EFiled: Feb 07 2018 04:14PM EST
Filing ID 61663500
Case Number 381,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MOTORS LIQUIDATION COMPANY DIP LENDERS TRUST,	)	
Plaintiff Below, Appellant,	)	No. 381, 2017
v.	)	Court Below – Superior Court of the State of Delaware
ALLSTATE INSURANCE COMPANY, *et al.*,	)	C.A. No. N11C-12-022 PRW CCLD
Defendants Below, Appellees.	)	[redacted]
	)	**PUBLIC VERSION**

APPELLANT MOTORS LIQUIDATION COMPANY DIP LENDERS TRUST'S REPLY BRIEF ON APPEAL AND CROSS-APPELLEE'S ANSWERING BRIEF ON CROSS-APPEAL

OF COUNSEL:

Selena J. Linde
Michael T. Sharkey
PERKINS COIE LLP
Suite 600
700 Thirteenth Street, NW
Washington, DC 20005-3960
Telephone: (202) 654-6200

POTTER ANDERSON & CORROON LLP
Jennifer C. Wasson (No. 4933)
Carla M. Jones (No. 6046)
Hercules Plaza, Sixth Floor
1313 North Market Street
Wilmington, DE 19801
Telephone: (302) 984-6000

Attorneys for Appellant Motors Liquidation Company DIP Lenders Trust

January 23, 2018
Corrected Version: January 30, 2018

Public Version Dated: February 7, 2018

[redacted]

TABLE OF CONTENTS

[redacted]

TABLE OF AUTHORITIES

CASES

Page(s)

[redacted]

[redacted]

[redacted]

OTHER AUTHORITIES

NATURE OF THE PROCEEDINGS

Motors Liquidation Company DIP Lenders Trust (the "Trust") files this brief in answer to the cross-appeal of OneBeacon and Continental, and in reply in further support of its own appeal.

The pre-1972 insurance company Appellees, OneBeacon and Continental,[1] seek to have this Court disregard established case law in both Delaware and Michigan addressing standard-form "occurrence" definitions like those found in the insurance policies here.[2] The Superior Court correctly held that there is no conflict between the law of Delaware and Michigan on the number of occurrences issue, and that under the "clear policy language" each holds "that similar injuries caused by intrinsically harmful products, such as asbestos, is a single occurrence."[3] The Superior Court also properly applied that standard to hold that the asbestos

[1] The pre-1972 insurance company appellees are: Continental Casualty Company ("Continental"); and OneBeacon Insurance Company ("OneBeacon"), which is now responsible for the policies sold by American Employers Insurance Company ("American Employers").

[2] The policies define "occurrence" to mean "an event, or continuous or repeated exposure to conditions, which unexpectedly cause bodily injury or injury to or destruction of property." A450.

[3] *Motors Liquidation Co. DIP Lenders Trust v. Allianz Ins. Co.*, 2013 WL 7095859, at *3, 5 (Del. Super. Dec. 31, 2013).

containing automotive friction products liability of General Motors Corporation ("GM") arose out of a single occurrence.[4]

OneBeacon and Continental, however, argue that each separate asbestos claim should be treated as a separate occurrence, so that the asbestos liability at issue here does not reach the per occurrence underlying limits of their excess policies.

OneBeacon and Continental's invocation of case law involving different policy language and products that were not intrinsically harmful does not support a finding of multiple occurrences here, nor does it demonstrate a conflict of law between Michigan and Delaware. Nor can the purported extrinsic evidence they rely on alter the meaning of the policies' clear language on "occurrence," particularly when both OneBeacon and Continental have admitted that the language is unambiguous. GM's asbestos containing automotive friction products liability falls squarely within the standards Michigan and Delaware use to determine a single occurrence, and the Superior Court ruling on this issue should be affirmed.

As to the allocation issue that the Trust has appealed, OneBeacon and Continental have now conceded that even under the Michigan law they argue

[4] *Motors Liquidation Co. DIP Lenders Trust v. Allianz Ins. Co.*, 2017 WL 2495417, at *14–18 (Del. Super. June 8, 2017), *as corrected* (June 19, 2017).

applies, "all sums" is the correct allocation method when the policy language extends coverage to an entire continuing occurrence. And the language here does precisely that, extending coverage to "all sums" that the policyholder becomes legally obligated to pay "arising out of an event or a continuous or repeated exposure to conditions which result in Personal Injury . . . which occurs during the period of this insurance." Under this language, if a continuous or repeated exposure to conditions—that is, an "occurrence" as that term is defined in the policies—results in injury during the policy period, then the insurance company must pay "all sums" the policyholder is legally obligated to pay "arising out of" the entire occurrence. There is no *pro rata* or other limiting language reducing that broad coverage.

OneBeacon and Continental's reliance on Michigan case law imposing proration under different policy language does not support reducing the broad coverage promised under the policies at issue here. Indeed, that same line of authority acknowledges that "all sums" allocation applies when the policy language calls for it. The Superior Court's ruling reducing coverage to a *pro rata* fraction of the covered occurrence should be reversed.

On the Trust's appeal of the judgment in favor of the post-1971 excess insurance companies,[5] these excess insurers have provided no support for the Superior Court's erroneous holding that "higher level excess insurance policies do not respond if the primary and first-level excess policies have not been triggered."[6] Travelers, in fact, has disavowed reliance on any such rule. And without that rule, the summary judgment granted to the post-1971 excess insurers must be reversed.

The post-1971 excess policies with their own language stating that their coverage is triggered for occurrences happening (rather than reported) during the policy period do not incorporate or depend on the operation of the different trigger of coverage in the underlying Royal policies. Therefore, those Appellees'

---

[5] The post-1971 insurance company appellees are: Munich Reinsurance America, Inc. ("Munich Re") (now responsible for the policies sold by American Re-Insurance Company ("Am Re")); Allstate Insurance Company ("Allstate") (now responsible for the policies sold by Northbrook Excess & Surplus Insurance Company ("Northbrook")); Mt. McKinley Insurance Company ("Mt. McKinley") (now responsible for the policies sold by Gibraltar Casualty Company ("Gibraltar")); Granite State Insurance Company ("Granite State"); TIG Insurance Company ("TIG") (now responsible for the policies sold by International Surplus Lines Casualty and Insurance Company ("ISLIC")); Certain London Market Insurance Companies ("London"); Travelers Casualty & Surety Company ("Travelers") (now responsible for the policies sold by Aetna Casualty & Surety Company ("Aetna")); American International Underwriters ("AIU"); Insurance Company of the State of Pennsylvania ("INSCOP"); Landmark Insurance Company ("Landmark"); Lexington Insurance Company ("Lexington"); and National Union Fire Insurance Company of Pittsburgh PA ("National Union").

[6] *Motors Liquidation Co. DIP Lenders Trust v. Allianz Ins. Co.*, 2015 WL 10376123, at *4 (Del. Super. Nov. 25, 2015).

arguments about the operation of the Royal trigger, including any purported judicial estoppel, course of conduct, or other modification of the Royal trigger between GM and Royal have no bearing on the coverage set forth in these excess policies.

Further, those post-1971 excess policies in the 1977 policy year that *do* follow form to the underlying Royal trigger of "occurrences which are reported" during the policy period are triggered for the full asbestos products liability occurrence, because that occurrence was first reported to GM during the 1977 policy year. The arguments of the 1977 insurers as to GM and Royal's treatment of asbestos claims as separate occurrences, despite policy language to the contrary, does not alter this result. These excess policies follow form to the "terms" of the Royal coverage, and not any modification to that coverage by judicial estoppel or course of conduct. These insurance companies' reliance on such extrinsic evidence is particularly inappropriate because they admit the term "occurrence" is unambiguous. Travelers' arguments also depend on the use of extrinsic evidence to argue for a different interpretation of the term "occurrence" than that called for by its plain language, and so Travelers' arguments also should be rejected.

This Court should reverse the Superior Court's ruling excusing the obligations of the post-1971 excess insurers.

SUMMARY OF ARGUMENT

THE TRUST'S ANSWER TO ONEBEACON AND CONTINENTAL CASUALTY COMPANY'S ARGUMENTS ON CROSS-APPEAL

1. DENIED. The Superior Court correctly held that there is no conflict between the law of Delaware and Michigan on the number of occurrences issue, and that under either law GM's asbestos containing automotive friction products liability arose out of a single occurrence, that is, the continuous manufacture and sale of allegedly intrinsically harmful products containing asbestos.

2. DENIED. The Superior Court correctly construed the plain language of the "occurrence" definition in the OneBeacon and Continental policies under Delaware and Michigan law, and properly rejected OneBeacon and Continental's purported extrinsic evidence of intent as to the unambiguous policy language.

3. DENIED. The Superior Court correctly held that decisions applying Michigan law, including *Associated Indemnity Corp. v. Dow Chemical Co.*,[7] demonstrate there is no true conflict with the Delaware decisions that analyze and apply the plain language of similar "occurrence" provisions in a manner consistent with contract interpretation principles shared by Delaware and Michigan law.

[7] 814 F. Supp. 613 (E.D. Mich. 1993).

THE TRUST'S SUMMARY OF ARGUMENT ON CROSS-APPEAL

1. The Superior Court correctly held that there is no conflict of law between Delaware and Michigan on the number of occurrences issue under policy language like that at issue here, and that under either law similar injuries caused by the continuous manufacture and sale of intrinsically harmful products, such as asbestos, arise out of a single occurrence.

2. The Superior Court correctly held that GM's asbestos containing automotive friction products liability arose out of a single occurrence under the applicable standard.

3. The Superior Court correctly rejected OneBeacon and Continental's reliance on purported extrinsic evidence to construe policy language OneBeacon and Continental both admit is unambiguous.

STATEMENT OF FACTS

The Trust refers the Court to the Statement of Facts in its Opening Brief, which addresses many of the facts relevant both to this appeal and to OneBeacon and Continental's cross-appeal.[8] This section addresses certain additional facts relevant to the arguments Appellees make in their briefing, including on the cross-appeal.

I. THE POLICIES

The Trust's Opening Brief describes the policies at issue,[9] including the "occurrence" definition involved in OneBeacon and Continental's cross-appeal on the number of occurrences:

> The word "Occurrence" means:
>
> an event, or continuous or repeated exposure to conditions, which unexpectedly cause bodily injury or injury to or destruction of property.[10]

The Trust's Opening Brief also described the "patchwork of coverage forms" among the excess policies sold to GM from 1971 to the mid-1980s, some of which follow form to the underlying Royal trigger of "occurrences which are reported" during the policy period, and some of which contain or incorporate

[8] Trust's Opening Br. at 8–26 (Trans. ID 61279994).

[9] *See, e.g.*, Trust's Opening Br. at 8–13.

[10] A450.

different triggers of coverage.[11] Additional evidence further demonstrates that GM's excess insurance coverage *did not* universally follow form to the Royal trigger of coverage. [redacted] Aetna, for example, added this endorsement to its policies sold to GM in the 1984 year.[13]

II. THE UNDERLYING ACTIONS

As discussed in the Trust's Opening Brief,[14] GM was first served with a lawsuit seeking damages as a result of bodily injury allegedly caused by

[11] *See*, *e.g.*, Trust's Opening Br. at 13.

[12] AR10–AR12. As discussed below, the Trust's position is that extrinsic evidence is not relevant to interpret the unambiguous language involved in this appeal, but is providing context for the purported extrinsic evidence put forth by Appellees.

[13] *See* AR28; AR43 (Aetna policy nos. 65 XN 87 WCA and 65 XN 88 WCA, at "Follow Form Endorsement.").

[14] Trust's Opening Br. at 14–15.

[redacted].

automotive friction products containing asbestos on December 2, 1977, when it received the complaint *Zitis v General Motors Corporation, et al.*, No. L11634 77 filed in the Superior Court of New Jersey, Law Division, Bergen County ("*Zitis*").[15] Subsequent to *Zitis*, GM was named as a defendant or co-defendant in numerous similar asbestos—related lawsuits filed in federal and state courts across the United States. The claimants typically sought damages for alleged bodily injuries, sickness, disease, or wrongful death allegedly resulting from asbestos-containing automotive friction products that were sold, manufactured, or distributed by GM. Like *Zitis*, these lawsuits base their allegations on the allegedly intrinsically harmful nature of asbestos.

In *Briggs v. A.O. Smith Corp., et al.*, for example, filed in the Marion Superior Court of the State of Indiana, the plaintiff alleged that GM sold asbestos brake linings, clutches, gaskets, and paper, as well as vehicles designed and intended to include asbestos products of GM or others.[16] The plaintiff alleged that "[t]he ordinary and foreseeable use of the defendants' asbestos products is an intrinsically dangerous and ultrahazardous [activity]" which resulted in death of plaintiffs' husband due to mesothelioma.[17] Similarly, in *Collum, et al. v.*

[15] *See* A893–A910.

[16] A1135.

[17] A1155–A1156.

Honeywell International, Inc., et al., filed in Circuit Court of Hinds County Mississippi, plaintiffs alleged that while they were performing mechanical work on vehicles they were exposed to defective and unreasonably dangerous asbestos-containing products sold by defendants including GM, including brakes shoes, brake drums, clutch facings and engine gaskets.[18]

At the time of its bankruptcy, approximately [redacted] As set forth in undisputed testimony, [redacted][19]

III. PRIOR ACTION INVOLVING GM AND ROYAL AND PURSUIT OF EXCESS INSURANCE

As discussed in the Trust's Opening Brief, GM filed a declaratory judgment action in Michigan to determine Royal's obligations under the Royal policies. *See Gen. Motors Corp. v. Royal & Sun Alliance Ins. Grp. PLC*, No. 05-063863-CK (Circuit Court, Oakland County, Michigan) (the "Michigan Action"). Prior to the settlement in that action, the Michigan court heard arguments on the number of occurrences, but did not resolve them.

[18] A1170–A1171.

[19] [redacted]

[redacted]

GM took the position in the Michigan Action that [redacted] in seeking reconsideration of the court's decision on Royal's statute of limitations summary disposition motion.[20] Royal, however, never agreed in the litigation that separate occurrences applied to the asbestos claims, and, in fact, there is evidence that Royal understood [redacted][21] Before the occurrence issue was resolved by the Michigan court, the case settled. In 2008, GM and Royal entered into a settlement releasing all of Royal's underlying policies.[22]

Tellingly, the pre-1972 Royal policies were not the only target of GM's efforts during this time frame. Rather, GM demonstrated an understanding that its asbestos liability could reach the excess policies at issue in this action. For example, in 2005 GM made and then settled a claim against Certain Underwriters

---

20 [redacted]

21 [redacted]

22 [redacted] *see also Motors Liquidation Co.*, 2017 WL 2495417, at *3.

[redacted]

at Lloyd's, London for their participation in coverage under the same post-1971 London excess policies at issue in this action against other, non-settled, London Market Companies.[23] GM also gave notice of its asbestos liability under the [redacted] prior to its bankruptcy and the creation of the Trust.[24]

The Trust was created pursuant to GM's bankruptcy plan, to avoid abandonment of certain unliquidated claims, including GM's rights to the proceeds under these excess insurance policies for the amounts GM already had paid out to resolve asbestos and environmental liabilities.[25] The beneficiaries of the Trust are the U.S. Treasury and the Governments of Canada and Ontario (through Export Development Canada), which acted as GM's debtor-in-possession lenders during the bankruptcy.[26]

---

[23] AR164; AR236.

[24] [redacted]

[25] *See, e.g.*, *Motors Liquidation Co.*, 2017 WL 2495417, at *3–4, 5–7.

[26] While OneBeacon and Continental point out that any recoveries in these actions will not go to asbestos claimants, this is because the rights the Trust is pursuing arise from amounts GM already had paid to resolve its liabilities at the time the Trust was created. *See, e.g.*, 2013 WL 7095859, at *1.

[redacted]

ANSWERING ARGUMENT ON CROSS-APPEAL

I. THE SUPERIOR COURT CORRECTLY HELD THAT GM'S AUTOMOTIVE FRICTION PRODUCTS LIABILITY AROSE OUT OF A SINGLE OCCURRENCE.

A. Question Presented

Was the Superior Court correct to hold that GM's asbestos containing automotive friction products liability arose out of a single "occurrence" as that term is defined in the policies at issue? (AR190–AR202; AR212–AR233; AR280–AR295; AR308–AR331; A1921–A1931).

B. Standard and Scope of Review

Legal issues, including policy interpretation, are reviewed *de novo*. *See, e.g.*, *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 489 (Del. 2001).

C. Merits of the Argument

The Superior Court correctly held that there is no conflict between the law of Delaware and Michigan, and that under the "clear policy language," each holds "that similar injuries caused by intrinsically harmful products, such as asbestos, is a single occurrence."[27] The Superior Court then correctly applied that holding to

[27] *Motors Liquidation Co.*, 2013 WL 7095859, at *3, 5. The policies define "occurrence" to mean "an event, or continuous or repeated exposure to conditions, which unexpectedly cause bodily injury or injury to or destruction of property." A450.

the OneBeacon and Continental policies, and held that GM's asbestos containing automotive friction products liability arose out of a single occurrence.[28]

OneBeacon and Continental argue in this appeal that the Superior Court, and the Delaware and Michigan decisions that it relied on (including a decision from this Court),[29] failed to analyze the plain language of the "occurrence" definition. To the contrary, the Superior Court and the Delaware and Michigan decisions it relied on fully analyzed the relevant language, and correctly held that the manufacture and sale of an allegedly intrinsically harmful product is a single occurrence. OneBeacon and Continental's invocation of inapposite case law, involving different policy language or products that were not intrinsically harmful, does not support a different result, nor does it demonstrate a conflict of law between Michigan and Delaware. GM's asbestos containing automotive friction products liability falls squarely within the standards Michigan and Delaware use to determine a single occurrence.

