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February 27, 2017

BY HAND

Hon. Mark Neary, Clerk
Supreme Court of New Jersey
Hughes Justice Center
25 Market Street
Trenton, New Jersey 08625

Re: *Continental Insurance Company, et al., v. Honeywell Int'l*, App. Div. Docket Nos. A-1071-13T1, A-1100-13T1

Dear Mr. Neary:

Enclosed for filing on behalf of United Policyholders are the original plus 8 copies of a Motion to appear as *amicus curiae*, together with supporting papers. Kindly file these papers and return one set marked "Filed" in the enclosed return envelope.

Thank you.

Respectfully submitted,
Bramnick, Rodriguez, Grabas, Arnold & Mangan
Attorneys for United Policyholders

By: Carl A. Salisbury
Carl A. Salisbury (013991992)

Encl.
cc: Counsel on the attached Service List (w/encl.)

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DOCKET NOS. A-1071-13T1, A-1100-13T1

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SUPREME COURT OF NEW JERSEY

CONTINENTAL INSURANCE COMPANY, FIDELITY & CASUALTY COMPANY OF NEW YORK, COMMERCIAL INSURANCE COMPANY OF NEWARK, N.J., and COLUMBIA CASUALTY COMPANY, Plaintiffs, v. HONEYWELL INTERNATIONAL, INC. (f/k/a ALLIEDSIGNAL, INC., successor to BENDIX AVIATION CORPORATION and BENDIX CORPORATION), Defendant-Respondent,	APPELLATE DIVISION DOCKET NOS.: A-1071-13T1 A-1100-13T1 LAW DIVISION DOCKET NO.: MOR-L-1523-00 SAT BELOW: JOSE L FUENTES, J.A.D. ROBERT J. GILSON, J.A.D. ELLEN L. KOBLITZ, J.A.D.

MOTION OF UNITED POLICYHOLDERS TO APPEAR AS *AMICUS CURIAE*

PLEASE TAKE NOTICE THAT, as soon as counsel may be heard, United Policyholders will move for leave to appear as *amicus curiae*.

Dated: February 27, 2017

By: 
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SUPREME COURT OF NEW JERSEY

CONTINENTAL INSURANCE COMPANY, FIDELITY & CASUALTY COMPANY OF NEW YORK, COMMERCIAL INSURANCE COMPANY OF NEWARK, N.J., and COLUMBIA CASUALTY COMPANY, Plaintiffs, v. HONEYWELL INTERNATIONAL, INC. (f/k/a ALLIEDSIGNAL, INC., successor to BENDIX AVIATION CORPORATION and BENDIX CORPORATION), Defendant-Respondent,	APPELLATE DIVISION DOCKET NOS.: A-1071-13T1 A-1100-13T1 LAW DIVISION DOCKET NO.: MOR-L-1523-00 SAT BELOW: JOSE L FUENTES, J.A.D. ROBERT J. GILSON, J.A.D. ELLEN L. KOBLITZ, J.A.D.

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS

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Preliminary Statement

For more than two decades, this Court's decision in *Owens-Illinois v. United Ins. Co.* has steered policyholders, insurers and lower courts to a proper and fair allocation of insurance coverage among triggered commercial general liability policies in complex asbestos-related and environmental coverage disputes. The rule has guided policyholders in their insurance purchasing decisions, given rise to a host of reasonable expectations concerning the scope and nature of liability coverage, and assisted countless parties and mediators to settle coverage disputes as an alternative to trial of these complex cases. The rule is now a part of the fabric of insurance coverage law in New Jersey. It promotes consistency and predictability in the application of legal principles, fosters reliance on judicial precedent, and contributes to the integrity of the judicial process. Upending the rule, as Travelers seeks to do on this appeal, would tend to extinguish each of those valuable attributes of *stare decisis*.

Procedural History and Statement of Facts

United Policyholders incorporates the Procedural History and Statement of Facts set forth in Honeywell's Brief on this appeal. U.P. specifically recognizes and agrees with Honeywell's observation that there was no dispute below that the Bendix brakes did not cause any injury in the underlying actions. Thus, since there is no evidence that Honeywell engaged in any wrongful conduct

after 1987, there is no need for this Court to reach or revisit the broader legal or factual issues concerning the coverage block or the proper interpretation of the *Owens-Illinois* decision. If, however, this Court decides to consider the legal and factual issues Appellant Travelers Casualty & Surety Company raises concerning *Owens-Illinois*, U.P. has a valuable perspective to share as *amicus*.

