

South Carolina Supreme Court Rules That Post-Loss Assignment Of Insurance Rights Is Valid Notwithstanding Lack Of Insurer Consent (Insurance Law Alert)

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Reversing an appellate court decision, the South Carolina Supreme Court ruled that the operative “loss” for insurance coverage purposes is determined by the date of occurrence, rather than the time of judgment or settlement, and that a post-loss assignment of insurance rights was valid even without insurer consent. *PCS Nitrogen, Inc. v. Continental Cas. Co.*, 2022 WL 1101704 (S.C. Apr. 13, 2022).

From 1966 to 1972, Columbia Nitrogen Corporation (“Old CNC”) operated fertilizer plants in Charleston. During that time frame, Old CNC was insured under policies issued by Continental. In 1986, Old CNC entered into an acquisition agreement which sold most of its assets to CNC Corp. (“New CNC”). In addition to the assets, New CNC assumed some of Old CNC’s liabilities related to the “acquired business.” The agreement also included a document titled “Assignment of Insurance Benefits,” which stated that Old CNC “has agreed to sell, convey, transfer, and assign . . . all of [its] rights, proceeds and other benefits to and under all of [its] policies.” New CNC later changed its name and merged with PCS Nitrogen. In 2013, PCS Nitrogen was found liable for environmental remediation as a corporate successor to Old CNC. PCS Nitrogen sought coverage under Old CNC’s policies, which Continental denied. A South Carolina trial court granted the insurer’s summary judgment motion, and the appellate court affirmed.

As discussed in our [January 2020 Alert](#), the appellate court ruled that the policies were not assigned to New CNC because Old CNC did not obtain the consent from the insurers required by the policies and South Carolina law. The court further held that the assignment was invalid as a post-loss assignment because there were no vested claims from prior actions against Old CNC at the time of assignment. The policies specified that coverage was not available “until the amount of the insured’s obligation to pay shall have been finally determined by judgment . . . or by written agreement.” Under this language, and because no actions had been filed against Old CNC prior to the asset sale, the court held that no losses had occurred and no vested claims existed. The court explained that although the operative occurrences (*i.e.*, contamination) may have occurred during the policy period, the insured loss (*i.e.*, the insured’s obligation to pay a sum of money) did not occur prior to the assignment.

Last month, the South Carolina Supreme Court reversed, adopting the “post-loss exception” and holding that insurer consent is not required

for an assignment of insurance benefits made after a “loss” has occurred. As a preliminary matter, the court concluded that under third-party policies, the operative “loss” arises at the time of the occurrence, not when judgment is issued against the insured. Further, the court ruled that in the present case, any loss occurred before Old CNC executed the assignment in 1986 and therefore that the assignment was valid.

The court remanded the matter for a determination of several other coverage issues, including whether the discharge of contaminants constitutes a covered “occurrence” in the first instance, whether a pollution exclusion bars coverage, or whether PCS engaged in any post-loss conduct that would operate to void coverage.

Several other state supreme courts have addressed this issue. The highest courts of California and New Jersey have applied a post-loss exception to factual scenarios similar to the one presented here. However, the State Supreme Courts of Hawaii and Oregon have held that post-loss assignments are not valid without insurer consent.

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