THE STATE OF SOUTH CAROLINA
In the Supreme Court

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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.

PETITIONER PCS NITROGEN, INC.'S REPLY IN RESPONSE TO AMICUS CURIAE BRIEF OF COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION

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INTRODUCTION

This brief responds to the amicus brief filed by the Complex Insurance Claims Litigation Association ("CICLA"). PCS Nitrogen, Inc. ("PCS") adopts its questions presented, statement of the case, and legal standard from its principal merits brief ("PCS Opening Brief").

All parties to this appeal agree and the Court of Appeals held, that a policyholder can assign policy benefits after a loss. The only disagreement is when a "loss" occurs under an insurance policy. PCS contends, consistent with the decisions of the vast majority of courts, that "loss" happens at the moment of an "occurrence." CICLA argues for a much more extreme view, contending that the contractual consent-to-assignment clause must be rigidly enforced, even after a loss. *See* Amicus Brief at 4–5. This "minority rule" view has been adopted by very few courts, "without any significant analysis," and has been "subjected ... to scathing criticism." *Fluor Corp. v. Superior Ct.*, 354 P.3d 302, 327 n.46 (Cal. 2015).

CICLA's proposed rule would contravene South Carolina's public policy allowing free transferability of property. Post-loss insurance rights, as choses in action, are property rights, and "[p]roperty interests are, in general, alienable." *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 422, 143 S.E.2d 803, 807 (1965). Nor does permitting post-loss assignment of insurance rights "undermine[] the risk-spreading mechanism" or "expand[] liabilities" of insurers. Amicus Brief at 7, 10–11. Courts around the country have rejected this argument and held that post-loss assignments are permissible precisely *because* they do not affect risk. *See* PCS Opening Brief at 20–25; PCS Reply at 11–14. Finally, CICLA wrongly implies that New CNC failed to ensure it had adequate coverage for the liabilities it assumed from Old CNC. Amicus Brief at 6. This argument misrepresents the record—New CNC *did* account for such liabilities when it executed a document entitled "Assignment of Insurance Benefits" (App. 2398)—and fails to acknowledge

commercial realties at the time of assignment, when courts and parties assumed that insurance rights for historical policies could be transferred without insurer consent. *Fluor*, 354 P.3d at 330.

CICLA offers no legitimate reason for adopting the "minority rule" or for ignoring the important public policy reasons behind permitting assignment of insurance policy benefits after an occurrence has taken place. This Court should reject CICLA's arguments and hold that policy rights are freely assignable after an occurrence.

ARGUMENT

I. CICLA proposes that this Court adopt the "minority rule" prohibiting assignment of policy benefits, even after loss.

In their Response brief, the insurer Respondents agreed with PCS that a policyholder can assign policy benefits after a loss, but they disagreed with PCS about what constitutes a "loss" under an insurance policy. Consistent with the majority of courts, PCS contends that a loss equates to an occurrence under the policy, meaning that policy benefits may be assigned even if the loss has not yet been reduced to a final judgment. The insurer Respondents have taken a narrower view, arguing that "loss" happens when judgment is entered against an insured. Ins. Response at 23 ("An insured can assign as a 'chose in action' a debt an insurer owes it under a policy, but the duty to indemnify does not mature into a debt until an underlying tort judgment is entered against the insured…." (emphasis and capitals removed)). The parties agree that policy benefits are assignable, but disagree about when those benefits may be assigned.[1] That is the issue before this Court.

By contrast, CICLA argues that a contractual consent-to-assignment clause must be rigidly enforced, regardless of whether loss has occurred, an extreme position nearly universally rejected. According to CICLA, a failure to obtain insurer consent precludes assignment of policy benefits, even after a loss. Amicus Brief at 4-5 ("[T]his properly ends this inquiry and satisfies the intent of the anti-assignment clause."). CICLA asks this Court to join the "minority rule" cases that "are animated by the view that 'freedom of contact' requires consent-to-assignment

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[1] The Court of Appeals also recognized that "[t]he majority rule is that [consent-to-assignment] clauses are generally only enforceable *before* a loss occurs." (App. at 10.) The Court of Appeals merely concluded that "Old CNC was not entitled to coverage '*until the amount of the insured's obligation to pay shall have been finally determined by judgment against the insured after actual trial ….*'" *Id.*

