THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
Apr 05 2021
S.C. SUPREME COURT

---

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

---

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

---

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

**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 BRIEF OF PETITIONER PCS NITROGEN, INC.

---

Wm. Howell Morrison
Sarah Spruill
Haynsworth Sinkler Boyd, P.A.
ONE North Main, 2nd Floor
Greenville, SC 29601
Phone: (864) 240-3200
hmorrison@hsblaw.com
sspruill@hsblaw.com

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

Attorneys For Petitioner, PCS Nitrogen, Inc.

## TABLE OF CONTENTS

Page

## TABLE OF AUTHORITIES

**Page**

**CASES**

**OTHER AUTHORITIES**

## INTRODUCTION

In a Response brief littered with strawmen, red herrings, and begged questions, the insurer Respondents misrepresent the facts of this case and the law on post-loss assignment of insurance policy rights. They argue at length that insurance *policies* cannot be assigned without insurer consent—but PCS has never made that argument. The policies here date from 1966 to 1984, and the assignment did not take place until 1986. The policy periods of the insurance policies at issue had all ended at the time of assignment. Only policy benefits were assigned.

Building on the false premise that this case involves assignment of *policies*, the insurer Respondents argue that Old CNC never assigned the "policies at issue here." *See* Response at 8–10. This highly misleading argument conflates the *active* insurance policies that Old CNC had at the time of assignment (in 1986) with Old CNC's *historical* policies (dating from 1966 to 1984). The factual record demonstrates that Old CNC assigned its insurance policy *benefits*, including those from 1966 to 1984, through a document entitled "Assignment of Insurance Benefits." The insurer Respondents' assertion that "policies" were never assigned is a red herring; the issue in this case is simply whether Old CNC's historical policy benefits (from the 1966 – 1984 policies) were validly assigned.

The insurer Respondents then spend pages arguing that policy rights do not become a "chose in action" until there is "money already due under the policies." Response at 15. They assert that "a chose in action" is equal to "a fixed debt payable to its holder." Response at 40 n.24; *see also id.* at 3, 20, 27, 36, 37. But this Court, consistent with the modern definition of a chose in action, recently defined the term far more broadly than that. A chose in action includes a "proprietary right to a claim" or "a claim for damages in tort" or even more simply a "cause of action." *Arredondo v. SNH SE Ashley River Tenant, LLC*, Op. No. 2019-001767 (S.C. Sup. Ct. filed Mar. 10, 2021) (Shearouse Adv. Sh. No. 8 at 40, 45). By overly constricting the definition

of "chose in action," the insurer Respondents seek to advance a position—that insurance rights are not assignable until there is a final judgment in an underlying case—which only one other jurisdiction has adopted.

The majority rule, adopted by most jurisdictions, is that insurance policy rights may be assigned after an "occurrence"—*i.e.*, "bodily injury or property damage which happens during the policy period." *See* Opening Brief at 7–12, 17–25. The insurer Respondents assert that this rule does not apply in the context of third-party liability policies like those here. That is incorrect; the leading cases adopting the majority rule were decided in the context of third-party liability policies. Likewise, none of the majority rule cases have accepted the insurer Respondents' argument that assigning policy benefits to a new entity increases risk to the insurer. The insurer Respondents raise the specter that "the new entity may seek to cast blame on the insured for the injury, to avoid or diminish its own liability...." Response at 34. But this argument totally ignores that insurers have a remedy for such a situation: if they can demonstrate the non-cooperation of the policyholder, they may be relieved of their coverage obligations. In other words, insurers write policies to cover the activities of a particular policyholder, and a post-occurrence assignment of policy rights "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).

Finally, the insurer Respondents offer no persuasive rebuttal to the important policy considerations that have informed courts across the country in adopting the majority rule. This Court should reject the insurer Respondents' arguments that insurance policy benefits must be "fixed" by a final judgment in order to be assignable. Instead, this Court should adopt the

majority rule and hold that Old CNC's insurance policy benefits from 1966 to 1984 were validly assigned by Old CNC in 1986.