OneBeacon and Continental's invocation of purported extrinsic evidence also cannot alter the application of the "occurrence" definition incorporated into

[28] *Motors Liquidation Co.*, 2017 WL 2495417, at *14–18.

[29] *Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d 1254 (Del. 2010) ("*DuPont*").

their policies, particularly when these insurance companies have admitted the language is unambiguous.

1. A Choice of Law Analysis Is Unnecessary Because There Is No Conflict of Law Between Delaware and Michigan on the Number of Occurrences.

The Superior Court correctly ruled that there is no need for a choice of law determination on the issue of the number of occurrences, because there is no conflict between the laws of Michigan and the Delaware forum—each applies the "cause test" to occurrence language like that here, and hold "that similar injuries caused by the continuous manufacture and sale of intrinsically harmful products, such as asbestos, is a single occurrence."[30] In absence of a conflict, the Superior Court correctly applied forum law.[31]

OneBeacon and Continental nevertheless argue that the Superior Court *sub silentio* reversed that part of the 2013 Decision in its 2015 Decision, and that Michigan law applies as a matter of judicial estoppel.[32] The 2015 Decision, however, nowhere mentions any judicial estoppel as to choice of law.

Furthermore, on the issues on which the 2015 Decision did find judicial estoppel, the Superior Court made clear that the prior litigation statements of GM

[30] *Motors Liquidation Co.*, 2013 WL 7095859, at *3.

[31] *See, e.g.*, *Deuley v. Dyncorp Int'l, Inc.*, 8 A.3d 1156, 1161 (Del. 2010).

[32] OB Br. at 52 (Trans. ID 61447045).

on which it relied addressed only the now-settled Royal policies, and not the excess policies at issue here.[33] In addition, the Superior Court's 2017 Decision on number of occurrences expressly relied on and followed the ruling in the 2013 Decision, demonstrating that the Superior Court had not intended to overrule the prior 2013 Decision in its 2015 Decision.[34] Indeed, given the determination in the 2013 Decision that there is no true conflict of law on the number of occurrences issue, any further choice-of-law analysis, whether based on judicial estoppel or any other factors, was unnecessary.[35]

As to the number of occurrences, however, this point is academic. The Trust does not dispute that if there were a conflict of law between Delaware and Michigan on the number of occurrences issue, then the law of Michigan would apply (because of Delaware's choice-of-law rules, not any judicial estoppel).[36] But there is no conflict between the law of Delaware and Michigan on the number of occurrences issue. As detailed below, both states recognize that under the policy language at issue, similar injuries resulting from the manufacture and sale of allegedly intrinsically harmful products, such as those containing asbestos, arise

[33] *See Motors Liquidation Co.*, 2015 WL 10376123, at *3.

[34] *Motors Liquidation Co.*, 2017 WL 2495417, at *18.

[35] *Deuley*, 8 A.3d at 1161 (when there is a "false conflict," the "Court should avoid the choice-of-law analysis altogether.").

[36] *See* Trust's Opening Br. at 28 & n.61.

out of a single occurrence. Thus the Superior Court was correct to find no true conflict of laws on this issue, and to hold that GM's liability for injuries arising out of the manufacture and sale of asbestos-containing automotive friction products arose out of a single occurrence.

2. Delaware and Michigan Both Recognize That Injury Arising out of the Manufacture and Sale of Intrinsically Hazardous Products Arises from a Single Occurrence.

The OneBeacon and Continental policies incorporate language defining "occurrence" to mean "an event, or continuous or repeated exposure to conditions, which unexpectedly cause bodily injury or injury to or destruction of property."[37] Both Delaware and Michigan hold that under such language, similar injuries arising out of the manufacture and sale of an intrinsically harmful product arise out of a single occurrence.

a. Under Delaware Law, All Injuries Resulting from the Manufacture and Sale of an Intrinsically Harmful Product Arise out of a Single Occurrence.

The courts of Delaware, GM's state of incorporation and the forum of the present dispute, hold that multiple product liability claims arising out of defective products constitute a single occurrence.[38] OneBeacon and Continental do not

[37] A450.

[38] *See DuPont*, 996 A.2d at 1258 ("DuPont's production of an unsuitable product [incorporated in thousands of homes and commercial buildings around the country] triggered only one single occurrence under the policies."); *Valley Forge Ins. Co. v.*

dispute that under Delaware law, all injuries resulting from intrinsically harmful products arise out of a single occurrence.

In *DuPont*, this Court upheld summary judgment that thousands of claims alleging leaking plumbing systems sold around the country incorporating DuPont's allegedly defective resin product all arose out of a single occurrence for purposes of excess policies' underlying limits.[39] This Court addressed policy language defining "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, property damage, or advertising liability during the policy period."[40] This Court held that "when determining the number of occurrences in a products liability case, the proper focus is . . . on production and dispersal – not on the location of injury or the specific means by which injury occurred."[41] As a result of this focus, this Court rejected the insurance company's argument that there were two ways in which the product could have failed, because in either event "the *product* itself was the source of the leaking polybutylene systems and

---

Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 2012 WL 1432524 (Del. Super. Mar. 16, 2012) (multiple products liability actions alleging burns from defective robes held to arise from a single occurrence).

[39] 996 A.2d at 1255–59.

[40] *Id.* at 1257.

[41] *Id.* at 1258 (internal quotation omitted; ellipsis in original).

the resultant property damage."[42] This Court also rejected the insurance company's arguments that factual issues precluded summary judgment, holding that the interpretation of the language on the number of occurrences is an issue of law.[43]

OneBeacon and Continental criticize this Court's decision in *DuPont* as not "apply[ing] the analysis of the occurrence definition's plain language."[44] To the contrary, this Court repeatedly invoked the language of the occurrence definition as the basis of its analysis,[45] and specifically identified the key issue before it as "the interpretation of policy language."[46] These Appellees' similar criticism of the Superior Court's decision also is misplaced, as the Superior Court emphasized that its holding that "similar injuries caused by the continuous manufacture and sale of intrinsically harmful products, such as asbestos, is a single occurrence" was based on "the clear policy language."[47]

---

[42] *Id.* at 1257 (emphasis in original).

[43] *Id.* at 1258–59; *see also id.* at 1257 (treating the number of occurrences issue as a matter of law subject to *de novo* review).

[44] OB Br. at 56.

[45] *See DuPont*, 996 A.2d at 1257–59.

[46] *Id.* at 1259.

[47] *Motors Liquidation Co.*, 2013 WL 7095859, at *3, 5. Appellees mischaracterize the Trust's briefing below when they assert that the Trust "conceded" that the Superior Court did not make "any determination about the proper reading of the particular policy language at issue." OB Br. at 23. The statement Appellees cite

Similarly, in *Valley Forge*, the Superior Court found no conflict between the laws of Massachusetts and Delaware, and held on summary judgment that under the "cause test" applicable under either state's law, multiple personal injury claims arising from the alleged propensity of the policyholder's robes to catch fire all arose out of a single occurrence.[48] The court rejected the insurance company's argument that there was a need to inquire as to the "exact mechanism of causation or injury," as all the injuries arose out of the allegedly intrinsically harmful product. In *Valley Forge*, the policy defined occurrence as an "accident, including continuous or repeated exposure to substantially the same harmful conditions."[49] Like the OneBeacon and Continental policies at issue here, the language did not contain an additional provision expressly stating that all injury arising out of the same conditions was one occurrence, but the court held that this made no difference to the single-occurrence result.[50]

The court in *Valley Forge* also rejected the insurance company's argument that there were multiple occurrences on the grounds that there were "multiple

---

was the Trust's statement that the 2013 Decision did not address any particular policy's language on the *allocation* issue; it said nothing about the number of occurrences. *See* A1947.

[48] 2012 WL 1432524, at *7–12.

[49] *Id.* at *2.

[50] *Id.* at *9 n.107.

defendants, different suppliers, inspectors, modes of transportation, and raw materials, as well as the number of lots or batches shipped."[51] Rather, the court held that "the [product itself] emerge[d] as the alleged cause of the injuries" giving rise to the policyholder's liability.[52]

b. Michigan Law Also Holds That Continuous Manufacture and Sale Of Allegedly Intrinsically Harmful Products Constitutes A Single Occurrence.

Michigan law does not conflict with the law of Delaware on the number of occurrences here. Michigan courts also hold that if the continuous production and sale of an intrinsically harmful product, including products containing asbestos, results in similar kinds of injury or property damage, then all such injury or property damage results from a single occurrence. *See Associated Indem. Corp v. Dow Chem. Co.*, 814 F. Supp. 613 (E.D. Mich. 1993) ("*Dow Chemical II*"); *Dow Chem. Co. v. Associated Indem. Corp.*, 727 F. Supp. 1524, 1529–31 (E.D. Mich. 1989) ("*Dow Chemical I*"). Michigan law provides no basis for finding multiple occurrences here, nor any conflict with Delaware law on this issue.

In *Dow Chemical II*, the court addressed insurance coverage for liability for property damage arising from alleged defects in gas pipe resin the policyholder produced and sold. The policies at issue defined "occurrence" as "an event,

[51] *Id.* at *10.

[52] *Id.*

[redacted]

including continuous or repeated exposure to conditions which results, during the policy period, in personal injury or property damage not intended from the standpoint of the insured," and stated that "for the purpose of determining the limit of the company's liability, all personal injury and property damage arising out of the repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence."[53]

The allegedly defective resin had been used in the extrusion of pipe for a large rural electrification program.[54] The insurance companies argued that the liability arose from many occurrences on the grounds that the resin was incorporated into the end product under varying processes, that the end product was installed in different locations subject to different conditions, and that some of the pipe did not leak while other pipe leaked from multiple causes.[55]

The court rejected the insurance companies' arguments and granted summary judgment for the policyholder on this issue, holding as a matter of law that "[t]he production of defective resin was the sole, proximate, uninterrupted, and continuing cause of all of the property damage" asserted by various parties.[56] The

[53] 814 F. Supp. at 617.

[54] *Id.* at 614.

[55] *Id.* at 618–19.

[56] *Id.* at 623.

court relied on three principles in reaching its single occurrence decision, focusing on the cause of the harm:

> (1) The number of occurrences is determined by reference to the cause or causes of the damage rather than by reference to the number of claims or settlements.
>
> (2) All property damage which results from one, proximate, uninterrupted, and continuing cause stems from a single occurrence.
>
> (3) If the continuous production and sale of an intrinsically harmful product results in similar kinds of property damage, then all such property damage results from a common occurrence.
>
> The third principle is a guideline for the application of the second.

Id. at 621.

OneBeacon and Continental argue that the decision in *Dow Chemical II* was not grounded in an analysis of policy language and so should not be followed. This assertion is puzzling, as the court in *Dow Chemical II* spent numerous pages in the opinion applying the facts to the policy language and expressly stated that the policy language controls: "[a]n insured is not entitled to coverage when its claim for coverage is inconsistent with the policy terms. An insured is entitled to a reasonable interpretation of its policy to minimize the cost of coverage

litigation."[57] There is no basis to challenge *Dow Corning II* as disregarding the policy language.

OneBeacon also argues that *Dow Chemical II* should not be followed, on the grounds that the occurrence definition it construed contained language stating 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."[58] This language simply echoes the language found in the "occurrence" definition here, which states that an occurrence can be the "continuous or repeated exposure to conditions."[59] Injuries arising out of the manufacture and sale of an intrinsically harmful product have been held to arise out of a single occurrence regardless of whether the language OneBeacon points to appears in the definition at issue.[60]

Under *Dow Chemical II*, the automotive friction asbestos product liability alleged against GM arises out of a single occurrence. Like the defective resin in *Dow Chemical II*, products containing asbestos are alleged to be intrinsically harmful, and GM's production and sale of such products therefore are a single occurrence giving rise to the liability. As with the defective resin, this is true

[57] *Dow Chemical II*, 814 F. Supp. at 623.

[58] OB Br. at 54 (quoting 814 F. Supp. at 617).

[59] A450.

[60] *See, e.g.*, *Valley Forge*, 2012 WL 1432524, at *9 n.107.

regardless of whether GM's asbestos containing products were manufactured under different conditions and designs or at different locations.

Dow Chemical I further supports a finding of a single occurrence here. There, the court held, under the same policy language as *Dow Chemical II*, that claims for damage arising out of alleged misrepresentations about the use of a building product ("Sarabond") constituted a separate occurrence for each building or group of buildings.[61] In finding separate occurrences, however, the court stressed that Sarabond was *not* alleged to be an intrinsically harmful product, but instead that Dow Chemical's alleged misrepresentations about its proper use led to the harm at each building.[62] The court therefore held that Dow Chemical's particular alleged misrepresentations in connection with the sale of the product for use in each building constituted a separate occurrence.[63]

The *Dow Chemical I* court specifically distinguished situations in which "the insured continuously and repeatedly produced and sold an intrinsically harmful product," including "asbestos products that caused injuries."[64] Further, the court

---

[61] 727 F. Supp. at 1531.

[62] *Id.* at 1530–31.

[63] *Id.*

[64] *Id.* at 1529 (citing *Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co.*, 597 F. Supp. 1515 (D.D.C. 1984); *Air Prods. & Chems., Inc. v. Hartford Accident & Indem. Co.*, 707 F. Supp. 762 (E.D. Pa. 1989)). *Owens-Illinois* held that "all personal

held that a finding of a single occurrence in cases of intrinsically harmful products was "correct," and that "continuous and repeated production of this intrinsically harmful product was the occurrence."[65] Thus, *Dow Chemical I* also supports a holding that liability from harm allegedly arising out of an intrinsically harmful product, including products containing asbestos, arises out of a single "occurrence" under policy language like that at issue in this case.

Both Michigan and Delaware law recognize that the continuous or repeated sale of intrinsically harmful products constitutes a single occurrence. There is no conflict of law, and this Court should affirm the Superior Court's holding that all of GM's automotive friction asbestos products liability claims arise out of a single occurrence.

---

injury arising out of the asbestos contained in O-I's Kaylo products" arose from a single "occurrence," 597 F. Supp. at 1528; *Air Products* held that the "continuing sale of the plaintiff's asbestos-containing products" constituted a single "occurrence." 707 F. Supp. at 773. Those courts each ruled in favor of a single occurrence as a matter of law on summary judgment, and rejected insurance company arguments that there were disputes of material fact or the need for discovery about the details of the different products, exposures, and injuries involved, or the intent and purpose of the parties to the insurance policies. *See* 707 F. Supp. at 773; 597 F. Supp. at 1526.

[65] 727 F. Supp. at 1531.

c. The Cases OneBeacon and Continental Rely on Do Not Support a Finding of Multiple Occurrences Here.

The Michigan authority OneBeacon relies on in its number of occurrences argument does not support a finding of multiple occurrences under the policy language and facts here. In *Dow Corning Corp. v. Continental Casualty Co.*, 1999 WL 33435067 (Mich. Ct. App. Oct. 12, 1999), the Michigan court held that each claimant alleging injury from breast implants manufactured by the policyholder constituted a separate occurrence.[66] But in *Dow Corning*, the "occurrence" definition contained language stating that "[a]ll such exposure to substantially the same general conditions *existing at or emanating from one premises location* shall be deemed one occurrence."[67] The court held that the different claimants' breast implants could not "reasonably be characterized" as conditions emanating from one premises location.[68] *Dow Corning* provides no basis for a finding of multiple occurrences under the policy language here, which contains no similar provisions, and the Superior Court was correct in distinguishing it.[69]

[66] 1999 WL 33435067, at *17.

[67] *Id.* (emphasis added).

[68] *Id.*

[69] *Motors Liquidation Co.*, 2017 WL 2495417, at *14–15.

OneBeacon also cites *Stryker Corp. v. National Union Fire Insurance Co. of Pittsburgh, Pa.*, in support of its multiple occurrence argument.[70] In *Stryker*, a Michigan federal court found that claims seeking damages for bodily injury caused by artificial knees were separate occurrences.[71] The artificial knees in *Stryker* caused bodily injury only if they were implanted more than five years after they were sterilized, after which the polyethylene knees began to lose strength if they remained in the open air.[72] In applying the "cause test," the court found that each implantation of an artificial knee that had been allowed to expire was an "occurrence" under the policy, because there was not "one continuous, uninterrupted cause of the implantation of expired products."[73]

By contrast, 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.[74] Unlike in *Stryker*, where the proximate cause of the underlying bodily injuries was

[70] 2004 U.S. Dist. LEXIS 32867 (W.D. Mich. Aug. 27, 2004).

[71] *Id.* at *12–13.

[72] *Id.* at *3.

[73] *Id.* at *12–13.

[74] *See Dow Chemical I*, 727 F. Supp. at 1530 ("if the continuous production and sale of an intrinsically harmful product results in similar kinds of injury . . . then all such injury . . . results from a common occurrence").

[redacted]

implanting an artificial knee that had been allowed to expire, the single proximate cause of the alleged bodily injuries in the underlying product claims against GM is the very act of making or distributing automotive friction products that contain asbestos. Thus, the Superior Court was correct to distinguish *Stryker* because it did not involve intrinsically harmful products.[75]

OneBeacon also misses that mark when it suggests that the Michigan Supreme Court decision in *Gelman* somehow requires a finding of multiple occurrences.[76] *Gelman* did not even address the number of occurrences. Instead, *Gelman* stands for the basic principle that "the terms of the contract [must be enforced] as written, interpreting the unambiguous language in its plain and easily understood sense."[77] This is exactly what the Superior Court did here, and was done in *Dow Chemical I* and *II*, as well as by this Court in *DuPont*. Each of these decisions examined the applicable "occurrence" policy language and found that similar injuries allegedly caused by the manufacture and sale of intrinsically harmful products constitutes a single occurrence under virtually identical policy language as that incorporated into OneBeacon and Continental's policies. The

[75] *Motors Liquidation Co.*, 2017 WL 2495417, at *15.

