IN THE SUPREME COURT OF THE STATE OF DELAWARE

MOTORS LIQUIDATION COMPANY DIP LENDERS TRUST, Plaintiff Below, Appellant/Cross-Appellee, v. ALLSTATE INSURANCE COMPANY, *et al.*, Defendants Below, Appellees, and ONEBEACON INSURANCE COMPANY, *et ano.*, Defendants Below, Appellees/Cross-Appellants.	:	No. 381, 2017 Court Below – Superior Court of the State of Delaware, C.A. No. N11C-12-022 PRW [CCLD]

APPELLEES' ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANTS' OPENING BRIEF ON CROSS-APPEAL SUBMITTED ON BEHALF OF ONEBEACON INSURANCE COMPANY AND CONTINENTAL CASUALTY COMPANY

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December 8, 2017
PUBLIC VERSION
FILED DECEMBER 21, 2017

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NATURE OF THE PROCEEDINGS

Plaintiff, Motors Liquidation Company DIP Lenders Trust (the "Trust") as the alleged transferee of General Motors Corporation's ("GM")[1] rights to prosecute and receive the proceeds of certain pre-1986 insurance policies, including high level excess policies issued by OneBeacon Insurance Company as Transferee of the Liabilities of American Employers Insurance Company (improperly named as OneBeacon Insurance Company as Successor to American Employers Insurance Company) ("OneBeacon") and allegedly issued by Continental Casualty Company ("Continental").

Through its Fourth Amended Complaint, the Trust seeks the proceeds of excess policies issued to GM by several excess insurers, including OneBeacon and Continental, as a result of approximately [redacted] claims alleging injuries caused by each claimant's unique exposure to GM's various asbestos-containing products and/or to asbestos existing at premises for which GM was liable between [redacted] ("Asbestos Claims").

[1] "GM" refers to the Delaware corporation that declared bankruptcy and dissolved on December 15, 2011.

[redacted]

OneBeacon issued [redacted] high level excess policies to GM [redacted] (the "OneBeacon Policies"),[2] and the Trust contends Continental Casualty Company issued [redacted] (the "Continental Policies"). Continental maintains that the Trust has not satisfied its burden to prove the existence and terms of those Continental Policies, and it continues to reserve its right to assert a lost or missing policy defense. The Superior Court assumed the truth of the Trust's factual allegations regarding the terms and existence of the Continental Policies, solely for the allocation and number of occurrences issues now before this Court. The OneBeacon and alleged Continental Policies [redacted] The Underlying Royal policies contain [redacted]

[2] "OneBeacon Policies" refers to American Employers' Insurance Company Policy [redacted] (A624–A627); American Employers' Insurance Company Policy [redacted] (A637–A640); and American Employers' Insurance Company Policy [redacted] (A641–A643).

[redacted]

The Trust appeals from Orders entered by the Superior Court insofar as those Orders hold that under Michigan law, the OneBeacon and the Continental Policies are subject to a pro-rata time on risk allocation.[3]

OneBeacon and Continental cross-appeal from the August 21, 2017, June 8, 2017, November 25, 2015, December 31, 2013, March 2 and 31, 2016 and June 8, 2017 Orders insofar as they hold that no conflict exists between Michigan and Delaware law on number of occurrences and that the [redacted] Asbestos Claims [redacted] [redacted][4]

On July 21, 2017, the Trust moved for entry of a final judgment, because

> Under the *pro rata* allocation ordered by the Court, the Trust concedes that the amount of GM's liabilities resulting from its Asbestos Claims does not reach the excess layer at which either the alleged OneBeacon or Continental policies provide coverage.[5]

On August 21, 2017, the Superior Court entered a Rule 58 final judgment[6] in favor of OneBeacon and Continental, among other insurer defendants, and against the

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[3] Plaintiff's Notice of Appeal, September 19, 2017, C.A. No. 381,2017 (Transaction ID 61137047) (Docket No. 1).
[4] Defendants OneBeacon and Continental's Notice of Cross-Appeal, October 4, 2017, C.A. No. 381,2017 (Transaction ID 61196946) (Docket No. 20).
[5] B2749.
[6] Order of Judgment, August 21, 2017, C.A. No. N11C-12-022 PRW [CCLD] (Transaction ID 61010680)) (Ex. F to Appellant's Motors Liquidation Company DIP Lenders Trust's Opening Brief ("Appellant's Br.")).

[redacted]

Trust on all causes of action asserted against each defendant in the Trust's Fourth Amended Complaint.[7]

On September 20, 2017, the Trust filed a notice of appeal from the Superior Court Orders adopting a pro-rata time on risk allocation.[8]

On October 4, 2017, OneBeacon and Continental filed a notice of cross-appeal from the Superior Court's Orders finding no conflict between Michigan and Delaware law on the number of occurrences [redacted][9]

[7] The Fourth Amended Complaint seeks coverage for environmental liabilities of GM arising from certain contaminated sites ("Environmental Claims"). B1393. The August 21, 2017 Order Provides that "the damages attributable to GM's asbestos claims and environmental claims do not and cannot reach the excess coverage layers at which the Trust alleges that OneBeacon and Continental policies attach[.]" Ex. F to Appellant's Br. at p. 2.

[8] Plaintiff's Notice of Appeal, September 19, 2017, C.A. No. 381,2017 (Transaction ID 61137047) (Docket No. 1).

[9] Defendants OneBeacon and Continental's Notice of Cross-Appeal, October 4, 2017, C.A. No. 381,2017 (Transaction ID 61196946) (Docket No. 20).

[redacted]

SUMMARY OF ARGUMENT

OneBeacon and Continental Casualty Company's Answer to the Trust's Summary of Argument on Appeal

1. **DENIED.** The Superior Court correctly determined that liability for the Asbestos Claims is to be allocated using the pro-rata time on risk rather than the "all sums" method.[10] The Superior Court's decision is supported by the plain language of the OneBeacon and alleged Continental Policies [redacted]

2. Paragraph 2 of the Trust's Summary of Argument is directed to insurer defendants with [redacted] policies, and not to OneBeacon or Continental. OneBeacon and Continental, therefore, do not admit, deny, or otherwise respond to Paragraph 2.

3. Paragraph 3 of the Trust's Summary of Argument is directed to insurer defendants with [redacted] policies, and not to OneBeacon or Continental. OneBeacon and Continental, therefore, do not admit, deny, or otherwise respond to Paragraph 3.

[10] *Motors Liquidation Co. DIP Lenders Tr. v. Allianz Ins. Co.*, No. N11C-12-022 PRW CCLD, 2017 Del. Super. LEXIS 279, at *43-47 (Del. Super. Ct. June 8, 2017).

[redacted]

4. Paragraph 4 of the Trust's Summary of Argument is directed to insurer defendants with [redacted] policies, and not to OneBeacon or Continental. OneBeacon and Continental, therefore, do not admit, deny, or otherwise respond to Paragraph 4.

5. Paragraph 5 of the Trust's Summary of Argument is directed to insurer defendants with [redacted] policies, and not to OneBeacon or Continental. OneBeacon and Continental, therefore, do not admit, deny, or otherwise respond to Paragraph 5.

[redacted]

OneBeacon and Continental Casualty Company's Arguments on Cross-Appeal

1) The Superior Court erred by concluding that there is no conflict between Michigan law, which indisputably applies, and Delaware law, which does not apply, and finding that the [redacted] Asbestos Claims involving exposures to a multitude of different asbestos-containing products by different persons in diverse circumstances and settings [redacted], namely manufacture and sale of "intrinsically harmful" products.

2) The Superior Court's [redacted] conclusion is at odds with the plain language of the OneBeacon and alleged Continental Policies, Michigan law, and GM's clearly expressed intent regarding the [redacted] that each of the [redacted]

3. The Superior Court erred by holding that *Associated Indemnity Corporation v. Dow Chemical Company* ("*Associated Indem.*"),[11] a federal district court decision, portends how the Michigan Supreme Court would rule because that case did not analyze or apply the plain language of the policies contrary to Michigan

[11] 814 F. Supp. 613 (E.D. Mich. 1993).

[redacted]

Supreme Court precedent articulated in *Gelman Sciences, Incorporated v. Fidelity & Casualty Company.*[12]

[12] 572 N.W.2d 617, 623 (Mich. 1998).

[redacted]

STATEMENT OF FACTS

The OneBeacon Policies are part of GM's unique insurance program and [redacted] which in turn [redacted][13]

By the Trust's own admission, the only evidence of the alleged Continental Policies is a [redacted][14] According to the Trust's responses to Continental's interrogatories, those documents alone support the conclusion that the policies [redacted] . . ."[15] The issue of whether the Trust has satisfied its burden to prove the existence, terms and conditions of the Continental Policies has been deferred for a later date if necessary following this appeal, and Continental continues to reserve its right to assert a lost or missing policy defense.[16]

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[13] A622.
[14] B1433; B1490-B1491; A628-634; A635-636.
[15] B1492-B1493.
[16] *Motors Liquidation Co. DIP Lenders Tr.*, 2017 Del. Super. LEXIS 279, at *6-7; B2623-24; B2584-85.

[redacted]

Solely for the purposes of ruling on the issues raised in the cross-motions for summary judgment, however, the Superior Court accepted as true the Trust's factual allegations regarding the existence and terms of the Continental Policies.[17]

A. The Policy Language

The [redacted] provides, in part, that the insurer agrees:

[redacted]

(i) [redacted]

[redacted][18]

[redacted] applies only to [redacted]

The insuring agreement of [redacted], which [redacted] provides that the insurer will:

[17] *Id.*; B2624-B2625; B2583-B2586.
[18] A592–A593.
[19] A592–A593.

