**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| JARDEN LLC, f/k/a and as successor by merger to JARDEN CORPORATION,<br><br>Plaintiff Below, Appellant,<br><br>v.<br><br>ACE AMERICAN INSURANCE COMPANY, ALLIED WORLD NATIONAL ASSURANCE COMPANY, BERKLEY INSURANCE COMPANY, ENDURANCE AMERICAN INSURANCE COMPANY, ILLINOIS NATIONAL INSURANCE COMPANY, and NAVIGATORS INSURANCE COMPANY,<br><br>Defendants Below, Appellees. | No. 273, 2021<br><br>ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE<br><br>C.A. No. N20C-03-112 AML (CCLD) |

**UNITED POLICYHOLDERS' MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE***

Pursuant to Delaware Supreme Court Rule 28, United Policyholders ("UP") respectfully moves the Court for leave to file the accompanying brief as *amicus curiae* in support of Plaintiff Below, Appellant Jarden LLC, and to address Appellees' contention that there should be no coverage under the insurance policies they sold Appellant and that there can be no coverage under Delaware law for

appraisal actions pursuant to 8 *Del. C.* § 262 ("Section 262"). The movant respectfully states that it has read the briefs of the Appellant as filed and can provide additional, substantive argument with appropriate citation of authorities. UP's proposed brief will assist the Court by providing the perspective of insurance consumers in Delaware and throughout the United States to supplement the arguments presented to the Court by the parties.

A copy of the proposed brief is attached hereto as Exhibit A.

***United Policyholders' Interest in the Pending Appeal***

*Amicus curiae* UP is a non-profit 501(c)(3) organization that is an advocate and information resource for individual and commercial consumers in Delaware and throughout the United States. Since its formation in 1991, UP has worked to inform and assist purchasers of insurance when seeking a policy or pursuing a claim for loss. UP's work is divided into three program areas: Roadmap to Recovery (disaster recovery and claim help), Roadmap to Preparedness (insurance and financial literacy and disaster preparedness), and Advocacy and Action (advancing pro-consumer laws and public policy). Public officials, state insurance regulators, academics, and journalists throughout the country routinely seek UP's input on insurance and legal matters. UP's Executive Director has been appointed to twelve consecutive terms as an official consumer representative to the National Association of Insurance Commissioners. In that role, UP works with regulators on matters related to policy

sales, claims and consumer rights. UP also serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and in turn, the U.S. Treasury Department.

Over the past three decades, UP has appeared as *amicus curiae* in state and federal courts across the country. These courts, including the United States Supreme Court, have directly benefitted from UP's knowledge and unique perspective of the insurance industry and have favorably cited UP *amicus* briefs. *See Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Sproull v. State Farm Fire and Cas. Co.*, Dkt. No. 126446 (IL 2021), 2021 Ill. LEXIS 619; *Cont'l Ins. Co. v. Honeywell Int'l, Inc*., 188 A.3d 297, 322 (N.J. 2018); *Allstate Prop. & Cas. Ins. Co.v. Wolfe*, 105 A.3d 1181, 1185-6 (Pa. 2014); *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 911 (Cal. 2005).

UP has a clear interest in the outcome of this appeal as it might: (1) affect the insurability of Section 262 actions as a whole under Delaware law, and (2) construe commonplace insurance policy language regarding interrelated wrongful acts, as well as in protecting the rights of insurance consumers in Delaware. Because of UP's substantial work on behalf of policyholders, UP is in a position to provide a unique and informed perspective on law and public policy that: (a) likely will not otherwise be brought to the Court's attention and (b) will enhance the Court's consideration of the issues now under review.

***Reasons Why the Brief Is Desirable and the Matters Asserted Are Relevant to the Disposition of the Case***

This appeal involves an issue of great importance to UP and to insurance consumers in Delaware and across the country. The appeal generally concerns whether Appellant is entitled to coverage under a directors and officers policy of insurance for consolidated shareholder appraisal actions resulting in a judgment against Appellant, as well as litigation costs and fees. The Appellees seek to use the Superior Court's decision to attempt to expand a prior decision by this Court to prohibit coverage for Section 262 actions regardless of insurance policy language.

