RECEIVED
APR 16 2021
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

No. 2020-000445

PCS NITROGEN, INC., *Petitioner*,

v.

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, *Respondents*.

AMICUS CURIAE BRIEF OF COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

Matthew G. Gerrald, S.C. Bar No. 76236
Barnes, Alford, Stork & Johnson, LLP
1613 Main Street (29201)
Post Office Box 8448
1613 Main Street
Columbia, SC 29202
(803) 799-1111
matt@basjlaw.com

Laura A. Foggan, *Pro Hac Vice Application Forthcoming*
Crowell & Moring LLP
1001 Pennsylvania Avenue NW
Washington, DC 20004
(202) 624-2774
lfoggan@crowell.com

Attorneys for Amicus Curiae
Complex Insurance Claims Litigation Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF THE AMICUS CURIAE 1

STATEMENT OF THE CASE 2

ARGUMENT 4

I. SOUTH CAROLINA LAW AND POLICY STRONGLY SUPPORT PARTIES' FREEDOM TO CONTRACT AS THEY SEE FIT. 4

II. INSURERS, POLICYHOLDERS, THE PUBLIC AT LARGE, AND THE INSURANCE MECHANISM DEPEND ON STRICT ENFORCEMENT OF INSURANCE POLICY TERMS. 7

III. PETITIONER'S THEORIES ARE FLAWED AND CANNOT OVERRIDE EXPRESS POLICY PROVISIONS. 11

A. Because Any Claims Under the Policies Were Potential or Inchoate, Old CNC Did Not Have a "Chose in Action" to Transfer to Petitioner. 12

B. Transferring an Insurance Policy by "Operation of Law" Violates Fundamental Principles of Contract Law. 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Home Prods. Corp. v. Liberty Mut. Ins. Co.,
565 F. Supp. 1485 (S.D.N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984) 10

Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.,
409 S.C. 487, 763 S.E.2d 19 (2014) 4

Atlanta Gas Light Co. v. UGI Utils, Inc.,
No. 3:03-cv-00614-HES, 2005 WL 5660476 (M.D. Fla. Mar. 22, 2005) 13

Auto Owners Ins. Co. v. Newman,
385 S.C. 187, 684 S.E.2d 541 (2009) 1

B.L.G. Enters. v. First Fin. Ins. Co.,
334 S.C. 529, 514 S.E.2d 327 (1999) 4

C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Com.,
296 S.C. 373, 373 S.E.2d 584 (1988) 7

Crenshaw v. Erskine Coll.,
432 S.C. 1, 850 S.E.2d 1 (2020) 4

Garvey v. State Farm Fire & Cas. Co.,
770 P.2d 704 (Cal. 1989) 11

Glidden Co. v. Lumbermens Mut. Cas. Co.,
861 N.E.2d 109 (Ohio 2006) 14

Gopher Oil Co. v. Am. Hardware Mut. Ins. Co.,
588 N.W.2d 756 (Minn. Ct. App. 1999) 9

Harleysville Grp. Ins. v. Heritage Cmtys., Inc.,
420 S.C. 321, 803 S.E.2d 288 (2017) 1

Harleysville Mut. Ins. Co. v. State,
401 S.C. 15, 736 S.E.2d 651 (2012) 1

Hudson Ins. Co. v. Gelman Scis., Inc.,
921 F.2d 92 (7th Cir. 1990) 13

Keller Founds., Inc. v. Wausau Underwriters Ins. Co.,
626 F.3d 871 (5th Cir. 2010) 7

Ligon v. Metro. Life Ins. Co.,
219 S.C. 143, 64 S.E. 2d 258 (1951) 7

Palmetto Mortuary Transp., Inc. v. Knight Sys., Inc.,
424 S.C. 444, 818 S.E.2d 724 (2018) 7

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

PCS Nitrogen, Inc. v. Cont'l Cas. Co.,
429 S.C. 30, 837 S.E.2d 662 (Ct. App. 2019) 3