## ARGUMENT IN REPLY

### I. No insurance "policies" were assigned, only policy rights.

The insurer Respondents argue that Old CNC assigned insurance "policies," not merely insurance rights for insurance policies whose policy periods had ended. This strawman argument appears throughout their brief:

- "Assignment of policies (what PCS seeks) is not permitted." Response at 4.
- "Old CNC's and New CNC's contemporaneous statements showed that they understood that assignment of insurance policies from one to the other was impossible without the consent of the insurers, which they did not obtain here." Response at 9.
- "New CNC understood it needed insurer consent for assignment of policies.... Yet no consent was sought or obtained for assignment of any of the policies at issue here." Response at 9–10.
- "[W]hat PCS really sought was not 'assignment' of insurance rights but 'novation'—to substitute itself as a completely new party, for all purposes, to the insurance contracts, which South Carolina law clearly prohibits without the *mutual consent* of all parties, which was not obtained." Response at 12.
- "Substituting PCS as the insured party is a novation requiring consent of all parties, which was not obtained." Response at 16.
- "PCS seeks to have itself substituted as the insured for all purposes under Respondents' policies." Response at 16.
- "PCS thus asks this Court to hold that PCS can claim insured status under Respondents' policies...." Response at 17.
- "But *Narruhn* did not involve an assignment of *policies*, meaning assignment to a new entity who sought to substitute itself as the insured for all purposes—which is what PCS seeks here." Response at 31.
- "Insurance policies are contracts personal to the insured and cannot be transferred to another—even after "loss"—without consent of the insurer." Response at 32.
- "Insurance policies may not be assigned *in toto* to a new insured without insurer consent, but a policyholder may assign only an accrued right to receive money from an insurer as a chose in action." Response at 36.

- "As noted above, forcing insurers into contracts with strangers necessarily increases their risk, for which they will have to account by raising rates on prudent policyholders." Response at 47.

These misleading statements, woven throughout the insurer Respondents' Response, blatantly mischaracterize the facts and PCS's arguments.[1] PCS has never argued that the insurance *policies* here were transferred. Transfer of policies would have been impossible based on the years of the policies in dispute here. When Old CNC assigned its assets and liabilities in 1986, 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, after the end of the last policy period. 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.").

Nor has PCS ever argued that insurance *policies* can be transferred to another 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* or *benefits* may be

---

[1] The insurer Respondents largely repeated arguments they made in opposing certiorari. Return at 15 ("[I]nsurance policies cannot be transferred without insurer consent." (upper-case removed)); *id.* ("PCS argues that insurance policies may be freely transferred to a stranger at any time after 'loss....'"); *id.* 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...."); *id.* 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 ....").

transferred after a loss has occurred. PCS could not have even made such an argument here because the coverage periods of the policies had ended. This case "necessarily" involves "a claim assignment." *Id.*

The insurer Respondents' arguments about "novation" fail for these same reasons. A "novation" requires the substituting of parties to a *policy*, not merely assigning *policy rights*. The cases cited by the insurer Respondents demonstrate this. *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*). Similarly, the Respondents' "law of the case" or "waiver" argument is a red herring because the "two issue rule" does not apply here. Response at 14–16. 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 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 causes of actions), *with In re Estate of Reagan*, No. 2015–UP–354, 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 insurer Respondents misrepresent the factual record about the transfer of insurance policy benefits versus insurance policies.

From their dubious assertion that this case involves insurance "policies"—and not policy rights—the insurer Respondents proceed to argue that Old CNC never assigned the "policies at issue here." *See* Response at 8–10. This argument, purportedly based in the factual record, is highly misleading. The insurer Respondents claim:

> These facts, which were not disputed by PCS, show that New CNC understood it needed insurer consent for assignment of policies, and that it actually obtained such consent from one of the then-current insurers of Old CNC. Yet no consent was sought or obtained for assignment of any of the policies at issue here.

Response at 9–10. This argument only makes sense if you assume that Old CNC's historical policies from 1966 to 1984 constituted active *policies*. But they were not active policies. The insurer Respondents thus conflate active policies with the historical policies. The irrationality of their position becomes clear when analyzing the facts they recite:

> This is confirmed by a December 6, 1986, letter, summarizing events surrounding the November 1, 1986, closing, which notes that, in fact, most of Old CNC's then-current policies were cancelled, with new policies being issued to New CNC ("the purchaser of Columbia Nitrogen Corporation"), rather than old policies being assigned to it. App. 2524-28. Only those policies that could not be cancelled for a refund of premium were assigned. App. 2524.

Response at 9. This discussion obviously relates to active insurance policies at the time of assignment, not historical policies. How could historical policies from 1966 to 1984 be cancelled "for a refund of premium"?

Policy benefits for historical occurrence policies are another matter. The factual record demonstrates that Old CNC assigned its policy *benefits*, including those at issue here, to New CNC. The two companies executed a document entitled "Assignment of Insurance **Benefits**" by which Old CNC assigned to New CNC "all of [Old CNC's] rights, title and interest, legal and

equitable, **in the benefits** and proceeds **under all of its insurance policies** to the extent the same may be transferred and assigned." (App. 2398) (emphasis added); (*see also* App. at 122–25.) The fact that New CNC also obtained insurer consent from one of Old CNC's insurers for a current insurance policy does not prove that Old CNC was required to get insurer consent to assign the rights to its historical policies dating from 1966 to 1984. Those historical policies would only cover liabilities arising from occurrences, bodily injury or property damage during those past time periods, so there would be no substitution of the policyholder, and insurer consent would not be required.