UP's proposed brief would supplement Appellant's by demonstrating that such contention would undermine the insurability of certain statutory claims and potentially risk the coverage that Delaware policyholders expected when they purchased their policies from insurance companies. Appellees' requested ruling would undermine the insurance market in Delaware by injecting uncertainty as to policyholders' purchased coverage. This post-loss underwriting to add an exclusion to the Appellant's policy that the Appellees themselves failed to draft destroys the coverage Appellant believed it had and improperly construes insurance policies on a wide-scale basis by inserting unwritten exclusionary language.

In addition, UP will demonstrate that this Court can bring clarity to Delaware policyholders and the Delaware insurance market by ruling that a Section 262 action can arise out of multiple pre-closing corporate acts that finalize in the execution of

the merger. Such a ruling would assist policyholders in providing certainty that their existing policies cover Section 262 actions.

Appellant Jarden LLC consents to UP's filing of this motion for leave to file a brief of *amicus curiae*. UP has not received consent from Appellees ACE American Insurance Company, Allied World National Assurance Company, Berkley Insurance Company, Endurance American Insurance Company, Illinois National Insurance Company, and Navigators Insurance Company to UP's filing of this motion for leave to file a brief of *amicus curiae*.

For the reasons set forth above, proposed *amicus curiae* UP respectfully requests that this Court grant the instant motion and leave for United Policyholders to file the attached *amicus curiae* brief.

[Signature block follows on the next page.]

Dated October 18, 2021

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**CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION**

1. The Motion for Leave to File Brief of *Amicus Curiae* United Policyholders ("Motion") complies with the typeface requirement of Supreme Court Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Office Business 365.

2. This Motion complies with the type-volume limitation of Supreme Court Rule 30(d) because it contains 905 words, which were counted by Microsoft Office Business 365.

Dated: October 18, 2021

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# BRIEF OF*AMICUS CURIAE* UNITED POLICYHOLDERS


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## STATEMENT OF IDENTITY OF *AMICUS CURIAE* AND INTEREST IN THE CASE

*Amicus Curiae*, United Policyholders ("UP"), is a non-profit 501(c)(3) organization founded in 1991 that is an advocate and information resource for individual and commercial insurance consumers throughout the United States, including Delaware. The organization informs and assists purchasers of insurance when seeking a policy or pursuing a claim for loss. Grants, donations, and volunteers support UP's work, which is divided into three program areas: Roadmap to Recovery (disaster recovery and claim help), Roadmap to Preparedness (insurance and financial literacy and disaster preparedness), and Advocacy and Action (advancing pro-consumer laws and publicpolicy). Public officials, state insurance regulators, academics, and journalists throughout the U.S. routinely seek UP's input on insurance and legal matters. UP's Executive Director has been appointed to twelve consecutive terms as an official consumer representative to the National Association of Insurance Commissioners. In that role, UP works with regulators on matters related to policy sales, claims andconsumer rights. UP also serves on the Federal Advisory Committee on Insurance,which briefs the Federal Insurance Office and in turn, the U.S. Treasury Department.

Since its founding in 1991, UP has filed *amicus curiae* briefs in federal and state appellate courts across 42 states and in over 450 cases. *Amicus* briefs filed by UP have been expressly cited in the opinions of state supreme courts as well as the

U.S. Supreme Court. *See Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Sproull v. State Farm Fire and Cas. Co.*, Dkt. No. 126446 (IL 2021), 2021 Ill. LEXIS 619; *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 911 (Cal. 2005); *Cont'l Ins. Co. v. Honeywell Int'l, Inc*., 188 A.3d 297, 322 (N.J. 2018); *Allstate Prop. & Cas. Ins. Co.v. Wolfe*, 105 A.3d 1181, 1185-6 (Pa. 2014). UP believes that, by virtue of its experience, it has perspectives and information that will serve as a useful supplement to the arguments presented to the Court by the parties.