Pilkington N. Am. v. Travelers Cas. & Sur. Co.,
861 N.E.2d 121 (Ohio 2006) 9, 14

Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.,
387 S.C. 583, 694 S.E.2d 15 (2010) 4

Red Arrow Prods. Co. v. Emps. Ins. of Wausau,
607 N.W.2d 294 (Wis. Ct. App. 2000) 8, 14

Schulmeyer v. State Farm Fire & Cas. Co.,
353 S.C. 491, 579 S.E.2d 132 (2003) 4, 7

SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC,
375 F. Supp. 2d 238 (S.D.N.Y. 2005) 9

Travelers Cas. & Sur. Co. v. U.S. Filter Corp.,
895 N.E.2d 1172 (Ind. 2008) 8

State ex rel. Udall v. Colonial Penn Ins. Co.,
812 P.2d 777 (N.M. 1991) 13

IDENTITY AND INTEREST OF THE AMICUS CURIAE

Straightforward enforcement of insurance contract terms, and the parties' bargained-for exchange reflected in those terms, is a vital issue to the insurance system and, more broadly, to all parties to contracts. The Court's ruling on the ability to transfer rights and interests under an insurance policy contrary to its terms and without the insurer's consent will impact interests well beyond those of the parties here. For that reason, a leading trade organization of major property and casualty insurance companies, the Complex Insurance Claims Litigation Association ("CICLA"), has sought leave to participate here as amicus curiae.

CICLA members write a substantial portion of the liability insurance policies in South Carolina, and they have written liability insurance policies in South Carolina and throughout the country with anti-assignment provisions similar or identical to those at issue in this case. Accordingly, CICLA is vitally interested in the judicial interpretation of these contract provisions and the enforcement of the contract's plain terms.

For decades, CICLA has been a strong voice in amicus submissions on complex insurance coverage issues and has sought to help courts resolve important insurance cases. CICLA regularly appears as an amicus curiae to address issues of great consequence to insurers, their policyholders, and the public.[1] Through its amicus participation in this case, CICLA will provide the Court with an important perspective on successor liability issues and the policies' requirement of insurer consent prior to the assignment of rights.

---

[1] For example, CICLA has appeared as an amicus curiae in several notable South Carolina cases, including *Harleysville Grp. Ins. v. Heritage Cmtys., Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017); *Harleysville Mut. Ins. Co. v. State*, 401 S.C. 15, 736 S.E.2d 651 (2012); and *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009).

STATEMENT OF THE CASE

CICLA adopts the Respondents' Counter-Statement of the Case but also presents a summary of the pertinent facts for the Court's convenience.

Between 1966 and 1972, Columbia Nitrogen Corporation ("Old CNC") operated phosphate fertilizer plants in Charleston. From 1966 to 1985, Old CNC, as the named insured, bought primary and excess liability insurance policies from the Respondents. The policies require insurer consent before an assignment of interest can occur: "Assignment of interest under this policy *shall not bind* the company *until its consent is endorsed hereon*." App. 255, 375 ¶ 9, 384 ¶ 10 (emphasis added). In October 1986, Old CNC sold some assets to CNC Corp. ("New CNC") through an acquisition agreement. New CNC also assumed some of Old CNC's liabilities. The acquisition agreement stated:

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

App. 2398 (emphasis added). A checklist the parties prepared to close the acquisition agreement also made clear that the parties would exchange "[a]ssignment of insurance policies *with the consent of the insurance companies endorsed thereon*." App. 2510 (emphasis added). In 1989, New CNC merged with another company, which in 1997 merged with the Petitioner, PCS Nitrogen, Inc.

On September 26, 2005, Ashley II of Charleston, LLC sued PCS Nitrogen for environmental remediation at its site because New CNC (which merged into a company which in turn merged into PCS Nitrogen) acquired Old CNC's Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) responsibilities in the 1986 transaction. The Fourth Circuit Court of Appeals affirmed the district court's

judgment only on the ground that New CNC had contractually assumed Old CNC's liabilities in the 1986 transaction. *See PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 176 (4th Cir. 2013).