## III. The assigned policy rights were a chose in action as this Court has defined that term. A chose in action arises at the time of occurrence.

Insurance policy rights, after a policy occurrence, are a "chose in action" as this Court has defined that term. This Court recently defined "chose in action" broadly to include a "proprietary right to a claim" or "a claim for damages in tort" or even more simply a "cause of action." *Arredondo*, No. 2019-001767, Shearouse Adv. Sh. No. 8 at 45. The Court explained:

> A "chose in action" is a type of property interest or **a proprietary right to a claim** or debt. *See Ball v. Ball*, 312 S.C. 31, 33-34, 430 S.E.2d 533, 534-35 (Ct. App. 1993) (holding a vested military pension was a "chose in action," or form of property, because the recipient "could maintain an action at law to enforce this right should the military ever wrongfully attempt to deny it to him"), *aff'd*, 314 S.C. 445, 445 S.E.2d 449 (1994); *see also Chose in Action*, *Black's Law Dictionary* (11th ed. 2019) (defining "chose in action" as "a proprietary right in personam, such as a debt owed by another person, a share in a joint-stock company, or ***a claim for damages in tort***" (emphasis added)). Arredondo and Respondents agree "chose in action" generally means "**cause of action.**"

*Id.* (bold added).

Old CNC's historical policies covered occurrences during the years they were written—1966 to 1984. The coverage period for the last policy at issue in this case ended on December 31, 1984. Those policies provide coverage only for bodily injury and property damage that

occurred between 1966 and 1984. The rights under those policies were not assigned until 1986—after the policy periods under which PCS seeks coverage. What Old CNC had purchased during those policy periods from 1966 to 1984 was the right to seek coverage for liability arising out of occurrences *during the policy periods*. There is no possible way for Old CNC—or PCS—to seek coverage under these historical policies for events that occurred *after* 1984. In other words, PCS can only seek insurance coverage for causes of action that arise from occurrences that happened before the policies were assigned in 1986, because otherwise those occurrences would have happened outside the periods of the policies providing coverage. The right to seek insurance coverage under Old CNC's historical policies thus constitutes a chose in action as this Court has defined it.[2] Importantly, the property damage at issue in the underlying case arose from the operations of Old CNC, the very operations that were insured by the insurer Respondents.

The insurer Respondents repeatedly try to redefine "chose in action" to make it narrower than this Court's definition. Their Response is peppered with attempts to constrict "chose in action" to be merely the right to collect money that is already due:

- "[T]he insured has no chose in action—that is, a right to recover money from the insurer, **money that is the insured's property because it is due and owing**—until a tort claimant obtains a judgment against the insured in an underlying tort

[2] Contrast this case with the facts of *Arredondo*. In that case, there was no chose in action because the "cause of action ... did not exist at the time Arredondo signed the arbitration agreement." *Id.* The arbitration agreement was signed on "October 12, 2012," the date the decedent was admitted to the nursing facility. *Id.* at 41. But the cause of action—for wrongful death and survival, allegedly resulting from the nursing facility's negligence—necessarily did not arise until *after* the arbitration agreement was signed. *Id.* Therefore, no chose in action could have existed when the agreement was signed. Here, by contrast, the Old CNC policies only cover liability for occurrences that *predate* the assignment of policy rights. Therefore, a chose in action necessarily existed before the assignment in 1986. In the simplest terms, all "occurrences" had already happened.

suit, because that is when, under the policies, the insurer's payment obligation arises." Response at 3 (emphasis added).

- "A **chose in action to recover money due** is property that can be transferred; a contractual relationship is not." Response at 20 (emphasis added).

- "[A]fter the insurer's obligations mature into a *payment* obligation, the insured then has a *transferable property interest* that cannot be restrained from alienation—no matter what name is given that piece of property." Response at 21.

- "Old CNC therefore had **no chose in action or other debt** it could assign to PCS...." Response at 27 (emphasis added).

- "The rule that insurance policies may not be assigned, but **a chose in action for money already due** may be assignable, is recognized by many other courts." Response at 36 (emphasis added).

- "[A]n insured may assign merely **a chose in action for an accrued money payment**, not policies to make a new person or entity an insured." Response at 37 (emphasis added).

- "Yet **a chose in action is** not a future contingency, but **a fixed debt payable to its holder**." Response at 40 n.24 (emphasis added).