[76] *See, e.g.*, OB Br. at 53 (citing *Gelman Scis., Inc. v. Fid. & Cas. Co. of N.Y.*, 572 N.W.2d 617 (Mich. 1998)).

[77] 572 N.W.2d at 623 (A court "may not rewrite the plain and unambiguous language under the guise of interpretation").

[redacted]

Superior Court was correct that there is no conflict between Delaware and Michigan law on this issue, and that GM's liability for asbestos containing automotive friction products constitutes a single occurrence under the policy language.

3. There Is No Policy Language That Alters the Number of Occurrences Standard.

In the face of the contrary authority from Delaware and Michigan, OneBeacon and Continental argue that policy language outside the express "occurrence" definition supports a finding of multiple occurrences. The language they reference, however, provides no such support.

OneBeacon and Continental claim that the definition of "Products Hazard" incorporated into their policies supports their argument. Royal Policy RTP06000 extends coverage to, among other things, [redacted]

[redacted]

[redacted]

78 [redacted]

79 [redacted]

[redacted]

OneBeacon and Continental argue that this definition somehow implies that occurrence must arise after the Insured has relinquished possession of a product.[80] These clauses nowhere state that the *occurrence* must take place after possession of a product is relinquished; rather the [redacted][81] There is nothing in the Product Hazard definition that excludes coverage for injuries caused by an alleged manufacturing defect in a product, including alleged injuries from the manufacture and sale of an intrinsically harmful product.[82]

OneBeacon's reliance on Endorsement 17 is similarly misplaced. That endorsement refers to [redacted][83] OneBeacon would have

---

[80] OB Br. at 63.

[81] [redacted] By contrast, the two decisions Appellees cite addressed different product hazard definitions, which expressly stated that the "occurrence" (rather than the injury) must take place after the product has left the policyholder's possession. *See LuK Clutch Sys. LLC v. Century Indem. Co.*, 805 F. Supp. 2d 370, 378–79 (N.D. Ohio 2011); *London Mkt. Insurers v. Superior Ct.*, 53 Cal. Rptr. 3d 154, 165–66 (Cal. App. 2d 2007).

[82] The Michigan Supreme Court has cautioned that it is error to equate the exposure that constitutes the occurrence with the resulting injury, because "[t]he CGL policies expressly distinguish [those concepts]." *Gelman*, 572 N.W.2d at 624.

[83] [redacted]

[redacted]

the Court read this language as requiring the occurrence to be caused by a claimed defect or result from GM's operations.[84] Its plain language, however, speaks of the [redacted] Nothing in this endorsement is inconsistent with injuries arising from the manufacture and sale of an intrinsically harmful products constituting a single occurrence.[85]

The language in the notice clause requiring the policyholder to inform the insurance company of [redacted][86] also does not support OneBeacon's argument.[87] The policy covers many types of occurrences, from mass torts from allegedly intrinsically harmful products to individual accidents allegedly caused by other types of problems. The notice clause contemplates that [redacted] Similarly, the policy's grant of coverage for [redacted]

[84] OB Br. at 64.

[85] Moreover, on its face, the endorsement does not even purport to address all possible types of occurrences. *See* A525.

[86] [redacted]

[87] OneBeacon also italicizes a part of the notice clause containing a thirty-six month time limit for bringing suits, but has not appealed the Superior Court's ruling that this language does not apply to the third-party liability coverage at issue here. *See Motors Liquidation Co.*, 2017 WL 2495417, at *14.

[redacted]

[redacted][88] does not mean that *all* occurrences covered by the policy must be of the type where the policyholder is in a position to [redacted] Thus, none of the other policy language to which the insurers point supports their position here.

4. GM's Asbestos Automotive Friction Products Liability Arose out of a Single Cause.

OneBeacon and Continental assert that the Superior Court's single occurrence ruling should be overturned, on the grounds that the underlying asbestos 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."[89] Any such differences do not support a multiple occurrence finding here, when the overarching cause of all of the alleged injuries is the intrinsically harmful nature of the asbestos containing automotive friction products. As discussed above, similar arguments in favor of multiple occurrences were rejected in *Dow Corning II*, *DuPont*, and *Valley Forge*, when the alleged injuries in each case all stemmed from the allegedly intrinsically harmful nature of the products involved.[90]

---

[88] [redacted]

[89] OB Br. at 61.

[90] *See Dow Chemical II*, 814 F. Supp. at 618–19, 623; *DuPont*, 996 A.2d at 1257; *Valley Forge*, 2014 WL 1432524 at *10. The *Air Products* decision, which was

[redacted]

Here, the presence of asbestos in GM's automotive friction products[91] were alleged to render them intrinsically harmful. This is demonstrated both by the sample underlying complaints in the record,[92] and the undisputed testimony that [redacted][94] As such, any differences that may exist are no greater than the differences among the claims that nevertheless were held to be a single occurrence in *Dow Chemical II* and *DuPont*, and *Valley Forge*.

---

cited with approval in *Dow Chemical I*, similarly found a single occurrence despite insurance company arguments "that the claimants' alleged injuries resulted from exposure to a number of asbestos and welding products, that the claimants' exposure occurred under a variety of conditions, and that different claimants allege different injuries." 707 F. Supp. at 773.

[91] OneBeacon and Continental attempt to muddy the waters on this issue by referring to claims GM faced alleging exposure to other types of asbestos-containing products, including locomotive brakes, aviation and marine engines, boilers, burner, and ovens, as well as premises claims. OB Br. at 1, 13. The Superior Court's single occurrence ruling below, however, addressed only claims alleging exposure to GM's automotive friction products. *See, e.g.*, AR277.

[92] *See* A893–A910; A1121–A1156; A1157–A1177.

[93] [redacted]

[94] [redacted]

[redacted]

5. OneBeacon's Invocation of Extrinsic Evidence Does Not Alter the Number of Occurrences.

OneBeacon seeks to have this Court disregard the plain language of the standard "occurrence" definition in the policy, and the Michigan and Delaware case law construing that language, by arguing that the Court should look to purported evidence of "GM's [u]nderstanding" of its meaning.[95] OneBeacon's invitation for this Court to alter the plain meaning of unambiguous standard—form policy language should be rejected, particularly as the evidence OneBeacon points to does not even involve the OneBeacon and Continental policies.

a. Extrinsic Evidence Cannot Alter Unambiguous Policy Language.

Extrinsic evidence, including any purported course of performance between GM and Royal, cannot be used to alter the settled unambiguous meaning of the term "occurrence."[96] The Superior Court relied on "clear policy language" for its

[95] OB Br. at 60.

[96] The Superior Court held forum law applies to the admissibility of extrinsic evidence. *Motors Liquidation Co.*, 2013 WL 7095859, at *4. The result would be the same under Michigan law. *See, e.g.*, *Cont'l Cas. Co. v. Indian Head Indus., Inc.*, 666 Fed. Appx. 456, 459, 463–64 (6th Cir. 2016) ("*Indian Head*") (rejecting reliance on nine-year course of performance between policyholder and insurance company when policy language at issue was unambiguous); *City of Grosse Pointe Park v. Michigan Mun. Liab. & Prop. Pool*, 702 N.W.2d 106, 115–16 (Mich. 2005) (prior handling of similar claims by risk pool cannot override unambiguous pollution exclusion); *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997) ("Extrinsic evidence is not used to interpret contract

holding that similar injuries arising out of the manufacture and sale of an allegedly intrinsically harmful product arise out of a single occurrence.[97] Neither OneBeacon nor Continental have argued on appeal that the "occurrence" definition incorporated into their policies is either patently or latently ambiguous. To the contrary, each joined a brief below admitting that [redacted][98] When contract language at issue is unambiguous, a court cannot rely on extrinsic evidence to alter its meaning.[99]

---

language where that language is plain and clear on its face.") (internal quotations omitted).

[97] *Motors Liquidation Co.*, 2013 WL 7095859, at *3, 5.

[98] [redacted]

[99] *See, e.g.*, *TGINN Jets, L.L.C. v. Hampton Ridge Props., L.L.C.*, 2013 WL 4609208, at *5 (Mich. Ct. App. Aug. 29, 2013) (rejecting reliance on extrinsic evidence, including under theory of "latent ambiguity," when "Defendants have not argued, let alone shown, that the proposed amendment creates an ambiguity"); *Indian Head*, 666 Fed. Appx. at 463–64, 465 (where party has not asserted ambiguity, prior course of performance under insurance policy "is irrelevant no matter how inconsistent with the terms of the contract that performance may have been. . . . [Party's] practical construction argument is inconsequential as neither party argues that the terms of the policy are ambiguous."); *City of Grosse Pointe Park*, 702 N.W.2d at 115–18 (insurance company's prior conduct in paying sewage backup claims did not override unambiguous pollution exclusion under theories of latent ambiguity or estoppel): *Gerald L. Pollack & Assocs., Inc. v. Pollack*, 2015 WL 339715, at *6–7 (Mich. Ct. App. Jan. 27, 2015) (extrinsic evidence, including course of performance, cannot alter the clear and unambiguous

[redacted]

Other courts have also rejected the use of extrinsic evidence in similar situations, when the policy language is unambiguous. For example, a Pennsylvania federal court, in *Goodyear Tire & Rubber Co. v. Travelers Casualty & Surety Co.*, rejected the argument OneBeacon makes here.[100] In *Goodyear*, the court held that the policyholder's long-term course of conduct with the primary carrier in treating asbestos claims as separate occurrences did not alter the single occurrence result called for under the unambiguous language of the umbrella policies.[101] Both of the decisions relied on in *Dow Chemical I* for the proposition that injuries arising out of the manufacture and sale of an intrinsically harmful

---

language of the contract); *see also Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, 112 A.3d 878, 890 (Del. 2015) (rejecting application of latent ambiguity doctrine when requested by a party that had asserted the language in question was unambiguous).

[100] 2014 WL 7338717, at *17–18 (W.D. Pa. Dec. 22, 2014) (applying similar Ohio rules on extrinsic evidence, the court rejected insurer's argument that a course of conduct between the policyholder and the primary insurance company treating asbestos claims as separate occurrences could alter the clear "occurrence" language calling for a single occurrence as to the umbrella policies).

[101] *Id.* at *9–10 ("Even accepting these facts as true, there is no genuine issue of material fact as they are insufficient to overcome the clear and unambiguous language of the [policies]…. Because the [policies'] provisions in issue are clear and unambiguous, there is no place for the course of dealing evidence offered by Travelers, and the court must instead apply the terms as written, according to their plain and ordinary meaning.") (internal quotation omitted).

product arise out of a single occurrence[102] rejected insurance company arguments that those courts should examine the intent and purpose of the parties to the insurance policies before ruling on the number of occurrences.[103]

A Michigan appellate court rejected Royal's own reliance on some of the same course of performance that the insurance companies offer here—GM and Royal's years of claims-handling conduct under the occurrence-reported policies—as irrelevant to alter unambiguous language in the Royal policies.[104] The insurance companies here have even less basis to rely on that purported conduct, as they were not parties to any course of performance between GM and Royal.[105] *Nor do One Beacon and Continental provide any evidence that they were even aware of any such course of performance*—relying instead on communications about other

---

[102] 727 F. Supp. at 1529 (citing *Owens-Illinois*, 597 F. Supp. at 1526; and *Air Prods. & Chems., Inc.*, 707 F. Supp. at 773).

[103] *See* 727 F. Supp. at 1526; *Owens-Illinois*, 597 F. Supp. at 1526.

[104] *See Gen. Motors Corp. v. Royal & Sun Alliance Ins. Grp. PLC*, 2007 WL 1206830, at *4 (Mich. Ct. App. Apr. 24, 2007).

[105] *See, e.g.*, *Mine Safety Appliances Co. v. AIU Ins. Co.*, 2015 WL 5829461, at *7, 11 (Del. Super. Oct. 1, 2015) (holding that the course of conduct between a policyholder and an underlying insurance company was irrelevant to the application of the unambiguous language in an excess insurance policy, even if the excess language is identical to that in the underlying, and the course of conduct was "directly contradictory."); *Cont'l Cas. Co. v. Rapid-Am. Corp.*, 609 N.E.2d 506, 511 (N.Y. 1993) ("*Rapid-Am. Corp.*") (holding that a policyholder's prior pursuit of one insurance company for coverage under a particular trigger-of-coverage theory was irrelevant when offered as extrinsic evidence of the appropriate trigger under another insurance company's policy).

policies, sent to others years after the last OneBeacon or Continental policies were sold to GM.[106]

And even if it were admissible in the face of the insurance companies' position that the policy language is unambiguous, contested extrinsic evidence cannot be used to alter the policy language.[107] While OneBeacon points to arguments by GM in the Royal Litigation [redacted][108] and so cannot be the basis for judicial estoppel.[109] Moreover, in the Michigan Action, discovery revealed a document demonstrating that [redacted][110]

Finally, OneBeacon is wrong when it asserts that GM "always" advanced a multiple occurrence theory, and that only the Trust, which it describes as "a stranger to the policies," has argued for a single occurrence.[111] Well before the

---

[106] *See* OB Br. at 14–15.

[107] *See e.g.*, *Stryker Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 842 F.3d 422, 428 (6th Cir. 2016).

[108] [redacted]

[109] *See*, *e.g.*, *Motorola Inc. v. Ankor Tech., Inc.*, 958 A.2d 852, 859–60 (Del. 2008) (prior court must have accepted previous argument as a basis for its decision for judicial estoppel to apply).

[110] [redacted]

[111] OB Br. at 60.

[redacted]

creation of the Trust or the assignment of GM's insurance rights, GM provided notice and pressed its claims for coverage against [redacted] London, [redacted] whose policies cannot be reached under a theory that each asbestos claimant is a separate occurrence.[112] GM even settled with other excess carriers (certain Lloyd's of London syndicates) and thus received payments under a single occurrence theory.[113]

In addition, GM, which had been renamed "Motors Liquidation Company," was the original plaintiff in this action until the Trust was substituted for it.[114] GM's efforts in filing this action, and setting up the Trust and transferring to it the insurance rights at issue in order to "avoid abandonment" of those causes of action,[115] rebut any inference that GM believed it had no such claims against these excess insurance companies. The suggestion that GM never demonstrated an understanding that its asbestos liability could constitute a single occurrence reaching the excess layers at issue here simply is incorrect.

[112] AR164; AR236.

[113] AR236.

[114] A445–A446 (Trans. ID 41184615), A442–A443 (Trans. ID 41516082).

[115] *See Motors Liquidation Co.*, 2017 WL 2495417, at *3–4, 5–7.

[redacted]

b. Waiver Does Not Apply Here.

In an attempted end run around the rules against use of extrinsic evidence to alter unambiguous policy language, OneBeacon characterizes its argument as based on a theory of waiver.[116] This theory also must fail.

Contractual provisions are subject to waiver only when there is clear and convincing evidence of "a mutual intention of the parties to waive or modify the original contract," that is, "a party advancing amendment must establish that the parties mutually intended to modify the *particular* original contract."[117] Here, as discussed above, the extrinsic evidence is not sufficient to show a clear and convincing waiver as between GM and Royal. But even if it were, OneBeacon and Continental point to no evidence that there was any mutual intention between *them* and GM to modify GM's rights under the particular insurance policies sold by OneBeacon and Continental.

Similarly, Michigan law on course of performance requires a "prejudicial change of position in good-faith reliance on such performance," before it can be used to alter contractual obligation, because "the law also recognizes that a party

---

[116] OB Br. at 67–69.

[117] *Quality Prods. & Concepts Co. v. Nagel Precision, Inc.*, 666 N.W.2d 251, 257–58 (Mich. 2003) (emphasis original); *see also Cont'l Cas. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1229, 1232 (Del. Ch. 2000) (Delaware law similarly requires mutual assent and consideration to modify a contract by waiver from course of conduct).

may undertake a wrong interpretation of the words of a contract and the other party should never be permitted to profit by such mistake in the absence of an estoppel."[118] OneBeacon and Continental point to no evidence that they relied to their prejudice on any of GM and Royal's conduct in connection with the interpretation of the term "occurrence."

There is no basis to find a waiver by GM or the Trust of any rights under the OneBeacon and Continental policies.

6. OneBeacon's Arguments Were Rejected After Full Briefings Below.

Despite the three separate occasions in which summary judgment motions on the number of occurrences were briefed and argued below, in 2013, 2015,[119] and 2016, OneBeacon and Continental argue that the Superior Court's 2017 ruling did not give them a full opportunity to argue this issue.[120] These insurance companies argue that the Superior Court erred in applying law of the case to the standard for determining the number of occurrences in the 2017 Decision, based on a statement in a 2015 hearing that the Superior Court intended to allow a specific

[118] *Schroeder v. Terra Energy, Ltd.*, 565 N.W.2d 887, 895 (Mich. Ct. App. 1997).

[119] The 2015 briefing took place as a part of the Trust's cross-motion to Travelers' motion on trigger of coverage.

[120] OB Br. at 69–70.

motion on the topic before ruling.[121] The 2017 Decision applied the law of the case doctrine to the 2013 Decision's holding that under the plain language and applicable law, similar injuries arising from the manufacture and sale of an intrinsically harmful product arise from a single occurrence.[122] In the briefing leading up to the 2017 Decision, OneBeacon and Continental had the full opportunity to, and did, make their arguments that this plain language should be disregarded based on purported extrinsic evidence, as well as that the nature of the asbestos claims called for a different result.[123] The fact that the Superior Court rejected these arguments does not mean that OneBeacon and Continental were denied any opportunities.