## ARGUMENT

This case fits a familiar and disturbing pattern unfortunately common in areas of law where a unified industry group faces off against a disparate set of consumers. Little more than a year ago in *In re Solera Insurance Coverage Appeals* ("*Solera II*"), 240 A.3d 1121 (Del. 2020), this Court decided a case in favor of the insurance companies by holding that a common type of risk associated with corporate mergers in Delaware – an appraisal action pursuant to 8 *Del. C.* § 262 ("Section 262") – was not covered by the specific wording of the D&O insurance policy in that case, which defined "Securities Claim" in part as alleging a "*violation* of law." *See Solera II*, 240 A.3d at 1131 (emphasis in original). Here, the insurance companies, which sold insurance policies with materially broader language to Appellant Jarden LLC ("Jarden"), seek to use this Court's holding in *Solera II* to attempt to create a general rule that Section 262 appraisal actions are functionally never covered by D&O

insurance policies. If not checked, this sort of attempt to incrementally erode policyholder rights will have profound and far-reaching effects beyond the direct impact to Jarden: individual policyholders who thought they had purchased effective insurance coverage for an important category of merger and acquisition-related risks will face great uncertainty, and the insurance industry will argue that a significant category of risk will have been shifted from the insurance market to individual policyholders.

UP will identify important issues of insurance policy interpretation and jurisprudence that arise from the Superior Court's ruling that denied coverage provided by Jarden's directors' and officers' liability insurance policies (the "D&O Policies") for losses resulting from four consolidated securities price appraisal lawsuits filed by stockholders against Jarden pursuant to 8 *Del. C.* § 262 (the "Appraisal Action"). UP respectfully submits this brief to supplement Jarden's argument that the Superior Court failed to interpret the specific language of the D&O Policies sold to Jarden and in doing so potentially made a dangerously broad public policy decision regarding the possibility of insurance coverage for appraisal actions generally.

Under Jarden's D&O Policies, the Appellee insurance companies promised to cover Jarden for "all Loss for which [Jarden] … becomes legally obligated to pay by reason of a Securities Claim …for any Wrongful Acts …." (A0127). The D&O

Policies broadly define "Wrongful Acts" as "*any* error, misstatement, misleading statement, *act*, omission, neglect, or breach of duty, … actually or allegedly committed or attempt by … [Jarden]." (A0130) (emphasis added). Jarden's losses in connection with the Appraisal Action are plainly covered under these provisions.

In its July 30, 2021 Memorandum Opinion, however, the Superior Court found no coverage for the Appraisal Action because, according to the Superior Court, a Section 262 appraisal action "does not seek redress in response to, or as reprisal of, an act." *Jarden, LLC v. ACE Am. Ins. Co.*, 2021 WL 3280495, at *5 (Del. Super. July 30, 2021).

To reach this conclusion, the Superior Court relied on this Court's decision in *Solera II*, in which this Court stated that an appraisal proceeding "'does not involve any inquiry into claims of wrongdoing.'" *Jarden, LLC*, 2021 WL 3280495, at *5 (quoting *Solera II*, 240 A.3d at 1136). In *Solera II*, this Court held that there was no coverage for an appraisal action because it did not meet the definition of "Securities Claim" in the insurance policies at issue in that case. *Solera II*, 240 A.3d at 1131. Those insurance policies defined "Securities Claim" as a claim "made against [Solera] for any actual or alleged violation of any federal, state or local statute, regulation, or rule or common law regulating securities …." *Id.* at 1125. This Court determined that an appraisal action is "not for a *violation* of law" and thus did not

meet those insurance policies' definition of "Securities Claim." *Id.* at 1131 (emphasis in original).

