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# SC Supreme Court Adopts "Post-Loss" Exception to Enforcement of Consent-to-Assignment Clauses in Liability Policies

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On April 13, 2022, the South Carolina Supreme Court held that an insured's assignment of its rights under a liability policy, without the insurer's consent, is valid once "loss" has taken place, even if the insured's liability for third-party damage has not been determined. Aligning South Carolina with what it called "the majority of jurisdictions," the court concluded that "loss" is synonymous with the "occurrence" giving rise to the insured's liability. *See PCS Nitrogen, Inc. v. Continental Cas. Co.*, No. 28093, 2022 S.C. LEXIS 54 (Apr. 13, 2022).

In *PCS Nitrogen*, the appellant, PCS Nitrogen, Inc. (PCS), sought coverage under liability policies issued to Columbia Nitrogen Corp. (referred to as "Old CNC") from 1966 to 1985 for PCS's liability arising out of pollution at a manufacturing site operated by Old CNC in Charleston, South Carolina. PCS claimed it had standing to seek coverage on several grounds, including that, in 1986, Old CNC had assigned its rights under the policies to PCS's predecessor. The trial court and South Carolina Court of Appeals disagreed with that theory, finding the purported assignment invalid because, contrary to express provisions in the policies, Old CNC had not sought or obtained the insurers' consent to the assignment.

PCS was granted certiorari to the South Carolina Supreme Court, which reversed the Court of Appeals and remanded to the trial court. The Supreme Court reasoned that, though an insurer is not obligated to disburse policy proceeds until there is a judgment or settlement, the "overwhelming majority of jurisdictions" have adopted the "exception" that "an assignment of insurance benefits made after the occurrence or underlying injury but before the insured's liability [is] fixed by judgment [is] enforceable as a post-loss assignment." The Supreme Court determined that, because the polluting activities at the Charleston site had ceased at the time of the assignment, it was a valid "post-loss" assignment, despite that PCS was not found liable for the pollution until decades later. The court also concluded that PCS's attempts to pin liability for the pollution on Old CNC's corporate successor – which itself had asserted it was a true insured under the policies – did not increase the risk to the insurers because the risk had become "fixed" at the time of the "loss." Finally, the court said it was "persuaded" by PCS's "public policy" argument that upholding the assignment would prevent the insurers from receiving a "windfall."

*PCS Nitrogen* is the latest in a series of decisions in which courts have disregarded express policy terms and excused insureds from obtaining their insurers' consent to assignments of coverage rights before the insureds were found liable for third-party damage. In states where courts have not adopted this approach, insurers should still be able to rely on their policies' consent-to-assignment clauses in determining rights to coverage.

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