And, for the reasons set forth above, the Superior Court's holdings in the 2013 and 2017 Decisions are correct: under the plain language of the policies, both Delaware and Michigan law hold that liability for similar injuries arising out of the manufacture and sale of intrinsically harmful products—such as GM's alleged liability for asbestos containing automotive friction products—arise out of

[121] *Id.*

[122] *See, e.g.*, *Motors Liquidation Co.*, 2017 WL 2495417, at *14–18; *and Motors Liquidation Co.*, 2013 WL 7095859, at *3.

[123] *See, e.g.*, B2507–B2587; B2629–B2667; B2706–B2743 (OneBeacon and Continental's 2016 briefing and argument on the number of occurrences).

[redacted]

a single occurrence. The Superior Court's rulings on the number of occurrences should be affirmed.

REPLY ARGUMENT ON APPEAL

I. THE SUPERIOR COURT ERRED AS A MATTER OF LAW IN IMPOSING EXTRA-CONTRACTUAL PRORATION.

A. Merits of the Argument

OneBeacon and Continental do not dispute that under the Michigan law they argue applies to the allocation issues, the "all sums" allocation method is applied when the policy language calls for it. And the policy language at issue here sets out the "all sums" method in a straightforward manner, and does not contain the language Michigan courts have interpreted as limiting coverage to a *pro rata* fraction of the sums the policyholder is legally obligated to pay. Rather, the policies at issue expressly extend coverage to all sums the policyholder is legally obligated to pay arising out of a continuing occurrence, as long as that occurrence causes some injury during the policy period.

In the face of this express language, OneBeacon and Continental's reliance on non-binding Michigan case law interpreting different policy language provides no support for limiting coverage to some *pro rata* fraction of the sums arising out of the occurrence. This Court should reverse the Superior Court's erroneous ruling limiting the coverage available under the OneBeacon and Continental policies through imposition of extra-contractual proration.

1. OneBeacon Has Not Shown a Conflict of Law as to the Allocation Language at Issue.

OneBeacon and Continental argue that the Superior Court's 2015 Decision held that the Trust was judicially estopped from arguing any law but Michigan's applies to the allocation issue.[124] But the 2015 Decision nowhere mentioned judicial estoppel as to choice of law. Moreover, on the issue as to which the Superior Court did find judicial estoppel, it was careful to specify that the judicial estoppel extended only to the Royal policies not the excess policies.[125]

As discussed below, however, the choice of law determination ultimately does not affect the result on the allocation issue here. It is undisputed that Delaware law would apply "all sums" allocation to the policy language at issue. Thus, to the extent that the lack of Michigan Supreme Court authority directly addressing allocation, and the split of authority among Michigan lower courts,[126] means that OneBeacon and Continental have not established a true conflict between Delaware and Michigan, "all sums" allocation applies.

If Michigan law does apply, the outcome is no different: as discussed below, even the Michigan authority relied on by OneBeacon and Continental holds

[124] OB Br. at 30–31.

[125] *See Motors Liquidation Co.*, 2015 WL 10376123, at *3.

[126] *Compare Dow Corning*, 1999 WL 3343567 (enforcing "all sums" allocation) *with Arco Indus. Corp. v. Am. Motorists Ins. Co.*, 594 N.W.2d 61 (Mich. App. 1998) (imposing proration), *aff'd by equal division*, 617 N.W.2d 330 (Mich. 2000).

that "all sums" allocation applies when the policy language at issue extends coverage to continuing occurrences. As the language incorporated into the policies at issue here extends coverage to all sums arising out of an occurrence that triggers coverage, without any *pro rata* reduction based on time on the risk, Michigan law requires "all sums" allocation here.

Indeed, OneBeacon and Continental cite no authority, from Michigan or anywhere else, imposing a *pro rata* limitation on coverage under a policy that expressly extends coverage to all sums arising out of a continuing occurrence like the policies here.

2. The Policy Language Extends Coverage to All Sums Arising out of a Continuing Occurrence.

a. RLA35 Promises Coverage for the Entire Continuing Occurrence.

The key question on the allocation issue is whether the language incorporated into the policies of the pre-1972 insurance company appellees, (namely, OneBeacon and Continental), extends coverage to a full occurrence, when that occurrence triggers coverage. OneBeacon and Continental admit that Michigan law upholds "all sums" allocation when the policy language supports it.[127] Thus, the dispute boils down to the question of whether the language

[127] OB Br. at 28 ("*Arco* and *Dow Corning* reach different results based on differing policy language.").

incorporated into the OneBeacon and Continental policies supports "all sums" allocation or calls for the imposition of proration.

As discussed below, there can be no question that the broad language incorporated into the OneBeacon and Continental policies extends coverage to the full occurrence, and contains no provision limiting that promise merely to some *pro rata* fraction of the occurrence. Under such language, even the Michigan authorities on which OneBeacon and Continental rely support "all sums" allocation.

(i) The Insuring Clause in RLA35 Extends Coverage to an Entire Continuing Occurrence.

The pre-1972 policies sold by OneBeacon follow form to the underlying Royal policy RLA35.[128] The language of RLA35 states that, once triggered, the policy covers "all sums" arising out of the full occurrence, with no language limiting that coverage to some *pro rata* fraction of the occurrence. Specifically, RLA35 expressly extends coverage to "all sums" that the policyholder becomes legally obligated to pay "arising out of an event or a continuous or repeated exposure to conditions which result in Personal Injury or Property Damage . . . which occurs during the period of this Insurance."[129] Under this language, if an

[128] *See* A624; A637; A641.

[129] A592–A593.

event or continuous or repeated exposure to conditions (that is, an "occurrence"[130]) results in injury or damage during the policy period, then the coverage promised by the insurance company is to pay "all sums" that the policyholder is legally obligated to pay "arising out of" that occurrence.

Neither the "occurrence," nor the sums the policyholder is legally obligated to pay arising out of that occurrence, is limited to a single policy period. To the contrary, the language used in the insuring agreement speaks of "continuous or repeated exposure to conditions," which can take place over a long period of time.[131] As discussed in the previous Section, the "occurrence" in this case is a continuing one, because "similar injuries caused by the continuous manufacture and sale of intrinsically harmful products, such as asbestos, is a single occurrence."[132]

---

[130] Under the definition followed form to from the underlying policy, "occurrence" means "an event, or continuous or repeated exposure to conditions, which unexpectedly cause bodily injury or injury to or destruction of property." A450.

[131] *See, e.g.*, *Dow Corning*, 1999 WL 3343567, at *7 ("[T]he definition of occurrence in this case expressly includes 'a continuous or repeated exposure' . . . . [T]his language contemplates an 'occurrence' taking place over a period of time, i.e., beginning before or ending after the policy period.").

[132] *Motors Liquidation Co.*, 2013 WL 7095859, at *3; *see also Motors Liquidation Co.*, 2017 WL 2495417, at *14–18.

[redacted]

While the RLA35 policy language requires that an occurrence result in personal injury "which occurs during the period of this Insurance,"[133] it nowhere limits the *coverage* it provides to a reduced amount based on the fraction of the injury that takes place during the policy period. To the contrary, the language requiring the occurrence to result in injury during the policy period is coupled with the language that then extends coverage to "all sums" the policyholder is legally obligated to pay "arising out of" that occurrence.[134] Thus, the repeated assertions of OneBeacon and Continental that the policy language limits *coverage* to injury taking place during the policy period[135] mischaracterize that language. Under a straightforward reading of RLA35, injury during the policy period determines whether the policy responds to the occurrence causing that injury, but then the remaining language sets out the *coverage* promised for such an occurrence. That language extends the coverage to all sums that the policyholder becomes legally obligated to pay arising out of the occurrence.

---

[133] A592–A593.

[134] *Id.*

[135] *See* OB Br. at 33 (policy language "extends *coverage* only for injury which occurs during the policy period"), 34 (policy "confin[es] *coverage* to personal injury which occurs during the policy period"), 38 ("the policies limit *coverage* to injury taking place during the policy period") (emphasis added in all).

[redacted]

The breadth of the promised coverage is emphasized by the wording of RLA35's Insuring Clause. The express reference to "continuous or repeated exposure to conditions" emphasizes that coverage extends to sums arising out of continuing occurrences, as well as discrete occurrences. The phrase "arising out of" in the context of an insurance policy has "a broad, comprehensive meaning synonymous with the phrase 'grows out of,' 'originating from,' 'having its origin in' or 'flowing from.'"[136] The phrase "all sums" further emphasizes the breadth of coverage. "'There is no broader classification than the word 'all.' In its ordinary and natural meaning, the word 'all' leaves no room for exceptions.'"[137] As a result, RLA35 expressly promises that once it is triggered to respond by some injury during the policy period, the policy provides broad coverage, with no exception, of all sums that flow from or grow out of an entire continuing occurrence.

---

[136] *Empire Fire & Marine Ins. Co. v. Minuteman Int'l, Inc.*, 2008 WL 142424, at *2 (Mich. Ct. App. Jan. 15, 2008) (quoting *People v. Warren*, 615 N.W.2d 691, 697 (Mich. 2000)).

[137] *People v. Monaco*, 710 N.W.2d 46, 50 (Mich. 2006) (quotation omitted). This broad reading of the term "all" has been applied in numerous Michigan cases to preclude exceptions where it appears in many kinds of contracts. *See, e.g.*, *Berger Realty Grp., Inc. v. Royal Ins. Co. of Am.*, 2002 WL 31380855, at *1 (Mich. Ct. App. Oct. 22, 2002) (addressing phrase "all claims" in a settlement agreement and holding "there is no broader classification than the word 'all;' the word leaves no room for any exceptions."); *Paquin v. Harnischfeger Corp.*, 317 N.W.2d 279, 281, 282 (Mich. Ct. App. 1982) (broad phrase "all claims, loss, expense, damage and liability" in indemnification contract "leaves no room for exceptions") (quotation omitted); *TGINN Jets*, 2013 WL 4609208, at *14 (broad phrase "all invoices" in agreement "leaves no room for exceptions.") (quotation omitted).

[redacted]

OneBeacon and Continental incorrectly argue that the Trust's reading of this language takes these words out of context.[138] To the contrary, these words and phrases—"all sums," "arising out of," and "continuous or repeated exposure to conditions"—all work together to emphasize the breadth of the coverage promised. The injury during the policy period triggers the policy to respond to an occurrence, including continuous or repeated exposure to conditions. The coverage provided for that occurrence is then defined broadly as "all sums" that the policyholder it legally obligated to pay "arising out of" that occurrence. By placing these broad terms in conjunction with each other, RLA35's insuring clause has them work together to emphasize that the coverage applies to all sums arising out of an entire continuing occurrence, as long as that occurrence resulted in some injury during the policy period. There is no language that then operates to reduce that broad coverage to merely a fraction of the sums arising out of the occurrence, based on the portion of the injury during the policy period.

In fact, if one were called upon to draft an insuring clause setting out "all sums" allocation on a blank sheet of paper, it is hard to imagine a clearer way of doing so than the wording of RLA35's insuring clause, promising to pay "all sums" the policyholder becomes legally obligated to pay "arising out of" the

[138] OB Br. at 38–39.

[redacted]

"continuous or repeated exposure to conditions," that is, the covered occurrence.[139] For example, then-Vice Chancellor Strine summarized the "all sums" allocation position, which he ultimately adopted, in nearly identical terms, stating that "Under the interpretation that [the policyholders] favor, the commitment in the Excess Policies to pay 'all sums' means that *a policy is responsible for all liability that flowed from a covered occurrence*."[140] There is no basis in this language to infer any intent to prorate.

(ii) The Trust Has Met the Burden of Showing Coverage Under RLA35.

OneBeacon argues that it is a policyholder's burden to establish the coverage under an insuring clause.[141] While this is a correct statement of the law, it does not assist OneBeacon here. As described above, the language of the RLA35 insuring agreement requires only that the policyholder show that *some* injury took place during the policy period as a result of an occurrence. Once that is shown, RLA35 expressly extends coverage to all sums the policyholder is legally obligated to pay, arising out of the entire continuing occurrence that caused that injury.

---

[139] A592.

[140] *Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76, 111 (Del. Ch. 2009) (emphasis added).

[141] OB Br. at 42.

[redacted]

If OneBeacon had intended to reduce that broad promised coverage to some *pro rata* fraction of the sums arising out of the occurrence, it then bore the burden of doing so with clear and express language. While policyholders bear the initial burden of proving that a loss falls within a policy's insuring agreement, the insurance company bears the burden of proving that any limitation they assert negates coverage:

> First, it must be determined whether the policy provides coverage to the insured, and second, the court must ascertain whether that coverage is negated by an exclusion. While it is the insured's burden to establish that his claim falls within the terms of the policy, the insurer should bear the burden of proving an absence of coverage.[142]

To be effective, any such limitations must be express and clear: "[i]t is appropriate for the insurer to bear the burden of any confusion which arises due to its failure to clearly state limitations of the coverage purchased."[143] The Michigan Supreme Court has held that a *pro rata* clause is a restriction on coverage, "which purports to *limit* the insurer's liability to a proportionate percentage of all insurance

[142] *Hunt v. Drielick*, 852 N.W.2d 562, 565 (Mich. 2014) (internal quotations omitted).

[143] *Auto Club Ins. Ass'n v. DeLaGarza*, 444 N.W.2d 803, 806 (Mich. 1989); *accord Hunt*, 852 N.W.2d at 565–66 (Mich. 2014) ("exclusions to the general liability in a policy of insurance are to be strictly construed against the insurer").

[redacted]

covering the event."[144] Thus, an insurer's attempt at proration must be express and clear, particularly to create an exception to the broad coverage promised.

Here, there is simply no language that limits the broad promise to pay all sums the policyholder becomes legally obligated to pay arising out of a continuing occurrence, if that occurrence has triggered coverage by resulting in some bodily injury during the policy period. OneBeacon has not met its burden to establish that the policy language permits proration.

b. The Language in RTP06000 Does Not Limit the Broad Coverage in RLA35.

OneBeacon argues that the insuring clause it incorporates from underlying Royal RLA35 is limited by language found in Royal policy no. RTP06000, which sits beneath RLA35.[145] Specifically, OneBeacon relies on language stating that RTP06000 is triggered by "occurrences during the policy period."[146]

RLA35, however, follows form to RTP06000 "except as otherwise provided" in RLA35 itself.[147] RLA35 already provides that coverage extends to all sums the policyholder is legally obligated to pay arising out of an occurrence, if

[144] *St. Paul Fire & Marine Ins. Co. v. Am. Home Assurance Co.*, 514 N.W.2d 113, 115 (Mich. 1994) (emphasis added).

[145] OB Br. at 35–36.

[146] OB Br. at 35 (quoting A449).

[147] A593.

[redacted]

that occurrence results in injury during the policy period, and so any contrary limitation in RTP06000 is not incorporated into RLA35.[148]

Even if the language of RTP06000 were applicable to the OneBeacon policies, that language does not even purport to limit coverage to injury during the policy period, and so does not support the proration OneBeacon seeks here. Rather, RTP06000 states that it is triggered by "occurrences during the policy period," which Michigan case law holds supports the "all sums" result and not proration.[149] The continuing occurrence—the manufacture and sale of intrinsically harmful asbestos-containing automotive friction products—was taking place during the policy period of the OneBeacon coverage. Therefore, any additional requirement found in RTP06000 is met here. Nothing in RTP06000's language states that the coverage for a continuing occurrence is reduced to only that fraction

[148] *See, e.g.*, *Stryker Corp. v. XL Ins. Am., Inc.*, 2013 WL 3276408, at *4 (W.D. Mich. June 27, 2013) (holding that a follow form excess policy does not follow the provisions of the underlying insurance that are inconsistent with the provisions of the excess policy); *In re Viking Pump*, 148 A.3d 633, 658–79 (Del. 2016) (reviewing various clauses in numerous different excess policies to determine which follow form to underlying umbrella's defense obligations, and which contain their own provisions on defense costs).

[149] *See Cont'l Cas. Co. v. Indian Head Indus., Inc.*, 2010 WL 188083, at *6 (E.D. Mich. Jan. 15, 2010) (describing how policy language in which "during the policy period" modifies the "occurrence" and not the injury supports "all sums," in contrast to the language before it).

[redacted]

of the sums from the occurrence attributable to the particular portion of the injury taking place during a given policy period.[150]

c. Continental's Policy Language Also Extends Coverage to the Entire Continuing Occurrence.

The language incorporated into the Continental policies from the underlying coverage sold by Home Insurance Company similarly supports "all sums" allocation here. The Home policy provides coverage "[a]s respects accidents or occurrences, whichever is applicable, taking place during the period of the Policy."[151] Thus, like the language from RTP06000 discussed immediately above, the Home policy language extends coverage to occurrences (which include long-term continuous or repeated exposures) taking place during the policy period, without any language suggesting the policy covers *only* that fraction of the occurrence that takes place during the policy period. Michigan law recognizes that similar policy language supports "all sums" allocation.[152]

---

[150] In addition, RTP06000 includes as covered "damages" for bodily injury "death at any time resulting therefrom," A448, which also has been held to demonstrate an intent inconsistent with proration. *See Cannon Elec., Inc. v. ACE Prop. & Cas. Co.*, No. BC290354, Statement of Decision at 39–40 (Cal. Sup. Ct. Aug. 17, 2017) (A1673–A1674).

[151] A629.

[152] *See Indian Head*, 2010 WL 188083, at *6 (describing how policy language in which "during the policy period" is linked to the "occurrence" and not the injury supports "all sums").

