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]

[AMENDED] CROSS-APPELLANTS' REPLY BRIEF ON CROSS-APPEAL SUBMITTED ON BEHALF OF ONEBEACON INSURANCE COMPANY AND CONTINENTAL CASUALTY COMPANY

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NATURE OF THE PROCEEDINGS

Defendants Below, Appellees/Cross-Appellants OneBeacon[1] and Continental submit this reply brief in further support of their cross-appeal from the Superior Court's orders to the extent that they find that each Asbestos Claim [redacted] As the Trust concedes, in the event of a true conflict between Delaware and Michigan law, Michigan law controls. A true conflict exists here. Indeed, in contrast to Delaware law, the Michigan Court of Appeals' decision in *Dow Corning* compels the conclusion that each asbestos claim [redacted] In its unconvincing attempts to demonstrate that there is no conflict, the Trust relies solely upon distinguishable federal district court decisions that pre-date *Dow Corning*. But a decision of the state's appellate court, rather than isolated federal case law, is the authoritative pronouncement of state law. In any event, the Superior Court concluded that the Trust is judicially estopped from seeking to apply any law other than Michigan law to the OneBeacon and Continental policies. Therefore, this Court should hold that pursuant to the plain language of the

[1] Terms not otherwise defined herein have the meaning ascribed in the Appellees' Answering Brief on Appeal and Cross-Appellants' Opening Brief on Cross-Appeal Submitted on behalf of OneBeacon Insurance Company and Continental Casualty Company, filed with this Court on December 8, 2017 (Filing ID 61447045) ("Op. Br.").

[redacted]

OneBeacon and Continental Policies, each Asbestos Claim is a [redacted]

a fact always recognized by GM (and Royal).

[redacted]

ARGUMENT

I. Michigan Law Governs the Interpretation of the OneBeacon and Continental Policies

A. Delaware Law Conflicts with Michigan Law Requiring a Plain Language Analysis of the Policy

The Trust concedes, "[i]f there [is] a conflict of law between Delaware and Michigan on the number of occurrence issue, then the law of Michigan would apply . . . ."[2] Under Michigan law "it is the policy language as applied to the specific facts in a given case that determines coverage."[3] The Michigan Court of Appeals in *Dow Corning*, the only Michigan state appellate court decision to address number of occurrences, stated "[w]ith Gelman as our guide, our analysis . . . begins and ends with the policy language."[4] In stark contrast to the federal court decisions purporting to represent Michigan law relied upon by the Trust,[5] *Dow Corning* finds multiple

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[2] Appellant Motors Liquidation Company DIP Lenders Trust's Reply Brief on Appeal and Cross-Appellee's Answering Brief on Cross-Appeal, filed with this Court on January 23, 2018 (Filing ID 61602098) ("Tr. R. Br.") at 17.

[3] *Gelman Sciences, Inc. v. Fidelity & Casualty Co. ("Gelman")*, 572 N.W.2d 617, 622 (Mich. 1998), *overruled in part on other grounds by Wilkie v. Auto-Owners Ins. Co.*, 664 N.W.2d 776 (Mich. 2003).

[4] *Dow Corning Corp. v. Continental Cas. Co.*, 1999 Mich. App. LEXIS 2920, at *12 (Mich. Ct. App. Oct. 12, 1999) ("*Dow Corning*").

[5] *Assoc. Indem. Corp. v. Dow Chem. Co.*, 814 F. Supp. 613 (E.D. Mich. 1993) ("*Dow II*") and *Dow Chemical Co. v. Associated Indem. Corp.*, 727 F. Supp. 1524, 1527 (E.D. Mich. 1989) ("*Dow I*")

occurrences based on the language of the occurrence definition rather than a product's intrinsic harm, a concept having no basis in the definition.[6]

Though each case involved identical policy language, the Michigan court in *Dow Corning* and the Delaware Court in *Stonewall* reached divergent results demonstrating the true conflict between Delaware and Michigan. In each case the policies define occurrence as:

> The term "occurrence" wherever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence.[7]

Dow Corning involved an alleged autoimmune reaction caused by exposure to silicone gel that leaked from breast implant products.[8] Rejecting the assertion that manufacture or sale of the products is the occurrence, the Michigan Court of Appeals held that a "more natural reading" of the occurrence definition requires that each

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[6] *Dow Corning*, 1999 Mich. App. LEXIS 2920.

[7] *Id.* at *52; *Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d 1254, 1257 (Del. 2010).

