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The Supreme Court of South Carolina Adopts the Post-Loss Exception

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In *PCS Nitrogen, Inc. v. Cont'l Cas. Co.*, 436 S.C. 254, 871 S.E.2d 590 (2022), the Supreme Court of South Carolina formally adopted the "post-loss exception" – a common law rule providing that insurer consent is not required for an assignment of insurance benefits made after a loss has occurred. The case involved a series of primary and excess liability policies insuring a fertilizer manufacturing plant in Charleston from 1966-1985. The plant and its assets were sold in 1986. The transaction included an assignment of rights under the primary and excess policies, despite the fact that the policies included the following Consent-to-Assignment provision: "Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon." The policies also included a No Action clause, which provided that:

> No action shall lie against the company, unless, as condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

In 2005, a third party commenced a declaratory judgment action in federal court against the assignee, arguing that the assignee was liable under CERCLA for environmental remediation at the fertilizer plant site. The assignee, in turn, filed an action in state court, seeking a declaration that the insurers who issued the 1966-1985 policies were obligated to provide coverage for its defense costs and environmental liabilities stemming from the CERCLA litigation.

The trial court granted the insurer's motion for summary judgment, holding that the assignment was unenforceable as a matter of law because the original policyholder did not secure the insurers' consent. Additionally, the court ruled that there was no "post-loss" assignment because, at the time of the assignment, no judgment had been entered against the policyholder. The Court of Appeals affirmed.

The Supreme Court reversed and, in doing so, formally made the "post-loss expectation" binding law in South Carolina. In their briefs, the insurers cited decisions from Hawaii and Oregon holding that *no*

assignments, even those made after a loss, are valid without insurer consent. The Court declined to follow Hawaii and Oregon, and instead endorsed "the majority rule [] that such a provision does not bar an assignment made after a loss." *Id*. at 262, 594. The Court also rejected the insurers' argument that the "post-loss exception" cannot apply, as there was no "loss" at the time of the 1986 assignment.[1] Specifically, the insurers argued that absent a judgment or settlement, no "loss" has taken place. The Court disagreed, finding that, "[T]he overwhelming majority of jurisdictions have applied the post-loss exception to enforce assignments of insurance benefits made without insurer consent after *an occurrence* has taken place [as opposed to when a judgment or settlement occurs]. . . . We agree with the majority of jurisdictions and hold the 'loss,' in the context of the post-loss exception, is synonymous with the 'occurrence.'" *Id*. at 266–68, 596–98 (emphasis added).

Insurers writing coverage in South Carolina should be aware of the Supreme Court's recent opinion and the effects it may have on post-loss assignments.

[1] The policies did not define the term "loss."

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