[redacted]

The continuing occurrence—the manufacture and sale of intrinsically harmful asbestos-containing automotive friction products—was taking place during the policy period of the Continental coverage. Therefore, the language incorporated by Continental from the Home policy responds. Nothing in the Home language then requires that coverage for a continuing occurrence be reduced to only that fraction of the sums from the occurrence attributable to the particular injury taking place during a given policy period.

OneBeacon and Continental argue that the language in the Home policy and RTP06000 stating that the occurrence must be taking place during the policy period implies that the injury resulting from that occurrence also is limited to that taking place during the policy period.[153] This is contrary to the Michigan Supreme Court's admonition that it is erroneous to equate the exposure that constitutes the occurrence with the resulting injury, when "[t]he CGL policies expressly distinguish [those concepts]."[154]

[153] OB Br. at 35–37.

[154] *Gelman*, 572 N.W.2d at 624 (quotations omitted).

3. Michigan Authority Supports "All Sums" Allocation Here, and Not Proration.

a. The Proration Cases OneBeacon and Continental Cite Address Different Policy Language.

OneBeacon and Continental admit that Michigan law supports "all sums" allocation when the policy language supports that method, pointing to the difference in language addressed in the proration decision in *Arco* and the "all sums" decision in *Dow Corning*: "[T]here is no split of authority. Rather, *Arco* and *Dow Corning* reach different results based on differing policy language."[155] Indeed, their string cite of Michigan cases imposing proration after *Dow Corning* is filled with decisions that recognize that *Dow Corning* was properly decided, based on the policy language it addressed extending coverage to continuing occurrences.[156] Thus, this Michigan authority supports the Trust's position here,

[155] OB Br. at 28.

[156] *See Indian Head*, 666 Fed. Appx. at 458–59, 465–66 (basing its proration ruling on policy language covering "all sums which [the insured] shall become legally obligated to pay as damages because of . . . bodily injury," with "bodily injury" defined as "injury, sickness or disease sustained by any person which occurred 'during the policy period,'" and distinguishing *Dow Corning* based on its different language, including "express coverage of injuries that continued after the end of the policy period."), *affirming* 2010 WL 188083, at *6 ("The Dow Corning policy expressly addressed injuries that extended outside the policy period."); *Decker Mfg. Corp. v. Travelers Indem. Co.*, 2015 WL 438229, at *14 (W.D. Mich. Feb. 3, 2015) ("More importantly, the policy at issue in *Dow Corning* specifically provided that the Insurer would continue to provide coverage if an injury continued beyond the time of termination of the policy."); *City of Sterling Heights v. United Nat'l Ins. Co.*, 2007 WL 172529, at *5 (E.D. Mich. Jan. 19, 2007) (holding that the

that "all sums" allocation applies when the policy language states that it will cover all sums arising out of a continuing occurrence.

The Michigan proration authority on which OneBeacon and Continental rely does not track the language of RLA35, which provides coverage for all sums arising out of an occurrence, as long as some injury takes place during the policy period. Rather, the Michigan *pro rata* case law all addressed language in which the insurance company promised to pay "all sums" the policyholder becomes legally obligated to pay "because of Bodily Injury . . . that takes place during the Policy Period."[157] The prorating courts hold that this language limits coverage to just the sums that are "because of" the fraction of the injury that takes place during the policy period.[158] That is, rather than extending coverage to the entire

---

language before it was "consistent with that found in *Arco Industries* and not that found in *Dow Corning* . . . . [The] policies are not ambiguous and require coverage for liability resulting from bodily injury that occurred during the policy period."), *aff'd in part and rev'd in part*, 319 Fed. Appx. 357 (6th Cir. 2009); *Stryker Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2005 WL 1610663, at *1 (W.D. Mich. July 1, 2005) (*Dow Corning* court "relied on a clause mandating that the insurer would continue to provide coverage if an injury continued beyond the time of termination of the policy.").

[157] *See Stryker*, 2005 WL 1610663, at *4.

[158] *See, e.g., id.* at *7 (such language "requires coverage for liability resulting from a bodily injury during the policy period."); *see also Arco*, 594 N.W.2d at 69 (accord).

occurrence as under the RLA35 language, these courts hold that this language ties the "all sums" directly to the injury during the policy period.

By contrast, while RLA35 requires that there be some injury during the policy period to trigger coverage, it then provides coverage for all sums the policyholder is legally obligated to pay arising out of the entire continuing occurrence that resulted in that injury, rather than only to the sums the policyholder is obligated to pay because of the injury during the policy period.

OneBeacon and Continental's own chart of language addressed in the Michigan *pro rata* case law vividly demonstrates this difference in language.[159] Each of the cases in the *Arco* line provides coverage only for sums the policyholder becomes legally obligated to pay "because of" bodily injury or property damage.[160] In each, the bodily injury or property damage is then limited to that which takes place during the policy period.[161]

---

[159] OB Br. at 45–47 (quoting *Arco*, 594 N.W.2d at 64; *Stryker*, 2005 U.S. Dist. LEXIS 13113, at *3; *Indian Head*, 666 F. App'x at 458–59; *Decker Mfg. Corp. v. Travelers Indem. Co.*, 2015 U.S. Dist. LEXIS 12169, at *26–27 (W.D. Mich. Feb. 3, 2015); *Wolverine World Wide, Inc. v. Liberty Mut. Ins. Co.*, 2007 Mich. App. LEXIS 657, at *6 (Mich. Ct. App. Mar. 8, 2007)). Moreover, the same authority recognizes that Michigan law will enforce "all sums" allocation where the policy language calls for it. *See Stryker*, 2005 WL 1610663, at *7; *Indian Head*, 666 F. App'x at 465–66; *Decker*, 2015 WL 438229, at *14.

[160] *Id.*

[161] *Id.*

OneBeacon and Continental identify no cases from Michigan that imposed proration under policy language, like that in RLA35, that expressly provides coverage for all sums the policyholder becomes legally obligated to pay arising out of an occurrence. Nor do they cite any Michigan cases imposing proration under policy language, like that in the Home policy, that extends coverage to occurrences taking place during the policy period, without any language limiting the coverage to a fraction of the occurrence.

And these differences in policy language are not meaningless or inconsequential. For example, then-Resident Judge Vaughn relied on this very distinction in rejecting a policyholder's argument for a particularly broad version of "all sums" allocation in a case involving language like that found in the *Arco* line.[162] Judge Vaughn expressly distinguished between the breadth of coverage under policy language agreeing to pay all sums for liability arising out of an occurrence, and the *Arco*-like language before him that agreed only to pay "all sums" due to property damage during the policy period:

> Thus, [under the policies at issue] it is not coverage for "all sums" for liability for damages caused by or arising out of an occurrence. It is coverage for "all sums" for liability for damages due to property damage which

[162] *See E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 879 A.2d 929, 940 (Del. Super. 2004).

> occurs during the policy year, caused by or arising out of an occurrence.[163]

Here, where the policies *do* incorporate the language that Judge Vaughn found to provide the broader coverage, allocation is not controlled by a line of authority addressing the narrower language. Rather, this language, like that in *Dow Corning*, requires that the insurer "pay damage arising out of an occurrence that is continuing at the time of termination of the policy,"[164] and so even the Michigan proration authority OneBeacon and Continental cite would support "all sums" allocation here. Where, as here, policy language "cannot be reconciled with the pro rata method of allocation,"[165] is inconsistent with "the very premise upon which the imposition of pro rata allocation rests,"[166] or "demonstrate[s] an intention to provide indemnification for ongoing losses that arose before and continued during the policy term,"[167] then there is no basis to limit coverage to some *pro rata* fraction. The Superior Court erred in relying on the *Arco* line of

---

[163] *Id.*

[164] *Century Indem. Co. v. Aero-Motive Co.*, 318 F. Supp. 2d 530, 545 (W.D. Mich. 2003) ("*Aero-Motive*").

[165] *Viking Pump*, 2 A.3d at 323.

[166] *In re Viking Pump*, 52 N.E.3d 1144, 1155 (N.Y. 2016).

[167] *Cannon*, Statement of Decision at 39–40 (A1673–A1674).

authority to limit coverage by proration under the very different language at issue here.[168]

b. The Policy Language Here Sets out "All Sums" Allocation at Least as Clearly as That in *Dow Corning*.

OneBeacon and Continental argue that the policies at issue here do not contain the precise language as that found to support "all sums" allocation in *Dow Corning*, *Viking Pump*, and *Cannon*.[169] Given these Appellees' concession that Michigan law supports "all sums" allocation when the policy language calls for it,[170] the relevant question is whether the policy language *here* supports "all sums" allocation. As discussed above, with its extension of coverage to "all sums" arising out of the occurrence, if that occurrence results in some injury during the policy period, RLA35's insuring clause is "a provision providing that coverage would continue for damages arising out of an occurrence that continued beyond the policy period,"[171] which Michigan recognizes calls for "all sums" allocation.

Dow Corning's version of the non-cumulation clause is certainly not the only policy language that can support "all sums" allocation. *Viking Pump*, for

---

[168] *See Motors Liquidation Co.*, 2017 WL 2495417, at *19–20.

[169] *See* OB Br. at 42–45, 48–50.

[170] OB Br. at 28.

[171] *See, e.g.*, *Stryker*, 2005 WL 1610663, at *6.

example, held that two different non-cumulation clauses supported "all sums" allocation, one of which did not contain the specific paragraph found in *Dow Corning* addressing an occurrence continuing after the end of the policy period.[172] Both versions of the clause were nevertheless held to be inconsistent with an intent to prorate, because each contemplated the possibility of the same injury triggering multiple consecutive policies.[173] Similarly, the *Cannon* court followed *Viking Pump* even for a policy that contained no non-cumulation clause at all, because it held that defining "damages" to include "death at any time" demonstrated an intent "to provide indemnification for ongoing losses that arose before and continued during the policy term."[174]

Here, the language of RLA35 is similarly inconsistent with any intent to prorate,[175] but instead expressly extends coverage to "all sums" arising out of a

[172] *Cannon*, Statement of Decision at 39–40 (A1673–A1674); *In re Viking Pump*, 52 N.E.3d at 1147–48; *Viking Pump*, 2 A.3d at 121.

[173] *See In re Viking Pump*, 52 N.E.2d at 1153–54; *Viking Pump*, 2 A.3d at 123.

[174] *Cannon*, Statement of Decision at 39–40 (A1673–A1674).

[175] Indeed, when RLA35 was drafted and sold in the 1960s, courts had not yet begun to impose proration under general liability policies for liability for long-term injuries. *See, e.g.*, Jeffrey W. Stempel, *Domtar Baby: Misplaced Notions of Equitable Apportionment Create a Thicket of Potential Unfairness for Insurance Policyholders*, *25* Wm. Mitchell L. Rev. 769, 827 (1999) ("[T]here is literally no pre-1980s case law supporting" proration) (AR62).

continuing occurrence. The Superior Court's ruling imposing proration should be reversed.

c. Michigan Supreme Court Authority Supports "All Sums" Allocation.

While OneBeacon and Continental argue that the Michigan Supreme Court's decision in *Gelman* supports proration, that decision, and other Michigan Supreme Court authority, supports "all sums" allocation here. The *Gelman* court 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."[176] Thus, there can be no inexorable "Michigan Rule" mandating proration, when the policy contains language setting out a different scope of coverage.

OneBeacon and Continental suggest that the *Gelman* court's reference to "fairly allocate[ing] the risk" once the trigger of coverage has been determined implies an endorsement of proration,[177] but they omit that *Gelman* expressly stated it was not deciding allocation, and cited both *pro rata* and "all sums" authority as

[176] *Gelman*, 572 N.W.2d at 622, 623.

[177] OB Br. at 29–30.

examples of potential allocation methods[178]—demonstrating that the Michigan Supreme Court certainly did not hold that *pro rata* was inexorably compelled over "all sums" by the "injury-in-fact" trigger of coverage it was adopting.[179]

Nor does *Gelman*'s holding that standard general liability policies are triggered by injury-in-fact during the policy period mandate *pro rata* allocation. The injury that triggers a policy to respond and the scope of coverage the policy provides once it is triggered are two different concepts. This is expressly demonstrated by the language of RLA35: that policy promises to pay "all sums which the Insured shall be obligated to pay by reason of the liability . . . imposed upon the Insured by law arising out of an event or continuous or repeated exposure to conditions which results in Personal Injury or Property Damage as defined in the Underlying Insurance . . . which occurs during the period of this Insurance."[180] Under this language, for the policy to be triggered to respond to a "continuous or

---

[178] *See Gelman*, 572 N.W.2d at 625 (stating "we do not decide the best method of allocation today" and noting that "other courts have utilized various proration methods and joint and several liability to allocate liability.") (citing *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 635 F.2d 1212, 1224–25 (6th Cir. 1980) (imposing proration), *and Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981) (enforcing "all sums" language)).

[179] The Michigan Supreme Court's affirmation of *Arco* by equal division has no precedential value outside that specific case, even if it had addressed the same language. *See, e.g., Matter of Godoshian's Estate*, 312 N.W.2d 209, 210 (Mich. App. 1981).

[180] A592–A593.

repeated exposure to conditions" (that is, an occurrence), the occurrence must indeed result in injury during the policy period. This is the trigger of coverage, described as an "injury-in-fact" trigger under Michigan law.[181] Once triggered by that injury, however, the policy then sets out a broad promise extending coverage to all sums the policyholder is legally obligated to pay arising out of the occurrence that caused that injury, and not merely for that part of the injury taking place during the policy period.

OneBeacon and Continental's citation to *Arco* for the proposition that *pro rata* allocation is a "logical corollary" of the injury-in-fact trigger is misplaced here.[182] As discussed above, *Arco* and the other Michigan *pro rata* case law addressed different language, which ties the "all sums" to the injury during the policy period. Here, where the insuring clause extends coverage to the entire occurrence, *Arco*'s "corollary" must give way to the express language of the policies spelling out the breadth of coverage.[183] And there is certainly no basis to rely on any purported corollary from an injury-in-fact trigger to construe the Home policy language incorporated into the Continental policy: that language sets out a

---

[181] *Gelman*, 572 N.W.2d at 627.

[182] OB Br. at 41 (quoting *Arco*, 594 N.W.2d at 69).

[183] "While 'time-on-the-risk' allocation may have been a 'logical corollary' to the language at issue in *Arco*, it would be an illogical corollary here." *Dow Corning*, 1999 WL 33435067, at *8.

trigger of an occurrence taking place during the policy period, rather than injury-in-fact during the policy period.[184]

Under Michigan law, if contract language is clear on a certain point, a court need not, and may not, resort to "logical corollaries" or other types of inferences to override that language.[185] Here, the policy language is clear that the scope of coverage for a triggered occurrence extends to all sums the policyholder is legally obligated to pay arising out of that occurrence. There is no warrant for a court to indulge in any inferences about the scope of coverage that would contradict or reduce that express promise.

Moreover, *Dow Corning* applied "all sums" allocation under Michigan's injury-in-fact trigger.[186] And this Court repeatedly has applied "all sums"

---

[184] A629 (providing coverage "[a]s respects accidents or occurrences, whichever is applicable, taking place during the period of the Policy.").

[185] Indeed, if the language of the entire contract is clear and unambiguous, there is no room for construction by the courts, and in such case, the language must be held to express the intention of the parties and the court need not search for meanings nor indulge in inferences as to the intention of the parties.

DeVries v. Brydges, 225 N.W.2d 195, 198 (Mich. App. 1974); *see also Gelman*, 572 N.W.2d at 623 ("[W]e may not rewrite the plain and unambiguous language under the guise of interpretation").

[186] *See Dow Corning*, 1999 WL 33435067, at *4.

[redacted]

allocation along with an injury-in-fact trigger.[187] There is nothing in the injury-in-fact trigger that precludes "all sums" allocation, particularly under the language at issue here.[188]

Thus, nothing in *Gelman* supports the imposition of proration in this case. Rather, the Michigan Supreme Court's holding that the policy language controls requires the enforcement of the express promise of coverage for an entire continuing occurrence, as long as it causes some harm during the policy period. In addition, the Michigan Supreme Court has adopted the same general principles of insurance policy construction that this Court in *Hercules, Inc. v. AIU Insurance Co.* and *Monsanto Co. v. C.E. Heath Compensation & Liability Insurance Co.*, has held require "all sums" allocation, principles that also drove the "all sums" result in *Dow Corning*. These principles include:

- the language of the insurance policy controls[189];

---

[187] *See Hercules*, 784 A.2d at 493; *Monsanto Co. v. C.E. Heath Comp. & Liab. Ins. Co.*, 652 A.2d 30, 32 n.4 (Del. 1994); *see also Viking Pump*, 2 A.3d at 110, 118–27 (applying both the injury-in-fact trigger and "all sums" allocation under New York law).

[188] Thus, there is no basis for OneBeacon and Continental's assertion that there is inconsistency in the Trust taking the position that a given policy is both triggered by injury during the policy period and also calls for "all sums" allocation. *See* OB Br. at 33.

[189] *Hercules*, 784 A.2d at 489; *Monsanto*, 652 A.2d at 33; *Gelman*, 572 N.W.2d at 622–23, 625; *Dow Corning*, 1999 WL 33435067, at *8 ("we must base our analysis on the language of the policy").

- the determination of when a policy is triggered for a long-term loss does not control the scope of coverage of a policy once triggered[190];

- the word "all" in a contract is interpreted broadly and admits no exceptions.[191]

- any exclusions from coverage must be express and clear[192];

- a *pro rata* provision is a limitation on coverage[193];

- issues of equitable apportionment among insurance companies cannot be used to reduce the coverage sold to the policyholder[194]; and

---

[190] *See Monsanto*, 652 A.2d at 34–35; *Gelman*, 572 N.W.2d at 620 n.7; *Dow Corning*, 1999 WL 33435067, at *7 ("[T]he panel in *Arco* failed to distinguish between the trigger of coverage (injury during the policy period), and the scope of coverage.").