[redacted]

[redacted]

[redacted] is defined in part, as:

[redacted]

[redacted] provision of [redacted] provides:

[redacted]

[redacted] is defined as [redacted]

When the [redacted] insurance became economically unattractive to GM, [redacted][24] Effective [redacted] through [redacted]

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[20] A448.
[21] A450.
[22] A449.
[23] A450
[24] B645.

[redacted]

[redacted] the language in [redacted] was changed from [redacted] "[25] to [redacted] further provided, [redacted] GM and Royal intended this change to reduce premiums by limiting [redacted] thereby dramatically reducing [redacted]

While [redacted] converted the [redacted] to [redacted] the definition of [redacted][29]

B. Each Claimant Alleges Different and Distinct Injury-Causing Exposures, at Different Times, at Different Places, and to Distinct Asbestos-Containing Products, which Caused Different Injuries.

The Trust's claim data shows that each claimant alleges unique exposure start and end dates,[30] at nearly [redacted] different locations,[31] to at [redacted] different types

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[25] A449.
[26] A493 (emphasis added).
[27] A493.
[28] B654-B655; B645.
[29] A450; A795.
[30] B2559-B2562.
[31] B2558.

[redacted]

of asbestos-containing products, including, but not limited to: [redacted] [32] Individual complaints illustrate that claimants were exposed to different GM products under differing circumstances, including [redacted] [33] The extent and severity of claimants' exposures also varied, as reflected in the variety of injuries they suffered, which include [redacted] [34]

C. Based on the Policy Language, GM and Royal Treated Each Asbestos Claim as a [redacted]

GM allegedly was served with its first asbestos-related claim on [redacted] [35] From that point, and through the close of the [redacted] GM was the subject of approximately [redacted] [36]

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[32] B2562-B2563.
[33] B2559-B2562.
[34] B2558-B2559.
[35] A1705; A893–A910.
[36] B2505-B2506.

[redacted]

Contemporaneous claim materials demonstrate that, during this entire time, GM and Royal [redacted][38]

In 1976, Alexander & Alexander ("A&A"), GM's agent, communicated to Sedgwick Forbes, a broker for certain London excess policies issued to GM, confirmed that [redacted]

[redacted]

A&A reiterated that, under this same [redacted] there was [redacted][40] In a [redacted] memorandum, A&A stated:

[redacted]

[37] B93-B203, B387, B390, B495.
[38] A450; A795.
[39] B74 (emphasis added).
[40] B240.
[41] B386.

[redacted]

In [redacted] Karl F. Ambos, Assistant Vice President at Royal, stated that [redacted]

[redacted][42]

In a [redacted] memo, Royal claim handler Carol Marrandino [redacted]

[redacted][43]

In its November 25, 2015 Opinion and Order, the Superior Court determined that GM and Royal treated each asbestos claim as a separate occurrence:

- "Year-after-year, the insured treated each asbestos-related claim as a separate occurrence[.] . . . [i]nstead of attempting to aggregate all asbestos claims as a single or related occurrence spanning many years[.]"[44]
- "[T]he asbestos-related claims made against GM after the first in November 1977 were not bundled or aggregated with similar claims. Instead, GM treated each claim as a separate occurrence[.] . . . And, that was how GM treated asbestos-related claims while Royal was on-risk."[45]

D. The Michigan and Delaware Litigation

After GM and Royal's relationship ended in [redacted] Asbestos Claims continued

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[42] B497.
[43] B496.
[44] *Motors Liquidation Co. DIP Lenders Tr. v. Allianz Ins. Co.*, No. : N11C-12-022 FSS (CCLD), 2015 Del. Super. LEXIS 1063, at *1 (Del. Super. Ct. Nov. 25, 2015).
[45] *Id.* at *5.

[redacted]

to be asserted against GM, and those were handled under a different insurance program.[46] It was not until late [redacted] that GM notified Royal [redacted] [redacted]."[47] In January 2005, GM and Royal filed separate declaratory judgment actions based on the very same policy language and Asbestos Claims at issue here.[48] Royal's action was *Royal Indemnity Co. v. General Motors Corp.*, C.A. No. 05C-01-223-RRC (Superior Court, New Castle County, Delaware) (the "Delaware Litigation"). GM's action was *General Motors Corp. v. Royal & Sun Alliance Ins. Group PLC.*, No. 05-063863-CK (Circuit Court, Oakland County, Michigan) (the "Michigan Litigation"). GM and Royal moved to dismiss or stay the other's action on *forum non conveniens* grounds.[49] In both actions, GM successfully argued that Michigan law, not Delaware law, applied. The Delaware Court stayed the Delaware Litigation[50] and the Michigan Litigation proceeded.[51]

GM successfully argued in the Delaware Litigation:

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[46] B664; B675.
[47] B686.
[48] A1285–A1343.
[49] A1413-A1416; B721-22.
[50] B721-B731.
[51] A1413-A1416.

[redacted]

- "Michigan law . . . applies to most if not all of the issues in dispute; Delaware law does not apply to any"[52]
- "Application of the first [forum non conveniens] factor – whose law applies to this dispute - favors Michigan"[53]
- "One thing is very clear, Delaware law does not apply"[54] and
- "[A]ll of the conflict of law factors point to application of Michigan law."[55]

Judge Cooch granted GM's motion to stay the Delaware Litigation based in part on his determination that Delaware law did not apply, finding that "[i]t appears to this Court that Delaware law will not be at issue in this case. . . . [N]either party advocates for application of Delaware law. . . . Accordingly . . . the choice-of-law factor . . . favor[s] granting a stay in favor of the Michigan action."[56]

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[52] A1349.
[53] A1361.
[54] B631.
[55] B632.
[56] B721-22.

Urging the Michigan court to retain jurisdiction in the Michigan Litigation, GM successfully made the same argument. Namely, that:

- "Michigan law . . . applies to most, if not all, issues in dispute; Delaware law does not apply to any"[57]
- "Michigan law applies to this dispute"[58] and
- "Delaware law does not apply to the parties' dispute[.]"[59]

In stark contrast with the Trust's current position, GM's unequivocal position in the Michigan Litigation was that the *very same* policy language treated each one of the *very same* Asbestos Claims as a separate occurrence:

- [redacted]"[60]
- [redacted] *See Dow Corning Corp. v. Continental Casualty Co*, 1999 WL 33435067, at *17 (Oct. 12, 1999), *appeal denied*, 617 NW2d 554 (2000)[.]"[61]
- [redacted]

[57] A1374.
[58] A1388.
[59] A1389 (emphasis in original).
[60] B751 (emphasis added).
[61] B752-B753 (emphasis added).

[redacted]

[redacted][62]

- [redacted] *See Dow Corning Corp v Cont'l Cas Co*, . . . 1999 WL 33435067, at *17[.]"[63]

GM maintained that it was entitled to [redacted] coverage [redacted] under the [redacted] Royal policies:

[redacted][64]

E. GM's Bankruptcy

On June 1, 2009, GM filed a voluntary petition in the United States Bankruptcy Court for the Southern District of New York seeking to reorganize under Chapter 11 of the Bankruptcy Code.[65] GM was renamed Motors Liquidation Company and effective December 15, 2011, Motors Liquidation Company, purported to transfer its rights to the proceeds of the OneBeacon and Continental Policies to the Trust.[66] The Trust has no obligation to pay or reimburse payment for

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[62] B753 (emphasis added).
[63] B760 (emphasis added).
[64] A1310.
[65] B765-B767.
[66] B1406-B1411.

[redacted]

any Asbestos Claim, and no portion of any recovery in this case will go to pay any Asbestos Claim.[67]

F. Procedural History

1) The 2013 Motions

In April 2013, before discovery, the Trust filed two partial summary motions, seeking (1) application of "all sums" allocation, which would require each triggered policy to pay all sums up to the policy limit, regardless of when the specific harm occurred and (2) to have all Asbestos Claims against GM treated [redacted][68] The Superior Court denied both motions.[69]

a. Allocation

Denying the Trust's motion, the Superior Court recognized that "Delaware and Michigan differ significantly" on the issue of allocation.[70] Since the Michigan Supreme Court had not expressly addressed allocation, the Superior Court predicted how the Michigan Supreme Court would rule as required by *Shook & Fletcher Asbestos Settlement Trust v. Safety National Casualty Corporation* ("*Shook*").[71]

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[67] B1408-B1409, B1413; B789-B791.
[68] *Motors Liquidation Co. v. Allianz Ins. Co.*, No. : N11C-12-022 FSS CCLD, 2013 Del. Super. LEXIS 605, at *2 (Super. Ct. Dec. 31, 2013).
[69] *Id.* at *1.
[70] *Id.* at *6.
[71] *Id.* at *7-8 (citing *Shook*, 909 A.2d 125 (Del. 2006)).