This Court, however, has defined chose in action more broadly. *Arredondo*, No. 2019-001767, Shearouse Adv. Sh. No. 8 at 45 ("A 'chose in action' is a type of property interest or a proprietary right to a claim or debt."); *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 344, 745 S.E.2d 90, 94 n.3 (2013) (defining "chose in action" to include "[t]he right to bring an action to recover a debt, money, or thing" (quoting Black's Law Dictionary 275 (9th ed. 2009))); *see also 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.").

The insurer Respondents also seek to use *Howard v. Allen*, 254 S.C. 455, 176 S.E.2d 127 (1970) to overly constrict the term "chose in action." They argue: "Assignment of a chose in

action when the insurer's obligation has matured into a payment obligation is permitted. Under *Howard*, the insured does not have a chose in action to recover an insurer's payment until an underlying tort judgment is entered against it." Response at 5. But the term "chose in action" never appears in *Howard*, nor does that case involve a policyholder's post-loss assignment of its own insurance rights. *Howard* never equates the term "chose in action" with "debt," as the insurer Respondents repeatedly seek to do. *See, e.g.*, Response at 27 ("Old CNC therefore had no chose in action or other debt it could assign to PCS...." ).

The holding of *Howard* is much more straightforward: this Court held that a third party could not directly attach and seize the applicable limits of an insurance policy held by a policyholder that had injured her (the third party). *Howard*, 254 S.C. at 459, 176 S.E.2d at 129 ("We are not convinced that the contractual obligations of defendant's insurer are a debt subject to attachment under the law of this state...."). That is, "[a]t the time of the levy in the instant case the insurer had not failed to perform any obligation to the insured and was, therefore, we think, not indebted to him in any amount." *Id.*, 254 S.C. at 462, 176 S.E.2d at 130. Therefore, the holding in *Howard*—that a third party could not directly attach insurer obligations to a policyholder—does not bear on whether a policyholder may assign policy rights to a corporate successor.[3]

---

[3] *Howard*'s discussion of an insurance policy's no-action clause is also consistent with PCS's arguments. First, the Court explained the purpose of the standard no-action clause: "The form of 'no action' clause in common use provides that no action can be brought against the insurer until after the determination of the liability of the insured by a final judgment, or by an agreement entered into between the insurer, the insured and the claimant." *Howard*, 254 S.C. at 460, 176 S.E.2d at 129. In *Howard*, a third-party claimant—*i.e.*, someone who was injured by the policyholder—attempted to "attach and seize the 'the applicable limits of liability and the duty to defend contained in" the policyholder's insurance policy. *Id.*, 254 S.C. at 457, 176 S.E.2d at 128. In discussing debt attachment, the Court held that, under the no-action clause, "the insurer owes the insured nothing until the liability of the insured and the amount thereof has been determined." This makes sense in the factual context of whether there was an attachable

## IV. Assigning post-occurrence policy rights does not change risk to the insurer.

The insurer Respondents argue that insurers' risk changes if policy rights are assigned *after* the end of the policy term. This position misunderstands, once again, what general liability policies insure against. General liability policies, like those in this case, provide coverage for occurrences, "bodily injury or property damage which happens **during the policy period**." (*See* ROA at 73-183, 586-603, 798-813, 825-866, 880-976, 991-1293, 1303-1439, 1451-1489, 1506-1803, 1823-2196) (emphasis added). The environmental contamination—the occurrence giving rise to coverage—happened during the policy periods and thus predated the assignment of policy rights by several years. The relevant policy terms here were from 1966 to 1984. The policy rights were not assigned until 1986.

Insurers assess risk based on the profile of the policyholder who will be insured *during the policy term*. "Risk characteristics of the insured determine whether the insurer will provide coverage, and at what rate." *N. Ins. Co. of New York v. Allied Mut. Ins. Co.*, 955 F.2d 1353, 1358 (9th Cir. 1992). Those characteristics might include the kind of business the policyholder engages in, its management, and the location of its operations. If the policyholder engages in activities during the policy period that result in "bodily injury or property damage" to a third party, then the insurer is obligated to provide coverage because that is what the insurer agreed to insure. A successor entity's actions—after the policy periods have ended—cannot possibly result in "bodily injury or property damage during the policy period" because the policy period has ended and any occurrences have already happened. An assignee of policy rights cannot travel back in time and engage in riskier behavior during a policy period that has ended. Thus,

---

debt in *Howard*, but it does not mean that a policyholder lacks any assignable interest (or chose in action) in an insurance policy until a final judgment.

"[w]hen the loss occurs before the transfer, ... 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.* Here, the insurers assessed the risk of insuring Old CNC during the policy terms of 1966 to 1984. Those risks did not—and could not—change as a result of the policy rights being later assigned in 1986.