[191] *See Monsanto*, 652 A.2d at 35 n.5; *Monaco*, 710 N.W.2d at 50 ("There is no broader classification than the word 'all.' In its ordinary and natural meaning, the word 'all' leaves no room for exceptions.") (internal quotation marks and citation omitted).

[192] Coverage under a general liability policy "typically is broad, extending generally to any business liability not expressly excluded." *Gelman*, 572 N.W.2d at 620; *see also Monsanto*, 652 A.2d at 33; *Francis v. Scheper*, 40 N.W.2d 214, 217 (Mich. 1949); *Pawlicki v. Hollenbeck*, 229 N.W. 626, 627 (Mich. 1930); *see also Dow Corning*, 1999 WL 33435067, at *7 n.10 ("We note that defendants could easily have limited their coverage to injuries occurring within the policy period by simply so stating in the coverage section of their policies.").

[193] The Michigan Supreme Court has described such provisions as a "pro-rata clause, which purports to *limit* the insurer's liability to a proportionate percentage of all insurance covering the event." *St. Paul Fire & Marine*, 514 N.W.2d at 115 (emphasis added); *see also Monsanto*, 652 A.2d at 35; *Hercules*, 784 A.2d at 491 n.28; *Dow Corning*, 1999 WL 33435067, at *7 n.10 (describing proration as a "limit[]" to coverage).

- the application of an injury-in-fact trigger.[195]

Applying these principles, this Court must decide the allocation issue consistently with how it believes the Michigan Supreme Court would rule.[196] This Michigan Supreme Court precedent on insurance policy interpretation is consistent with the analysis in *Dow Corning*, as well as this Court's analysis in *Hercules* and *Monsanto*. This Court should hold that, if squarely faced with an allocation issue, the Michigan Supreme Court would stand by its precedents on insurance policy interpretation and require an "all sums" allocation, particularly when addressing policy language expressly recognizing full coverage for "all sums" arising out of a continuing occurrence.

---

[194] *See Monsanto*, 652 A.2d at 35 n.8; *see also Commercial Union Ins. Co. v. Med. Protective Co.*, 393 N.W.2d 479 (Mich. 1986) (upholding overpaying insurer's right to bring equitable claims against co-insurer); *Frankenmuth Mut. Ins. Co. v. Cont'l Ins. Co.*, 537 N.W.2d 879, 880 (Mich. 1995) (cautioning that attempts to resolve disputes among co-insurers "should not be applied to leave the insured without the coverage due.").

[195] *See Gelman*, 572 N.W.2d 617*; see also Hercules*, 784 A.2d at 493; *Monsanto*, 652 A.2d at 32 n.4; *Dow Corning*, 1999 WL 33435067, at *4.

[196] *See, e.g., Shook & Fletcher Asbestos Settlement Trust v. Safety Nat'l Cas. Corp.*, 909 A.2d 125, 128 (Del. 2006).

[redacted]

II. THE SUPERIOR COURT ERRED IN EXCUSING THE OBLIGATIONS OF THE POST-1971 EXCESS INSURANCE POLICIES.

The post-1971 excess insurers provide no support for the Superior Court's erroneous holding that "higher level excess insurance policies do not respond if the primary and first-level excess policies have not been triggered."[197] Travelers, in fact, has disavowed reliance on any such rule. And without that rule, the summary judgment granted to the post-1971 excess insurers must be reversed.

The excess policies sold by Munich Re, Allstate, Mt. McKinley, Granite State, and TIG (or their predecessors) all contain their own trigger language, which states that their coverage is triggered for occurrences happening (rather than reported) during the policy period. As a result, the coverage under these policies does not depend on the operation of the different trigger of coverage in the underlying Royal policies. Therefore, those Appellees' arguments about the operation of the Royal trigger, including any purported judicial estoppel, course of conduct, or other modification of the Royal trigger between GM and Royal has no bearing on the coverage set forth in these excess policies.

Those post-1971 excess policies in the 1977 policy year that *do* follow form to the underlying Royal trigger of "occurrences which are reported" during the

[197] *Motors Liquidation Co.*, 2015 WL 10376123, at *4.

policy period are triggered for the full asbestos products liability occurrence, because that occurrence was first reported to GM during the 1977 policy year. The arguments of the 1977 insurers as to GM and Royal's treatment of asbestos claims as separate occurrences, despite policy language to the contrary, does not alter this result. These excess policies follow form to the "terms" of the Royal coverage, and not any modification to that coverage by judicial estoppel or course of conduct. These insurance companies' reliance on such extrinsic evidence is particularly inappropriate because they admit the term "occurrence" is unambiguous.

Travelers' arguments also depend on the use of extrinsic evidence to argue for a different interpretation of the term "occurrence" than that called for by its plain language, and so Travelers' arguments also should be rejected.

This Court should reverse the Superior Court's ruling excusing the obligations of the post-1971 excess insurers.

A. Merits of the Argument

1. There Was No Finding of Judicial Estoppel as to the Excess Policies.

Munich Re spends the bulk of its brief arguing that the Trust is judicially estopped from making a claim against the post-1971 *Royal* policies. But, the Trust

is not making any claims against the post-1971 Royal policies, which were settled by GM years ago.[198]

The Superior Court expressly held that the litigation statements to which it applied judicial estoppel were made only as to the Royal coverage and not as to any of the excess policies at issue in this case.[199] None of the excess insurers has appealed that part of the Superior Court's decision or argued that there is any basis for judicial estoppel as to the excess coverage.

Thus, any finding that the Trust is judicially estopped from further pursuit of coverage under the long since released post-1971 Royal policies is irrelevant,[200] because the post-1971 insurers cannot establish that the inability of GM or the Trust to pursue the post-1971 Royal coverage excuses their own obligations under the separate excess policies they sold.

---

[198] AR236; *see also Motors Liquidation Co.*, 2017 WL 2495417, at *3.

[199] *See Motors Liquidation Co.*, 2015 WL 10376123, at *3.

[200] There is, in fact, no basis for judicial estoppel even as to the post-1971 Royal policies, as the courts addressing the forum battles between GM and Royal did not rely on any of GM's statements as to the post-1971 Royal coverage in rendering their decisions. *See* Trust's Opening Br. at 59–60. Munich Re's argument that the mere "reference[]" to GM's argument on this point meant the court relied on it, Munich Re Br. at 15, overlooks that it was not included among the court's rationale for its holding. For the reasons stated above, however, judicial estoppel as to the long-since settled underlying Royal policies has no bearing on the obligations of these excess insurance companies.

For the reasons discussed below, there is no basis for the post-1972 insurance companies to escape their obligations simply because GM chose not to pursue, and then released, the post-1972 *Royal* policies. For those excess policies that set out their own triggers of coverage, no judicial estoppel as to the trigger under the Royal policies controls, because the excess insurance companies are bound by their own express triggering language. For those excess policies that do follow or incorporate the Royal trigger of coverage, those policies expressly follow form to the *terms* of the Royal coverage, and not any purported modification through judicial estoppel, course of conduct, or otherwise.

2. The Express Triggering Language in the Excess Policies Controls Over Any Different Language Set out for the Royal Coverage.

a. The Underlying Trigger of Coverage Does Not Apply to an Excess Policy that Sets out Its Own Triggering Language.

The insurer appellees have not challenged the holding that GM's statements to which the Superior Court applied judicial estoppel were made only as to the Royal policies, and not to any of the excess policies here. Thus, the post-1971 excess carriers attempt to argue that the fate of the underlying Royal coverage somehow determines their own obligations under the separate excess insurance policies they sold GM. The Superior Court bridged this gap by imposing a rule that "barring exceptional circumstances or policy language not present here, higher

level excess insurance policies do not respond if the primary and first-level excess policies have not been triggered."[201]

As set forth in the Trust's Opening Brief, this holding is contrary to the way following form excess policies work, and the insurance companies have failed to put forth any authorities supporting the rule the Superior Court imposed. Rather, the obligations of the excess policies are controlled by their own terms, which can provide broader coverage than the underlying policies, and respond even if the underlying policies do not. As a result, the Superior Court's ruling excusing the post-1971 excess insurance companies from their coverage obligations should be reversed.

Travelers, in fact, expressly disavows reliance on any general rule that an excess policy does not respond if an underlying primary policies is not triggered.[202] Munich Re, by contrast, does invoke the Superior Court's rule,[203] but provides no authority in support of that rule in the few pages of its brief it spends on this

[201] *Motors Liquidation Co.*, 2015 WL 10376123, at *4.

[202] Travelers Br. at 35–38. Travelers instead argues that its policy language excuses its coverage when the Royal coverage does not respond; those arguments are addressed below.

[203] *See* Munich Re Br. at 40–44.

issue.[204] Rather, it merely attempts to distinguish the Trust's authority, but is unsuccessful at even that.

For example, Munich Re cites to a paragraph from the Appleman treatise as supporting its position.[205] While the treatise does state that "excess coverage is not triggered until the underlying primary policy limits are exhausted," and "[a] true excess policy does not broaden the underlying coverage of the primary policy,"[206] that same treatise section also expressly discusses excess policies, like those at issue here, that follow form to underlying coverage but add their own clauses: "Following form excess policies also commonly contain unique provisions that the underlying primary policy does not contain, such as additional exclusions *or additional coverage*."[207] In other words, when a following form excess policy adds its own clauses that override those found in the followed primary, then that policy is not a "true excess policy," but instead provides "additional coverage."

As discussed in the Trust's Opening Brief and below, many of the post-1971 policies at issue that follow form to the underlying Royal coverage expressly except situations where the excess policies have their own provisions addressing an

---

[204] *Id.*

[205] Munich Re Br. at 40.

[206] A1504 (Holmes' *Appleman on Insurance* § 145.1 (2d ed. 2011)).

[207] A1505 (Holmes' *Appleman on Insurance* § 145.1 (2d ed. 2011) (emphasis added)).

[redacted]

issue. As a result, those excess policies that set out their own triggers of coverage do not incorporate the Royal occurrence-reported trigger, and so are not bound by application of that trigger.

Courts applying Michigan law, as well as this Court, have enforced this type of follow form clause and held that an excess insurance policy does not incorporate the underlying language when the excess policy has its own language addressing an issue.[208] And when the excess policy provides broader coverage, such clauses result in the excess policy responding, even when the primary policy does not. For example, in *Smith v. Hughes Aircraft Co.*,[209] an exclusion in the underlying policies barred coverage for the pollution losses at issue.[210] Two excess policies, however, contained a narrower version of the exclusion, which did not bar coverage for pollution.[211] Like the excess policies here, these excess policies followed form to the underlying except as otherwise provided in the excess

[208] *See, e.g.*, *Stryker*, 2013 WL 3276408, at *4 (holding that a follow form excess policy does not follow the provisions of the underlying insurance that are inconsistent with the provisions of the excess policy); *In re Viking Pump, Inc.*, 148 A.3d at 658–79 (reviewing various clauses in numerous different excess policies to determine which follow form to underlying umbrella's defense obligations, and which contain their own provisions on defense costs).

[209] 783 F. Supp. 1222, 1229 (D. Ariz. 1991), *aff'd in part, rev'd on different issue*, 22 F.3d 1432 (9th Cir. 1993).

[210] *Id.* at 1228–29.

[211] *Id.* at 1229.

policies.[212] The court held that the excess policies covered the loss, despite the fact that the underlying coverage did not respond because it contained a broader exclusion.[213]

The court in *Erie Insurance Exchange v. J.M. Pereira & Sons, Inc.*,[214] recently reached a similar result. There, the policy at issue, referred to as the "BCL policy," followed form to underlying coverage "unless otherwise directed by [the BCL] insurance." The underlying policy limited coverage to "work in the State of Pennsylvania," and so did not respond to the accident at issue, which took place in New York.[215] The BCL policy, however, had a clause stating that it applied "anywhere in the world."[216] The court held that despite the fact that geographical limitation in underlying coverage meant that the underlying policy did not respond to this accident, the BCL policy had its own geographical scope language and so did not follow form to the underlying policy on that issue.[217]

As a result, the BCL policy provided coverage for the accident, even though its underlying policy did not respond. The court held this was required in order to

---

[212] *Id.*

[213] *Id.*

[214] 57 N.Y.S.3d 823, 829 (N.Y. App. Div. 2017) ("*J.M. Pereira*").

[215] *Id.* at 825–26.

[216] *Id.* at 828.

[217] *Id.*

give effect to all of the language in the BCL policy, including the language creating an exception to following form when the BCL policy has "otherwise directed."[218]

The reasoning of *Hughes Aircraft* and *J.M. Pereira* applies here as well. The post-1971 excess policies that expressly state that they are triggered by occurrences taking place during the policy period cannot be read to incorporate the underlying Royal trigger of "occurrences which are reported" during the policy period. To hold that coverage under these excess policies is limited by the Royal occurrence-reported trigger would be to disregard the express language in those policies stating that they do not follow form in situations where the excess policies have their own language on an issue.[219]

Indeed, the court in *Mine Safety Appliances Co. v. AIU Insurance Co.*[220] recognized that a follow form policy can respond even where the underlying policy it followed was not triggered because its differing policy period already had

---

[218] *Id.* at 828.

[219] *Barton-Spencer v. Farm Bureau Life Ins. Co. of Mich.*, 892 N.W.2d 794, 798 (Mich. 2017) ("Courts should construe contracts so as so give effect to every word or phrase as far as practicable.") (internal quotations omitted); *Norton v. K-Sen Transp. Partners L.P.*, 67 A.3d 354, 360 (Del. 2013) ("When interpreting contracts, we construe them as a whole and give effect to every provision if it is reasonably possible.").

[220] 2015 WL 5829461 (Del. Super. Oct. 1, 2015).

[redacted]

expired.[221] More broadly, courts in both Michigan and Delaware have recognized that a policyholder can access its excess insurance policies when the amount of a loss reaches the excess layers, even if the underlying insurance company has not itself paid out its full limits.[222] In those situations, the excess insurance company is protected by the fact that it only pays that portion of the loss above its underlying limit, but whether the primary insurance company or the policyholder pays the

[221] *Id.* at *2. Travelers asserts that *Mine Safety* supports its position on the grounds that the court found the Excess Net Loss language unambiguous. Travelers Br. at 32. That finding, however, related to that language's exclusion of defense costs, and in fact demonstrates that the language of an excess policy controls its coverage over contrary provisions as to defense coverage in the underlying policies. *See* 2015 WL 5829461, at *10.

[222] *See Mass. Mut. Life Ins. Co. v. Certain Underwriters at Lloyd's of London*, 2014 WL 3707989, at *8 (Del. Super. June 6, 2014); *Tenneco Auto. Inc. v. El Paso Corp.*, 2001 WL 1641744, at *9–10 (Del. Ch. Nov. 29, 2001) (rejecting argument that policyholder could not settle its claims with insurer for less than its policy limit as "inconsistent with our general policies favoring and encouraging settlement"); *Smit v. State Farm Mut. Auto. Ins. Co.*, 525 N.W.2d 528, 533 (Mich. App. 1994) ("[I]t is not necessary to exhaust the limits of the primary policy insuring the owner in order to proceed with a claim for excess coverage available under a second policy. . . ."); *see also URS Corp. v. Travelers Indem. Co.*, 501 F. Supp. 2d 968, 975 (E.D. Mich. 2007); *Stargatt v. Fid. & Cas. Co. of N.Y.*, 67 F.R.D. 689, 690 (D. Del. 1975) (holding that where covered claims exceed amount of primary policy, recovery under excess policy is permitted even if primary insurer paid less than limits), *aff'd*, 578 F.2d 1375 (3d. Cir. 1978). While Munich Re seeks to distinguish these cases as addressing various issues, *see* Munich Re Br. at 41–42, that is precisely the point: Courts in all of these situations routinely hold that an excess insurance company must respond to a loss that reaches its layer of coverage, regardless of whether the underlying policies responded, or responded in full, to that loss.

[redacted]

amounts beneath that limit is irrelevant to the excess insurance company's coverage obligations.[223]

Thus, the Superior Court erred in its holding that "higher level excess insurance policies do not respond if the primary and first-level excess policies have not been triggered."[224] The post-1971 excess insurance companies have provided no support for this purported rule, which is contrary to the language of the policies and the applicable law. Without the Superior Court's general rule to excuse their obligations, the question becomes one of policy language. As discussed in the next section, the language of these post-1971 excess policies sets out their own triggers of coverage, and so they do not incorporate the Royal occurrence-reported trigger (rendering irrelevant any judicial estoppel or extrinsic evidence as to that trigger).

b. The Language in Excess Policies That Sets out Their Own Trigger of Coverage Controls.

The post-1971 policies of Munich Re, Allstate, Granite State, Mt. McKinley, and TIG all are triggered by occurrences taking place during the policy period, and

[223] *See, e.g.*, *Mine Safety*, 2015 WL 5829461, at *11; *Smit*, 525 N.W.2d at 533; *Stargatt*, 67 F.R.D. at 691; *J.M. Pereira*, 57 N.Y.S.3d at 828; *Koppers Co. v. Aetna Cas. & Sur. Co.*, 158 F.3d 170, 176 (3d Cir. 1998). Munich Re's argument that *Mine Safety* acknowledged the necessity of underlying exhaustion, *see* Munich Re Br. at 41, omits that *Mine Safety* required only that the specific dollar amount of the underlying limit of the excess insurance be met, not payment by particular underlying insurance companies. *See* 2015 WL 5829461, at *11.

[224] *Motors Liquidation Co.*, 2015 WL 10376123, at *4.