[8] *Dow Corning*, 1999 Mich. App. LEXIS 2920, at *1.

implantation represents a distinct "accident," "event," or "happening" and therefore, is a separate occurrence under the policy.[9]

Stonewall involved claims that a resin used to join metal and plastic pipe caused the pipes to leak resulting in property damage.[10] The Court held "where a single event, process or condition results in injuries, it will be deemed a single occurrence even though the injuries may be widespread in both time and place and may affect a multitude of individuals."[11] *Stonewall* is not based on an analysis of the occurrence definition, and the Court distinguished cases reaching a different result "based on their interpretation of the specific policy language at issue" and because they do not "apply the cause test."[12]

The other Delaware case the Trust cites, *Valley Forge*, makes only passing reference to the policy language and finds that Massachusetts and Delaware law do not conflict because "both states apply substantially the same 'cause' test when determining the number of occurrences under an occurrence-based general liability insurance policy."[13] Here, Michigan law controls and requires that the number of

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[9] *Id.* at *53.
[10] *Stonewall Ins. Co.*, 996 A.2d at 1255.
[11] *Id.* at 1257.
[12] *Id.* at 1258.
[13] *Val. Forge Ins. Co. v. Natl. Union Fire Ins. Co.*, No. N10C-07-135 JRS (CCLD), 2012 Del. Super. LEXIS 130, at *34 (Del. Super. Ct. Mar. 15, 2012).

occurrences be rooted in the policy language. A "true conflict" exists because the laws of Michigan and Delaware produce different results when applied to the [redacted] found in the OneBeacon and Continental Policies.[14]

[14] *Id.* at *26.

[redacted]

B. The Trust is Judicially Estopped from Seeking to Apply Law other than Michigan to the OneBeacon and Continental Policies

In any event, the Trust is judicially estopped from contending any law other than Michigan law applies to the number of occurrences issue. The Trust's argument that the Superior Court's judicial estoppel ruling does not apply to this issue[15] ignores the breadth and clarity of the Superior Court's judicial estoppel ruling. Munich Re moved for summary judgment on the doctrine of judicial estoppel based on positions GM took in the GM/Royal coverage litigation (both in Delaware and Michigan), including that Michigan law would control.[16] Munich Re's summary judgment motion sought an order from the Superior Court "declaring that:

> (1) The plaintiff, Motors Liquidation Company DIP Lenders 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[17] . . . .[18]

The Superior Court granted the motion for summary judgment on judicial estoppel, in its entirety and without reservation: "Munich Reinsurance America, Inc.'s Motion for an Order Declaring Plaintiff is Judicially Estopped is GRANTED.

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[15] Tr. R. Br. at 16-17.

[16] B1764-B1805.

[17] The Trust has not disputed, nor can it, that the asbestos claims tendered to Royal in 2004 are the identical claims for which the Trust seeks coverage in this matter.

[18] B1804.

IT IS SO ORDERED."[19] The Trust is thereby judicially estopped from contending to this Court that any law other than Michigan applies to this coverage dispute over the Asbestos Claims by virtue of the Superior Court's 2015 Order, based on GM's successful argument that Michigan law applied in GM's litigation against Royal.

[19] *Motors Liquidation Co. DIP Lenders Trust v. Allianz Ins. Co.*, No. N11C-12-022 FSS (CCLD), 2015 Del. Super. LEXIS 1063, *30 (Del. Super. Ct. Nov. 25, 2015). Motion for reargument was denied, but without a mention of the judicial estoppel ruling. *Motors Liquidation Co. DIP Lenders Tr. v. Allianz Ins. Co.*, 2016 Del. Super. LEXIS 110 (Del. Super. Ct. Mar. 2, 2016).

II. *Dow Corning* is Controlling Michigan Law

The Superior Court erred in not finding, and in fact not even considering, *Dow Corning* to be representative of Michigan law. The Trust attempts to distinguish *Dow Corning* on the ground that it involved language stating "[a]ll such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence,"[20] [redacted] But this attempt is directly refuted by the decision itself:

> ...we see no basis in the policy language for construing the terms "accident," "event," or "happening" necessarily to mean the manufacture and sale of breast implants. We agree with Dow Corning that a more natural reading of the policy is that each implantation represents a separate accident, event, or happening.[21]

The Court affirmed the lower court's determination that "each exposure to breast implants constituted a separate occurrence"[22] without regard to the "[a]ll such exposure" language emphasized by the Trust.[23] Only after finding that the "more natural reading" of the policy was that each implantation was a separate occurrence did the court mention this language, commenting "whether breast implants can be

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[20] *Dow Corning*, 1999 Mich. App. LEXIS 2920, at *52.
[21] *Id.*
[22] *Id.* at *53.
[23] Tr. R. Br. at 28.