This Court in *Narruhn* articulated this risk-based rationale, relying on the explanation in Couch on Insurance that "after events giving rise to the insurer's liability have occurred, the insurer's risk cannot be increased by a change in the insured's identity." *Narruhn*, 404 S.C. at 344, 745 S.E.2d at 94 (quoting 3 *Couch on Insurance* 3d § 35.8 (2011 Rev. Ed)). In *Narruhn,* this Court also relied on *Illinois Tool Works*, which explained: "The risks do not change or increase after the period expires or if an assignee rather than the named insured seeks coverage for losses." 962 N.E.2d 1042, 1054 (Ill. App. Ct. 2011). Courts across the nation agree that insurer risk does not change if policy rights are assigned after the policy period has ended. *See* Opening Brief at 22–25.

Despite the overwhelming authority for this clear, commonsense rationale, the insurer Respondents claim that assignment of policy rights "necessarily increases the risk to the insurer" because "the 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." Response at 34. They claim that "the new entity may seek to cast blame on the insured for the injury, to avoid or diminish its own liability...." *Id.*[4] But this argument totally ignores that the insurers have a

---

[4] The insurer Respondents' recitation of the underlying facts is also misleading. They claim that "PCS made allegations directly adverse to Old CNC," and cite an amended third-party complaint that was filed in the underlying litigation after some discovery had occurred. Response at 10 (citing App. at 395–433). In that third-party complaint, however, PCS was not attempting to prove that Old CNC should be held liable for environmental contamination at the

remedy for such a situation: they can demonstrate the non-cooperation of the policyholder and be relieved of their coverage obligations. This is precisely what courts have held when confronted with this very argument. For example, the Ninth Circuit explained that, even if "the risk of noncooperation arguably increases" when a successor firm is assigned policy rights, "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." *N. Ins. Co. of New York v. Allied Mut. Ins. Co.*, 955 F.2d 1353, 1358 (9th Cir. 1992).

The specter of a policyholder's non-cooperation has nothing to do with the risks the insurer wrote the policy to cover. *See Egger v. Gulf Ins. Co.*, 588 Pa. 287, 303 (Pa. 2006) ("Gulf's risk remained the same, regardless of whether [the original insured] or [the assignee] held the policy.... Once ... 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 [the assignee]."). The insurer in *Egger*, making the same argument as the insurers here, claimed "that it '*did,* in fact, experience an increased risk'" because of the assignment by the original

---

Charleston Site—Old CNC's environmental contamination had already been demonstrated in discovery—but rather that Old CNC's parent corporations should be liable for the contamination caused by their subsidiary. (App. at 412–421.) Acknowledging unpleasant facts about Old CNC—for the purpose of obtaining contribution from Old CNC's parent corporation—does not show that PCS somehow tried to create liability for Old CNC, or that any division of interests between the insurers and PCS resulted from PCS's third-party claim.

Likewise, the insurer Respondents note that, in the underlying litigation, "PCS adamantly and consistently denied that it was the corporate successor to Old CNC or that it had assumed Old CNC's liabilities with respect to the Charleston Site." Response at 10 (citing App. at 444–45.) The suggestion is that PCS should not now be permitted to seek access to Old CNC's insurance rights. But PCS lost its corporate successor arguments related to the Charleston Site. The federal district court held that New CNC had acquired Old CNC's environmental liability arising out of the Charleston Site and that PCS was the successor to New CNC. (App. at 440, 449–50.) Once PCS was held liable for Old CNC's environmental contamination, it sought coverage from Old CNC's insurance policies covering those liabilities.

policyholder. *Id.* at 302 (quoting insurer's brief). The Pennsylvania Supreme Court stated that this argument "defies logic," explaining:

> It is true … that an insured or assignee potentially could engage in some type of "illegitimate manipulation" of the variables involved in litigation. However, … if such manipulation were to occur, the insurer would have the full array of affirmative defenses to negate its obligation to indemnify.

*Id.* at 302, 303. The Pennsylvania Supreme Court thus considered and rejected the argument raised by the insurers here that a post-occurrence assignment of policy rights affects risk to the insurer: "[B]ecause Gulf's risk was not increased following the assignment, since the assignment was subject to such claims, demands, or defenses as the insurer would have been entitled to make against the original insured, … the assignment was valid." *Id.* at 304 (internal citations omitted). Simply put, assignment of policy rights does not change risk to the insurer.