[redacted]

Citing the Michigan Court of Appeals decision in *Arco Industries Corp. v. American Motorists Ins. Co.* ("*Arco*"),[72] the Superior Court determined that the Michigan Supreme Court would adopt a pro-rata time on risk allocation.[73] The Court reasoned that "*Arco* was affirmed by the Michigan Supreme Court" and noted that *Stryker Corp. v. National Union Fire Insurance Co.*,[74] "a federal court applying Michigan law[,] also held that the Michigan Supreme Court would adopt pro rata 'time on the risk.'"[75]

The Superior Court distinguished *Dow Corning Corp. v. Continental Cas. Co.* ("*Dow Corning*"),[76] which applied an "all sums" allocation, because it "rel[ied] heavily on policy language explicitly extending coverage outside the policy period[,]"[77] which language does not appear in the OneBeacon or Continental Policies, or any policy which they follow.

b. Number of Occurrences

OneBeacon, Continental and others opposed the Trust's [redacted] motion, because discovery was incomplete, and the Trust's [redacted]

[72] 594 N.W.2d 61 (Mich. Ct. App. 1998).
[73] *Motors Liquidation Co.*, 2013 Del. Super. LEXIS 605, at *8-10.
[74] No. 4:01-CV-157, 2005 U.S. Dist. LEXIS 13113 (W.D. Mich. July 1, 2005).
[75] *Motors Liquidation Co.*, 2013 Del. Super. LEXIS 605, at *9.
[76] 1999 Mich. App. LEXIS 2920 (Mich. Ct. App. Oct. 12, 1999).
[77] *Motors Liquidation Co.*, 2013 Del. Super. LEXIS 605, at *9.

[redacted]

position was not supported by the policy language, the facts, or Michigan law.[78] The Superior Court *denied* the Trust's [redacted] motion without reaching the merits because evidence regarding the "negotiation and claims reporting processes" demonstrates GM and Royal's understanding and "will likely lead to a different result than merely relying on the policy language."[79]

Insofar as the Superior Court observed that Delaware courts and one federal district court applying Michigan law have held that the manufacture and sale of intrinsically harmful products constitute a [redacted], the Superior Court did so without making any determination about the proper reading of the particular policy language at issue. This point was conceded by the Trust in its briefing before the Superior Court.[80] Indeed, the 2013 Opinion does not analyze the "occurrence" definition, as required by Michigan authority.[81]

2) The 2015 Motions

a. Judicial Estoppel re: Application of Michigan Law

In the November 25, 2015 Opinion and Order, the Superior Court determined, among other issues, the Trust is estopped from applying any state's law other than

[78] B1303; B1308-12.
[79] *Motors Liquidation Co.*, 2013 Del. Super. LEXIS 605, at *16.
[80] A1947.
[81] *Motors Liquidation Co.*, 2013 Del. Super. LEXIS 605, at *3-6.

[redacted]

Michigan.[82] Significantly, the motion leading to that Opinion and Order "request[ed] the Court to declare . . . [t]he Trust is bound by, and may not contradict, GM's prior position that Michigan law applies to the resolution of insurance coverage issues presented by the asbestos claims that GM tendered to Royal beginning in October 2004 . . . ."[83] That motion was granted without limitation, based upon GM's consistent and successful position in the Michigan Litigation[84] and the prior Delaware Litigation[85] that Delaware law did not apply to determine coverage for the *very same* Asbestos Claims under the *very same* underlying Royal policies whose language the OneBeacon and Continental policies follow.[86] The Trust stands in the shoes of GM with no greater rights now than could have been exercised by GM.[87] "The Trust is stuck for better or worse with whatever GM's understandings were."[88]

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[82] *Motors Liquidation Co. DIP Lenders Tr.*, 2015 Del. Super. LEXIS 1063, at *1.
[83] B1762.
[84] A1413-A1416.
[85] B721-B731.
[86] B1785, B1798.
[87] B1335 ("THE COURT: [Y]ou are not suggesting, are you, that there's any difference for my purposes between the Trust and GM? MS. LINDE: None whatsoever.").
[88] B1334.

3) The 2016 Motions

The Trust, OneBeacon and Continental filed motions and cross-motions for summary judgment to resolve, among other issues, the manner of allocation and whether the Asbestos Claims constituted one or separate occurrences.[89]

a. Allocation

In its June 2017 Order, the Superior Court correctly determined that liability for the Asbestos Claims is to be allocated across the excess policies using the pro-rata time on risk rather than the "all sums" method.[90]

b. Number of Occurrences

The Superior Court erred in holding that the [redacted] distinct Asbestos Claims arose [redacted] under the OneBeacon and Continental Policies.[91] The Superior Court also erred by determining that it was constrained by the law of the case doctrine to apply the cause test, discussed in the 2013 decision rather than engaging in an analysis of the policy language as mandated by Michigan law.[92]

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[89] *Motors Liquidation Co. DIP Lenders Tr.*, 2017 Del. Super. LEXIS 279, at *2-4.
[90] *Id.* at *43-47.
[91] *Id.* at *33-43.
[92] *Id.* at 40-43.

[redacted]

4) 2017 Motion for Entry of Final Judgment

In light of the Superior Court's pro-rata time on risk allocation ruling, the Trust concluded that the OneBeacon and Continental excess policies could never be reached.[93] The Trust then moved for entry of final judgment in favor of all defendants on all claims so it could proceed with its appeal of the allocation decision. On August 21, 2017, the Superior Court entered a final judgment against the Trust on all causes of action asserted against each defendant in the Trust's Fourth Amended Complaint and in favor of OneBeacon and Continental, among other defendants.[94]

The Trust's appeal and OneBeacon and Continental's cross-appeal followed.

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[93] B2749.

[94] Order of Judgment, August 21, 2017, C.A. No. N11C-12-022 PRW [CCLD] (Transaction ID 61010680) (Ex. F to Appellant's Br.).

[redacted]

ANSWERING ARGUMENT ON APPEAL

I. THE SUPERIOR COURT PROPERLY DETERMINED THAT THE ONEBEACON AND CONTINENTAL POLICIES SHOULD BE ALLOCATED PRO-RATA TIME ON RISK CONSISTENT WITH THE POLICY LANGUAGE AND MICHIGAN LAW

A. Question Presented

Did the Superior Court correctly adopt the pro-rata time on risk allocation method consistent with the plain language of the OneBeacon and Continental Policies and Michigan law? This question was raised below at B911-B949, B2588-B2628, and B2668-B2705.

B. Standard of Review

Interpretation of an insurance policy contract with clear language is a question of law, which is reviewed *de novo*.[95]

C. Merits of Argument

1) There is a True Conflict Between Delaware and Michigan Law on Allocation and Michigan Law Applies

a) Delaware and Michigan Differ Significantly on Allocation

[95] *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 40 (Del. 1991).

Although it posits that Delaware law could apply because the Superior Court erred in finding there is a "true conflict" on the issue of allocation, the Trust repeatedly applies Michigan law to support its arguments on appeal.[96] The Superior Court correctly found that there is a true conflict because "Delaware and Michigan differ significantly" on the issue of allocation.[97] *Arco*,[98] a published Michigan Court of Appeals decision that was subsequently affirmed by the Michigan Supreme Court is the "current precedent in Michigan."[99] *Dow Corning*, an unpublished decision of the Michigan Court of Appeals, is distinguishable and does not represent Michigan law.[100] The Superior Court did not err in holding that the "there is a true conflict of law as to allocation"[101] and that the "Michigan Supreme Court would likely not follow 'all sums.'"[102]

The Trust asserts that a supposed split in the Michigan intermediate appellate court and lack of dispositive authority from the Michigan Supreme Court means there is no true conflict between Michigan's pro-rata allocation law and the all sums

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[96] Appellant's Br., at pp. 36-50, 51.
[97] *Motors Liquidation Co.*, 2013 Del. Super. LEXIS 605, at *6.
[98] 594 N.W.2d 61.
[99] *Motors Liquidation Co.*, 2013 Del. Super. LEXIS 605, at *8.
[100] *Id.*, at *9-10.
[101] *Id.* at *10.
[102] *Id.* at *5-10.

precedent in Delaware.[103] But there is no split of authority. Rather, *Arco* and *Dow Corning* reach different results based on differing policy language. *Arco* applies a pro-rata time on risk allocation because the policy language limits coverage to injury which occurs during the policy period, as the policy language does in this case.[104] *Dow Corning* applied an "all sums" joint and several allocation based on policy language that expressly extended coverage to injury taking place after expiration of the policy.[105] No such language is found in the policies at issue here.

Absent Michigan Supreme Court precedent, this Court's task is to predict how that Court would decide the issue.[106] In so doing, this Court should consider how Michigan's Court of Appeals has addressed the issue.[107] As explained by the Chancery Court:

> Although this approach has a predictive, uncertain quality, it reminds one who is doing his job with fidelity of the need to hew closely to the statutes of [the sister state] and the teachings of [that state's] courts, particularly those of its highest court.[108]

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[103] Appellant's Br., at p. 51.
[104] *Arco,* 594 N.W.2d at 69.
[105] *Dow Corning Corp.*, 1999 Mich. App. LEXIS 2920.
[106] *Shook*, 909 A.2d at 128.
[107] *Id.*
[108] *Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76, 112-16 n.144 (Del. Ch. 2009).