[redacted].

so do not follow form to the Royal occurrence-reported trigger.[225] The Superior Court did not discuss or address the particular language of any of these excess policies in the 2015 Decision or in its denial of reargument; rather, it quoted language only from the Aetna policies.[226] As discussed below, the language of all of these policies sets out their own triggers of coverage of occurrences taking place during the policy period, rendering irrelevant Royal's underlying occurrence-reported trigger, and any estoppel, extrinsic evidence, or conduct as to the Royal trigger.

Moreover, none of these insurance companies has appealed the 2013 Decision's ruling, which held that unless a different standard were to be established through relevant extrinsic evidence, their "clear policy language" requires that "similar injuries caused by the continuous manufacture and sale of intrinsically harmful products, such as asbestos, is a single occurrence."[227] As a result, each of these policies is triggered by GM's asbestos containing automotive friction products liability occurrence, which was taking place in each of their policy periods.

---

[225] London did not place its full policy evidence into the record, so a remand is required to address London's policies.

[226] Travelers' arguments regarding the Aetna policy language are addressed below.

[227] *Motors Liquidation Co.*, 2013 WL 7095859, at *3, 5.

(i) Munich Re

Munich Re does not dispute that the American Re-Insurance Company ("Am Re") policies for which Munich Re is responsible follow form to underlying coverage [redacted][228] The Royal occurrence-reported trigger appears in the "Policy Period, Territory" clause of the underlying Royal policies. The Am Re Form, however, has its own "Term" clause setting out its own trigger language: "This Certificate applies only to accidents or occurrences happening between the effective and expiration dates" of the policy.[229] This policy term clause, responding to occurrences *happening* during the policy period, is inconsistent with the Royal policy period clause, which responds to an occurrence *reported* during the policy period. As a result, by the express language of the Am Re Form, the Am Re policies do not follow the inconsistent Royal trigger but instead respond to occurrences happening during the policy period.

Munich Re's joinder points to no language in the Am Re Form that would alter this result. Munich Re argues that its coverage applies only to claims covered by the underlying Royal policies, quoting clauses stating that its excess policies indemnify [redacted]

[228] *See e.g.*, [redacted]

[229] A812.

[redacted]

[redacted][230] Neither of these clauses supports Munich Re here.

Munich Re omits key language from its quotations to the Am Re Form: the amount of the applicable underlying limits can be [redacted][231] Under this language, Munich Re's attachment point can be reached by payments by the Insured, GM, for an occurrence that triggers the Am Re Form, regardless of whether any underlying insurance company responded or paid any portion of that amount.[232]

Nor does the reference to the [redacted] support Munich Re's argument. In the insurance context, the term "hazards" means a general type of coverage, such as products liability, which is covered under the "products hazard."[233] The general reference to the "hazards"

---

[230] Munich Re Br. at 29–30.

[231] A811 (emphasis added).

[232] *See, e.g.*, *Koppers*, 158 F.3d at 176.

[233] *See, e.g.*, C.A. Kulp, *Casualty Insurance: An Analysis of Hazards, Policies, Insurers and Rates* at 3 n.1 (3d ed. 1956) (defining "*hazard*" as "a synonym of loss cause or source, corresponding identically to the *perils* of fire and marine policies.") (AR2). The reference is thus to the "products hazard" definition in the underlying Royal coverage, *see, e.g.*, A790, A794–A795, which requires that the injury take place after the policyholder has relinquished possession of the product, and not to all of the terms and conditions of the Royal policies.

[redacted]

covered by the underlying policy does not override the specific follow form clause stating the policy [redacted] and the Am Re Form's express "Term" clause setting out a trigger of an occurrence during the policy period.[234] Indeed, when the Am Re Form actually describes how the underlying coverage is to be exhausted, it specifies that [redacted][235]

In addition, the very first page of the Am Re Certificate identifies it as providing [redacted] coverage,[236] indicating that it is intended to provide coverage when the primary policy does not. An "umbrella" policy "insure[es] against certain risks that a concurrent primary policy does not cover."[237] Munich Re's argument that its own excess umbrella policies are excused from coverage whenever the underlying Royal coverage does not respond should be rejected.

[234] A811, A812.

[235] [redacted]

[236] [redacted]

[237] A1505 (Holmes' *Appleman on Insurance* § 145.1 (2d ed. 2011)).

[redacted]

(ii) Allstate

Allstate admits that the Northbrook Insurance Company ("Northbrook") policies for which it is responsible contain express triggering language stating that they respond to occurrences "taking place during the policy period."[238] The Northbrook policies follow form to the underlying Royal coverage, but only "except as otherwise provided herein."[239]

Allstate attempts to avoid this straightforward language by arguing that its policies require that the occurrence *both* take place *and* be reported during the policy period, asserting that the two different trigger clauses are "complimentary [sic] and consistent."[240] That is not the standard set out in the Northbrook policy language, which does not follow form to clauses "otherwise provided herein"—because "otherwise" means "in a different way or manner."[241] A trigger of an occurrence *taking place* during the policy period is certainly "different" from a trigger of an occurrence *reported* during the policy period.[242] Allstate, in fact,

---

[238] Allstate Joinder at 2; *see also, e.g.*, A768.

[239] *E.g.*, A768.

[240] Allstate Joinder at 4.

[241] *Merriam-Webster's Collegiate Dictionary* at 879 (11th ed. 2011) (AR152).

[242] The claims-made trigger to which Appellees repeatedly analogize the occurrence-reported trigger, as well as the manifestation trigger to which it is similar, routinely are described as "different" from the more traditional triggers of occurrence-based policies. *See, e.g.*, Jeffrey W. Stempel, *Stempel on Insurance*

[redacted]

admits that these triggers are different, when it describes them as complementary, a term used when describing things that are not the same.

Allstate also points to language that the Northbrook policies cover claims "as would be payable by the issuer of the Underlying Policy."[243] This general reference to the coverage of the Underlying Policy cannot override the more specific follow-form provision, which spells out precisely when the coverage provisions of the underlying policy are followed and when they are not.[244] Indeed, Northbrook knew how to override its own follow-form language and did so in

---

Contracts (3d ed. 2006) § 14.02 ("[A]n occurrence basis policy operates differently from a claims-made policy.") (AR238); *Gelman*, 572 N.W.2d at 621 ("Courts and commentators have discussed four possible theories for determining what event or events trigger coverage under standard CGL policies. These are the 'exposure,' 'injury in fact,' 'manifestation,' and 'continuous' trigger theories."); *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 1995 WL 654020, at *7 (Del. Super. Oct. 27, 1995) ("There are four different types of triggers the Court could find apply in this case. . . ."); *see also Huntzinger v. Hastings Mut. Ins. Co.*, 143 F.3d 302, 314 (7th Cir. 1998) ("'[T]rigger theories' are not uniform across jurisdictional lines. In fact, as many as seven markedly different theories have emerged among the courts."); *Lafarge Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 935 F. Supp. 675, 681–82 (D. Md. 1996) (describing "a number of different trigger theories" including "manifestation," "exposure," "injury-in-fact or damage-in-fact," and "continuous" (internal quotations omitted)).

[243] Allstate Joinder at 4.

[244] *See Royal Prop. Grp., LLC v. Prime Ins. Syndicate, Inc.*, 706 N.W.2d 426, 434 (Mich. App. 2005) ("[S]pecific provisions normally override general ones.").

[redacted]

other parts of the policy,[245] but did not do so for this general reference to coverage of the Underlying Policy.

In addition, the Northbrook policy form's "Maintenance of Underlying Insurance" clause requires the "Underlying Policy" to be maintained "in full effect during the period of this policy except for the reduction of any aggregate limit contained therein solely by payment of claims for *occurrences which take place during the policy period of this policy*."[246] In other words, when the Northbrook policy actually describes how the underlying coverage works, it specifies that it can only be exhausted by occurrences taking place, rather than reported, during the policy period. This undercuts any argument that the reference to claims payable by the issuer of the Underlying Policy can be read as a reference to an occurrence-reported trigger.

(iii) Granite State

Granite State argues that the language in its policy, describing the underlying coverage as exhausted only by "occurrences occurring" during the policy period, can somehow be read to mean "occurrences which are reported."[247] As discussed above in the section on Allstate, however, these are different triggers.

[245] A768 (providing that "the underlying insurance . . . shall be deemed to include" certain exclusions, "notwithstanding" the follow-form provision).

[246] A768 (emphasis added).

[247] AIG Joinder at 7.

The follow-form language sets forth what happens in this situation—the different trigger set out in the underlying policy is not incorporated into Granite State's excess coverage.[248]

(iv) Mt. McKinley

Mt. McKinley did not file a substantive joinder, instead joining the Munich Re and Travelers briefs in footnotes. Thus, Mt. McKinley has not made any arguments based on any policy language specific to it. It has not disputed the Trust's arguments that the Gibraltar policies, for which it is responsible, expressly describe the underlying coverage that it follows as responding to occurrences [redacted] rather than reported, during the policy period.[249]

(v) TIG

TIG did not file a substantive joinder, merely joining the Munich Re and Travelers briefs in footnotes. Thus, TIG makes no argument based on any policy language specific to it, and so it does not dispute the Trust's arguments that its [redacted] rather than occurrences reported during the policy period.[250]

[248] A915.

[249] *See* Trust's Opening Br. at 74.

[250] *See* Trust's Opening Br. at 74–75.

[redacted]

(vi) London

London expressly relies on the Superior Court's erroneous holding that an excess insurance policy does not respond if the primary policy is not triggered,[251] rather than on any particular language in its policies supporting that result.[252] In fact, London acknowledges that only a small fraction of its own policies (at least some of which it acknowledges are [redacted]) are even in the record[253] and does not assert that all of the underlying policies these follow form to are in the record. As a result, if this Court reverses the Superior Court and holds that there is no general rule that an excess policy with its own triggering language is excused from coverage if a primary policy does not respond, a remand is necessary to examine the specific language contained in or incorporated into London's policies. As London has not placed in the record the full language contained in or incorporated into its policies, much less established any ambiguity or incompleteness in that language, its invocation of extrinsic and secondary evidence as to the meaning of policy language must be rejected.[254]

---

[251] *See* London Joinder at 5, 7.

[252] London Joinder at 5 (admitting that "language was not the basis of the arguments presented" in the Munich Re motion that London joined below).

[253] London Joinder at 4.

[254] *See* London Joinder at 4–5, 9–10; *see also Cent. Ill. Light Co. v. Home Ins. Co.*, 795 N.E.2d 412, 430–31 (Ill. App. 2003) (London "slips" are secondary evidence of policies and not policies themselves).

[redacted]

(vii) The Excess Insurers With Their Own Trigger Clauses Cannot Rely on Any Estoppel or Extrinsic Evidence as to the Royal Policies' Trigger.

As established above, the excess policies of Munich Re, Allstate, Granite State, Mt. McKinley, and TIG[255] all have their own triggering language of occurrence taking place, not reported, during the policy period. As a result, their coverage is not affected by any judicial estoppel as to the triggering of the Royal coverage. Similarly, no purported extrinsic evidence as to GM's treatment of the occurrence-reported trigger can have any bearing on these policies, which do not even contain or incorporate Royal's occurrence-reported trigger.

Rather, these policies all are triggered by occurrences taking place during their policy periods. None of these insurance companies has appealed the 2013 Decision's ruling, which held that unless a different standard were to be established through relevant extrinsic evidence, their "clear policy language" requires that "similar injuries caused by the continuous manufacture and sale of intrinsically harmful products, such as asbestos, is a single occurrence."[256] Indeed, each of these insurance companies has taken the position that there is no ambiguity

[255] For the reasons stated above, a remand is required to address London's full policy language.

[256] *Motors Liquidation Co.*, 2013 WL 7095859, at *3, 5.

in the term "occurrence,"[257] and so there is no basis even to invoke any purported extrinsic evidence to construe the meaning of the term "occurrence" in these policies' triggering language of "occurrences" taking place during the policy period.[258]

3. The Aetna Policies Are Triggered by Their Express Language.

Unlike Munich Re, Travelers disavows reliance on any general rule that "higher level excess insurance policies do not respond if primary and first-level excess policies have not been triggered."[259] Travelers goes so far as to say the Superior Court did not base its 2015 Decision on such a rule,[260] despite the Superior Court expressly stating that: "*the decision here flows from* the court's holding as a matter of law that barring exceptional circumstances or policy

[257] [redacted]

[258] Further grounds for rejecting the insurance companies' arguments as to purported extrinsic evidence are discussed below in the section on Travelers' arguments, but as to these policies which do not even incorporate the Royal occurrence-reported trigger, the purported extrinsic evidence is particularly inapplicable.

[259] Travelers Br. at 38; *see also* A1605 (July 10, 2015 Hearing Tr. at 28:12–17) (Travelers' counsel disavows reliance on a rule "that excess insurance must necessarily be no broader than the underlying.").

[260] Travelers Br. at 35.

[redacted]

language not present here, higher level excess insurance policies do not respond if the primary and first-level excess policies have not been triggered."[261]

Travelers instead relies on the language of its policies to argue that its coverage is dependent on the underling Royal coverage, pointing to the fact that the Superior Court did quote certain language from the Aetna policies (for which Travelers is responsible) in the 2015 Decision and the subsequent decision denying reargument.[262]

As discussed in the Trust's Opening Brief and below, however, the language of the Aetna policies does not support Travelers' position. Rather, those policies contain a trigger of occurrences taking place during the policy period, rather than occurrences reported during the policy period. The Aetna policies also speak of covering occurrences which "WOULD BE COVERED BY THE *TERMS* OF THE CONTROLLING UNDERLYING INSURANCE,"[263] and the "TERMS" of the coverage underlying the Aetna policies do cover this occurrence. Travelers'

[261] *Motors Liquidation Co.*, 2015 WL 10376123, at *4 (emphasis added).

[262] Travelers Br. at 35–36 & n.110. As the Superior Court quoted language from no other excess policies in these decisions, Travelers' policy language-based arguments provide little or no support to the other Appellees that joined its brief but have different language. The specific language of those other policies is discussed above, and in the case of AIG below.

[263] *See, e.g.*, A726 (emphasis added).

efforts to alter the meaning of that language by means of extrinsic evidence must be rejected.

a. The Trust Did Not Waive Its Arguments That the Terms of the Royal Coverage Were Triggered.

Travelers mischaracterizes the Trust's Opening Brief in its efforts to argue that the Trust has waived an appeal of the Superior Court's findings "concerning the meaning of Endorsement 15 and how GM and Royal applied Endorsement 15 to asbestos claims."[264] To the contrary, the Trust expressly argued that the asbestos automotive friction products liability occurrence was "reported" to GM when GM was served with the first lawsuit arising out of that occurrence in 1977, and that this report triggered the "terms" of the underlying Royal coverage in that year for the full occurrence.[265] The Trust also argued that it was inappropriate for the Superior Court to have relied on the purported extrinsic evidence of the course of conduct between Royal and GM to construe the unambiguous language of the policies.[266] Thus, the Trust waived no arguments about the Superior Court's interpretation of the operation of the Royal trigger or its erroneous reliance on extrinsic evidence to arrive at that interpretation.

---

[264] Travelers Br. at 20–22; *see also id.* at 28.

[265] *See* Trust's Opening Br. at 76–79, 81–83.

[266] Trust's Opening Br. at 83–86.

[redacted]

b. The Aetna Policies Are Triggered by an Occurrence Taking Place During the Policy Period.

Travelers does not dispute that its policies state that "AETNA CASUALTY will indemnify the INSURED against EXCESS NET LOSS *arising out of an accident or occurrence during the policy period*";[267] that is, they contain a trigger of an occurrence during the policy period. As the 1976 and 1977 Aetna policies were in effect during the time that GM was manufacturing and selling asbestos-containing products,[268] these policies are triggered to respond to GM's asbestos products liability occurrence, because that occurrence—the manufacture and sale of asbestos-containing automotive friction products—was taking place during the 1976 and 1977 policy periods.

Aetna, like the Superior Court,[269] instead focuses its argument on language in the definition of Excess Net Loss extending coverage to occurrences "WHICH WOULD BE COVERED BY THE TERMS OF THE CONTROLLING UNDERLYING INSURANCE."[270] The "TERMS" of the controlling underlying

[267] *See, e.g.*, A707 (emphasis added).

[268] [redacted]

[269] *See Motors Liquidation Co.*, 2015 WL 10376123, at *4–5.

[270] A726.

[redacted]

insurance, however, do cover the automotive friction asbestos products liability occurrence.

The definition of "CONTROLLING UNDERLYING INSURANCE" is set out in the policy's "SCHEDULE OF UNDERLYING INSURANCE," which lists: "PTE 33 ROYAL GLOBE EXCESS LIABILITY," and then immediately adds: "[t]his schedule applies to the above policies *and any renewals or replacements thereof*."[271] Royal PTE 33 is a multi-year policy that was in effect during both the 1976 and 1977 policy periods.[272] The first asbestos automotive friction products liability action was served against GM in December 1977. Thus, GM's asbestos products liability occurrence was first reported during the policy period of PTE 33, triggering the "terms" of that policy's occurrence-reported trigger for the full occurrence.[273]

Travelers attempts to avoid this result by arguing that this Court should disregard the well settled meaning of the actual "terms" of the controlling

---

[271] A708 (emphasis added).

[272] A644–A657 (Royal policy no. PTE 33); *see also* A791 ("occurrences which are reported" trigger in underlying Royal policy no. PTP 760076).

[273] In addition, the Aetna policies set out an understanding that the underlying insurance also contains a trigger of taking place (rather than reported) during the policy period: like the other post-1971 policies that contain their own triggering language, a provision in the Aetna policies speaks of underlying coverage being reduced by claims for an occurrence "which takes place during the period of this policy." *See* A721.