Courts across the country agree that insurer risk does not change if policy rights are assigned after an occurrence. *Givaudan*, 151 A.3d at 591; *Egger*, 903 A.2d at 1228; *Johnson v. CSAA Gen. Ins. Co.*, 478 P.3d 422, 431 (Okla. 2020); *Parker's Classic Auto Works, Ltd. v. Nationwide Mut. Ins. Co.*, 215 A.3d 1084, 1086 n.1 (Vt. 2019); *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 861 N.E.2d 121,129 (Ohio 2006); *Gopher Oil*, 588 N.W.2d at 763; *Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co.*, 881 P.2d 1020, 1027 (Wash. 1994); *Olin Corp. v. Lamorak Ins. Co.*, --- F.Supp.3d ---, 2021 WL 396781, at *12 (S.D.N.Y. Feb. 4, 2021); *In re Archdiocese of Saint Paul & Minneapolis*, 579 B.R. 188, 201 (Bankr. D. Minn. 2017). None of these courts adopted the insurer Respondents' argument that a purported "division of interests" between the insurer and the assignee increases risk to the insurer. Response at 34.

## V. Loss under an insurance policy does not need to be "fixed." Courts have thoroughly rejected the insurer Respondents' argument.

The insurer Respondents also rehash their argument that insurance policy rights are not assignable—or are not a chose in action—until it is "a fixed debt payable to its holder." Response at 40 n.24. They claim that this rule "is recognized by many other courts," Response at 36, and then cite the widely discredited decision of the Indiana Supreme Court that policy rights "must be identifiable with some precision" to be assignable. *Travelers Cas. & Sur. Co. v. United States Filter Corp.*, 895 N.E.2d 1172, 1180 (Ind. 2008). Other courts have rejected this holding. *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 Corp. v. Superior Ct.*, 354 P.3d 302, 327 n.46 (Cal. 2015) ("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.").

To further confuse matters, the insurer Respondents then deliberately muddy the issue by citing several decisions from jurisdictions that follow the *minority rule* on post-loss assignments. *See* Response at 36–39. The minority rule does not permit *any* assignment of policy rights without insurer consent under any circumstances. *Fluor*, 343 P.3d at 327 n.46. The insurer Respondents cite numerous minority rule cases as a "*see also*" string citation to support their contention that "a chose in action for money already due may be assignable." Response at 36. This is a highly misleading use of case law, given the proposition they are cited to support. Those cases "enforce consent-to-assignment clauses even more strictly than in [*Traveler's Casualty*] … by failing to recognize *any* post-loss exception to those clauses (even, apparently, as to claims that … have been reduced to a money judgment)." *Fluor*, 354 P.3d at 327 n.46

(citing four cases from minority jurisdictions). The *Fluor* court reviewed four minority rule cases—including three cases the insurer Respondents cite here—and explained why their reasoning was unpersuasive:

> These minority cases are animated by the view that "freedom of contact" requires consent-to-assignment clauses be rigidly enforced—thereby valuing the contract rights of insurers to enforce such clauses, over the contract rights of parties to contract for transfer of such claims. Each case, implicitly or explicitly—and without any significant analysis—rejects the majority rule, which as noted generally enforces postloss assignment of claims under third party liability policies. The cases cited by Hartford are: *Del Monte Fresh Produce (Hawaii), Inc. v. Fireman's Fund* (2007) 117 Hawai'i 357, 183 P.3d 734, 747 and footnote 15 (enforcing consent-to-assignment clauses without considering whether the assignment occurred after the loss, and peremptorily rejecting the majority rule); *Holloway v. Republic Indemnity Company of America* (2006) 341 Or. 642, 147 P.3d 329 (declining to enforce postloss assignment of claim under a liability policy, barely acknowledging the contrary view of most jurisdictions, and finding no public policy that would require the court to void the clause); *In re Katrina Canal Breaches Litigation* (La. 2011) 63 So.3d 955, 959 (acknowledging the overwhelming majority rule and the same prior rule in La., but concluding that an intervening statute protects the "freedom of contract" and strictly bars assignment, even regarding claims under first party property policies); and also *Keller Foundations, Inc. v. Wausau Underwriters Ins. Co.* (5th Cir. 2010) 626 F.3d 871, 874–878 (acknowledging the overwhelming majority rule, but applying Tex. law, enforcing consent-to-assignment provisions in all circumstances). Academic commentators have subjected cases such as these to scathing criticism. (1 Stempel on Insurance Contracts, *supra,* § 3.15[D], pp. 3–130 to 3–132 [analyzing *Holloway, supra,* 147 P.3d 329].)