An actual conflict exists where, as in this case, there is a "material difference" between the states' laws, such that a party is "more likely" to prevail, or has a "better chance," under one versus the other.[109]

The Superior Court properly followed *Arco* as predicting how the Michigan Supreme Court would rule on the issue under the facts here. "[T]he Michigan Supreme Court affirmed *Arco* [and did so] after *Dow Corning* was decided."[110] The pro-rata time on risk approach "respect[s] the Michigan Supreme Court's admonition 'to fairly allocate the risk[.]'"[111] *Arco* has been consistently applied and recognized as the law of Michigan.[112] *Dow Corning*, on the other hand, has been rejected or distinguished by every Michigan state and federal court that has

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[109] *Berg Chilling Sys., Inc. v. Hull Corp.*, 435 F.3d 455, 462 (3d Cir. 2006).
[110] *Motors Liquidation Co.*, 2013 Del. Super. LEXIS 605, at *10.
[111] *City of Sterling Heights v. United Nat'l Ins. Co.*, 319 F. App'x 357, 361 (6th Cir. 2009).
[112] *City of Sterling Heights*, 319 F. App'x. at 361 (affirming *City of Sterling Heights v. United Nat'l Ins. Co.*, No. 03-72773, 2007 U.S. Dist. LEXIS 3915 (E.D. Mich. Jan. 19, 2007)); *Decker Mfg. Corp. v. Travelers Indem. Co.*, No. 1:13-CV-820, 2015 U.S. Dist. LEXIS 12169, at *37-38 (W.D. Mich. Feb. 3, 2015); *Decker Mfg. Corp. v. Travelers Indem. Co.*, 106 F. Supp. 3d 892, 895 (W.D. Mich. 2015); *Alticor, Inc. v. Nat'l Union Fire Ins. Co.*, 916 F. Supp. 2d 813, 832 (W.D. Mich. 2013); *Stryker Corp.*, 2005 U.S. Dist. LEXIS 13113, at *18; *Wolverine World Wide, Inc. v. Liberty Mut. Ins. Co.*, No. 260330, 2007 Mich. App. LEXIS 657, at *7 (Mich. Ct. App. Mar. 8, 2007); *Cont'l Cas. Co. v. Indian Head Indus.*, Civil Action No. 05-73918, 2010 U.S. Dist. LEXIS 3170, at *21 (E.D. Mich. Jan. 15, 2010) (affirmed by *Cont'l Cas. Co. v. Indian Head Indus.*, 666 F. App'x 456, 458 (6th Cir. 2016)).

considered allocation.[113] As the Trust conceded during argument below, after *Arco* there has not been "an all sums result from Michigan" that did not have the additional *Dow Corning* "clause that expressly extended coverage past the end of the policy period."[114]

Heeding the Michigan Supreme Court's statement that courts "should . . . endeavor to fairly allocate the risk,"[115] *Arco* and its progeny are strong predictors that the Michigan Supreme Court would apply a pro-rata time on risk allocation were it to be presented with this case.

b) The Trust is Estopped From Seeking to Apply any Law Other than Michigan Law

The Trust is estopped from applying any state's law other than Michigan's.[116] Indeed, GM consistently and successfully maintained in both the Delaware Litigation and the Michigan Litigation that [redacted]

[redacted]

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[113] *City of Sterling Heights*, 319 F. App'x. at 361; *City of Sterling Heights*, 2007 U.S. Dist. LEXIS 3915; *Decker Mfg. Corp*, 2015 U.S. Dist. LEXIS 12169, at *37-38; *Alticor, Inc.*, 916 F. Supp. 2d at 832; *Stryker Corp.*, 2005 U.S. Dist. LEXIS 13113, at *18; *Cont'l Cas. Co.*, 2010 U.S. Dist. LEXIS 3170, at *13-14; *Cont'l Cas. Co.*, 666 F. App'x at 465.

[114] B2713.

[115] *Gelman*, 572 N.W.2d at 626.

[116] *Motors Liquidation Co. DIP Lenders Tr.*, 2015 Del. Super. LEXIS 1063, at *1.

[redacted]

[redacted][117] Accordingly, the Superior Court correctly determined that the Trust is estopped from now arguing against application of Michigan law.[118]

c) Delaware Conflicts Rules Mandate Application of Michigan Law

Delaware conflicts principles and choice of law rules also compel the conclusion that Michigan law applies. Delaware courts apply a two-part test to resolve which sovereign's law applies when there is a conflict:

> first, the court determines whether there is an actual conflict of law between the proposed jurisdictions. If there is a conflict, the court determines which jurisdiction has the "most significant relationship to the occurrence and the parties" based on the factors (termed "contacts") listed in the Restatement (Second) of Conflict of Laws.[119]

As a general matter, when interpreting an insurance contract, courts should apply "the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy."[120] However, where a "policy covers a group of risks that are scattered throughout two or more states[,]"[121]

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[117] A1413-A1416; B721-22.
[118] *Motors Liquidation Co. DIP Lenders Tr.*, 2015 Del. Super. LEXIS 1063, at *1.
[119] *Bell Helicopter Textron, Inc. v. Arteaga*, 113 A.3d 1045, 1050 (Del. 2015) .
[120] Restatement (Second) of Conflict of Laws § 193 (1971).
[121] *Id.*

[redacted]

the location of the insured risk is "of less importance . . . [and] Delaware courts apply the general choice of law considerations in § 188" of the Restatement.[122]

Section 188 of the Restatement states that where parties to a contract have not included an effective choice of law provision, the court should consider the following contacts: "1) the place of contracting, 2) the place of negotiation of the contract, 3) the place of performance, 4) the location of the subject matter of the contract, and 5) the domicile, residence, nationality, place of incorporation and place of business of the parties."[123] "In complex coverage cases such as this, the insured's corporate headquarters has most often been found to be the logical situs of the most significant insurance-related activities."[124]

Here, the most significant relationship test leads to Michigan. GM was headquartered in Michigan and administered its insurance program and paid insurance premiums from there. There is a true conflict on the issue of allocation and Michigan law applies.

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[122] *Viking Pump, Inc.*, 2 A.3d at 87.
[123] *Shook & Fletcher Asbestos Settlement Tr. v. Safety Nat'l Cas. Corp.*, No. 04C-02-087 MMJ, 2005 Del. Super. LEXIS 334, at *8 (Del. Super. Ct. Sep. 29, 2005); *Liggett Group, Inc. v. Affiliated Ins. Co.*, 788 A.2d 134, 138 (Del. Ch. 2001) .
[124] *Id.*, at *10.

2) Pro-Rata Time on Risk Allocation is Consistent with the Policy Language

Rather than "imposing extra-contractual proration"[125] as the Trust erroneously contends, pro-rata allocation is rooted firmly in the express language of the OneBeacon and Continental policies, which [redacted] No language extends coverage [redacted][126]

The Trust admits in interrogatory answers that [redacted][127] Yet the Trust now backtracks and instead argues that the policies somehow extend coverage to [redacted] But this is inconsistent with its interrogatory answers, the policy language, and controlling Michigan law.

a) [redacted]

The OneBeacon Policies are [redacted]"[128] The Trust contends that Continental's alleged policies [redacted]

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[125] Appellant's Br. at p. 27.
[126] A592–A593.
[127] B1366-1370; B1499-B1500.
[128] A624, A637, A641.

[redacted]

[redacted] which [redacted][129]

[redacted] provides, in part:

1. [redacted]

* * *

[redacted]

(i) [redacted]

* * *

[redacted][130]

This clear language limits coverage to [redacted]

[redacted][131] The interpretation urged by the Trust disregards the words confining [redacted][132] This interpretation impermissibly re-writes the policies to confer on the Trust far broader

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[129] B1492-B1493; A628-A634 at A628-A629.
[130] A592–A593 (emphasis added).
[131] A592–A593.
[132] Appellant's Br. at pp. 35, 43.

[redacted]

coverage than GM itself purchased.[133] The Superior Court properly declined to re-write the policy and this Court should as well.

b) [redacted]

The Superior Court properly looked to [redacted] (the "Underlying Policy" to which [redacted] follows form) to further support a pro-rata allocation. [redacted] states that it is:

[redacted] applies [redacted]"[135] [redacted] defines [redacted] as "[redacted]"[136]

The language of [redacted] is clear, and consistent with [redacted] in providing coverage only [redacted]

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[133] *Gelman*, 572 N.W.2d at 623.
[134] A593.
[135] A449.
[136] A450.

[redacted]

[redacted] like [redacted] affords coverage [redacted]

c) [redacted]

As noted above, the Trust contends that the alleged Continental policies [redacted] rather than or in addition to [redacted] Consistent with [redacted][139] Moreover, [redacted][140] and is "[redacted] . . ."[141] Because the [redacted] is subject to the terms of [redacted] including [redacted]

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[137] A449-A450.
[138] *Motors Liquidation Co. DIP Lenders Tr.*, 2017 Del. Super. LEXIS 279, at *46-47.
[139] A629.
[140] A628.
[141] A629.

[redacted]

[redacted][142] it likewise affords coverage only [redacted]

3) The Policies are Triggered by [redacted]

The Trust cites *Gelman*[143] as controlling Michigan authority on insurance policy interpretation. *Gelman* holds that language limiting coverage to injury taking place during the policy period means that there must be "injury-in-fact" during the policy in order to trigger coverage.[144] The *Gelman* Court considered the following definition of "occurrence":

> [A]n accident, including injurious exposure to conditions, which results *during the policy period*, in bodily injury or property damage neither expected nor intended from the standpoint of the insured[.][145]

The Trust spins *Gelman* as somehow supporting an all sums allocation by stating it exemplifies a case in which "[l]iability of a policyholder for a long-term latent injury process, such as asbestos bodily injury or environmental property damage, can trigger insurance coverage under any standard general liability policy in effect

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[142] A450.
[143] 572 N.W.2d at 622-23; Appellant's Br. at p. 30.
[144] *Gelman,* 572 N.W.2d at 624.
[145] *Id.* at 620 (emphasis added).