On March 24, 2015, PCS Nitrogen filed this action in South Carolina state court seeking coverage from Respondents under Old CNC's liability insurance policies. The insurers jointly moved for summary judgment, which the trial court granted, finding that none of the challenged policies were validly assigned to New CNC because Old CNC did not receive the insurers' consent as required under the insurance policies' terms and South Carolina law. Additionally, PCS Nitrogen did not have rights under Old CNC's insurance policies under a "de facto" merger theory because New CNC had contractually assumed Old CNC's liabilities. Old CNC was not merged into New CNC. The Court of Appeals affirmed. *See PCS Nitrogen, Inc. v. Cont'l Cas. Co.*, 429 S.C. 30, 837 S.E.2d 662 (Ct. App. 2019).

On March 12, 2020, PCS Nitrogen filed a petition for a writ of certiorari to this Court. The Court granted the petition, agreeing to review two questions:

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?

ARGUMENT

I. SOUTH CAROLINA LAW AND POLICY STRONGLY SUPPORT PARTIES' FREEDOM TO CONTRACT AS THEY SEE FIT.

The plain meaning of the insurance contract at issue governs this dispute. The lower court's decision to reject any effort to read out or retroactively override the terms of an insurance policy, which require consent of any assignment of interest under the policies, should be affirmed. Rewriting a contract between parties is "a service the courts of South Carolina do not perform." *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010) (citation omitted). South Carolina courts have long supported freedom of contract and have rejected unbounded judicial discretion to void agreements on public policy grounds: "No jury—nor any judge—is permitted by law to rewrite a contract to impose liability based on some vague personal sense of what is fair." *Crenshaw v. Erskine Coll.*, 432 S.C. 1, 25, 850 S.E.2d 1, 13 (2020). *See also Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, 409 S.C. 487, 492, 763 S.E.2d 19, 21-22 (2014) (noting this Court's "longstanding regard for parties' freedom to contract").

"Parties to a contract have the right to construct their own contract without interference from courts to rewrite or torture the meaning of the policy to extend coverage." *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (citation omitted). As this Court has determined, "it would violate public policy to allow a court to insert a [contractual] limitation where none existed." *Poynter Invs.*, 387 S.C. at 587-88, 694 S.E.2d at 17 (citation omitted). Instead, contract provisions "must stand or fall on their own terms." *Id.* at 588, 694 S.E.2d at 18. This is true regardless of the provisions' "wisdom or folly, apparent unreasonableness, or failure [of

the parties] to guard their interests carefully." *B.L.G. Enters. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999) (alteration in original) (citation omitted).

Respondents' insurance policies contain clear and unambiguous consent-to-assignment clauses, providing that "[a]ssignment of interest under this policy shall not bind the company until its consent is endorsed hereon." Old CNC never obtained any Respondent's consent to transfer any policy interest to New CNC (or its successors such as PCS Nitrogen), as required by the express policy provisions, and thus coverage is unavailable to PCS Nitrogen. Applying fundamental contract principles, this properly ends the inquiry and satisfies the intent of the anti-assignment clauses—namely, it prohibits strangers to the contract, like PCS Nitrogen, from claiming entitlement to insurance benefit without the insurer's consent.

More broadly, the Court's ruling on the contractual issues presented will not be limited to insurance policies. If the Court were to rule for PCS Nitrogen, it would essentially be saying that, as a matter of public policy, the freedom to assign contractual rights cannot be checked by explicit contractual language. Instead, this Court should rule that commercial parties are free to barter their respective rights and that the explicit language of their agreements governs the transferability of rights under those agreements. In short, the plain meaning of the contract should prevail.