However, this Court in *Solera II* did not make a sweeping ruling that appraisal actions may never be covered under D&O liability insurance policies as a matter of public policy. Rather, this Court based its decision on the specific wording of the insurance policies at issue in that case. But in accepting the Appellee insurance companies' argument that the Appraisal Action cannot be covered *because of* the Court's ruling in *Solera II*, the Superior Court failed to interpret the language of the D&O Policies in this case on their own and interpreted *Solera II* as having reach beyond the policy language at issue in *Solera II*, thereby potentially issuing a public policy decision regarding coverage for appraisal actions. If left to stand, D&O insurance companies will use the Superior Court's decision to "post-loss underwrite" and seek to exclude coverage for appraisal actions under insurance policies that do not contain any such exclusion.

In addition, despite acknowledging a number of pre-closing acts that allegedly led to the merger, the Superior Court held there was no actual or alleged "Wrongful Act" prior to the Run-Off Date of the D&O Policies (*i.e.*, the date of execution of the merger). Thus, the Superior Court disregarded all of Jarden's alleged pre-closing acts that allegedly contributed to determinations of the fair value of the shares in the Appraisal Action, holding that a claim for the Appraisal Action arose after the

Policy's Run-Off Date. *See Jarden*, 2021 WL 3280495, at *7. But even if the actual execution of a merger is a prerequisite to the bringing of a Section 262 action, the Superior Court took an overly formalistic approach that disregarded the realities of pre-closing activity and ignored the plain language of Jarden's D&O Policies. In doing so, the Superior Court added an exclusion to the D&O Policies where one does not exist.

## I. THE SUPERIOR COURT FAILED TO PROPERLY INTERPRET THE D&O POLICY LANGUAGE AND THEREFORE ISSUED A DECISION THAT THE INSURANCE INDUSTRY WILL USE A PRECLUDING COVERAGE FOR APPRAISAL ACTIONS AS A MATTER OF PUBLIC POLICY

The language of insurance policies must be enforced in accordance with their ordinary and commonly understood meaning. *See Salamone v. Gorman*, 106 A.3d 354, 367-68 (Del. 2014) ("Delaware law adheres to the objective theory of contracts, *i.e.*, a contract's construction should be that which would be understood by an objective, reasonable third party."). If the meaning of the words in an insurance policy are ambiguous, "the doctrine of *contra proferentem* requires that the language of an insurance contract be construed most strongly against the insurance company that drafted it." *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195-96 (Del. 1992). The Superior Court erred by failing to interpret the plain language of the Policy's definition of "Wrongful Act" as it is commonly

and ordinarily understood, and such failure undermines the shared goal of certainty and understanding of coverage for parties to insurance policies.

Under the broad D&O Policies here, coverage is provided for a "Claim, … which, in whole or in part, is brought by one or more securities holders of the Company, in their capacity as such." (A0129). A Section 262 appraisal action clearly fits that definition. *See* 8 *Del. C.* § 262(a), (d). Indeed, the Policy defines "Claim" to be a "written demand" for non-monetary relief. (A0128). Section 262 expressly requires as a precondition to an appraisal action that "[e]ach stockholder electing to demand the appraisal of such stockholder's shares shall deliver to the corporation, before the taking of a vote on the merger or consolidation, a **written demand** for appraisal of such stockholder's shares." 8 *Del. C.* § 262(d)(1) (emphasis added).

Notwithstanding the clear coverage of the Appraisal Action by the D&O Policies, the Superior Court applied an overly restrictive meaning to the Policy's language and held Jarden was not entitled to coverage for a Section 262 action. The Superior Court based its holding on this Court's decision in *In re Solera Insurance Coverage Appeals*, which held that certain costs incurred in connection with a Section 262 action were not covered by an insurance policy sold to Solera. *Solera II*, 240 A.3d 1121 (Del. 2020). The holding in *Solera II*, however, was not as broad as the Superior Court held and the Appellees contend, and does not foreclose

coverage under each and every D&O policy for Section 262 actions. Indeed, the *Solera II* court acknowledged that its ruling in *Solera II* was limited to the D&O policies at issue only in that matter. *See* 240 A.3d at 1123.