[redacted]

considered 'general conditions' that are 'substantially the same' for all underlying claimants is highly questionable."[24]

Giving effect to the OneBeacon and Continental Policy language as required by *Dow Corning*, [redacted] The clear words of the occurrence definition provide that an occurrence is [redacted]

The Trust asserts "the asbestos—containing automotive friction products made by GM are alleged to be *intrinsically harmful*—i.e., there is no additional, independent link in the causal chain (such as allowing them to expire) that must take place subsequent to their production and sale for them to become harmful."[26] The Trust is wrong. The automotive friction products like the breast implants in *Dow Corning* cause harm only if and when there is an injurious exposure to a component. In the case of the breast implants, harm allegedly ensued only after exposure to

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[24] *Dow Corning*, 1999 Mich. App. LEXIS 2920, at *52.
[25] A449-A450.
[26] Tr. R. Br. at 29.

[redacted]

silicone gel contained in them.[27] In the case of the automotive friction products, harm is alleged to arise only after injurious exposure to asbestos fibers contained in them.[28] Under these circumstances, [redacted] under the policy language. Indeed, during oral argument before the Superior Court the Trust's counsel acknowledged:

> THE COURT: All right. Let me ask you this: You don't have asbestos, could you just sue GM right now because they put out asbestos-containing products in the neighborhood you lived in growing up?
>
> MS. LINDE: No, I would have to prove that I had an injury.
>
> THE COURT: You have to prove that you inhaled it and that you had a bodily injury from it; correct?
>
> MS. LINDE: Correct.[29]

Pursuant to Michigan law as set forth in *Dow Corning*, each claimant's injurious exposure is a separate occurrence.

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[27] 1999 Mich. App. LEXIS 2920, at *2.
[28] B2557-B2562.
[29] B2716.

[redacted]

III. The Federal Cases Cited by the Trust are not Indicative of How the Michigan Supreme Court would Decide the Occurrence Issue

The federal cases relied on by the Trust and the Superior Court[30] were decided more than six years before *Dow Corning,* and are not indicative of how the Michigan Supreme Court would rule. Indeed, where a state supreme court has not spoken, a decision of the state's intermediate appellate court (*Dow Corning*) rather than a single, isolated federal district court decision (*Dow II*), is the authoritative pronouncement of state law.[31] In any event, the federal district court's *Dow II* decision simply does not explain how the policy language in that case [redacted] *Dow II* made no determination under the facts of that case, concerning what constituted an "event" or "exposure to conditions" as required by the policy language.[32] Instead, *Dow II* merely determines because the product at issue was in that court's view "intrinsically harmful" (a term that does not appear in

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[30] *Dow II*, 814 F. Supp. 613 and *Dow I*, 727 F. Supp. 1524.

[31] *See, e.g., AT&T Corp. v. Clarendon American Ins. Co.*, 931 A.2d 409, 420 (Del. 2007) (refusing to accept an unpublished California federal court decision as an "authoritative pronouncement of California law" because it was "not an opinion by a California state court."); *see also Shook & Fletcher Asbestos Settlement Tr. v. Safety Nat'l Cas. Corp.*, No. 04C-02-087 MMJ, 2005 Del. Super. LEXIS 334, at *15 (Del. Super. Ct. Sep. 29, 2005) (For Delaware courts attempting to ascertain a foreign state's law under conflict of law principles, "[f]ederal court pronouncements or predictions of what a state court might decide . . . are not binding on the court of the forum state.").

[32] 814 F. Supp. at 617.

[redacted]

the policies there [redacted] the claims must all arise from a single occurrence.[33]

Faced with the same policy language at issue in *Dow II*, the *Dow I* court rejected the single occurrence theory.[34] In *Dow I*, a single product, Sarabond, caused property damage to multiple buildings when used in accordance with misleading instructions provided by the manufacturer.[35] Sarabond, like the automotive friction products at issue here, had certain key differences from the single resin product at issue in *Dow II,* including:

- Only a fraction of the buildings made with Sarabond suffered damage.[36] In *Dow II*, "the replacement rate of the pipelines was one hundred percent."[37]

- The failure of the facades built with Sarabond mortar depended upon the manner in which the product was used.[38] In *Dow II*, "[a]ll of the pipe had an unacceptable propensity to develop leaks after installation and when subjected to continuous internal pressure."[39]

- The damage from the Sarabond resulted from various factors, including the surrounding environment and weather conditions, the design of the buildings, workmanship and the like.[40] "All of the resin sold by Dow

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[33] *Id.* at 621-23.
[34] *Dow I*, 727 F. Supp. at 1527.
[35] *Id.* at 1530.
[36] *Dow II*, 814 F. Supp. at 619.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 622.
[40] *Id.* at 619.

