reason to prevent transfer of policy rights (or choses in action) after the underlying occurrence has taken place. "The rationale for honoring 'no assignment' clauses vanishes when liability arises from presale activity." *N. Ins. Co. of New York v. Allied Mut. Ins. Co.*, 955 F.2d 1353, 1358 (9th Cir. 1992). The purpose of "no assignment" clauses is to protect insurers against increased risk:

> Insurers take account of the nature of the insured when issuing a policy. Risk characteristics of the insured determine whether the insurer will provide coverage, and at what rate. An assignment could alter drastically the insurer's exposure depending on the nature of the new insured. "No assignment" clauses protect against any such unforeseen increase in risk. When the loss occurs before the transfer,

> however, the characteristics of the successor are of little importance: **regardless of any transfer the insurer still covers only the risk it evaluated when it wrote the policy**.

Id. (emphasis added). This rationale applies both to the duty to indemnify and to the duty to defend. *Id.*

Courts reject insurer arguments that post-loss assignments impact risk to the insurer.[11] For example, the Ninth Circuit addressed and rejected the insurer argument that "[s]ubstituting a different defendant may alter substantially defense costs," holding that "[t]he nature of the risk, rather than the particular characteristics of the defendant, will have the greater effect on defense costs." *Id.* The court held that the policy benefits, "including the right to a defense," were validly assigned and provided "coverage for presale occurrences." *Id.* The Supreme Court of Pennsylvania similarly rejected the insurer argument that post-loss assignment of insurance rights alters insurer risk:

> [The insurer's] risk remained the same, regardless of whether Foulke or Appellee held the policy. That risk was that a jury on some date subsequent to 1997 would assess damages in an amount greater than $1,000,000.00 for the fatal injuries that Foulke personnel caused Egger on September 5, 1997. **Once Foulke, the original insured, acted negligently in causing the death of Egger, the bargained-for risk was realized and was not changed by the assignment of rights to Appellee**. The loss had occurred, and it remained only for that loss to be liquidated through legal proceedings.

[11] The insurer Respondents made this argument in opposing certiorari here. They claimed that "any rule that permits assignment to a new insured of all policy rights as soon as an underlying injury occurs… necessarily increases the risk to the insurer." Respondents' Return at 21. They argued that assignment "results in a division of interests that the insurer counts on being aligned: the insured's and insurer's common interest in defeating liability." *Id.* at 21–22. The Ninth Circuit rejected this very argument. It recognized that "[i]nasmuch as the successor firm was not a party to the original policy, the risk of noncooperation arguably increases," but dismissed this concern since "the insurer is protected against this risk because it is freed of its defense obligation if the successor firm does not fulfill its duty to aid in the defense." *Id.*

Egger, 903 A.2d at 1228 (emphasis added) (footnote omitted).

Again and again courts have adopted this rationale, holding that once the "occurrence" giving rise to coverage has taken place, the insurer's risk is fixed, and insurance rights may be validly assigned in spite of anti-assignment clauses. *See, e.g., Johnson v. CSAA Gen. Ins. Co.*, 478 P.3d 422, 431 (Okla. 2020), *as corrected* (Dec. 18, 2020) ("Distinguishing between an assignment of an insurance policy and an assignment of a post-loss chose in action which does not increase an insurer's risk has continued to be recognized by a majority of courts in the United States as implementing an important public policy."); *Parker's Classic Auto Works, Ltd. v. Nationwide Mut. Ins. Co*., 215 A.3d 1084, 1086 n.1 (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."); *Pilkington*, 861 N.E.2d at 129 ("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."); *Gopher Oil*, 588 N.W.2d at 763 ("The purpose of a non-assignment clause is to protect the insurer from an increase to the risk it has agreed to insure. But when events giving rise to an insurer's liability have already occurred, the insurer's risk is not increased by a change in the insured's identity." (internal citations omitted)); *Pub. Util. Dist. No. 1 of Klickitat County v. Int'l 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.").[12]

[12] *See also Olin Corp. v. Lamorak Ins. Co.*, --- F.Supp.3d ---, 2021 WL 396781, at *12 (S.D.N.Y. Feb. 4, 2021) ("The policies expired many years before the 1996 spinoff…. [W]here the right to insurance for the 'occurrence' of environmental contamination is assigned after the