[redacted]

underlying insurance, and that coverage under the Aetna policies should depend instead on the purported course of conduct between GM and Royal. The express language of the Aetna policies, however, does not tie coverage to the course of conduct in relation to the underlying coverage, but to its "terms." This is emphasized by the additional language stating that the Aetna policies apply "WHETHER OR NOT SUCH [underlying] POLICIES ARE IN FORCE."[274] The Aetna policies do not depend on the actual performance or payment by Royal pursuant to the underlying policy, but by whether the occurrence would be covered by the policy's "terms."

This alone renders the reliance by Travelers and the Superior Court on purported extrinsic evidence erroneous; further reasons for rejecting this reliance are discussed below.

c. Travelers Cannot Alter Its Obligations Under Unambiguous Policy Language by Invoking Purported Extrinsic Evidence.

(i) Travelers and the Other Appellees Cannot Alter the Plain Meaning of the Term "Occurrence."

Travelers' entire argument depends on the use of purported extrinsic evidence to alter the established meaning of the term "occurrence," which here encompasses GM's entire automotive friction asbestos products liability, to instead

[274] A726.

be read as meaning that each separate asbestos claim is a separate occurrence. Its argument is based on such assertions as "the asbestos-related claims made against GM after the first in November 1977 were not bundled or aggregated with similar claims,"[275] "GM treated each claim as a separate occurrence,"[276] and "GM and Royal agreed to treat every post-1971 claim as a separate occurrence."[277] Even in a section of its brief arguing that it was *not* seeking to alter the meaning of the term "occurrence," Travelers admits that its argument depends on equating the term "occurrence" with "claim" based on GM's purported statements and agreements.[278] The Superior Court, as well, acknowledged that its 2015 Decision was based on its findings that GM had acknowledged that "all post-1971 claims against GM were treated as separate occurrences happening in the year they were reported."[279]

Travelers, like all of the other Appellees, joined a brief below admitting that [redacted][280] And Travelers has not appealed the Superior Court's holding that the "clear policy language" requires

[275] Travelers Br. at 28; *see also id.* at 31.

[276] *Id.* at 28; *see also id.* at 6, 8.

[277] *Id.* at 32–33.

[278] *Id.* at 39.

[279] *Motors Liquidation Co.*, 2015 WL 10376123, at *3.

[280] [redacted]

[redacted]

that "similar injuries caused by the continuous manufacture and sale of intrinsically harmful products, such as asbestos, is a single occurrence."[281] Thus, Travelers' arguments, which depend on treating each claim as a separate occurrence based on purported extrinsic evidence, must be rejected.

A party that does not even argue that a contract term is ambiguous cannot rely on extrinsic evidence under either Delaware or Michigan law.[282] Travelers' argument that a court can look to extrinsic evidence to determine whether there is a latent ambiguity[283] must fail here, because Travelers and the other Appellees already have admitted that the term "occurrence" contains no such ambiguity.

Indeed, a Michigan appellate court rejected Royal's own assertion that GM and Royal's course of conduct in handling asbestos claims could alter the

[281] *Motors Liquidation Co.*, 2013 WL 7095859, at *3, 5.

[282] *See, e.g.*, *TGINN Jets*, 2013 WL 4609208, at *5 (rejecting reliance on extrinsic evidence, including under theory of "latent ambiguity," when "Defendants have not argued, let alone shown, that the proposed amendment creates an ambiguity"); *Indian Head*, 666 Fed. Appx. at 463–64 (where party has not asserted ambiguity, prior course of performance under insurance policy "is irrelevant no matter how inconsistent with the terms of the contract that performance may have been. . . . [Party's] practical construction argument is inconsequential as neither party argues that the terms of the policy are ambiguous."); *see also Nationwide Emerging*, 112 A.3d at 890 (rejecting application of latent ambiguity doctrine when requested by a party that had asserted the language in question was unambiguous).

[283] *See* Travelers Br. at 23.

unambiguous language of the Royal policies.[284] While Travelers argues that the particular unambiguous language Royal was trying to alter was different from the unambiguous language that Travelers seeks to alter here,[285] the decision holds the same course of conduct between Royal and GM cannot be used "to vary the terms of an otherwise clear and unambiguous contract,"[286] which is precisely what Travelers seeks to do. And the excess insurers like Travelers have even less basis to rely on a course of conduct in which they did not participate.[287]

(ii) Travelers Fails to Establish Any Ambiguity in Endorsement 15.

In an attempt to avoid the impact of its admission that the term "occurrence" is unambiguous, Travelers claims that the ambiguity it seeks to resolve by extrinsic evidence appears in the occurrence-reported trigger language of Royal's

[284] *See Gen. Motors*, 2007 WL 1206830, at *4.

[285] Travelers Br. at 40.

[286] *Id.* at 3.

[287] *See*, *e.g.*, *Mine Safety*, 2015 WL 5829461, at *7, 11 (holding that the course of conduct between a policyholder and an underlying insurance company was irrelevant to the application of the unambiguous language in an excess insurance policy, even if the excess language is identical to that in the underlying, and the course of conduct was "directly contradictory."); *Rapid-Am. Corp.*, 609 N.E.2d at 511 (holding that a policyholder's prior pursuit of one insurance company for coverage under a particular trigger-of-coverage theory was irrelevant when offered as extrinsic evidence of the appropriate trigger under another insurance company's policy).

[redacted]

Endorsement 15, rather than the definition of "occurrence."[288] This argument also fails. As discussed above, Travelers' entire argument depends on its theory that each asbestos claim should be treated as a separate occurrence based on extrinsic evidence.

In addition, Travelers fails to demonstrate any ambiguity in the language of Endorsement 15. Royal's Endorsement 15 sets out the trigger of occurrences which are first reported during the policy period:

> This policy applies worldwide, only to occurrences which are reported to the Insured or the Company, whichever occurs first, during the policy period provided the services, goods or products were manufactured, sold, handled or distributed within the United States of America, territories, possessions or Canada. The date of the report to the Insured or the Company, shall be deemed the date of occurrence.[289]

Travelers erroneously asserts that an ambiguity exists in the second sentence, on the purported grounds that the phrase "the report" in that sentence can be read to mean either the first report of the occurrence, or the report of each separate claim.[290] The language, however, is unambiguous on this point: the phrase "the report" in the second sentence unambiguously refers to the report of the occurrence in the previous sentence; there is nothing in the language that would

[288] Travelers Br. at 25.

[289] A561; A791.

[290] Travelers Br. at 25.

permit it to be read as a report of each separate claim. The use of the definite article "the" makes clear that "the report" in the second sentence is the previously referenced report of the occurrence.[291]

Even under Michigan's doctrine of latent ambiguity, extrinsic evidence cannot be used to contradict the clear language of a contract.[292] Travelers has not shown any ambiguity in the phrase "the report" that would justify rewriting the policy to instead say "the report of a separate claim."

(iii) The Purported Extrinsic Evidence Does Not Support Travelers Here.

If extrinsic evidence *were* admissible to alter the meaning of the term "occurrence," Travelers would have another problem: the extrinsic evidence of Travelers' own understanding demonstrates that it intended for the standard

[291] "The" is a definite article that is "used as a function word to indicate that a following noun or noun equivalent is definite *or has been previously specified by context or circumstance*." *Merriam Webster's Collegiate Dictionary* at 1294 (11th ed. 2011) (AR153) (emphasis added). *Accord*, *Nat'l Foods, Inc. v. Rubin*, 936 F.2d 656, 660 (2d Cir. 1991) (holding that use of the definite article meant that "'the court' referred to the second time in sub-paragraph (b) should be the same one referred to the first time.").

[292] *See, e.g.*, *Stryker*, 842 F.3d at 428 ("'[P]arol evidence under the guise of a claimed latent ambiguity is not permissible to vary, add to, or contract' any other 'plainly expressed terms of [the] writing.'") (quoting *Mich. Chandelier Co. v. Morse*, 297 N.W. 64, 66 (Mich. 1941); *see also E.I. du Pont*, 693 A.2d at 1061 ("Extrinsic evidence is not used to interpret contract language where that language is plain and clear on its face.") (internal quotations omitted).

[redacted]

definition of "occurrence" to apply, rather than any course of conduct between GM and Royal.

Travelers relies on [redacted][294] This evidence, however, demonstrates the *opposite* of what Travelers argues. The phrase [redacted][295]

If Aetna had intended product liability claims to constitute separate occurrences for the purpose of its coverage, it could have included a different

293 [redacted]

294 [redacted]

295 [redacted]

[redacted]

definition of "occurrence" in its policies. Instead, Aetna did the exact opposite: Aetna sold GM policies that referenced only the "terms" of the underlying coverage, not any purported [redacted] In fact, Aetna specifically endorsed its own policies to include a standard occurrence definition of its own,[296] further demonstrating an intent that the Travelers coverage be subject to the standard treatment of occurrences and not any contrary course of conduct of GM and Royal. And, of course, the policies it sold contained triggering language of occurrences taking place during the policy period, and described the underlying coverage as responding in the same way.[297] [redacted] Aetna could hardly have made it more clear that it intended its policies to be subject to the standard treatment of occurrence, and not [redacted]

Additional evidence produced in this action further undercuts the argument that GM's excess insurance coverage universally followed form without exception

[296] *See, e.g.*, [redacted]

[297] *See, e.g.*, A707, A721.

[redacted]

to the Royal trigger of coverage. [redacted]

Aetna added this endorsement to its policies sold to GM in the 1984 year.[299] Had Aetna wished its earlier policies to follow form to the Royal trigger notwithstanding the trigger language in its own policies, it could have included a similar endorsement in the earlier policies.

Under Michigan law, contested extrinsic evidence cannot be used to alter the policy language.[300] Here, the proffered evidence of Travelers' own conduct and

[298] AR10–AR12.

[299] See AR28; AR43 (Aetna policy nos. 65 XN 87 WCA and 65 XN 88 WCA, at "Follow Form Endorsement.").

[300] *See, e.g.*, *Stryker*, 842 F.3d at 428 (policyholder's proffer of testimony from insurance company's own former employees on the interpretation of disputed policy language rejected as insufficient to create a latent ambiguity).

[redacted]

understandings supports the precise opposite inference from the one Travelers urges. That is, Travelers clearly understood the standard "occurrence" definition to aggregate claims from the same clause, and took steps to clarify that its own policies followed that standard meaning rather than GM and Royal's purported course of conduct.[301] Thus, if the evidence were admissible, it would defeat, rather than support, Travelers' position.

4. The Policies in the 1977 Policy Year Are Triggered to Respond to the Occurrence.

AIG[302] does not dispute that its policies in the 1977 year follow form to the Royal occurrence-reported trigger.[303] As a result, those policies, like the Royal PTE 33 policy discussed above, are triggered to respond to the entire asbestos

[301] *See also* the discussion *supra* in Section I (Number of Occurrences) about the contested nature of the evidence as to Royal and GM's conduct and positions. Any reliance by Travelers on GM's prior litigation positions on the number of occurrences is particularly inappropriate, given that Travelers has advocated for a single occurrence in prior asbestos coverage litigations. *See, e.g., Travelers Cas. & Sur. Co. v. Gerling Global Reins. Corp. of Am.*, 419 F.3d 181, 185 (2d Cir. 2005) (Travelers argues that all "asbestos-related" products claims against policyholder "arose from a single occurrence"); *Pittsburgh Corning Corp. v. Travelers Indem. Co.*, 1998 WL 5302, at *2 (E.D. Pa. Jan. 21, 1998) ("Travelers argues that [] the manufacture and sale of [the asbestos-containing product by] Unibestos constitutes the single cause of all underlying asbestos injuries and is thus one 'occurrence'").

[302] The "AIG" Appellees with policies in the 1977 policy year that follow form to the Royal trigger include Lexington, INSCOP, and National Union.

[303] AIG Joinder at 8.

product liability occurrence by the report of the first such asbestos liability in that year.[304]

AIG erroneously argues that the "Trust did not dispute" that its policies are [redacted][305] To the contrary, the AIG policies are triggered by *occurrences* reported during the policy period, as the Trust consistently has maintained.[306] AIG's attempt to conflate "occurrences" with "claims" is contradicted by its own policies, which treat the two terms as distinct.[307] Any attempt by AIG to invoke extrinsic evidence to vary the settled meaning of "occurrence" would fail for the same reasons as discussed above in the section on Travelers—like Travelers, AIG now takes the position that

---

[304] A791 ("The date of the report to the Insured or the Company, shall be deemed the date of occurrence.").

[305] [redacted]

[306] *See, e.g.*, Trust's Opening Br. at 76–79; *see also* A1868–A1869, A1920–A1921 (Trust's briefing on 1977 AIG policies below).

[307] *See, e.g.*, A832 (INSCOP 1977 policy no. 4177-8385 § III (requiring notification of claims "upon knowledge of any accident or occurrence likely to give rise to a claim hereunder"); *id.* § VI (requiring underlying insurance to be maintained "in full effect . . . except for any reduction of the aggregate limit or limits contained therein, where applicable, solely by payment of claims in respect of accidents and/or occurrences occurring during the period of this policy")); A887, A888 (Lexington 1977 policy no. GC5506153 ("Upon the happening of an occurrence reasonably likely to involve the company herein, written notice shall be given as soon as practicable to the company. . . . The insured shall give like notice of any claim made on account of such occurrence.")); *id.* Condition 2 ("The Insured shall . . . report in writing . . . every loss, damage or occurrence which may give rise to a claim under this policy").

[redacted].

the term "occurrence" is not ambiguous in any policy,[308] destroying any basis for it to rely on extrinsic evidence. The AIG policies follow form to the [redacted] not any modification of those terms by estoppel or course of performance.[309] The term "occurrence" as incorporated into the AIG policies in the occurrence-reported trigger must be given the meaning the Superior Court already found based on the "occurrence" definition's clear language, which AIG has not appealed.

AIG, like the other Appellees, argues that, because the occurrence-reported trigger was occasionally described as a [redacted] trigger, each underlying asbestos claim should be treated as a separate occurrence for coverage purposes, each triggering the occurrence-reported coverage in the year the particular underlying claim was made.[310] In addition to improperly relying on extrinsic evidence, this demonstrates a fundamental misunderstanding of how claims-made coverage works. "Claims-made" coverage typically contains provisions grouping related claims and requiring that they all be covered under the policy triggered by

[308] [redacted]

[309] *See, e.g.*, A334; A888; A821.

[310] [redacted]

[redacted]

the first such claim.[311] The occurrence-reported coverage contains just such a provision for grouping related claims: the "occurrence" definition itself, which, under the policy language and Michigan (and Delaware) law, groups all claims alleging harm from intrinsically harmful products into a single occurrence. Thus, the first report of the asbestos friction product liability occurrence in 1977 triggered that year's occurrence-reported policies for the entire occurrence.

[311] *See, e.g.*, AR245 (Pierce, Weston, Levy, and McMahon, *Insurance Practices and Coverage in Liability Defense* (2d ed. 2015) § 11.04(A) ("One important consequence of the interrelated wrongful acts provision is that it puts all the claims back to [the] first insurance policy where the wrongful acts arose")); *Gidney v. AXIS Surplus Ins. Co.*, 140 So. 3d 609, 613 (Fla. Dist. Ct. App. 2014) ("The provision of the policy entitled 'Multiple Claims' provides coverage for claims made subsequent to the policy period that relate back to a prior claim brought by a third party during the policy period against the insured."); *United Westlabs, Inc. v. Greenwich Ins. Co.*, 2011 WL 2623932, at *14 (Del. Super. July 1, 2011) (Policy's "'Interrelated Claims' provision stated: 'All Claims arising from Interrelated Wrongful Acts shall be deemed to constitute a single Claim and shall be deemed to have been made at the earliest time at which the earliest Claim is made or deemed to have been made,'" and, the court held that two alleged wrongful acts involving hacking and copyright infringement, which allegations occurred in 2007 and 2009, were interrelated and so telescoped back to 2007).

[redacted]

CONCLUSION

For all of the reasons set forth above and in its Opening Brief, the Trust respectfully requests that:

(a) This Court affirm the judgment of the Superior Court that GM's asbestos containing automotive friction products liability arises out of a single occurrence.

(b) This Court reverse the judgment of the Superior Court imposing proration and hold that the pre-1972 policies require "all sums" allocation;

(c) This Court reverse the judgment of the Superior Court as to judicial estoppel, and hold that:

(i) The Munich Re, Allstate, Mt. McKinley, Granite State, TIG (1981 and 1983 policy years), and Travelers (1976 and 1977 policy years) policies are triggered by GM's asbestos-containing automotive friction products liability occurrence taking place during their policy periods;

(ii) The Lexington, INSCOP, and National Union policies in the 1977 policy year are triggered by the first report of the asbestos-containing automotive friction products liability occurrence during their policy periods; and

(d) This Court remand the case to the Superior Court for further proceedings.

POTTER ANDERSON & CORROON LLP

By: */s/ Jennifer C. Wasson*
Jennifer C. Wasson (No. 4933)
Carla M. Jones (No. 6046)
Hercules Plaza, Sixth Floor
1313 North Market Street
Wilmington, DE 19801
Telephone: (302) 984-6000

Attorneys for Appellant Motors Liquidation Company DIP Lenders Trust

OF COUNSEL:

Selena J. Linde
Michael T. Sharkey
PERKINS COIE LLP
Suite 600
700 Thirteenth Street, NW
Washington, DC 20005-3960
Telephone: (202) 654-6200

January 23, 2018
Corrected Version: January 30, 2018
5609811 / 38603

Public Version Dated: February 7, 2018