[redacted]

> Canada was intrinsically harmful because . . . all pipe extruded from it, by whatever method, was deficient for use . . . ."[41]

In *Dow I*, the Court merely observed that the non-Michigan cases the insurer cited stood for the position that "if the continuous production and sale of an intrinsically harmful product results in similar kinds of injury or property damage, then all such injury or property damage results from a common occurrence."[42] Here, even when the GM asbestos claims at issue include only "automotive friction products,"[43] the alleged injuries arose from unique exposure start and end dates,[44] at nearly [redacted] different locations,[45] to at [redacted] different types of automotive friction asbestos-containing products,[46] resulting in varying injuries [redacted][47]

The *Dow Corning* court had the benefit of both *Dow I* and *II* decisions, yet it expressly declined to find that the manufacture and sale of "intrinsically harmful"

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[41] *Id.* at 623.

[42] *Dow I*, 727 F.Supp. at 1530.

[43] The Trust relies on its apparent narrowing of the Asbestos Claims at issue to only asbestos containing "automotive friction products" in its motion for summary judgment on number of occurrences to support application of its single occurrence theory. Tr. R. Br. at 35, n. 91, *citing* AR277.

[44] B2559-B2562.

[45] B2558.

[46] B2562-B2563.

[47] B2558-B2559.

[redacted]

products is the single occurrence.[48] Here, the single occurrence finding is achieved only by substituting [redacted] with the "intrinsically harmful" concept in violation of Michigan law.[49]

[48] 1999 Mich. App. LEXIS 2920, at *51-54.

[49] *Gelman*, 572 N.W.2d at 623 ("[W]e may not rewrite the plain and unambiguous language under the guise of interpretation. Instead, we must enforce the terms of the contract as written . . . in its plain and easily understood sense.").

[redacted]

IV. The Policy Language does not

As demonstrated in Opening Brief on Cross-Appeal, affords coverage to [50] In order to which is [51] The Trust ignores the fact that, in order [52] [53] The Trust misreads this language asserting that the must be caused by the product.[54] The use of the

[50] Op. Br. at p. 68 (citing A448).
[51] A450.
[52] Tr. R. Br. at 32.
[53] A525-A526.
[54] Tr. R. Br. at 32.

[redacted]

[redacted] This provision requires that

[redacted]

This clause does more than [redacted] The Trust makes the unremarkable observation that [redacted][58] More to the point, however, this clause requires [redacted] Despite the Trust's contrary position, GM conceded in the Michigan Litigation that [redacted]

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[55] A451.
[56] A451 (emphasis added).
[57] Tr. R. B. at 33.
[58] Tr. R. B. at 33.

[redacted]

[redacted]

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

[redacted]

The Trust asserts that [redacted] However, this ignores the fact that the language [redacted]

[redacted]

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[59] AR144.

[60] A448-A449.

[61] Tr. R. B. at 33-34.

[62] *See, e.g., London Market Insurers v. Superior Court*, 53 Cal. Rptr. 3d 154 (Cal. Ct. App. 2007).

[redacted]

V. Evidence of GM and Royal's Treatment [redacted] Shows GM Waived any [redacted]

OneBeacon and Continental do not cite this evidence to "alter the settled unambiguous meaning of the term 'occurrence'" as the Trust suggests.[63] Rather, this evidence clearly and convincingly shows that GM waived any argument that the Asbestos Claims [redacted] Evidence of "representations or affirmative conduct" as well as evidence of affirmative acceptance is admissible and sufficient to prove GM's knowing waiver of any right to now claim that [redacted]

In the Michigan Litigation, which involved [redacted] and the same Asbestos Claims at issue here, GM and Royal each treated each Asbestos Claim [redacted][65] GM and Royal did the same under [redacted][66] Michigan waiver law[67] recognizes that statements and course of conduct can

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[63] Tr. R. Br. at 36.

[64] *Quality Prods. & Concepts Co. v. Nagel Precision, Inc.*, 666 N.W.2d 251, 260 (Mich. 2003); Op. Br. at p. 68.