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." *Fluor*, 354 P.3d at 327 n.46. The California Supreme Court noted that these "minority rule" cases were decided "without any significant analysis" and have been "subjected … to scathing criticism." *Id.* The New Jersey Supreme Court also rejected this "minority view," explaining that "[t]o the extent those cases stand for the principle that the rights of insurers to enforce anti-assignment clauses should be valued above the rights of the insured to freely assign their claims, they are inconsistent with the established policy of New Jersey." *Givaudan Fragrances Corp. v. Aetna Cas. & Surety Co.*, 151 A.3d 576, 590 (N.J. 2017); *see also Wehr Constructors, Inc. v. Assurance Co. of Am.*, 384 S.W.3d 680, 686 (Ky. 2012) ("The low esteem for the minority rule may be well-illustrated by the observation that the only cases [the insurer] cites us to applying the rule are cases applying Texas law."). CICLA's view is thus out of step with the vast majority of jurisdictions, particularly those that have provided the most extensive and thoughtful analysis of the issue.

II. The "minority rule" is an improper restraint on alienability of property rights.

Post-loss insurance rights, as choses in action, are property rights. This Court recently explained that a "'chose in action' is **a type of property interest** or a proprietary right to a claim or debt." *See 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) (emphasis added); *id.* (recognizing that "a vested military pension was a 'chose in action,' or form of property…." (citing *Ball v. Ball*, 312 S.C. 31, 33-34, 430 S.E.2d 533, 534-35 (Ct. App. 1993))); *see also* 17 Williston on Contracts § 49:126 (4th ed.) ("After a loss occurs, the indemnity policy is no longer an executory contract of insurance. It is now a vested claim against the insurer and can be freely assigned or

sold like any other chose in action or piece of property."); PCS Opening Brief at 7–12; PCS Reply at 8–11.[2]

CICLA's proposed rule—to rigidly enforce consent-to-assignment clauses, even after a loss has occurred—contravenes South Carolina's public policy allowing free transferability of property. Under this Court's precedent, "[p]roperty interests are, in general, alienable." *Sandy Island Corp.*, 246 S.C. at 422, 143 S.E.2d at 807. "One of the main incidents of property is its transferability. The power of disposing of stock, like the power of disposing of any other property, is a common right, and necessarily attaches to ownership." *Alderman v. Alderman*, 178 S.C. 9, 181 S.E. 897, 911 (1935) (quoting 7 Rul. Case L. *Corporations* § 239, at 261 (1929))). Indeed, it is a "well-established principle that alienability is an intrinsic attribute of ownership." *Auten v. Snipes*, 370 S.C. 664, 673, 636 S.E.2d 644, 649 (Ct. App. 2006). The "minority rule" would violate this principle of alienability by prohibiting policyholders from assigning their property rights in historical insurance policies.

The "majority rule" cases cite the public policy against restraints on alienation for permitting post-loss assignment of insurance rights despite consent-to-assignment clauses. "The majority rule is an exception to the general principle that parties to a contract may freely limit assignment of their contractual rights. The principle underlying the rule is a deeply rooted public policy against allowing restraints on alienation of choses in action." *Givaudan*, 151 A.3d at 586 (collecting cases); *Wehr*, 384 S.W.3d at 685 ("[T]he courts that have considered this issue have

[2] CICLA argues that insurance rights cannot become a "chose in action" "before a third party has brought suit or liability has been reduced to a sum certain." Amicus Brief at 11. CICLA cites no cases in the one page that it devotes to this argument (*id.* at 12), likely because most authority disagrees. *See* PCS Opening Brief at 7–12; PCS Reply at 8–11. CICLA also suggests that a "chose in action" may exist in "the context of first party insurance" but not under third-party liability policies. Amicus Brief at 12. This is incorrect. *See* PCS Reply at 19–20.

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." (footnote omitted)); *Fluor*, 354 P.3d at 320 (accepting the policyholder's proposed "third party liability rule: Once a risk insured against is realized by the happening of a 'loss' which triggers coverage ... anti-assignment clauses are deemed to be an impermissible restraint on alienation prohibited by law" (internal quotation marks omitted)); *Bolz v. State Farm Mut. Auto. Ins. Co.*, 52 P.3d 898, 904 (Kan. 2002) (rejecting insurer's "contention that the public policy in favor of freedom of contract is superior to the public policy in favor of free assignment of choses of action"); *Wehr*, 384 S.W.3d at 688 ("[W]e believe that the relevant public policy interests are best served by our adoption of the majority rule.... This conclusion is fully consistent with our prior holdings adverse to contractual provisions tending to restrain the alienability of choses in action, which, as explained above, is the principal underpinning of the majority rule."); *Henry Ford Health Sys. v. Everest Nat'l Ins. Co.*, 927 N.W.2d 717, 724 (Mich. App. 2018) ("[W]e conclude that the antiassignment clause in defendant's insurance policy is unenforceable because it is against public policy to the extent that it attempts to restrict the insured's ability to assign an accrued claim.").