This risk-based analysis is easily applied to the facts here. The assignment of Old CNC's policy rights was the assignment not of an insurance policy but of a chose in action that was bought and paid for by Old CNC and existed prior to the sale of Old CNC. The insurer Respondents agreed to insure Old CNC against the underlying liabilities in this case, environmental damage occurring during Old CNC's operations and *while Old CNC maintained the policies*. That is exactly the risk the insurer Respondents contractually agreed to insure, and it is exactly the risk for which they received premiums. The sale to PCS in no way altered the risk undertaken by the insurer Respondents at the time the polices were issued. Rather, permitting assignment of the policy rights (the choses in action) merely "reconnect[s] the polic[ies'] coverage to the insured loss." *Gopher Oil*, 588 N.W.2d at 763.

C. Preventing post-occurrence assignment of insurance rights is bad public policy.

The Court of Appeals' decision should be reversed for at least three other practical reasons. First, the Court of Appeals' rule, if affirmed by this Court, will necessarily have a chilling effect on companies hoping to buy or sell corporate assets. Second, 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. Third, the outcome below will needlessly complicate insurance law on this point, will place South Carolina with only one other jurisdiction, will be confusing to apply, and will lead to inconsistent results.

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policies have expired, the risk of exposure that was contractually undertaken by the insurer occurred prior to the assignment." (internal quotation marks, citations, and alterations omitted)); *See 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.")

1. The Court of Appeals' decision will have a chilling effect on business transactions.

Allowing post-loss assignments serves the useful purpose of "reconnect[ing] [a] policy's coverage to the insured loss," which allows for efficient corporate transactions. *Gopher Oil*, 588 N.W.2d at 763. This is "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. For "many decades" the post-loss transferability of insurance rights was simply assumed: "courts, parties to transactions, and litigants generally *assumed* the legal propriety of assigning to a successor, in connection with a transfer of assets and liabilities, the right to invoke insurance coverage for losses that had previously occurred—even if those losses were not determined with precision or indeed known, let alone reduced to a judgment." *Id.* at 326 (citing May, George, *Successor's Rights to Insurance Coverage for Predecessors' Preacquisition Activities: Recent Developments* (2005) 40 Tort Trial & Ins. Prac. L.J. 911, 912)). Courts and parties recognized that a corporate successor who assumed its predecessor's liabilities should also receive applicable insurance coverage for those liabilities. *Id.* ("[I]in the decades after *Ocean Accident* [*& Guar. Corp. v. Southwestern Bell Tel. Co.*, 100 F.2d 441 (8th Cir.)], and until the mid–1980s, 'courts routinely allowed whoever ended up with the tort liability to enjoy the benefit of insurance coverage that would have applied before the later corporate transaction took place.'" (quoting 1 Stempel On Insurance Contracts (3d ed. 2014) at p. 3–128 & fn. 409.4)).

Allowing post-loss insurance rights to be freely transferred fosters economic activity, lowers transaction costs, maximizes wealth creation, and protects companies that buy and sell corporate assets. The *Fluor* court explained:

> 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). The rule also "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." *Id.*

By contrast, rigidly enforcing anti-assignment clauses can have a chilling effect on businesses, particularly those hoping to buy or sell corporate assets. Preventing the transfer of insurance to cover past liabilities, like those PCS assumed here, changes the economic calculus of any potential acquisition taking place in South Carolina. This is particularly true where a company's past liabilities, such as liabilities for environmental contamination, may not be known for years or even decades.

2. The Court of Appeals' decision grants a windfall to insurers.

There are clear benefits to permitting post-loss assignment of insurance rights. However, there is no similar benefit to prohibiting such assignments. As explained above, the risks at issue were factored into the original underwriting of these policies. The premiums paid by Old CNC were in exchange for coverage against these very risks. PCS is asking the insurers to provide coverage for environmental damage that (i) occurred during the policy periods; (ii) because of actions taken by Old CNC, the original insured; and (iii) under policies for which they were

already paid premiums. In other words, PCS is seeking to have the insurers "cover[] the risk [they] originally contracted to insure." *In re Viking Pump*, 148 A.3d at 651–52.

Relieving the insurers of their contractual duty to provide coverage gives them a windfall simply because the business no longer exists, and it allows them to keep their premiums without holding up their end of the bargain. *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*, 588 N.W.2d at 764 ("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."). The New Jersey Supreme Court best described why prohibiting post-loss assignments is unfair to policyholders:

> 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.