There is nothing in such a rule that dampens the ability of companies to buy and sell corporate assets, and Petitioner is wrong in suggesting that South Carolina public policy supports the transfer of insurance rights against the policy terms and without the insurer's consent. Mergers, acquisitions, and sales are part of corporate life, but this economic reality does not justify inventing insurance rights that conflict with an insurance policy's express terms. This case does not involve the actual *merger* of one

entity into another, where a single entity survives the corporate transformation; it concerns a contractual acquisition of assets and liabilities where one company has transferred certain obligations to the other.

In the latter situation, of which Old CNC's commercial agreement with New CNC is an example, the assignment of rights to insurance in a sale or acquisition agreement between two corporations is valid *only* if permitted under the insurance policy terms. This does not mean that companies buying and selling assets and liabilities cannot manage the risks of their transactions. To the contrary, the parties to a transaction can always seek the insurer's consent *as the policyholder agreed to do*, or, failing to obtain consent, choose to apportion liability so that it remains with the policyholder. They can agree not to transfer liabilities, thus leaving them with the original company that has insurance in place (assuming the policies' terms cover the loss). They can agree to an increased premium under which they might obtain the insurer's consent to an assignment of insurance coverage rights. They can set the price of the sale at a level that recognizes the purchaser is assuming liabilities without the protection of the seller's insurance coverage. Or they can choose to purchase claims-made coverage or other tail coverage that would remedy any shortage in coverage.

In short, there are any number of ways that companies involved in mergers, acquisitions, and sales (exercising their freedom to contract) can structure their agreements to address the risks of uninsured exposure. South Carolina's public policy favoring freedom of contract is fully consistent with this outcome. It recognizes that companies have the freedom and responsibility to account for these issues in merger, acquisition, and sales transactions. If companies fail to plan adequately for exposures in their commercial dealings with one another, they should not be permitted to make up for

their mistakes by asking the courts to retroactively override their chosen contract terms in an insurance agreement—with insurers who are not even parties to the corporate transaction. *See, e.g., C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Com.*, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988) ("We are without authority to alter a contract by construction or to make new contracts for the parties.").

II. INSURERS, POLICYHOLDERS, THE PUBLIC AT LARGE, AND THE INSURANCE MECHANISM DEPEND ON STRICT ENFORCEMENT OF INSURANCE POLICY TERMS.

Judicial decisions that fail to enforce insurance policy terms according to their plain meaning undermine the risk-spreading mechanism. Like any business, insurers must be able to rely on established principles of contract law. Thus, insurance coverage rights and obligations should begin and end with the policy language. Insurance contracts are, first and foremost, contracts to which the ordinary rules of contractual interpretation apply. *See Palmetto Mortuary Transp., Inc. v. Knight Sys., Inc.*, 424 S.C. 444, 460, 818 S.E.2d 724, 733 (2018) ("The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language.") (quoting *Schulmeyer*, 353 S.C. at 495, 579 S.E.2d at 134).

When a policy's terms are "clear and unambiguous," they alone dictate the policy's "force and effect," and a court must construe them accordingly, using "their plain, ordinary, and popular" meaning. *Schulmeyer*, 353 S.C. at 495, 579 S.E.2d at 134 (citations omitted). Courts in South Carolina have held that consent-to-assignment, or anti-assignment, clauses are valid contractual terms that should be strictly enforced. *See, e.g., Ligon v. Metro. Life Ins. Co.*, 219 S.C. 143, 154, 64 S.E. 2d 258, 264 (1951). *See also Keller Founds., Inc. v. Wausau Underwriters Ins. Co.*, 626 F.3d 871, 874 (5th Cir. 2010) ("[T]he non-assignment clause bars any assignment of the coverage without [the insurer's]

approval, rendering invalid any transfer that might have taken place").[2] Treating every asset acquirer as though it were the insured that contracted for coverage, even without the insurer's consent, would effectively remove valid consent-to-assignment clauses from insurance contracts.