[redacted]

during any part of the continuing injury process."[146] Although a continuing injury may trigger multiple successive policies in effect when the continuing injury occurs, *Gelman* provides no support for an all sums allocation. Rather, that decision recognizes that where—[redacted]—the policies limit coverage to injury taking place during the policy period the accident or exposure must *result* in injury during the policy period:

- The plain language of the policies at issue unambiguously provides that an "occurrence" is an accident that results in property damage during the policy period. Otherwise stated, according to the policies' explicit terms, actual injury must occur during the time the policy is in effect in order to be indemnifiable, i.e., the policies dictate an injury-in-fact approach.[147]

- The plain meaning of the term "occurrence," as used in the CGL policy, is clear. It is (1) an accident (2) which results (3) in property damage (4) during the policy period. Stated another way, an actual injury must occur during the time the policy is in effect in order to be indemnifiable or compensable.[148]

- The plain language of the definition of "occurrence" used in the CGL policy requires exposure that "results, during the policy period, in bodily injury" in order for an insurer to be obligated to indemnify the insured. The unambiguous meaning of these words is that an injury--and not mere exposure--must result during the policy period.[149]

The Trust's attempt to isolate the terms "[redacted]" "[redacted]" "[redacted]"

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[146] Appellant's Br. at p. 27.
[147] *Gelman,* 572 N.W.2d at 623.
[148] *Id.* at 624.
[149] *Id.* at 624.

[redacted]

and [redacted] and ignore context and all other policy terms is unavailing.[150] None of these terms support an all sums allocation under Michigan law, nor can they be read out of the context of the entire policy.[151] The Trust's cases regarding these individual terms are inapposite. Despite the construction of [redacted] in *People v. Monaco*,[152] a child support case, [redacted] as used in the OneBeacon and Continental Policies does not extend coverage [redacted][153] *Empire Fire & Marina Insurance Company v. Minuteman International Inc.*,[154] a case the Trust relies upon to construe the term [redacted] contains no discussion of allocation.[155] More to the point, the Sixth Circuit, addressing allocation for asbestos bodily injury claims under Michigan law, held that nearly identical policy language "provides that [the insurer] is only obligated to cover 'all sums' for injuries during the policy period."[156] "The policies here clearly state that coverage will be provided for injuries that occur during the

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[150] Appellant's Br., at pp. 32-33.
[151] *Patmon v. Nationwide Mut. Fire Ins. Co.*, No. 318307, 2014 Mich. App. LEXIS 2583, at *5 (Dec. 23, 2014) .
[152] 710 N.W.2d 46 (Mich. 2006).
[153] Appellant's Br. at p. 33 n.70.
[154] 2008 WL 142424, at *2 (Mich. Ct. App. Jan. 15, 2008).
[155] Appellant's Br. at pp. 32-33.
[156] *Cont'l Cas. Co.*, 666 F. App'x at 464.

[redacted]

policy period. Nothing more."[157]

The Trust also misconstrues the District Court's analysis in *Continental Casualty Company v. Indian Head Industries, Inc.*[158] to contend that the [redacted][159] despite the policy language to the contrary, and a definition of [redacted] The District Court in *Indian Head* consistently interpreted the Continental policy at issue there, finding that it provided coverage for bodily injury which occurs during the policy period:

> The "occurrence"—meaning the accident or, in this case, the exposure to the conditions, may not necessarily occur "during the policy period" since "occurrence" is not limited by time under the definition. This means the "occurrence" may have occurred prior to the policy period. The policy only requires that the "occurrence" or accident or exposure must result in "bodily injury." The "bodily injury" definition sets forth a time limitation. The "bodily injury" (other than death) must occur "during the policy period."[160]

4) The Authority Relied upon by the Superior Court Supports Pro-Rata Time on Risk Allocation

a) Under Michigan Law, policy language that limits coverage [redacted] requires Pro-Rata Time on Risk Allocation

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[157] *Motors Liquidation Co. DIP Lenders Tr.*, 2017 Del. Super. LEXIS 279, at *47.
[158] 2010 U.S. Dist. LEXIS 3170.
[159] Appellant's Br. at pp. 49-50, n. 111.
[160] 2010 U.S. Dist. LEXIS 3170, at *13.

[redacted]

Courts applying Michigan law consistently hold that pro-rata time on risk allocation applies to policy language limiting coverage to injury during the policy period.[161] "The overwhelming majority of cases [] consider Michigan a 'pro rata' state."[162] The "logical corollary" to the injury-in-fact trigger, [redacted] is that the policy only applies to injury during the policy period and not injury taking place outside of the policy period.[163] Stated another way:

> The essence of the actual injury trigger is that each insurer is held liable for only those damages which occurred during its policy period; no insurer is held liable for damages outside its policy period. Where policy periods do not overlap, therefore, the insurers are consecutively, not concurrently liable. A "pro rata by limits" [or all sums] allocation method effectively makes those insurers with higher limits liable for damages incurred outside their policy periods and is therefore inconsistent with the actual trigger theory.[164]

Arco expressly rejected as inconsistent with the injury-in-fact trigger, an "all sums" or joint and several allocation because such an allocation imposes liability on the

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[161] *Motors Liquidation Co. DIP Lenders Tr.*, 2017 Del. Super. LEXIS 279, at *43 (citing *Cont'l Cas. Co.*, 666 F. App'x at 464-65; *City of Sterling Heights,* 319 F. App'x. at 361; *Decker Mfg. Corp.*, 106 F. Supp.3d at 895; *Alticor, Inc.*, 916 F. Supp.2d at 832-33; *Stryker Corp.*, 2005 U.S. Dist. LEXIS 13113, at *18; *Century Indem. Co. v. Aero-Motive Co.,* 318 F. Supp. 2d 530, 545 (W.D. Mich. 2003)).
[162] *Motors Liquidation Co. DIP Lenders Tr.*, 2017 Del. Super. LEXIS 279, at *43.
[163] *Arco*, 594 N.W.2d at 69.
[164] *Id.*.

[redacted]

insurer for all injury, including injury occurring outside of the policy period, a result that is contrary to the policy language.[165]

[redacted] no exclusion is necessary and the lack of one does not result in the OneBeacon and Continental Policies extending coverage [redacted] "It is the general rule of insurance contract interpretation, applied by [the Michigan Supreme Court], that an insured bears the burden of proving coverage[.]"[166] The method of allocation in this case is not dependent on an exclusion and the Trust's cases discussing an insurer's burden with regard to exclusions are inapplicable.[167] The Trust has the burden to prove the policies extend coverage [redacted] This is a burden that the Trust simply cannot meet under the plain policy language.

Other cases the Trust cites in support of its "joint and several" position "[are] easily distinguishable and unhelpful[.]"[168] *Matter of Viking Pump, Inc.*[169] applied New York law and turned on language, which the Court reasoned undercut the

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[165] *Arco*, 594 N.W.2d at 69.
[166] *Heniser v. Frankenmuth Mut. Ins.*, 534 N.W.2d 502, 505 n.6 (Mich. 1995) .
[167] Appellant's Br. at pp. 34-35.
[168] *Motors Liquidation Co. Dip v. Allianz Ins. Co.*, No. : N11C-12-022 PRW (CCLD), 2016 Del. Super. LEXIS 110, at *3 (Super. Ct. Mar. 2, 2016).
[169] *In re Viking Pump*, 52 N.E.3d 1144, 1156–57 (N.Y. 2016).

[redacted]

rationale for pro-rata allocation by providing coverage for injury which continues after the policy period.[170] [redacted]

Cannon Electric, Inc. v. ACE Property & Casualty Co.,[171] an unpublished California trial court decision applying New York and California law, involves policies with materially different language, which that court viewed as inconsistent with pro-rata allocation.[172] As described by the court, the insuring agreements at issue in *Cannon Electric* make no mention of injury during the policy period and "expressly provide a transfer of the liability risk from the insured to the insurer for all consequential harms – past, present and future – flowing from that injury":[173]

- "For example, the London Market Insurers' umbrella policy in force from August 5, 1977 until December 1980, promises to indemnify the Assured 'for all sums which the Assured shall be obligated to pay by reason of the liability . . . imposed upon the Assured by law . . . for damages on account of . . . Personal Injuries . . . caused by or arising out of each occurrence happening anywhere in the world.'"[174]

- The Home Umbrella policies contain a Prior Insurance and Non-Cumulation of Liability condition and "include

[170] Appellant's Br. at pp. 40-41.
[171] A1673–A1674.
[172] A1681.
[173] A1682.
[174] A1669.

[redacted]

> insuring agreements that agree to indemnify ITT for 'all sums' which they may be obligated to pay by reason of their liability."[175]

Focusing on "including death at any time resulting therefrom"[176] appearing in the *Cannon Electric* and [redacted] the Trust ignores [redacted]"[177] and [redacted][178] Here, the policy language [redacted] and *Cannon Electric* has no application.

Hercules Inc. v. AIU Insurance Company,[179] and *Monsanto Co. v. C.E. Heath Compensation and Liability Insurance Company*[180] each applied Delaware and Missouri law, respectively, both of which are inapplicable here. The Trust's citation to *St. Paul Fire & Marine Insurance Company v. American Home Assurance Company*[181] is also misplaced.[182] *St. Paul Fire* considered "other insurance" clauses of three concurrent primary insurance policies, not allocation across multiple

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[175] A1670.
[176] Appellant's Br. at pp. 40-41.
[177] A449.
[178] A592–A593.
[179] *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481 (Del. 2001).
[180] *Monsanto Co. v. C.E. Heath Comp. & Liab. Ins. Co.*, 652 A.2d 30 (Del. 1994).
[181] *St. Paul Fire & Marine Ins. Co. v. Am. Home Assurance Co.*, 514 N.W.2d 113, 115 (Mich. 1994).
[182] Appellant's Br. at pp. 34-35, 52 n.122.