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. The result should not be different simply because PCS now seeks to assert those rights.

3. The Court of Appeals' decision will be confusing to apply and will lead to arbitrary, inconsistent, and unfair results.

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 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."). Meanwhile, the majority rule continues to gain traction across the country. In December 2020, for example, the Oklahoma Supreme Court "agree[d] with the majority of courts allowing an assignment by an insured possessing an insurable interest when the subject of the assignment is a post-loss chose in action based upon property insurance." *Johnson*, 478 P.3d at 435.[13] The Court of Appeals' holding below is at odds with the vast (and growing) majority of states. If this Court affirmed that ruling, it would sow unnecessary confusion into insurance law.

The Court of Appeals' rule would also lead to arbitrary and inequitable outcomes. Some liabilities are immediately apparent (an explosion; a building collapse), while others can take years or even decades to discover (environmental contamination; asbestos). The Court of

[13] There is also a small minority of states that "enforce consent-to-assignment clauses even more strictly … by failing to recognize *any* post-loss exception to those clauses (even, apparently, as to claims that … have been reduced to a money judgment)." *Fluor*, 354 P.3d at 327 n.46 (citing four cases from minority jurisdictions). That minority rule was not discussed in *Narruhn*, nor was it relied on by the Court of Appeals below.

Appeals' rule would likely allow policyholders in the former category to assign policy rights to successor entities but would, for no good reason, exclude policyholders in the latter category from coverage. And since latent liabilities, such as environmental contamination, are often some of the most expensive, the Court of Appeals' rule would bar coverage for policyholders who need it the most.

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

PCS argued to the circuit court that the issue of de facto merger was a fact question that precluded summary judgment and that evidence in the record supported a ruling that PCS was the de facto successor to Old CNC. For example, PCS's expressly assumed Old CNC's liabilities. In addition, the United States District Court had previously held that PCS *was* the de facto successor to Old CNC.[14] *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F. Supp. 2d 431, 480 (D.S.C. 2011) ("PCS is a 'person' subject to CERCLA liability because it is the successor of a corporation that owned and operated the facility when hazardous substances were disposed of.").

Despite this, the circuit court found as a matter of law that PCS was not the de facto successor to Old CNC. In reaching this result, the circuit court mistakenly inverted the legal test for a finding of de facto merger and incorrectly held that a party's express assumption of liabilities ***precludes*** a finding of de facto merger. (App. at 170.) In fact, the cases cited by the circuit court stand for the exact opposite conclusion. *See Brown*, 128 S.C. 428, 123 S.E. at 99; *Huggins v. Commercial & Sav. Bank*, 141 S.C. 480, 140 S.E. 177, 185–86 (1927); *United States v. Davis Mem'l Hosp.*, 956 F.2d 1163 (Table) (4th Cir. 1992)). Indeed, according to this Court, a

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

finding of merger *is* warranted where the evidence shows that "liability for the payment of claims outstanding against [the seller] had been **expressly or impliedly assumed** by the [purchaser]." *See Brown*, 128 S.C. 428, 123 S.E. at 99 (emphasis added). The circuit court got it backward, holding that liabilities can only be transferred to a successor entity where the parties do *not* intend to transfer liabilities to a successor entity.

PCS raised the de facto merger issue on appeal, but the Court of Appeals declined to address the argument, asserting that "the cases PCS Nitrogen cites do not address the question of insurance coverage, and it is unclear how a finding of successor liability under a de facto merger theory would provide access to coverage rights under Respondents' policies." (App. at 11 n.7.) The Court of Appeals' statement misunderstands the argument: If PCS is the legal successor to Old CNC, then *all* the rights and obligations of Old CNC would transfer to PCS, including its rights to insurance coverage. 19 C.J.S. Corporations § 899 ("A new corporation created by consolidation or merger succeeds to all the rights, powers, and privileges of the original corporations, including causes of action and contract rights."). This basic principle of corporate law applies to the insurance context. The rationale, described in the related context of statutory merger,[15] is that an entity that succeeds to its predecessor's liabilities should also succeed to its protection (including insurance) for those liabilities:

> [I]nasmuch as the merger of corporations results in the transfer of liabilities of the merged corporation (Regina) and also all of its rights, the logical conclusion is that the surviving corporation (Heublein) simply stands in the same position as that occupied by the merged corporation (Regina) prior to the merger. Therefore, inasmuch as Heublein is to be held responsible for the liability of

[15] A "de facto merger is "[a] transaction that has the economic effect of a statutory merger but that is cast in the form of an acquisition or sale of assets or voting stock." MERGER, Black's Law Dictionary (11th ed. 2019). "Although such a transaction does not meet the statutory requirements for a merger, a court will generally treat it as a statutory merger for purposes of the appraisal remedy." *Id.*

> Regina, it is entitled to the protection which Regina had (that is, its insurance with United Pacific) at the time of the accident, and that, as an asset of Regina, such coverage passed to Heublein as the surviving corporation.