*Fluor*, 61 Cal. 4th at 1215 n.46.[5] The New Jersey Supreme Court also rejected the "minority view" cases relied on by the insurer Respondents here, explaining that "[t]o the extent those cases stand for the principle that the rights of insurers to enforce anti-assignment clauses should

---

[5] The insurer Respondents cited *Del Monte Fresh Produce (Hawaii), Inc. v. Fireman's Fund* (2007) 117 Hawai'i 357, 183 P.3d 734, 747; *Holloway v. Republic Indemnity Company of America* (2006) 341 Or. 642, 147 P.3d 329; and *Keller Foundations, Inc. v. Wausau Underwriters Ins. Co.* (5th Cir. 2010) 626 F.3d 871, 874–878, among others. *See* Response at 36–39.

be valued above the rights of the insured to freely assign their claims, they are inconsistent with the established policy of New Jersey." *Givaudan* 151 A.3d at 590.[6]

Nearly all courts following the majority rule—which permits post-loss assignments of insurance rights—have rejected the insurer Respondents' argument here that the "loss" must be "a fixed debt payable to its holder." Response at 40, n.24. Rather, as PCS has explained, loss under an insurance policy happens at the moment of the *occurrence* under the policy—and the policy rights may be assigned without insurer consent after that occurrence. *See 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*, 861 N.E.2d at 123 (Ohio 2006) ("A chose in action arises under an occurrence-based insurance policy at the time the loss occurred."); *Egger*, 903 A.2d 1219, 1229 ("[T]he obligation of Gulf to provide excess coverage … arose on the date of the occurrence…."); *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

---

[6] The Court of Appeals also inappropriately relied on *Del Monte Fresh Produce (Hawaii), Inc. v. Fireman's Fund Ins. Co.*, 183 P.3d 734, 746–47 (Haw. 2007), a "minority rule" case. In *Narruhn*, this Court tacitly approved of the majority rule. "[W]e note it 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 (citing 3 *Couch on Insurance* 3d § 35:8 (2011 Rev. Ed.) (discussing the "majority" rule)). Given this Court's apparent acceptance of the majority rule in *Narruhn*, the Court of Appeals' reliance on *Del Monte* was improper.

policy, but the assignment of a chose in action"); *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.").[7]

## VI. Policy rights are assignable after an occurrence under a third-party liability policy.

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 Fluor*, 354 P.3d at 328–29; *Givaudan*, 151 A.3d at 591; *In re Viking Pump, Inc.*, 148 A.3d at 652; *Illinois Tool Works,* 962 N.E.2d at 1055; *Pilkington*, 861 N.E.2d at 123; *Egger*, 903 A.2d at 1229.

The insurer Respondents attempt to distinguish this overwhelming out-of-state authority, claiming that "[m]any of the cases addressing assignment of insurance rights have arisen in the context of first-party insurance." A review of the cases PCS cited proves that Respondents' claim is untrue—those cases 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

---

[7] The insurer Respondents spend pages trying to discredit majority rule cases permitting post-loss assignment of insurance rights. *See* Response at 35–44. For example, they attempt to persuade this Court that *Ocean Accident & Guar. Co. v. Southwestern Bell Tel. Co.*, 100 F.2d 441 (8th Cir. 1939), misapplied Missouri law. Response at 40. These arguments, most of which are recycled from their prior briefing at the Court of Appeals, are unpersuasive or mischaracterize the case law they discuss, as PCS previously demonstrated. (*See* App. at 125–136.) *Ocean Accident*, for example, continues to be recognized as accurately stating Missouri law today. *See Korte Const. Co. v. Deaconess Manor Ass'n*, 927 S.W.2d 395, 401 (Mo. Ct. App. 1996) ("The doctrine, as it exists in Missouri, appears to have its genesis in *Ocean Accident.*").

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) (emphasis added)); *Givaudan*, 151 A.3d at 587 (analyzing "assignment transfers rights **under a third-party liability policy**" (emphasis added)). In other words, those cases reached *precisely* the result PCS has advanced here: under a *third-party* liability policy, "loss" happens at the moment of the occurrence giving rise to coverage (*i.e.*, injury to the third party), not merely after the insured has been held liable for a third-party judgment.

Insurance policy rights may be assigned after an occurrence under the policy. Most courts recognize that "'loss' is "the occurrence of the event, which creates the liability of the insurer," which is "the 'Occurrence' to which the policy applied; *i.e.*, the bodily injury that [policyholder] caused" during the policy period. *Egger v. Gulf Ins. Co.*, 588 Pa. 287, 299–300 (2006). The insurer Respondents have failed to rebut that simple point.