[redacted]

successive policies, and the case does not support a conclusion that pro-rata allocation amounts to a "restriction on coverage" under Michigan law.[183]

b) The Superior Court correctly held that the OneBeacon and Continental Policy Language Supports Pro-Rata Time on Risk Allocation Under Michigan Law

i. The OneBeacon and Continental Policies Do Not Provide Coverage [redacted]

The language in [redacted][184] and [redacted] tracks the language construed in *Arco* and the cases following it by limiting coverage to [redacted]

Arco:[185] The company will pay on behalf of the *insured all sums* which the insured shall become legally obligated to pay as damages because of . . . property damage to which this insurance applies, caused by an occurrence." Occurrence is "an accident, including *continuous or repeated exposure to conditions, which result during the policy period* in . . . property damage neither expected nor intended from the standpoint of the insured."
Stryker:[186] We [National Union] will pay on behalf of the Insured [Stryker] those sums in excess of the Retained Limit that the Insured becomes legally obligated to pay . . . because of *Bodily Injury . . . that takes place during the Policy Period* and is caused by an Occurrence happening anywhere in the world."

[183] *St. Paul Fire & Marine Ins. Co.*, 514 N.W.2d 113, 120-121.
[184] B1492-B1493.
[185] *Arco*, 594 N.W.2d at 64 (emphasis added).
[186] *Stryker Corp.*, 2005 U.S. Dist. LEXIS 13113, at *3 (emphasis added).

[redacted]

Occurrence is "an accident, including continuous and repeated exposure to conditions, which results in Bodily Injury . . . neither expected or intended from the standpoint of the Insured. All such exposure to substantially the same general conditions shall be considered as arising out of one Occurrence."
Indian Head:[187] [Continental] will pay on behalf of [Indian Head] *all sums* which [Indian Head] shall become legally obligated to pay as damages because of . . . bodily injury . . . to which this insurance applies, caused by an occurrence, and [Continental] shall have the right and duty to defend any suit against [Indian Head] seeking damages on account of such bodily injury . . . even if any of the allegations of the suit are groundless, false or fraudulent . . . . *"Bodily injury" is "bodily injury, sickness or disease sustained by any person which occurs during the policy period*, including death at any time resulting therefrom," "Occurrence" is "an accident, including continuous or repeated exposure to conditions, which results in bodily injury . . . neither expected nor intended from the standpoint of [Indian Head]."
Decker:[188] Travelers will pay "*all sums* which the insured shall be come legally obligated to pay as damages because of . . . property damage caused by an occurrence." The 1973-1975 Policies: "property damage" is "injury to or destruction of tangible property" and "occurrence" is "an *accident . . . which results, during the period this policy* is in effect, in . . . property damage." The 1975-1977 Policies: "Property damage" is a *"physical*

[187] *Cont'l Cas. Co.*, 666 F. App'x at 458-59 (emphasis added).
[188] *Decker Mfg. Corp.*, 2015 U.S. Dist. LEXIS 12169, at *26-27 (emphasis added).

[redacted]

injury to or destruction of tangible property *which occurs during the policy period*" and "occurrence" is "an accident, including continuous and repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the Insured."
Wolverine:[189] The policies in question limit coverage to "*all sums*" for which the insured becomes obligated because of property damage as "included in the definition of 'ultimate net loss.'" "Ultimate net loss" is "the total sum which the insured, or the company as his insurer, or both, becomes legally obligated to pay as damages, because of property damage . . . which are paid as a consequence of any occurrence covered hereunder." "Occurrence" is "an event, or *continuous or repeated exposure to conditions, which results during the policy period* in personal injury, property damage, or advertising liability. . ."

Arco, *Indian Head*, *Decker,* and *Wolverine* each involve policies containing "all sums" language, yet each applies a pro-rata time on risk allocation. The central finding in each of these cases is that pro-rata allocation flows from language limiting coverage to injury during the policy period.[190] Despite this, the Trust urges the Court to find that the Superior Court, the Michigan Court of Appeals, several United States District Courts, and the United States Court of Appeals for the Sixth Circuit all have

[189] *Wolverine World Wide, Inc.,* 2007 Mich. App. LEXIS 657, at *6 (emphasis added).

[190] *Stryker Corp.,* 2005 U.S. Dist. LEXIS 13113, at *20 *City of Sterling Heights*, 2007 U.S. Dist. LEXIS 3915, at *16; *Wolverine World Wide*, 2007 Mich. App. LEXIS 657, at *6; *Decker Mfg. Corp.*, 2015 U.S. Dist. LEXIS 12169, at *38.

incorrectly construed Michigan allocation law in cases involving indistinguishable policy language.

Arco and its progeny, taken together with *Dow Corning*, lead to the inescapable conclusion that pro-rata allocation applies where (1) the policy provides coverage only for injury during the policy period; and (2) the policy does not contain language explicitly extending coverage to injuries taking place beyond the policy period. The OneBeacon and Continental Policies [redacted] and, therefore, pro-rata time on risk allocation must be applied here.

ii. Dow Corning's Allocation Ruling has No Application to this Case

Holding that "*Arco's* pro-rata allocation is the sensible and right approach here" the Superior Court distinguished *Dow Corning*, noting (1) the OneBeacon and Continental Policies [redacted] covering only injury which occurs *during the policy period* and (2) that [redacted] and [redacted] without the additional [redacted] language found in *Dow Corning* cannot support an "all sums" allocation.[191]

[191] *Motors Liquidation Co. DIP Lenders Tr.*, 2017 Del. Super. LEXIS 279, at *43-47.

[redacted]

Dow Corning[192] provides two justifications for "all sums" or "joint and several" allocation, neither of which applies here. First, the insuring clause in that case contains no "temporal limitation":

> The Company hereby agrees . . . to indemnify the insured for all sums which the [i]nsured shall be obligated to pay by reason of the liability . . . imposed upon the [i]nsured by law, . . . for damages . . . on account of . . . Personal Injuries, *caused by or arising out of each occurrence*."[193]

Both [redacted] and [redacted] clearly provide [redacted]

[redacted]"[194]

Second, *Dow Corning* based its allocation holding on policy language extending coverage for injury beyond the policy period:

> In the event that personal injury or property damage arising out of an occurrence covered hereunder is continuing at the time of termination of this policy, The Company will continue to protect the Insured for liability in respect of such personal injury or property damage without payment of additional premium.[195]

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[192] 1999 Mich. App. LEXIS 2920.
[193] *Id.* at *19.
[194] A592–A593; A629 .
[195] 1999 Mich. App. LEXIS 2920, at *20.

[redacted]

Neither the OneBeacon or Continental Policies, nor any policy to which they [redacted] contain [redacted]

Dow Corning provides no basis for adopting an "all sums" allocation here.[196] An "all sums" allocation disregards the policy language and controlling precedent while impermissibly rewriting "plain and unambiguous [contract] language under the guise of interpretation."[197]

The Superior Court's adoption of a pro-rata time on risk allocation is a correct application of Michigan law, which controls here, and pro-rata allocation is consistent with the policy language. Accordingly, the Superior Court's allocation ruling should be affirmed.

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[196] *Century Indem. Co.*, 318 F. Supp. 2d at 545; *Stryker Corp.*, 2005 U.S. Dist. LEXIS 13113, at *19; *City of Sterling Heights*, 2007 U.S. Dist. LEXIS 3915, at *12; *Cont'l Cas. Co.*, 2010 U.S. Dist. LEXIS 3170, at *14-16; and *Decker Mfg. Corp.*, 2015 U.S. Dist. LEXIS 12169, at *37-38.

[197] *Gelman*, 572 N.W.2d at 623.

[redacted]

ARGUMENT ON CROSS APPEAL

I. THE SUPERIOR COURT ERRED IN RULING THAT THE [redacted] ASBESTOS CLAIMS CONSTITUTE [redacted] UNDER ONEBEACON AND CONTINENTAL POLICIES

A. Question Presented

Whether Delaware and Michigan law conflict on the number of occurrences, and the Superior Court erred in holding that [redacted] Asbestos Claims constitute a [redacted] without engaging in an analysis of policy language and disregarding GM's treatment of each Asbestos Claim [redacted] as well as GM's waiver of any argument that the Asbestos Claims arise [redacted]? This question was raised below at B950-B973, B1303-B1307, B2507-B2555, B2578-B2587 and B2629-B2667.

B. Standard of Review

The Superior Court's determination that the Asbestos Claims constitute a [redacted] under the policies is subject to *de novo* review.[198]

[198] *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 75 (Del. 2010).

[redacted]

C. Merits of Argument

1) Michigan Law Controls the Number of Occurrences Issue

The Trust is estopped from asserting that any law other than Michigan law applies, and a choice-of-law analysis is therefore not necessary.[199] Moreover, application of Michigan law is consistent with Delaware choice-of-law rules, which place great weight on the location of the policyholder's headquarters.[200]

"Delaware courts use a two-part test to determine which sovereign's law to apply when there is a conflict: first, the court determines whether there is an actual conflict of law between the proposed jurisdictions. If there is, then the court must determine which jurisdiction has the 'most significant relationship to the occurrence and the parties' based on the factors (termed 'contacts') listed in the Restatement (Second) of Conflict of Laws."[201] Here, there is a true conflict

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[199] *Motors Liquidation Co. DIP Lenders Tr.*, 2015 Del. Super. LEXIS 1063, at *1. Granting Munich Reinsurance America Inc.'s ("Munich Re") estoppel motion to bar the Trust from asserting that any law other than Michigan applied. B1084 The Trust has not disputed that the asbestos claims that Old GM tendered to Royal in 2004 are the same claims for which the Trust seeks coverage in this matter.