III. Allowing post-loss assignments does not "expand liabilities" or "undermine the risk-spreading mechanism."

CICLA claims that permitting post-loss assignment of insurance rights "undermines the risk-spreading mechanism" and "expands liabilities." Amicus Brief at 7, 10–11.[3] This position

[3] CICLA vastly oversells this argument, threatening, for example, that "[i]f courts read consent-to-assignment clauses out of insurance contracts, the original risk assessment of the insurer becomes a nullity." Amicus Brief at 9. This claim is both hyperbolic and misleading. PCS has never suggested that courts should "read consent-to-assignment clauses out of insurance contracts"; such clauses are viable for insurance policies during their policy terms, while they are

misstates what general liability policies insure against, 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). Insurers assess risk based on the profile of the policyholder who will be insured during the policy term. A successor entity's post-policy-period actions cannot result in "bodily injury or property damage during the policy period." *See N. Ins. Co. v. Allied Mut. Ins. Co.*, 955 F.2d 1353, 1358 (9th Cir. 1992). ("When 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.").

Courts around the country have rejected CICLA's argument that post-occurrence assignment increases risk. "The risks do not change or increase after the period expires or if an assignee rather than the named insured seeks coverage for losses." *Illinois Tool Works*, 962 N.E.2d 1042, 1054 (Ill. App. Ct. 2011); *see also Gopher Oil Co. v. Am. Hardware Mut. Ins. Co.*, 588 N.W.2d 756, 763 (Minn. Ct. App. 1999); PCS Opening Brief at 22–25 and PCS Reply at 12–15. This Court concurred in this view: "after events giving rise to the insurer's liability have occurred, the insurer's risk cannot be increased by a change in the insured's identity." *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 344, 745 S.E.2d 90, 94 (2013) (quoting 3 *Couch on Insurance* 3d § 35.8 (2011 Rev. Ed))).

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still executory contracts of insurance. Consent-to-assignment clauses prevent substitution of policyholders that might engage in riskier behavior. After the loss has already occurred, however, "the indemnity policy is no longer an executory contract of insurance" but is rather "a chose in action or piece of property." 17 Williston on Contracts § 49:126 (4th ed.). By that point, the consent-to-assignment clause has already served its purpose. The majority rule does not eliminate such clauses but merely restricts them to their proper use of prohibiting substitution of policyholders during the policy term.

CICLA's own discussion proves that insurers evaluate risks related to the policyholder's activities during the policy period: for example, insurers "clarify the nature and scope of the prospective insured's operations" and "conduct onsite inspections." Amicus Brief at 8. These risk-assessment activities relate to the business of the policyholder during the policy term. In the case of the 1966-1984 policies here, the insurers would have evaluated the risks involved in insuring Old CNC, based on Old CNC's operations, to determine, for example, whether Old CNC's operations might cause environmental contamination. New CNC or PCS cannot change or undermine the risk assessments the insurers made of Old CNC. The risks evaluated by the insurers did not—and could not—change when the policy rights were later assigned in 1986.

CICLA also argues that "insurers set premiums at levels appropriate for the nature and scope of the risks they assume for each *individual* insured." Amicus Brief at 8. The assignment of policy rights changed nothing about the "individual insured" in the 1966–1984 policies—Old CNC. The assignment in 1986 could not possibly have changed the insurers' "risk calculations" for Old CNC's activities during that period. Consider a hypothetical. If Old CNC had never assigned the policy benefits or its liabilities from the same time period, Old CNC would have been sued in the underlying cases and held liable for the environmental clean-up caused by its own contamination. The insurers would not, in this example, be permitted to argue that the consent-to-assignment clause barred coverage. This outcome would be the same as what PCS is advocating here: the insurers would have to cover the risks they underwrote, including the risk that Old CNC would engage in activities during the policy period that resulted in environmental

contamination. Comparing the two outcomes—the hypothetical and the outcome PCS is advocating here—it is clear there is no change in risk.[4]

IV. New CNC ensured that policy benefits were assigned through an explicit "Assignment of Insurance Benefits."

CICLA wrongly implies that New CNC was careless when it entered into its acquisition agreement with Old CNC and failed to coordinate insurance coverage for Old CNC's past liabilities that came with the asset sale. CICLA writes:

> [P]ublic policy … recognizes that companies have the freedom and responsibility to account for issues in merger and acquisition. 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.