[65] B751, B752-B753, B760, A1310.

[66] B74, B93-B203, B240, B386, B387, B390, B495-B497; *Motors Liquidation Co. DIP Lenders Trust*, 2015 Del. Super. LEXIS 1063, at *1.

[67] *Quality Prods.*, 666 N.W.2d at 259-60.

[redacted]

demonstrate waiver even in the absence of ambiguity, something not addressed by the unpublished General Motors decision relied upon by the Trust.[68]

Indeed, one of the Trust's own exhibits shows that both GM and Royal understood that under [redacted] each one of the *very same* Asbestos Claims is a separate occurrence. Specifically, GM stated:

[redacted][69]

The Trust now contends that "discovery revealed a document demonstrating that Royal understood that asbestos claims arise of a single occurrence," citing a February 7, 1980 letter from Albert Mauceri, Asst. Sec., to Robert Cross, Excess & Treaty Management Corp.[70] The Trust previously offered this same letter as "evidence that Royal believed all asbestos bodily injury claims should be[redacted]

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[68] *Gen. Motors Corp. v. Royal & Sun Alliance Ins. Grp. PLC*, 2007 Mich. App. LEXIS 1113 (Mich. Ct. App. Apr. 24, 2007); Tr. R. Br. at 39.

[69] [redacted]..

[70] Tr. R. B. at 40 (citing AR9).

[redacted]

[redacted]"[71] The Superior Court rejected this evidence as "taken out of context."[72] In light of the overwhelming evidence that GM and Royal both consistently treated the Asbestos Claims as [redacted], this letter is inapposite.

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[71] A1818.

[72] *Motors Liquidation Co. DIP Lenders Trust*, 2015 Del. Super. LEXIS 1063, at *8.

[redacted]

VI. Law of the Case Doctrine Does Not Support the Superior Court's Number of Occurrences Ruling

The Trust concedes that the Superior Court's number of occurrences ruling relied on the law of the case doctrine.[73] As this Court has recognized, the law of the case "applies only to those matters necessary to a given decision and those matters which were decided on the basis of a fully developed record."[74] That was plainly not the case here.[75] Instead, the 2013 Decision—which was the basis for the court's subsequent "law of the case" rationale—was issued when "discovery [wa]s incomplete," as the Superior Court recognized at the time in *denying the Trust's* motion for summary judgment (without addressing the merits of the occurrence issue).[76] "[E]vidence regarding the negotiation process and course of performance will likely lead to a different result than merely relying on the policy language," the court concluded.[77] Indeed, the Superior Court recognized this in its 2015 Decision,

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[73] Tr. R. Br. at 44.

[74] *Zirn v. VLI Corp.*, 681 A.2d 1050, 1062 n.7 (Del. 1996)

[75] *Motors Liquidation Co. DIP Lenders Trust v. Allianz Ins. Co.*, No. N11C-12-022 PRW (CCLD), 2017 Del. Super. LEXIS 279, at *39-40 (Del. Super. Ct. June 8, 2017).

[76] *Motors Liquidation Co. v. Allianz Ins. Co.*, No. N11C-12-022 FSS (CCLD), 2013 Del. Super. LEXIS 605, at *14-16 (Del. Super. Ct. Dec. 31, 2013).

[77] *Id.* at *16.

noting that its 2013 Decision was "a preliminary decision" in which it "preliminarily read the primary and excess policies in isolation and without context."[78]

In any event, the law of the case doctrine is not "an *absolute* bar to reconsideration of a prior decision that is clearly wrong."[79] As demonstrated above, and in the Opening Brief on Cross-Appeal, any ruling predicting that the Michigan Supreme Court would find that [redacted] of Asbestos Claims constitute a [redacted] is clearly wrong. Michigan law and the policy language lead to precisely the opposite conclusion: that the Asbestos Claims constitute [redacted] Therefore, the Superior Court erred in resting its decision upon the law of the case doctrine.

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[78] *Motors Liquidation Co. DIP Lenders Trust*, 2015 Del. Super. LEXIS 1063, at *3.

[79] *Motors Liquidation Co. DIP Lenders Trust*, 2017 Del. Super. LEXIS 279, at *40 (*quoting Gannett Co. v. Kanaga,* 750 A.2d 1174, 1181 (Del. 2000) (emphasis in original)).

[redacted]

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Superior Court with respect to number of occurrences and enter an Order in favor of OneBeacon and Continental that the Asbestos Claims each constitute a separate occurrence under the OneBeacon and Continental Policies.

Respectfully Submitted,

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