Insurers underwrite contracts only on specific terms and for specific risks and commonly include consent-to-assignment clauses to limit the risks assumed. In determining whether to provide coverage, and to what extent, insurers engage in careful risk calculations. These crucial calculations help insurers spread risk over a large risk pool. To effectively determine how large the risk pool needs to be, insurers must control the identities of their policyholders, so they can carefully calculate the level of liability they face. Insurance is a very individualized business. Insurers generally investigate proposed coverage risks and policy applicants before issuing coverage. They review answers to questions in policy applications and may request additional information or clarify the nature and scope of a prospective insured's operations. They may conduct on-site inspections and evaluate the applicant's risk-management and loss-prevention measures. These inquiries help insurers set premiums at levels appropriate for the nature and scope of the risks they assume for each *individual* insured. For higher premiums, insurers might agree to allow rights under their policies to be freely transferred to other entities. Here, however, the plain language of the contracts shows that Old CNC did not pay for, and the Respondents did not undertake, this type of obligation.

---

[2] *See also generally Red Arrow Prods. Co. v. Emps. Ins. of Wausau*, 607 N.W.2d 294 (Wis. Ct. App. 2000) (no valid assignment without insurer's consent and also rejecting attempts to gain the benefits of the policies by operation of law). *Cf. Travelers Cas. & Sur. Co. v. U.S. Filter Corp.*, 895 N.E.2d 1172 (Ind. 2008) (rejecting application of a "chose in action" theory such as the one Petitioner advances here).

The consent-to-assignment clause creates certainty to protect against the contingency of increased costs associated with multiplication of policyholders. Consent-to-assignment clauses prevent one policyholder from endowing new entities with the status of policyholder, such that insurers' obligations are expanded to include not only the original policyholder but also any number of new assignees. If courts read consent-to-assignment clauses out of insurance contracts, the original risk assessment of the insurer becomes a nullity.

"The purpose of a non-assignment clause is to protect the insurer from an increase to the risk it has agreed to insure." *Gopher Oil Co. v. Am. Hardware Mut. Ins. Co.*, 588 N.W.2d 756, 763 (Minn. Ct. App. 1999) (citations omitted). *See also SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, 375 F. Supp. 2d 238, 250 (S.D.N.Y. 2005) ("[N]o-assignment clauses are designed to protect insurers from unforeseen increases in risk[.]") (citation omitted). Ignoring consent-to-assignment clauses can also dramatically alter the defense obligations imposed on the insurer. Providing defense obligations to strangers is exactly the type of risk that such a clause is intended to avoid. If rights and interests under a policy can be transferred absent valid consent, there is no certainty about the number of strangers an insurer may be forced to defend, making the insurer's costs inevitably higher than originally expected.[3] This would make it difficult for insurers to predict how much money to set aside to meet their obligations. Because the costs of defending more than one entity inevitably will be greater than those of defending a single entity, finding that an entity simply buying assets from the insured has insurance rights

[3] *See, e.g., Pilkington N. Am. v. Travelers Cas. & Sur. Co.*, 861 N.E.2d 121, 132 (Ohio 2006) (assigning rights notwithstanding an anti-assignment clause "may constitute a material change in the duties of the insurer, who could be obligated to defend multiple parties").

without the consent of the insurer presents precisely the increase in risk to the insurer that should not be sanctioned. Increasing or changing the risk, as defined by the terms of coverage under the insurance policy, necessarily challenges the insurance mechanism.

Further, adding entities to coverage forces the actual policyholder to share the policy proceeds with multiple entities, diminishing the protection it bargained and paid for even while increasing the insurer's overall risk. Policies generally limit liability to a certain cap. When an insurer faces risks greater than those posed by the original policyholder, the insurer is likely to reach the limits of the policy more quickly. The policy could thus be exhausted without payment to or on behalf of the original policyholder, who is the only entity that paid premiums to obtain the full benefit of the policy.