Legal Argument

I. The Appellate Division properly interpreted and applied the *Owens-Illinois* allocation rule in this case.

The Trial Court managed this case in precisely the manner this Court directed and the outcome was consistent with both the language and the spirit of *Owens-Illinois,* 138 N.J. 437 (1994). The opinion in *Owens-Illinois* was, quite clearly, an exhaustive and careful study of (1) the way other courts across the country have decided allocation issues, and (2) the standard-form language of the commercial general liability insurance policy (the operative terms of which have not materially changed since 1994). The study of the resolutions of other courts revealed that the only "real difference" among them was "in their treatment of periods of self-insurance." *Owens-Illinois,* 138 N.J. at 467. As for the terms of the contracts, the decision observed: "We are unable to find the answer to allocation in the language of the policies." *Id.* at 468. Accordingly, the treatment of periods of

self-insurance is one of the important distinctions between this Court's approach to allocation and that of the leading cases that preceded the *Owens-Illinois* decision: *Keene Corp. v. Insurance Co. of N. America,* 667 F.2d 1034 (D.C.Cir. 1981), *cert. denied,* 455 U.S. 1007 (1982) and *Insurance Co. of N. America v. Forty-Eight Insulations, Inc.,* 633 F.2d 1212 (6th Cir. 1980), *clarified in part,* 657 F.2d 814 (6th Cir.), *cert. denied,* 454 U.S. 1109 (1981).

A central concern of this Court in fashioning a rule that adequately accounted for periods of self-insurance was to establish incentives that would encourage policyholders to shift the liability risks of their activities to insurance companies. "Among the factors that we should consider is the extent to which our decision will make the most efficient use of the resources available to cope with environmental disease or damage." *Owens-Illinois,* 138 N.J. at 472. "One of the principles of such decision-making is to provide incentives that parties should engage in responsible conduct that will increase, not decrease, available resources." *Id.* The resources to which the Court was referring were "insurance resources," if and when those resources are available to the policyholder.

"The theory of insurance is that of transferring risks." *Id.* "Because insurance companies can spread costs throughout an industry and thus achieve cost efficiency, the law should, at a minimum, not provide disincentives to parties to acquire insurance

when available to cover risks." *Id.* (Emphasis added.) Thus, this Court repeatedly recognized that incentives exist only to the extent that there is insurance coverage available to a policyholder to transfer a risk. "[T]he *Keene* rule of law [that is, the entire liability can be allocated to a single triggered policy] reduces the incentive of the property owners to insure against future risks." *Id.* at 473. "*Assuming the availability of insurance,* principles of law that would act as a disincentive to the building owners in the hypothetical might serve in the long run to reduce the available assets to manage the risk." *Id.* (Emphasis added.)

The Court's focus was on the conscious decision of the policyholder in deciding to forego the purchase of available insurance; it was not upon the policyholder's decision to engage in a particular kind of business activity. "A fair method of allocation appears to be one that is related to both time on the risk and the degree of risk assumed. When periods of no insurance reflect *a decision by an actor to assume or retain a risk, as opposed to periods when coverage for a risk is not available,* to expect the risk-bearer to share in the allocation is not unreasonable." *Id.* at 479. Here, of course, the period after 1987 was indisputably a time when coverage for the risk at issue was not available, because the insurance industry had excluded it. Thus, the Trial Court and the Appellate Division here resolved the allocation issue precisely as this Court had instructed.

The Trial Court correctly applied the rule that a policyholder should only be deemed to assume the risk of a liability if the policyholder made a conscious decision to forego transferring the risk to insurance coverage that was actually available. The *Owens-Illinois* decision made it perfectly clear that this Court would repose a large measure of discretion in trial court's to devise appropriate allocations and that appeals courts should be most reluctant to second-guess a lower court's allocation if it was determined in accordance with the rules and procedures set forth in the decision. Having instructed the lower courts in both the rules and the mechanics of reaching allocation decisions, this Court should only disturb those decisions upon the clearest evidence of an egregious abuse of discretion. To second-guess a carefully crafted decision such as this one would result in uncertainty for future parties who are endeavoring to comply with *Owens-Illinois* and would defeat this Court's salutary objective of "channel[ing] available resources in remediation of environmental harms" rather than into endless litigation of the coverage dispute. The record does not support doing so here.