## VII. Public policy supports PCS's position.

Public policy considerations strongly support PCS's position that, post-occurrence, insurance rights should be freely assignable. The majority rule allowing post-loss assignment of insurance rights promotes economic efficiency, lowers transaction costs, and maximizes wealth creation, as well as preventing insurers from reaping an unfair windfall. *See* Opening Brief at 25–30. Permitting assignment here also furthers government interests in remediating the environment. (App. 52–53, 138–39).[8] The insurer Respondents seek to undercut these important

[8] The insurer Respondents claim that "policies with pollution exclusions would not provide coverage for the cleanup of the Charleston Site in any event," suggesting that this public policy consideration carries no weight here. Response at 46 n.32. Their argument rests on a mischaracterization of the facts and the holding of *Ross Development Corp. v. PCS Nitrogen, Inc.*, 526 F. App'x 299 (4th Cir. 2013), a case which dealt with a *different* company that engaged in *different* activities using *different* chemical materials during a *different* time period. (App. at

policy consideration by arguing yet again that PCS is seeking to "forc[e] insurers into contracts with strangers." Response at 45 (rehashing their argument that Old CNC assigned policies, not merely policy rights). The insurers are not being forced into a contract with PCS because the coverage periods of the policies at issue all ended by 1984. In any case, the insurer Respondents' position elevates the freedom of contract above all else: "The public policy of South Carolina favors the enforcement of contracts as written." Response at 44. This argument ignores the rationale for the majority rule allowing post-loss assignments in spite of anti-assignment clauses: "The principle underlying the rule is a deeply rooted public policy against allowing restraints on alienation of choses in action." *Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co.*, 227 N.J. 322, 339 (2017).

The insurer Respondents also try to sidestep the windfall insurers would receive if post-loss assignments are prohibited. They claim: "If Old CNC had been sued, and if its liability were covered, the insurers would pay." Response at 45. This statement ignores that the insurers are merely being asked to cover the liabilities that they agreed to insure. PCS is seeking coverage for environmental damage caused by Old CNC during the original policy periods for which the insurers were already paid premiums—that is, 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. The insurers are seeking to avoid paying for that covered environmental damage—which occurred during the policy periods between 1966 and 1984—solely because, years after the policy periods

---

2372–73.) The *Ross* decision did not address Old CNC's conduct at all and thus does not control whether any pollution exclusions will apply here. Even assuming the pollution exclusions were to apply to this case, this Court's ruling here will have an impact on companies other than PCS and environmental clean-up sites other than the Charleston Site.

had ended, the policies were assigned to a successor entity. This is an unfair insurer windfall and serves no public purpose.

**VIII. The de facto merger issue merits remand.**

The circuit court found 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. In reaching this conclusion, the circuit court committed legal error, misreading this Court's holding in *Brown v. Am. Ry. Exp. Co.*, 128 S.C. 428, 123 S.E. 97, 99 (1924), and the Court of Appeals affirmed that ruling. *See* Opening Brief at 30–33. 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 been held liable for Old CNC's actions, but the circuit court's decision means PCS cannot access the insurance rights it assumed along with those liabilities—insurance benefits purchased to cover exactly those liabilities.

The insurer Respondents claim that PCS is not the de facto successor to Old CNC by making a hyper-technical argument that there can be no de facto merger where a party has expressly assumed liabilities because "express assumption and *de facto* merger are *alternative* theories." Response at 48 (citing *Brown*, 128 S.C. at 432, 123 S.E. at 99). But this argument seems to admit that PCS *is* the corporate successor to Old CNC, meaning that PCS succeeded to all the rights and obligations of Old CNC, including its insurance rights. 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.").

The insurer Respondents further argue that "based on the undisputed facts of record, the remaining factors necessary for the theory to apply are not satisfied in this case." Response at 48. The circuit court, however, never reached these other factors because it based its grant of

summary judgment on a legally erroneous reading of *Brown*. This error must be corrected. At the very least, this Court should reverse the circuit court's legal error on de facto merger and remand for further proceedings to determine whether the remaining factors apply.

## CONCLUSION

For these reasons and those presented in its opening brief, PCS asks this Court to reverse the Court of Appeals and hold that, after an "occurrence" under an insurance policy, policy rights are freely assignable. Allowing such assignment of policy rights is the majority rule in this country and is good public policy. Nothing in the insurer Respondents' Response compels a different result. Alternatively, this Court should reverse the circuit court's legal error on de facto merger and remand for further proceedings to determine whether the remaining factors apply.

Dated: April 5, 2021

Respectfully submitted,

s/ Sarah P. Spruill
Wm. Howell Morrison
Sarah Spruill
Haynsworth Sinkler Boyd, P.A.
ONE North Main, 2nd Floor
Greenville, SC 29601
Phone: (864) 240-3200
hmorrison@hsblaw.com
sspruill@hsblaw.com

*And*

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

ATTORNEYS FOR PETITIONER, PCS NITROGEN, INC.