The consequences of failing to effectuate the language of insurance contracts, including consent-to-assignment clauses, are potentially far-reaching. Liability expansion does not affect only insurers. First, the failure to enforce insurance policies can disrupt the stability of contracting with insurers by undercutting insurance's vital risk-spreading function. Further, if courts ignore the risks that an insurer assumed (or did not assume), the insurer must necessarily account for such new liabilities in the premiums it charges, eventually impacting all consumers.[4] Ultimately, this trickles down and causes "ordinary insureds to bear the expense of increased premiums necessitated by

[4] This type of decision would create excessive uncertainty over the effect of policy language, which is then passed on to all insurance consumers in the form of higher premiums and restricted insurance availability. *See, e.g.*, *Am. Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1511 (S.D.N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984) ("By imposing greater costs upon insurers, courts make it necessary for them to increase their rates, not merely to compensate for their increased liability, but also to anticipate other, judicially created liabilities[.] . . . [T]he persons whom [insurers] now cover may well be grievously hurt in future years by the lower coverage that results, or by the bankruptcies caused by companies becoming self-insured in an effort to avoid the higher rates required to pay for broader theories of coverage.").

the erroneous expansion of their insurers' potential liabilities." *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 711 (Cal. 1989).

All contracting parties, and the public, are interested in enforcing valid contractual terms, including anti-assignment clauses. Courts recognize that permitting entities, such as PCS Nitrogen, to claim coverage under policies issued to other entities would unfairly alter and expand an insurer's risk while diminishing coverage available to original policyholders, such as Old CNC (and its parent company, which was also a policyholder here). It would also adversely affect the insurance-buying public. In the long run, the insurance underwriting process, public policy, and equity are all served by adhering to longstanding principles of insurance contract interpretation, which require courts to enforce policy terms according to their plain meaning.

III. PETITIONER'S THEORIES ARE FLAWED AND CANNOT OVERRIDE EXPRESS POLICY PROVISIONS.

Insurance policies are a matter of contract and should be interpreted accordingly. Petitioner attempts to make an end-run around the consent-to-assignment clauses. First, it asserts that Old CNC merely transferred to New CNC a "chose in action" against the insurers, rather than the rights in the policies. This seemingly creative theory cannot create coverage because no such right could exist before a third party has brought suit or liability has been reduced to a sum certain. Next, Petitioner advances an "operation of law" theory in its effort to create coverage barred by the policy terms. Its argument that, even absent a valid assignment, the policies were transferred to it by "operation of law" at the time of the asset sale ignores fundamental contract rules.

A. Because Any Claims Under the Policies Were Potential or Inchoate, Old CNC Did Not Have a "Chose in Action" to Transfer to Petitioner.

Here, at the time of the 1986 corporate transaction, Old CNC had no "chose in action" that it could transfer to Petitioner. At the time of the asset purchase, Old CNC had not asserted claims under the policies for defense or indemnification connected to the underlying claims; indeed, the underlying claims had not yet been asserted. When Old CNC entered the purchase agreement with Petitioner, it did not have a chose in action to transfer because (1) the underlying claimants had yet to assert claims against it; (2) it had yet to tender the claims to the insurers; (3) the insurers had yet to determine their obligations under the policies; (4) litigation had yet to commence; and (5) judgment had yet to be entered. Under these circumstances, a chose in action did not exist.

The proposition that a chose in action is created at the time of the loss is drawn from the context of first party insurance, such as fire insurance. Under first-party policies, the loss is easily identified, for example, when the house or building catches fire. At that point, assuming compliance with requisite conditions precedent, the insurer owes coverage under the policy. In contrast, the policies before the Court are liability policies. These policies do not respond directly to an underlying tort at the time the tort is committed but respond only in the instance that suit is brought, with a duty to defend, or when a settlement or judgment is obtained, with a duty to indemnify. In this situation, if no tort claimant ever sues, the policyholder never has a "debt" it can recover under the policy. As such, Petitioner's reasoning that the chose in action was created at the time of the "occurrence"—the time of the tort—does not fit the context of a liability policy. At that point, the policyholder itself has only inchoate, contingent, and conditional rights as against its insurer that are not capable of transfer without insurer consent.