*Solera II* involved D&O policies with a narrowly worded definition of "Securities Claim." *See id.* at 1125 (policies defined "Securities Claim" to require an "actual or alleged violation of any federal statute, regulation, or rule or common law regulating securities"). Contrasting that definition against the policy language in the D&O Policies here demonstrates the breadth of coverage available under the D&O Policies sold to Jarden, including for Section 262 claims. The contrast also underscores that a singular set of words is not used in all D&O policies sold to Delaware policyholders. Thus, the Superior Court's erroneous ruling on coverage for Section 262 actions is improper and seriously undermines the ability of insurance companies and policyholders to sell and buy insurance policies with specific wordings that provide particularized, and potentially varying, degrees of coverage.

Indeed, Jarden's broad coverage is important to demonstrating why policyholders incorporated in Delaware should be entitled to the coverage they paid to receive, and reasonably expect, including for Section 262 actions. Mergers and acquisitions are commonplace for companies incorporated in Delaware. For example, a recent study published in the Boston University Law Review found that there were "869 deals in which the target firms were incorporated in Delaware

completed in the 2015-2019 period." Wei Jang et al., *The Long Rise and Quick Fall of Appraisal Arbitrage*, 100 BOSTON U. L. REV. 2155 (2020), *available at* http://www.bu.edu/bulawreview/files/2021/01/JIANG-LI-THOMAS.pdf. The study identified that in that four-year time-period, there were 223 unique appraisal cases focused on 122 deals. *See id.* 2155-56. Similarly, another publication from Cornerstone Research found that "[f]rom 2006 to 2018, a total of 433 appraisal petitions were filed in Delaware," which corresponded to 320 unique merger cases. *See* CORNERSTONE RESEARCH, *Appraisal Litigation in Delaware: Trends in Petitions and Opinions 2006-2018*, at 4 (2019), *available at* https://www.cornerstone.com/publications/reports/appraisal-litigation-delaware-2006-2018. These statistics showing the frequency of Section 262 actions demonstrate that it is in the public interest for the Court to hold that coverage is available for appraisal actions.

Policyholders such as Jarden have purchased D&O policies with the expectation that they would cover Section 262 actions. *Cf. Houseman v. Sagerman*, 2015 WL 7307323, at *9-11 (Del. Ch. Nov. 19, 2015) (finding company prejudiced by shareholders' late attempt to seek quasi-appraisal remedies because defendant company's D&O policy had expired and company was foreclosed from seeking the benefits of its D&O policy to mitigate litigation costs). But here the Appellees and the Superior Court below seem to seek to extend *Solera II* beyond Jarden's broad

and individual policy language to foreclose coverage for all appraisal actions under Delaware law. To hold that there is no coverage under Delaware law for Section 262 actions would result in post-loss and post-purchase rewriting of insurance policies purchased by policyholders who believed such actions would be covered. That broad-scale reinterpretation of insurance policies away from the reasonable expectations of policyholders would result in the creation of a judicially drafted exclusion across all D&O policies regardless of individual policy language. *Cf. Monzo v. Nationwide Prop. & Cas. Ins. Co.*, 249 A.3d 106, 118 (Del. 2021) ("Delaware [courts] should not 'destroy or twist policy language under the guise of construing it.'").

It is black-letter law that certainty and specificity in contracts is a requirement. *See, e.g.*, *Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209, 1229 (Del. 2018) (stating the rule that for a contract to be valid it must contain "sufficiently definite" material terms). If this Court were to do as the insurance companies seek here and extend the holding *Solera II* beyond the language of the policies at issue in *Solera II*, it would undermine the certainty policyholders thought they had purchased with their insurance policies. Such a sweeping ruling would have profound implications on Delaware policyholders and public policy, which is what the Superior Court appears to have done with its decision. *See Stenberg v. Nanticoke Mem. Hosp., Inc.*, 62 A.3d 1212, 1217 (Del. 2013) ("Questions of public policy are best left to the

legislature"); *Helman v. State*, 784 A.2d 1058, 1068 (Del. 2001) ("Courts are not super-legislatures and it is not a proper judicial function to decide what is or is not wise legislative policy."). Those implications might include policyholders seeking to reincorporate in states other than Delaware where coverage for appraisal actions may more clearly be available.