II. Travelers presents no justification for departing from this Court's precedent in *Owens-Illinois*.

Having followed this Court's direction concerning the handling of allocation issues in cases such as this one, the lower courts here should be affirmed and the parties should enjoy the

continued benefits of the certainty that *stare decisis* provides. Travelers, on the other hand, seeks a significant re-interpretation of the holding in *Owens-Illinois*, one that is both unsupported by the language of the opinion and inconsistent with the understanding of the decision by courts and parties that have applied the *Owens-Illinois* formula for more than twenty years. If adopted, the Travelers interpretation would effect an overruling of the decision, *sub silentio*.

Specifically, Travelers seeks to have this Court ignore the repeated statements in the opinion that make it clear that allocation to the policyholder is inappropriate "during periods when coverage is unavailable." Instead, Travelers twists the interpretation of the phrase "assumption of the risk" to mean "assumption of the risk of continued sale of asbestos-containing products after 1987."[1] *Owens-Illinois* makes it perfectly clear that a policyholder only "assumes the risk" of a liability when coverage is available to cover such a risk and the policyholder consciously decides not to transfer it to an insurer. There is, of course, no way to incentivize the purchase of insurance that is not reasonably available. This Court should decline the Travelers

[1]As mentioned above, the evidence in the record is undisputed that there were actually no "risks" associated with the Bendix brakes because they did not cause injury, a fact that Travelers acknowledged in its arguments before the Appellate Division and that was also admitted by its experts.

invitation effectively to overturn the holding in *Owens-Illinois*.

Although *stare decisis* is not an inflexible principle that deprives courts of the ability to correct errors, it nevertheless furthers important policy goals. Courts should not dispense with the principle except for compelling reasons. "The doctrine of *stare decisis*—the principle that a court is bound to adhere to settled precedent—serves a number of important ends." *Luchejko v. City of Hoboken*, 207 N.J. 191, 208 (2011). The doctrine "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720, 737 (1991).

For these reasons, this Court has observed that *stare decisis* "carries such persuasive force that we have always required a departure from precedent to be supported by some special justification." *State v. Brown*, 190 N.J. 144, 157 (2007) (*quoting Dickerson v. United States*, 530 U.S. 428, 443, 120 S.Ct. 2326, 2336, 147 L.Ed.2d 405, 419 (2000)). Moreover, the longer a rule of law has been in place, the more imbedded the public interest becomes in preserving the precedent.

For instance, in the *Luchejko* case, as in this one, the rule at issue had been in place for nearly three decades. Accordingly, this Court observed: "*Stare decisis* thus casts a long shadow over

these proceedings. We should not lightly break with a line of decisions that has promoted settled expectations" on the part of the interested parties. *Luchejko v. City of Hoboken*, 207 N.J. at 208. Similarly, the shadow of *Owens-Illinois* is sufficiently long to have spawned a considerable progeny. A recent review of citing references to the decision in Westlaw reveals that it has been cited in over 200 subsequent decisions and trial court orders, and in nearly 1400 authorities altogether. A departure from this significant body of precedent should be "supported by some special justification." *State v. Brown*, 190 N.J. at 157. Nothing of the kind exists here.

Special justification for overturning precedent might exist when the passage of time illuminates that a ruling was poorly reasoned. *White v. Twp. of N. Bergen*, 77 N.J. 538, 550-54 (1978). A reason for departing from *stare decisis* might also exist when changed circumstances have eliminated the original rationale for a rule. *See, e.g., Immer v. Risko*, 56 N.J. 482, 487-88 (1970) (abrogating inter-spousal immunity on basis that its rationale no longer existed). Courts may also depart from a rule that has clearly become unworkable. *J & M Land Co. v. First Union Nat'l Bank ex rel. Shepard,* 166 N.J. 493, 521 (2001). Travelers has failed even to present to this Court any of these special justifications, much less has it proved that they exist.

On the contrary, *Owens-Illinois* has withstood the test of

time. Those who practice coverage law on behalf of policyholders have seen countless instances in which the relative certainty of the *Owens-Illinois* formula has fostered settlement of complex coverage cases. Although insurers and insureds may well start with differing assumptions concerning the application of the facts to the arithmetic, more often than not the end result of the parties' allocation calculations is that they coincide sufficiently to narrow the issues and to make settlement easier and, thus, more likely. This real-world result comports with this Court's stated intentions when it fashioned the *Owens-Illinois* formula. "Courts cannot simplify issues that are intrinsically complex. We can, however, narrow the range of disputes and provide procedures better to resolve the disputes that remain. If we can accomplish that much, we can better channel the available resources into remediation of environmental harms." *Owens-Illinois*, 138 N.J. at 480. Experience during the past twenty-three years strongly suggests that the decision accomplished this objective.