B. Transferring an Insurance Policy by "Operation of Law" Violates Fundamental Principles of Contract Law.

Commercial entities, including those in the banking, financing, and insurance industries, conduct their affairs with the expectation that, if called upon to resolve a dispute, courts will enforce contracts as written. Judicial fidelity to this time-honored principle of contract enforcement is vital to retaining the confidence of the business community at large that the bargain made will be the bargain enforced. *See, e.g.*, *Hudson Ins. Co. v. Gelman Scis., Inc.*, 921 F.2d 92, 95 (7th Cir. 1990) ("[P]ublic policy requires that contracts be interpreted to effectuate the actual agreement between the parties"); *State ex rel. Udall v. Colonial Penn Ins. Co.*, 812 P.2d 777, 780 (N.M. 1991) ("[G]reat damage is done where businesses cannot count on certainty in their legal relationships[.]") (citation omitted). If courts begin to alter and expand the risks that sophisticated parties have agreed upon, commercial transactions will become more difficult and uncertain. This principle is particularly vital for insurers for the reasons discussed above.

Transfer of an insurance policy by operation of law impinges on the rights of insurers and insureds to rely on the insurance contract and allocate risks as they see fit. *See, e.g.*, *Atlanta Gas Light Co. v. UGI Utils, Inc.*, No. 3:03-cv-00614-HES, 2005 WL 5660476, at *19 (M.D. Fla. Mar. 22, 2005) (refusing to transfer a policy by operation of law given "the importance of the contractual relationship between an insurer and an insured"). For example, in *Red Arrow Products*, a corporation sought coverage for environmental cleanup costs allegedly arising from the policyholder's activities after assuming the policyholder's liabilities in an asset purchase agreement. Rejecting an "operation of law" argument, the court found that "the question is not, 'Who will pay the

costs of environmental cleanup?'" but rather whether the successor corporation "is an insured under the . . . policies *as a matter of contract law*." 607 N.W.2d at 303 (emphasis added). "[B]ecause [the successor corporation] never paid premiums on the policies and never bargained for the policies," the court held that "there was no privity of contract" between the insurer and the successor corporation, and thus no coverage for the successor under the policies. *Id.* Likewise, applying fundamental contract principles, there is no contractual relationship between Respondents and Petitioner, without a valid assignment, and thus Petitioner is not entitled to coverage under Respondents' policies.[5]

The clear consensus is that "coverage does not arise by operation of law when the liability was assumed by contract." *Glidden Co. v. Lumbermens Mut. Cas. Co.*, 861 N.E.2d 109, 115 (Ohio 2006) (citation omitted). Here, any liability Petitioner assumed was through a contract between Old CNC and New CNC, not a merger of one corporation into another. In the absence of a valid assignment of the policies from Old CNC to New CNC (and subsequently to Petitioner), there is no privity of contract between the Respondents and Petitioner, and therefore no coverage.

---

[5] *See generally Pilkington*, 861 N.E.2d at 132 (transfer of operation of law would place insurance companies in the position of providing a defense to two entities).

CONCLUSION

For these reasons, the Court should enforce the consent-to-assignment clauses in the Respondents' insurance policies and affirm the judgment of the Court of Appeals.

Matthew G. Gerrald, S.C. Bar No. 76236
Barnes, Alford, Stork & Johnson, LLP
1613 Main Street (29201)
Post Office Box 8448
Columbia, SC 29202
(803) 799-1111
matt@basjlaw.com

Laura A. Foggan, *Pro Hac Vice Application Pending*
Crowell & Moring LLP
1001 Pennsylvania Avenue NW
Washington, DC 20004
(202) 624-2774
lfoggan@crowell.com

Attorneys for Amicus Curiae Complex Insurance Claims Litigation Association

April 16, 2021