This Court also should not do for the insurance companies what they have themselves failed to do and write an across-the-board exclusion into D&O policies. As the *Solera II* court observed, the General Assembly enacted the appraisal remedy in 1899. *Solera II*, 240 A.3d at 1133. Insurance companies have been aware of the appraisal statute for 122 years. They have long had the opportunity to preclude coverage for Section 262 actions by drafting and including exclusions for such actions in insurance policies they sell to Delaware policyholders. That they have not done so is powerful evidence of their intent to provide coverage for Section 262 actions, and their failure to exclude coverage should not be rewarded by an after-the-face extension of *Solera II* beyond its limited fact-specific holding.

If this Court had intended to hold that Section 262 actions are not insurable under Delaware law, as the Appellees argued, it could have done so in *Solera II*. Instead, the *Solera II* court based its ruling off the particular language in the insurance policies at issue in *Solera II*. *Solera II*, 240 A.3d at 1123. There was no holding on prohibitions of coverage or statements as to Delaware public policy. The

D&O Policies sold to Jarden contain different and broader policy language that demonstrates coverage for Section 262 actions, and there is undoubtedly other language in other Delaware policyholders' insurance policies than that contained in the D&O Policies or the ones at issue in *Solera II*.

Given the existence of different policy language in different insurance policies, evidencing the intent to provide broader coverage, it is in the interest of all policyholders for policies to continue to be construed based on their own specific language rather than based on a wholesale judicially created exclusion. If insurance markets are to function properly in Delaware, exclusions should be clear on an insurance policy's face and not added *post hoc* through nullification by litigation.

## II. THE APPRAISAL ACTION AROSE FROM A SERIES OF "INTERRELATED WRONGFUL ACTS" AND IS THEREFORE A COVERED CLAIM.

The Superior Court also held that Jarden was not entitled to coverage under its Policy because even if the Appraisal Action were a "Wrongful Act," it did not occur until after Policy's Run-Off Date. That holding also overlooks the plain language of the D&O Policies and creates a backdoor means to post-loss underwriting.[1]

[1] Counsel for Jarden raised the issue of "interrelated wrongful acts" at oral argument. (A0436-A0438).

The D&O Policies define "Wrongful Act" as "any … act … actually or allegedly committed or attempted by" Jarden with respect to a "Securities Claim." (A0138). By focusing solely on the merger execution date as an "act," the Superior Court essentially held that a Section 262 action is derived from a single corporate act. *See Jarden*, 2021 WL 3280495, at *6. Not only does that holding disregard each pre-closing act specifically noted by the Court of Chancery in the Appraisal Action as impacting the value of the securities, *see In re Appraisal of Jarden Corp.*, 2019 WL 3244085, at *3, it disregards the D&O Policies' language about "Interrelated Wrongful Acts."

The D&O Policies state that

> [a]ll Claims arising out of the same Wrongful Act and all Interrelated Wrongful Acts of the Insured shall be deemed to be one Claim, and such Claim shall be deemed to be first made on the date of the earliest of such Claims is first made, regardless of whether such date is before or during the Policy Period.

(A0134). The D&O Policies define "Interrelated Wrongful Acts" as "all Wrongful Acts that have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of related facts, circumstances, situations, events, transactions or causes." (A0128).

Similar interrelated or related wrongful acts language is commonplace in claims made insurance policies such as D&O policies. Accordingly, such language

is certain to be at issue in insurance company arguments determining whether coverage exists for a Section 262 action.

Here, the D&O Policies broadly tie "any act" to the earliest "act" such that a "Claim" is deemed to be made on the earliest date of a "Claim." In other words, because a "Claim" includes a written demand for non-monetary relief, the shareholders' first pre-closing written demand for an appraisal is the earliest date of Jarden's Claim for coverage for the Appraisal Action. *See* 8 *Del. C.* § 262(d)(1). The Superior Court held that without a merger's execution there can be no appraisal action, *Jarden*, 2021 WL 3280495, at *6; but without a shareholder making a pre-closing written demand for an appraisal, there also can be no appraisal action. *See* 8 *Del. C.* § 262(d)(1). Accordingly, the D&O Policies' "Interrelated Wrongful Acts" language demonstrates why the Appraisal Action should be covered under the D&O Policies even if the execution of the merger itself is the final act giving rise to a right to seek an appraisal.