Amicus Brief at 6–7. The suggestion is that New CNC "fail[ed] to plan adequately" to ensure it had adequate coverage for the liabilities it assumed from Old CNC. Under this theory, New CNC was careless, and PCS is now asking this Court to "[r]ewrit[e] a contract between parties" in order to "make up for [its] mistakes." *Id.* at 4, 7. This theory misrepresents the record. It also fails to recognize the nearly universal understanding of insurance coverage law in 1986, when the assignment took place.

The record shows that New CNC did in fact account for Old CNC's past liabilities in the 1986 acquisition. The parties executed a document entitled "Assignment of Insurance Benefits," under 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–

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[4] PCS's liability at the Ashley Site arose solely from Old CNC's operations there—Old CNC had ceased operations and sold the property before New CNC acquired Old CNC's assets.

25.).[5] The record demonstrates that New CNC planned for exposures related to Old CNC's historical operations. When, decades later, Old CNC's past operations became the source of liability, PCS sought coverage under the insurance benefits that had been validly assigned by the "Assignment of Insurance Benefits."

CICLA's accusation that New CNC "fail[ed] to plan adequately" also misunderstands commercial realities and standard insurance practices in 1986, the time of assignment. At that time, courts and parties simply assumed that insurance rights for historical policies (*i.e.*, policies whose policy periods have ended) could be transferred without insurer consent. *Fluor*, 354 P.3d at 330 ("[U]ntil 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." (internals omitted)). This had been the status quo for nearly 50 years, since the Eighth Circuit's 1939 decision in *Ocean Accident & Guarantee Corp. v. Southwestern Bell Telephone Co.*, 100 F.2d 441 (8th Cir. 1939). As the California Supreme Court explained:

> For many decades after *Ocean Accident,* 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.

Fluor, 354 P.3d at 326; *see also Givaudan*, 151 A.3d at 588 ("The rule in *Ocean Accident*, voiding restrictions on assignment in liability policies after a third party's loss or injury has occurred regardless of when a claim is asserted against the insured, was quickly and nearly universally adopted by courts around the country."). Commentators have explained that, for years (including when the assignment occurred here), parties uniformly understood that post-loss

[5] There was a separate "checklist" related to assignment of insurance "policies"—*i.e.*, Old CNC's then-active policies—but this was distinct from the policy benefits assigned in the "Assignment of Insurance Benefits" document. (App. 2398, 2510.)

assignment of insurance rights was permissible without insurer consent. *See, e.g.,* Joseph Thacker, Andrew W. Miller, Brian D. Heskamp, Nicholas J. Hammond, *Do Rights Transfer Under Occurrence-Based General Liability Insurance Policies After the Sale of A Business?*, Brief, Fall 2011, at 52, 53 ("Before 2003, courts and commentators almost uniformly interpreted the antiassignment clause only to prevent an insured from transferring its policy rights to a third party before the date of a loss….").

Based on recognized insurance principals in 1986, when courts still "nearly universally" accepted the rule articulated in *Ocean Accident* that post-loss insurance policy benefits could be assigned without insurer consent, New CNC could expect that it successfully acquired Old CNC's policy benefits for the 1966 to 1984 policies when the parties executed the "Assignment of Policy Benefits." New CNC's approach was standard at the time. Governing legal principles recognized that "an assignment of a right under a policy prohibiting assignment may be made" because "such an assignment is not the assignment of the policy itself … but it is the assignment of a claim, or debt, or chose in action." *Ocean Accident*, 100 F.2d at 446. The assignment did not violate any insurance policy's consent-to-assignment clause because it was "not the assignment of the policy itself." *Id.* CICLA's argument seeks to impose the contemporary "minority rule" view of assignments on New CNC, even though New CNC's approach to obtaining insurance rights was "nearly universally" accepted in 1986. Given the state of the law on the assignability of insurance rights at the time of the transaction, it is clear that New CNC took care to evaluate Old CNC's liability risks and to ensure that it obtained coverage for those risks through the "Assignment of Policy Benefits."