[200] *Liggett Group, Inc.*, 788 A.2d at 138. The parties do not dispute that GM was headquartered administered its insurance program, and paid insurance premiums from its offices in Michigan. B1484-B1485.

[201] *Bell Helicopter*, 113 A.3d at 1050.

between Delaware law and Michigan law, and Delaware choice of law rules require Michigan law to be applied.

a) There is a True Conflict between Michigan and Delaware Law on the Number of Occurrences

An actual conflict exists where, as in this case, there is a "material difference" between the states' laws, such that a party is "more likely" to prevail, or has a "better chance," under one versus the other.[202] Because Michigan's highest Court has yet to address the occurrence issue, the Court must "rule as [the highest court of the state in question] would likely rule if presented with the issue."[203] "[T]he best evidence in forecasting such decisions" is:

> lower state court precedents, related decisions in considered dicta of a state's highest court, the policies that inform that court's application of certain legal doctrines, court decisions in other jurisdictions, and relevant legal treatises and articles.[204]

Here, the Michigan Supreme Court's decision in *Gelman*[205] necessarily leads to finding of multiple occurrences. Far surpassing the "materially different" standard, an outcome based on the policy language is directly contrary to the

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[202] *Berg Chilling Sys., Inc.*, 435 F.3d at 462 .
[203] *Shook*, 909 A.2d at 128.
[204] *Di Sabatino v. United States Fid. & Guar. Co.*, 635 F. Supp. 350, 352 (D. Del. 1986).
[205] 572 N.W.2d at 623 (emphasis added).

Superior Court's conclusion that Michigan's highest Court would adopt a single occurrence conclusion not rooted in an interpretation of the policy language.[206] As such, there is a true conflict between Michigan and Delaware law.[207]

b) *Associated Indemnity Corp.* is not controlling Michigan Law on the Number of Occurrences

The Superior Court erred in relying on the federal district court decision in *Associated Indemnity Corp. v. Dow Chemical Co.*[208] as indicative of how the Michigan Supreme Court would likely rule on the number of occurrences under the circumstances presented here. *Associated Indem.* is inapposite because the policy language there provided that "all personal injury . . . arising out of the repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence."[209] [redacted] in the OneBeacon or Continental Policies. Moreover, the Superior Court (and the district court in *Associated Indem.*) departed from the *Gelman* mode of analysis, erroneously

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[206] *Motors Liquidation Co.*, 2013 Del. Super. LEXIS 605, at *6.
[207] *Stonewall Ins. Co.*, 996 A.2d at 1258.
[208] 814 F. Supp. 613.
[209] *Id.* at 617.

[redacted]

substituting the policy language with an extra-contractual notion that all injuries caused by an "intrinsically harmful" product can be treated as a single occurrence.[210]

Associated Indem. involved a dispute over coverage under various primary and excess policies for defense and indemnity costs arising from the production and sale of a pipe resin.[211] Like the lower court opinion reversed by *Gelman*, the court in *Associated Indem.*, beyond simply reciting its terms, and provided no "further analysis" of how its decision was supported by the applicable "occurrence" definition.[212]

Associated Indem. made no determination, under the facts of that case, concerning what constituted an "event" or "exposure to conditions" as required by the policy language.[213] Nor did *Associated Indem.* determine whether there was "exposure to substantially the same conditions."[214] Instead, *Associated Indem.* concluded that the single product at issue was "intrinsically harmful" [redacted] and, therefore, all claims relating to that product arose from a single

[210] *Motors Liquidation Co.*, 2013 Del. Super. LEXIS 605, at *6.
[211] *Associated Indem. Corp.*, 814 F. Supp. at 614.
[212] *Id.* at 617, 622.
[213] *Id.* at 617.
[214] *Id.*

[redacted]

occurrence.[215] Because *Associated Indem.*[216] is not rooted in the policy language, it is not an indicator of the how the Michigan Supreme Court would rule on the number of occurrences if presented with the facts of this case.[217]

Associated Indem. is further distinguishable in that it involved a single product, resin.[218] By contrast, in this case, more than [redacted] claimants allege injury-causing exposure at different times and at different locations, to multiple types of asbestos-containing products.

Moreover, two other cases the Trust cited in the lower court, *Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*,[219] and *Valley Forge Ins. Co. v. Nat'l Union Fire Ins. Co.*,[220] did not apply Michigan law or account for the policyholder's and insurer's mutual and documented understanding as to how the terms of their insurance program are to be implemented. Nor do these cases apply the analysis of the occurrence definition's plain language required by the Trust's authority, *Gelman*.

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[215] *Id.* at 621–23.
[216] *Id.* at 617.
[217] *Gelman*, 572 N.W.2d at 623.
[218] *Associated Indem. Corp.*, 814 F. Supp. at 622–23.
[219] 996 A.2d 1254, 1257–58 (Del. Supr. 2010).
[220] No. N10C-07-135 JRS CCLD, 2012 Del. Super. LEXIS 130, at *43 (Del. Super. Ct. Mar. 15, 2012).

[redacted]

c) The Michigan Court of Appeals Found Multiple Occurrences in *Dow Corning* with an Occurrence Definition [redacted]

Six years after *Associated Indem.*, the Michigan Court of Appeals decided *Dow Corning*.[221] *Dow Corning* is the only Michigan state appellate court decision addressing number of occurrences. It found multiple occurrences under [redacted]

Dow Corning involved a dispute over coverage for thousands of claims involving injuries due to different types of breast implants.[222] The *Dow Corning* policies defined "occurrence" as:

> an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury... during the policy period....

The court noted "[w]ith *Gelman* as our guide, our analysis . . . begins and ends with the policy language."[223] *Dow Corning* did not embrace the concept that the sale and manufacture of products is the overarching and sole, proximate, uninterrupted, and continuing cause of all the bodily injury claims.

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[221] 1999 Mich. App. LEXIS 2920.
[222] *Id.* at *5.
[223] *Id.* at *12.

[redacted]

Rather, *Dow Corning* held that each implantation of breast implant products was a separate occurrence.[224] The circumstances of each claimant's exposure in *Dow Corning* varied, involving implantations by thousands of different surgeons in hospitals and medical offices across the nation.[225] The reasons for each claimant's exposure and alleged injuries also varied.[226] The claims arose from the implantation of at least nine different standard models of breast implant products, as well as custom and special order implants, which Dow Corning manufactured and sold over a period of nearly thirty years.[227] The Michigan Court of Appeals found "no basis in the policy language for construing the terms 'accident', 'event', or 'happening' necessarily to mean the manufacture or sale of breast implants."[228] Rather, "a more natural reading of the policy is that each implantation represents a separate accident, event or happening".[229]

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[224] *Id.* at *53.
[225] B505.
[226] *Id.*
[227] B503-04.
[228] *Dow Corning*, 1999 Mich. App. LEXIS 2920, at *52.
[229] *Id.*

Here, as in *Dow Corning,* the "more natural reading" of the policy language [redacted][230]

Stryker Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.,[231] another case finding multiple occurrences under Michigan law, is consistent with *Dow Corning.* There, the insured sought coverage for at least 71 claims seeking damages for injury allegedly caused by implantation of an expired artificial knee product, known as "Uni-Knee."[232] The *Stryker* court applied the "cause test" but was "unpersuaded" that a computer failure allowing expired artificial knees to be implanted was the "one continuous, uninterrupted cause."[233] Instead, the court reasoned that because Stryker retained ownership of each Uni-Knee until the time of implantation, and Stryker's potential liability resulted only when an individual Uni-Knee was sold and implanted, each implantation was a separate occurrence.[234]

[redacted] as defined in the OneBeacon and Continental policies, [redacted]

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[230] B751-B53; B760.
[231] No. 4:01-CV-157, 2004 U.S. Dist. LEXIS 32867 (W.D. Mich. Aug. 27, 2004).
[232] *Id.* at 2.
[233] *Id.* at *12-13.
[234] *Id.*, at *10.

[redacted]

[redacted]"[235] Under this definition, [redacted] Nothing [redacted] supports the conclusion that manufacture or sale of different "intrinsically harmful" products [redacted] The Superior Court's holding contravenes the policy language, Michigan law and GM's own express intent that each Asbestos Claim [redacted][236]

d) This Court Should Construe the Policy Language Consistent with GM's Understanding that Each Claim is [redacted]

GM always intended that each Asbestos Claim be treated [redacted] under the [redacted] at issue here.[237] Unlike the Trust, who is a stranger to the policies, GM, the actual policyholder, never viewed the manufacture and/or sale of products as the single "event" or "continuous or repeated *exposure* to conditions." GM's intent that each claim be treated [redacted]

[235] A450.
[236] B1304-B1305.
[237] B751-B753; B760.