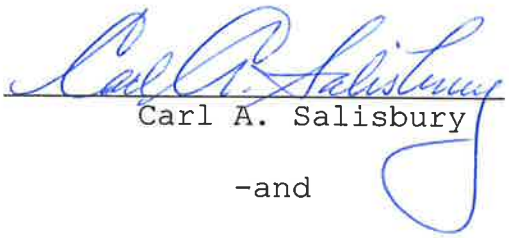
Specifically with respect to this case, the lower-court decisions validated the wisdom of the approach this Court devised in *Owens-Illinois*.

Conclusion

For all of the foregoing reasons, the decision of the Appellate Division should be affirmed.

Dated: February 25, 2017

Bramnick, Rodriguez, Grabas, Arnold & Mangan

By: 
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CONTINENTAL INSURANCE COMPANY, FIDELITY & CASUALTY COMPANY OF NEW YORK, COMMERCIAL INSURANCE COMPANY OF NEWARK, N.J., and COLUMBIA CASUALTY COMPANY, Plaintiffs, v. HONEYWELL INTERNATIONAL, INC. (f/k/a ALLIEDSIGNAL, INC., successor to BENDIX AVIATION CORPORATION and BENDIX CORPORATION), Defendant-Respondent,	APPELLATE DIVISION DOCKET NOS.: A-1071-13T1 A-1100-13T1 LAW DIVISION DOCKET NO.: MOR-L-1523-00 SAT BELOW: JOSE L FUENTES, J.A.D. ROBERT J. GILSON, J.A.D. ELLEN L. KOBLITZ, J.A.D.

CERTIFICATION OF SERVICE

I, Carl A. Salisbury, of full age, hereby certify as follows:

I am counsel for United Policyholders. I have caused the attached Motion and supporting papers to be served today via email and Federal Express on all counsel on the attached Service List.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: February 27, 2017

Carl A. Salisbury (103991992)

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CONTINENTAL INSURANCE COMPANY, et al., v. HONEYWELL INT'L, APP. DIV.
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BRIEF IN SUPPORT OF UNITED POLICYHOLDERS' MOTION TO APPEAR AS *AMICUS CURIAE*

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TABLE OF AUTHORITIES

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Other Authorities

This Court should permit United Policyholders to appear as *amicus curiae* because the participation of U.P. will assist the Court in connection with an issue of public interest raised by this appeal; the application is timely; and no party will suffer any prejudice if U.P. appears.

QUESTION PRESENTED FOR *AMICUS* CONSIDERATION

Whether the Appellate Division was correct to follow this Court's controlling authority when it allocated none of the coverage responsibility to the policyholder for long-tail, delayed manifestation damages during periods when insurance coverage for such liabilities was unavailable.

BACKGROUND OF THE CASE

U.P. refers the Court to Honeywell's Opposition to the Petition for Certification for a detailed recitation of the specific facts, which U.P. summarizes here in connection with the issue U. P. seeks to address. The Bendix Corporation is the corporate predecessor of Honeywell International, Inc. Bendix manufactured and sold brake and clutch pads that contained asbestos. Although it is undisputed in this action that the Bendix products did not cause injury, Honeywell is a defendant in numerous claims relating to exposure to Bendix brake pads. Honeywell seeks a declaration in this case that its liability insurance carriers must defend and indemnify Honeywell in the personal injury actions.

Honeywell has settled its claims with all of the Defendant

insurers except for Travelers Casualty & Surety Company and St. Paul Fire and Marine Insurance Company.[1] Before the Appellate Division, the parties filed appeals on different issues. Travelers appealed, among other things, the Trial Court's ruling that Honeywell need not share in coverage allocations as if it were self-insured after 1987 because excess insurance for asbestos bodily injury claims was no longer available to Honeywell after 1987.

Honeywell filed two motions in the Trial Court seeking, among other relief, partial summary judgment on the issue whether coverage for asbestos-related liabilities was reasonably available to Honeywell after 1987. The Trial Court granted summary judgment in favor of Honeywell that such coverage was not reasonably available, and that ruling is not at issue on this appeal. The Trial Court also ruled, on a motion by Travelers, that Honeywell's continued sale of Bendix brakes after 1987 did not require allocation of liability for the underlying personal-injury actions to Honeywell as long as the injury was alleged to have begun before 1987. In a decision dated July 20, 2016, the Appellate Division affirmed that ruling.

This Court granted the Petition for Certification of

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[1] Travelers purchased St. Paul in November 2003. The Appellate Division decision at issue on this appeal, however, refers to Travelers and St. Paul separately, so we will do the same.

