

White and Williams Defeats Claims Brought by Insured's Alleged Successor in Environmental Coverage Dispute

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On March 23, 2016, the White and Williams Insurance Coverage and Bad Faith Group scored a significant victory in a long-tail insurance coverage dispute over alleged environmental property damage in *PCS Nitrogen, Inc. v. Continental Casualty Company, et al.*, pending in the South Carolina Court of Common Pleas for Charleston County. In dismissing all claims against the firm's clients on summary judgment, the court held that a purported assignment of an insured's rights under its liability insurance policies, before a judgment had been entered against the insured, was invalid because the insured failed to obtain consent from the insurers as required by the policies. In contrast to courts from certain other jurisdictions, the court rejected an argument made by the alleged policyholder, PCS Nitrogen, Inc. (PCS), that an insured is excused from obtaining consent to an assignment merely after injury to a third party has occurred. Instead, the consent requirement applies unless the insured is assigning an accrued right to payment under the policies, which arises only after the insured's third-party liability has been reduced to a sum due.

The court also dismissed PCS's alternative argument that a fact question existed as to whether it held rights under the policies as the corporate successor to the named insured, Columbia Nitrogen Corporation (referred to as "Old CNC"). Old CNC owned and operated a fertilizer manufacturing plant on the polluted property at issue until 1985. In 1986, Old CNC sold certain – but not all – of its assets and liabilities relating to the fertilizer manufacturing business to a new company, CNC Corporation (referred to as "New CNC"). New CNC later became PCS. In an underlying Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) cost recovery action, the U.S. District Court for the District of South Carolina held that PCS was the successor to New CNC's environmental liabilities based on three alternative theories: (1) New CNC had contractually assumed Old CNC's environmental liabilities; (2) there was a "substantial continuity" between Old CNC and New CNC, such that New CNC effectively assumed Old CNC's environmental liabilities; and (3) the circumstances warranted a conclusion that a de facto merger occurred between Old CNC and New CNC. PCS appealed to the U.S. Court of Appeals for the Fourth Circuit, which affirmed based solely on the contractual-assumption theory. Accordingly, the court in the coverage action held that the corporate succession theories on which the district court in the cost recovery action had relied – substantial continuity and de facto merger – were void and PCS was precluded from relying on them to support its claim to rights under the policies. The court in the coverage action further determined that, even if PCS were permitted to make its alternative argument, it failed as a matter of law because: (1) the substantial continuity test is no longer good law in the CERCLA context; and (2) the policy rationale under South Carolina law for finding a de facto merger – i.e., that a creditor of the purchased corporation loses a remedy and the ability to sue someone because the purchasing corporation did not assume the purchased corporation's liability – did not apply here because New CNC had expressly assumed Old CNC's liability.

The White and Williams team members are Patricia Santelle, Thomas Going, Robert Walsh and Paul Briganti.