V. CICLA failed to rebut PCS's public policy arguments.

As PCS explained, 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* PCS Opening Brief, at 25–30; PCS Reply at 20–22; *Fluor*, 354 P.3d at 330 (describing the majority rule as "a venerable rule that arose from experience in the world of commerce," which "has been acknowledged as contributing to the efficiency of business by minimizing transaction costs and facilitating economic activity and wealth enhancement").

CICLA never refutes these public policies supporting post-loss assignment of insurance benefits. CICLA merely argues: "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." Amicus Brief at 5. CICLA simply makes its same argument that rigid enforcement of policy language should override all other considerations. CICLA suggests that, if Old CNC wanted to assign the insurance benefits, it should have sought insurer consent. Amicus Brief at 6. Courts recognize, however, that requiring insurer consent under such circumstances allows the insurer to engage in "unfair or oppressive conduct" by "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." *Fluor*, 354 P.3d at 330. The insurer has nothing to gain from permitting the assignment but plenty to gain from refusing: it can eliminate long-tail risks while still keeping the premiums it received for covering those risks. Requiring a policyholder to seek consent to assign historical policy benefits would increase transaction costs and slow economic activity.

CICLA then proposes "alternatives" by which New CNC could have covered Old CNC's past liabilities: New CNC could have bought new claims-made policies to cover the liabilities; paid the insurers additional premiums to obtain their consent to the assignment; negotiated a lower asset sale price to account for the greater risk; or explicitly not assumed Old CNC's

liabilities. Amicus Brief at 6. None of these are reasonable options, and all of them would impede economic activity. If the asset purchaser were required to buy new policies or pay additional premiums to obtain consent for the assignment, the insurers would be paid twice to cover the same risk. This unfairly rewards insurers and increases transaction costs. Similarly, lowering the asset sale price is not a reasonable alternative because it requires the asset purchaser to engage in complex risk analyses that it is likely not equipped to do, at least not efficiently—this is why companies outsource such risk assessment to insurance companies in the first place. Finally, carving out old liabilities from an asset sale would be unacceptable to many sellers and would almost certainly lead to later disputes about whether certain liabilities were transferred.

In short, all of CICLA's "alternatives" gum up the works of economic activity, and there is conversely no economic benefit in forcing a company to obtain new insurance policies—potentially at great expense—when existing historical policies which were purchased and underwritten to insure "occurrences" during past policy periods already cover those risks. Public policy strongly supports the majority rule allowing post-loss assignment of insurance benefits without insurer consent. Nothing in CICLA's brief suggests otherwise.

VI. CICLA misunderstands PCS's argument on de facto merger.

The circuit court found as a matter of law that PCS was not the de facto successor to Old CNC by inverting the legal test for a finding of de facto merger. It incorrectly held that a party's express assumption of liabilities *precludes* a finding of de facto merger (App. at 170), but this Court's decisions stand for the opposite conclusion: express assumption of liabilities may indicate the existence of de facto merger. *See Brown v. Am. Ry. Exp. Co.*, 128 S.C. 428, 123 S.E. 97, 99 (1924); *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). Based on this erroneous legal conclusion, the circuit court ended its analysis. PCS sought remand on this issue.

In a footnote, the Court of Appeals declined to address PCS's de facto merger argument. (App. at 11 n.7.) PCS now requests, as alternative relief, that this Court reverse the circuit court's grant of summary judgment so that the issue of de facto merger can proceed to trial. The issue matters because courts regularly hold that insurance rights transfer as a result of a de facto merger, *see* PCS Opening Brief at 31–33. If a de facto merger were proved at trial, PCS would be the successor to Old CNC's insurance rights.

CICLA's argument here begs the question: "any liability Petitioner assumed was through a contract between Old CNC and New CNC, not a merger of one corporation into another." Amicus Brief at 14. This argument assumes the thing it seeks to prove—that express assumption of liabilities *precludes* a finding of de facto merger. But that assumption is not supported by South Carolina law. *See Brown*, 128 S.C. 428, 123 S.E. at 99 (explaining that a 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]"). Nor should CICLA's citation to out-of-state law have any merit on this issue where South Carolina law holds otherwise.

CONCLUSION

For these reasons and those presented in its opening and reply briefs, 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. CICLA's proposed rule would be an impermissible restraint on alienation: South Carolina law does not compel such a ruling and there is no sound policy reason for adopting it.

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Respectfully submitted,

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