Travelers and St. Paul.

THE MATTERS U.P. WISHES TO ADDRESS

This appeal of the Appellate Division's decision applying *Owens-Illinois v. United Ins. Co.*, 138 N.J. 437 (1994) affords this Court an opportunity to reaffirm the twenty-three-year-old rule that there should be no allocation to a policyholder under commercial general liability insurance policies for any period when insurance coverage was not reasonably available. That rule is now a part of the fabric of insurance coverage law in New Jersey. It promotes consistency and predictability in the application of legal principles, fosters reliance on judicial precedent, and contributes to the integrity of the judicial process. Upending the rule, as Travelers seeks to do on this appeal, would tend to extinguish each of those valuable attributes of *stare decisis*.

IDENTITY AND INTEREST OF *AMICUS CUIRAE*

United Policyholders is a non-profit 501(c)(3) organization whose mission is to be a trustworthy and useful information resource and an effective voice for consumers of all kinds of insurance in all 50 states. Donations, foundation grants, and volunteer labor support the organization's work. No insurance companies underwrite or fund our programs. Our work is divided into three programs:

- *Roadmap to Recovery*™ provides tools and resources for

solving insurance problems after an accident, loss, illness, or other adverse event.

- *Roadmap to Preparedness* promotes disaster preparedness and insurance literacy through outreach and education in partnership with civic, faith based, business, and other non-profit associations.

- *Advocacy and Action* advances pro-consumer laws and public policy related to insurance matters.

U.P. speaks for a diverse range of policyholders from low income drivers to international energy companies to domestic manufacturers. We have filed more than 300 "friend of the court" briefs in state and federal cases and in U.S. Supreme Court matters. We host a dynamic library of publications, sample documents, links and reports.

Elected officials, academics and journalists throughout the U.S. routinely seek U.P.'s input. U.P. has been appointed for six consecutive years as an official consumer representative to the National Association of Insurance Commissioners.

In this case, United Policyholders seeks to fulfill the "classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the Court's attention to law that may have escaped consideration." *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). This is an appropriate role for *amicus*

curiae. As commentators have frequently stressed, an *amicus curiae* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings."[2] This Court has granted motions by U.P. to appear as *amicus curiae* in other insurance cases, most recently in *Badiali v. New Jersey Manufacturers Ins. Group,* 220 N.J. 544 (2015).

LEGAL ARGUMENT

PURSUANT TO NEW JERSEY COURT RULES, THIS MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE* SHOULD BE GRANTED

An *amicus curiae* is "one who gives information to the court on some matter of law in respect of which the court is doubtful, or who advises of certain facts or circumstances relating to a matter pending for determination." *Casey v. Male*, 63 N.J. Super. 255, 258 (L.Div. 1960). An application to appear as *amicus curiae* shall be granted if the applicant's participation will assist in resolving an issue of public importance, the application is timely, and no party to the litigation will be unduly prejudiced. *R.* 1:13-9. Moreover, in determining whether to grant an *amicus* application, courts consider whether the case has "broad implications," *Taxpayers Association v. Weymouth Township,* 80 *N.J.* 6, 17 (1976),

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[2] R. Stern, E. Greggnian & S. Shapiro, *Supreme Court Practice,* 570-71 (1986) (quoting Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)).

or is of "general public interest." *Casey, supra,* 63 *N.J.Super.* at 259.

In accordance with these criteria, this request to appear as *amicus curiae* should be granted. Honeywell observes that the undisputed facts of this case make it unnecessary to reach the legal and factual issues Travelers raises concerning the application and interpretation of *Owens-Illinois* in this case. If, however, this Court decides to reach the issue, policyholders and insurers, alike, continue to depend upon and to apply the allocation rules this Court established more than two decades ago in cases involving insurance coverage for long-tail, delayed-manifestation liabilities. The parties' ability to continue to rely upon the significant body of New Jersey insurance law that has developed around this rule makes this an issue of substantial public interest and importance. This Court will benefit from hearing the views and input of parties that have experience litigating and resolving these complex disputes.

U.P.'s motion for leave to participate as *amicus curiae* is timely. Finally, no party will be prejudiced by U.P.'s participation. United Policyholders, therefore, respectfully requests leave to file an *amicus curiae* brief in this Court to inform the Court with respect to the interests of New Jersey policyholders.

CONCLUSION

For the reasons set forth above, U.P. respectfully requests that the Court grant U.P.'s motion for leave to file and *amicus curiae* brief.

Dated: February 25, 2017

By: _____
Carl A. Salisbury.

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