Aetna Life and Cas. v. United Pac. Reliance Ins. Companies, 580 P.2d 230, 232 (Utah 1978) (footnotes omitted); *see also Brunswick Corp. v. St. Paul Fire and Marine Ins. Co.*, 509 F. Supp. 750, 752–53 (E.D. Pa. 1981) ("[B]y issuing the comprehensive liability insurance policy to the since-merged corporation, the insurer undertook contingent contractual obligations to the merged corporation with corresponding contingent contractual rights in that corporation's favor. Upon merger, these rights automatically vested in the surviving corporation by operation of the merger statute. In other words, the surviving corporation simply stands in the same position as that occupied by the merged corporation prior to the merger." (internal citations omitted)).

Courts regularly hold that insurance benefits transfer to a successor entity when there is a de facto merger. *See, e.g., Westoil Terminals Co. v. Harbor Ins. Co.*, 73 Cal.App.4th 634, 640 (Cal.App. 2 Dist., 1999) ("[A] *de facto* merger passes the benefits of the insurance policies of the predecessor entity to the successor entity."); *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); *Knoll Pharmaceutical Co. v. Automobile Ins. Co.*, 167 F.Supp.2d 1004, 1011 n.9 (N.D. Ill., 2001) ("[I]f we found a *de facto* merger, summary judgment for Knoll would still be appropriate because Defendant Insurers' policies would have transferred *de facto* to Knoll.").

In short, if a de facto merger were proved at trial, PCS would automatically possess Old CNC's policy rights. The Court of Appeals failed to acknowledge this and, in doing so, affirmed an erroneous conclusion of law by the circuit court that conflicts with this Court's prior decisions

about what evidence may demonstrate a de facto merger. *See Brown*, 128 S.C. 428, 123 S.E. at 99. If this Court declines to reverse on the basis of the post-loss assignability of insurance rights (as argued above), then it should alternatively reverse on the de facto merger issue. Summary judgment on this issue was improper, and the circuit court's ruling suffered from a clear error of law. As a result, PCS should be able to present evidence at trial that it obtained Old CNC's insurance policy rights by virtue of a de facto merger.[16]

CONCLUSION

The Court of Appeals' ruling that insurance policy rights may not be assigned, even after an occurrence giving rise to coverage, conflicts with this Court's prior rulings and goes against the overwhelming nationwide consensus. PCS therefore asks this Court to reverse the Court of Appeals and hold that, after an "occurrence" under an insurance policy, policy rights become a freely assignable chose in action. PCS further requests that this Court remand this action to the circuit court with instructions to enter judgment that PCS is the assignee as to Old CNC's insurance policies and entitled to coverage under those policies. In the alternative, PCS respectfully requests that this Court reverse the Court of Appeals' decision affirming the circuit court's erroneous conclusion of law on de facto merger and remand this matter for trial.

[16] In footnote 6, the Court of Appeals suggested that decisions by the United States District Court for the District of South Carolina and the Fourth Circuit in a "related matter" addressed the pollution exclusion and ruled adversely to PCS. (App. at 7 n.6) (citing *Ross Dev. Corp. v. PCS Nitrogen, Inc.* 526 App'x 299 (4th Cir. 2013)). That case involved PCS's claims against the prior owner of the Charleston property, not Old CNC's operations at the facility. The decision regarding insurance coverage and the pollution exclusion related to the conduct of Ross' predecessor at the Ashley facility and the policies pursuant to which Ross was seeking coverage—not the conduct of Old CNC or the policies at issue here. To the extent footnote 6 can be read as a determination on the pollution exclusion with respect to the Old CNC policies, the Court of Appeals was in error, since those policies and Old CNC's conduct were not at issue in the *Ross* litigation.

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Respectfully submitted,

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