[redacted]

[redacted][238]

"[C]ourts look to the allegations of the nature of exposure and harm" to determine what constitutes an occurrence.[239] The claimants alleged different injuries resulting from varied levels of exposure to different forms of asbestos contained in a myriad of GM's products taking place in different locations at different times.[240]

The "conditions" to which each individual claimant was [redacted] were airborne asbestos fibers emanating from the different GM's products.[241] Finding that all claims [redacted] is inconsistent with the mandate of *Gelman* (which the Trust admits is controlling)[242] "[W]e must enforce the terms of the contract as written, *interpreting the unambiguous language in its plain and easily understood sense*."[243]

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[238] *E.g., LuK Clutch Sys., LLC v. Century Indem. Co.*, 805 F. Supp. 2d 370, 378 (N.D. Ohio 2011); *London Mkt. Insurers v. Superior Court*, 53 Cal. Rptr. 3d 154, 165 (Cal. App. 2d 2007); *Dow Corning*, 1999 Mich. App. LEXIS 2920, at *51-53.
[239] *Dow Corning Corp.*, 1999 Mich. App. LEXIS 2920, at *51-53.
[240] B2557-B2562.
[241] *Id.*
[242] Appellant's Br. at p. 30, 34.
[243] 572 N.W.2d at 623 (emphasis added).

[redacted]

GM's treatment of the very same Asbestos Claims [redacted] under the very same [redacted] is entirely consistent with *Dow Corning*.[244] Indeed, GM cited *Dow Corning* as controlling authority in support its position in the Michigan Litigation that [redacted][245]

e) The Plain Policy Language Does Not Support the [redacted] Finding

As the Trust acknowledged in the Superior Court, "when a policy has a defined term, that . . . definition is applied and it's applied each time that term appears."[246] The Trust also asserted that

> The Michigan Supreme Court has emphasized that an insurance policy's coverage is determined by the application of its particular language: "Ultimately, it is the policy language as applied to the specific facts in a given case that determines coverage," and a court "may not rewrite the plain and unambiguous language under the guise of interpretation."[247]

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[244] 1999 Mich. App. LEXIS 2920.
[245] B752-B753 (emphasis added); B760.
[246] B2305-B2306, B2310-B2311; A1612.
[247] Appellant's Br., at p. 30.

[redacted]

Under this rule of construction, the [redacted] cannot be the sole injury-causing [redacted][248]

[redacted] affords coverage for "[redacted]"[249] "[redacted]" in turn, is defined, in part, as:

[redacted][250]

In order to "[redacted]" the "[redacted]"[251]

The manuscript language of [redacted] provides as follows:

[redacted]

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[248] *E.g.*, *LuK Clutch Sys.*, 805 F. Supp. 2d at 378; *London Mkt. Insurers*, 53 Cal. Rptr. 3d at 163-65; and *Dow Corning,* 1999 Mich. App. LEXIS 2920.
[249] A448.
[250] A450.
[251] *London Market Insurers*, 53 Cal. Rptr. 3d at 166 and *LuK Clutch Sys.*, 805 F. Supp. 2d at 379.

[redacted]

[redacted]

* * *

[redacted]

* * *

[redacted]

Under this language, an [redacted] must either be (1) [redacted] This language contradicts the position that a [redacted] The use of the [redacted]

Prior to [redacted] applied:

[redacted]

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[252] A525-A526.

[253] A449 (emphasis added).

[redacted]

[redacted] was then amended, such that, [redacted], it applied only to:

[redacted]

These policy provisions further demonstrate that the [redacted]

[redacted] The record is devoid of any evidence that GM reported its manufacture and sale of asbestos containing products *to itself* or to Royal. Rather, GM reported individual claims as they were received.[255]

[redacted]

[redacted] state as follows, in part:

[redacted]

* * *

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[254] A493 (emphasis added).
[255] B2562-B2576.
[256] A451 (emphasis added).

[redacted]

[redacted]

Construing an [redacted] as [redacted] with the mode of construction advocated for by the Trust.

Maintaining the opposite position to that of the Trust, in the Michigan Litigation GM argued:

[redacted][258]

The "[redacted]" clause of [redacted] provides, in part:

[redacted]

[257] A597 (emphasis added).
[258] B753.

[redacted]

[redacted]

This clause (and the occurrence definition itself) contemplates that [redacted]

[redacted]

f) GM Waived any Argument that the Claims Arise from [redacted]

GM and Royal's decades-long treatment of each Asbestos Claim as [redacted] as well as GM's repeated admissions in the Michigan Litigation that each of the Asbestos Claim is [redacted] clearly and convincingly demonstrate that GM waived any argument that the asbestos exposures constitute a [redacted] The Trust stands in GM's shoes and is "stuck" with GM's understanding that each claim [redacted] definition at issue:

> THE COURT: I'm understanding the Trust to be taking a position that the Trust, for better and for worse as far as the Trust is concerned, is in the shoes of GM. And if GM couldn't make the claim, then the Trust cannot make the claim. And if that's not what the Trust is saying, then that I think is probably what I'm saying[.]...
> THE COURT: Right. The Trust is stuck for better or for worse with whatever GM's understandings were.[261]

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[259] A448-A449.
[260] *See, e.g.*, *London Market Insurers*, 53 Cal. Rptr. 3d at 167.
[261] B1334.

[redacted]

"[W]aiver is a voluntary and intentional abandonment of a known right,"[262] which can be "established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to waive the terms of the original contract."[263]

Extrinsic evidence of "representations or affirmative conduct" as well as extrinsic evidence of affirmative acceptance are admissible and sufficient to prove a party's knowing waiver of contractual rights.[264] GM indisputably had full knowledge of its rights under the policies as it handled each claim [redacted] under the same [redacted] and repeatedly urged that position in the Michigan Litigation.

The Trust concedes that a unitary construction of "occurrence" should be consistently applied.[265] Moreover, the Superior Court correctly found that, for two

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[262] *Quality Prods. & Concepts Co. v. Nagel Precision, Inc.*, 666 N.W.2d 251, 258 (Mich. 2003).
[263] *Id.*; *Klas v. Pearce Hardware & Furniture Co.*, 168 N.W. 425, 427 (Mich. 1918) *Martin v. Martin*, 538 N.W.2d 399, 401 (Mich. 1995).
[264] *Quality Prods.*, 666 N.W.2d at 260;.
[265] B2310 ("if the word occurrence is used in the occurrence reported section of the Royal policies, that's the definition you have to plug in to what occurrence reported means."); B2305-B2306; B2311; A1612.

[redacted]

decades, GM and Royal treated each asbestos claim [redacted][266] By treating each claimant's injury-causing exposure to asbestos-containing products [redacted], GM's intent was to [redacted][267]

Like GM, Royal recognized that each asbestos claim was treated [redacted] under the GM insurance program.[268] These undisputed facts clearly and convincingly demonstrate a mutual understanding of how the terms were to be applied, and GM waived any argument that the injury-causing exposures constitute [redacted]

g) The Superior Court's 2013 Decision Regarding Occurrence is Not the Law of the Case; the Doctrine is Inapplicable Because That Decision Was in Error

The Superior Court erred in applying the law of the case doctrine to find [redacted] based on a decision that did not reach the merits of the issue. The law of the case doctrine has limited applicability only to "matters . . . decided on the

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[266] *Motors Liquidation Co. DIP Lenders Tr.*, 2015 Del. Super. LEXIS 1063, at *1.
[267] A1310.
[268] B496-B497.

[redacted]

basis of a ***fully developed record.***"[269] The Superior Court denied the Trust's motion on the number of occurrences in its December 2013 Opinion because the record with regard to GM and Royal's understanding of what constituted an occurrence was not fully developed and discovery was incomplete on that issue.[270] Although the December 2013 Opinion references course of conduct evidence with regard to the post-1971 "occurrence-reported" policies, the same definition of "occurrence" applies throughout the Royal program,[271] a point conceded by the Trust.[272]

During a hearing on June 2015, the Superior Court noted that the number of occurrences would be determined on a separate motion, stating: "[the] outcome [regarding the number of occurrences] is going to be the product of a specific motion on that topic."[273] Clearly, the merits of the issue had not been decided in 2013 or 2015. As such, in the June 2017 decision, the Superior Court incorrectly invoked the law of the case doctrine to find that all of the Asbestos Claims [redacted]

[redacted]

[269] *Zirn v. VLI Corp.*, 681 A.2d 1050, 1062 n.7 (Del. 1996) (emphasis added).
[270] *Motors Liquidation Co.*, 2013 Del. Super. LEXIS 605, at *16.
[271] See, e.g., A450; A795.
[272] B2310; B2305-B2306; B2311; A1612.
[273] A1628.

[redacted]

Even if the December 31, 2013 decision were the "law of the case" with regard to the number of occurrences, which it is not, "the doctrine does not apply when the previous ruling was clearly in error[.]"[274] Any determination in the December 2013 decision that the Michigan Supreme Court would find, under the circumstances and policy language presented here, that the [redacted] of Asbestos Claims [redacted] was clearly erroneous. The 2013 decision does not recite, or analyze the component words of the [redacted] which is mandated by Michigan law.[275] The unique nature of each claimant's exposure circumstances shows that, under the "plain language" analysis (discussed more fully above), and consistent with GM's understanding and implementation of that language, [redacted] As such, the law of the case doctrine was erroneously applied to find that the Asbestos Claims arise from [redacted]

[274] *Delphi Petroleum, Inc. v. Magellan Terminals Holdings, L.P.*, 2015 WL 500705, at *2 (Del. Super. Ct. Jan. 30, 2015)
[275] *Gelman*, 572 N.W.2d at 623.

[redacted]

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Superior Court with respect to allocation and reverse the decision of the Superior Court with respect to number of occurrences and enter a Judgment in favor of OneBeacon and Continental that the Asbestos Claims each constitute [redacted] under the OneBeacon and Continental Policies.

Respectfully Submitted,

December 8, 2017

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PUBLIC VERSION FILED DECEMBER 21, 2017