The Supreme Court can bring clarity to the issue about the number of acts necessary for a shareholder to bring a Section 262 action. That clarification would benefit the insurance marketplace in Delaware generally, as well as informing policyholders whether they need to purchase coverage extensions through the date of execution of a merger to ensure they are protected against the risk of liability and litigation for Section 262 actions. This Court should reaffirm the right of parties in

Delaware to purchase D&O liability insurance policies that provide the broad coverage that their terms describe, rather than applying what amounts to judicially applied after-the-fact exclusions to Section 262 actions.

## CONCLUSION

For these reasons, *amicus curiae* United Policyholders respectfully requests that this Court reverse the judgment of the Superior Court.

[Signature block follows on the next page.]

Dated: October 18, 2021

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1. The *Brief of Amicus Curiae United Policyholders* ("Brief") complies with the typeface requirement of Supreme Court Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Office Business 365.

2. This Brief complies with the type-volume limitation of Supreme Court Rule 14(d)(i) because it contains 3,387 words, which were counted by Microsoft Office Business 365.

Dated: October 18, 2021

**LANDIS RATH & COBB LLP**

*/s/ Rebecca L. Butcher*

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*Counsel for Amicus Curiae United Policyholders*

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

| | |
|---|---|
| JARDEN LLC, f/k/a and as successor by merger to JARDEN CORPORATION,<br><br>Plaintiff Below,<br>Appellant,<br><br>v.<br><br>ACE AMERICAN INSURANCE COMPANY, ALLIED WORLD NATIONAL ASSURANCE COMPANY, BERKLEY INSURANCE COMPANY, ENDURANCE AMERICAN INSURANCE COMPANY, ILLINOIS NATIONAL INSURANCE COMPANY, and NAVIGATORS INSURANCE COMPANY,<br><br>Defendants Below,<br>Appellees. | No. 273, 2021<br><br>ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE<br><br>C.A. No. N20C-03-112 AML (CCLD) |

**[PROPOSED] ORDER GRANTING UNITED POLICYHOLDERS' MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE***

WHEREAS, on October 18, 2021, pursuant to Delaware Supreme Court Rule 28, United Policyholders filed its Motion for Leave to File Brief as *Amicus Curiae* (the "Motion"), and attached as Exhibit A to the Motion, Brief of *Amicus Curiae* United Policyholders (the "Brief");

WHEREAS the Court has considered the Motion, and finds the Brief desirable and relevant to the disposition of this appeal in accordance with Rule 28;

NOW, THEREFORE, this ____ day of _____, 2021, it is hereby ORDERED:

1. The Motion is GRANTED; and

2. Counsel for the Proposed Amicus Curiae is granted leave to file the brief.

_____
Justice

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

| | |
|---|---|
| JARDEN LLC, f/k/a and as successor by merger to JARDEN CORPORATION,<br><br>Plaintiff Below,<br>Appellant,<br><br>v.<br><br>ACE AMERICAN INSURANCE COMPANY, ALLIED WORLD NATIONAL ASSURANCE COMPANY, BERKLEY INSURANCE COMPANY, ENDURANCE AMERICAN INSURANCE COMPANY, ILLINOIS NATIONAL INSURANCE COMPANY, and NAVIGATORS INSURANCE COMPANY,<br><br>Defendants Below,<br>Appellees. | No. 273, 2021<br><br>ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE<br><br>C.A. No. N20C-03-112 AML (CCLD) |

## CERTIFICATE OF SERVICE

I, Rebecca L. Butcher, Esquire hereby certify that on October 18, 2021, a true and correct copy of the foregoing United Policyholders' *Notice of Appearance of Rebecca L. Butcher, United Policyholders' Motion for Leave to File Brief as Amicus Curiae,* and *Proposed Order Granting United Policyholders' Motion for Leave to File Brief as Amicus Curiae* were caused to be served on the following counsel of record via File & Serve*Xpress*:

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Dated: October 18, 2021

*/s/ Rebecca L. Butcher*
Rebecca L. Butcher (No. 3816)

# File & ServeXpress Transaction Receipt

**File & ServeXpress Transaction ID:** 67021550
**Submitted by:** Linda Rogers, Landis Rath & Cobb LLP
**Authorized by:** Rebecca L Butcher, Landis Rath & Cobb LLP
**Authorize and file on:** Oct 18 2021 5:02PM EDT

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**Court:** DE Supreme Court
**Division/Courtroom:** N/A
**Case Class:** Civil-Appeal
**Case Type:** Civil-Other
**Case Number:** 273,2021
**Case Name:** Jarden LLC, f/k/a and as successor by merger to Jarden Corporation v. ACE American Insurance Company

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**Transaction Option:** File and Serve
**Billing Reference:** 200.000 United Policyholders
**Read Status for e-service:** Not Purchased

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**Documents List**

| | | | |
|---|---|---|---|
| **7 Document(s)** | | | |
| **Attached Document, 2 Pages** | | | |
| **Document Type:** Notice of entry of appearance | **Access:** Public | **Statutory Fee:** $1.50 | **Linked:** Yes |
| **Document title:** Notice of Appearance of Rebecca L. Butcher on behalf of Amicus Curiae United Policyholders | | | |
| **Attached Document, 6 Pages** | | | |
| **Document Type:** Motion to file amicus brief | **Access:** Public | **Statutory Fee:** $1.50 | **Linked:** Yes |
| **Document title:** United Policyholders' Motion for Leave to File Brief as Amicus Curiae | | | |
| **Attached Document, 2 Pages** | | | |
| **Document Type:** Certificate of Compliance with Typeface | **Access:** Public | **Statutory Fee:** $1.50 | **Linked:** |
| **Document title:** Certificate of Compliance to United Policyholders' Motion for Leave to File Brief as Amicus Curiae | | | |
| **Attached Document, 20 Pages** | | | |
| **Document Type:** Exhibit | **Access:** Public | **Statutory Fee:** $1.50 | **Linked:** |
| **Document title:** Exhibit A (Proposed Brief of Amicus Curiae United Policyholders) to United Policyholders' Motion for Leave to File Brief as Amicus Curiae | | | |
| **Attached Document, 2 Pages** | | | |
| **Document Type:** Certificate of Compliance with Typeface | **Access:** Public | **Statutory Fee:** $1.50 | **Linked:** |
| **Document title:** Certificate of Compliance to Brief of Amicus Curiae United Policyholders | | | |
| **Attached Document, 2 Pages** | | | |
| **Document Type:** Proposed Order | **Access:** Public | **Statutory Fee:** $1.50 | **Linked:** |
| **Document title:** [Proposed] Order Granting United Policyholders' Motion for Leave to File Brief as Amicus Curiae | | | |

| Attached Document, 2 Pages | | | |
|---|---|---|---|
| **Document Type:** Certificate of Service | **Access:** Public | **Statutory Fee:** $1.50 | **Linked:** |
| **Document title:** Certificate of Service of Notice of Appearance of Rebecca L. Butcher, Motion for Leave to File Brief as Amicus Curiae, and [Proposed] Brief of Amicus Curiae United Policyholders | | | |

Expand All

**Sending Parties (1)**

| Party | Party Type | Attorney | Firm | Attorney Type |
|---|---|---|---|---|
| United Policyholders (pending) | Amicus pending | Butcher, Rebecca L | Landis Rath & Cobb LLP | Attorney in Charge |

**Recipients (11)**

Service List (11)

| Delivery Option | Party | Party Type | Attorney | Firm | Attorney Type | Method |
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| Service | Ace American Insurance Company | Appellee | Kyle, Peter H | DLA Piper US LLP-Wilmington | Attorney in Charge | E-Service |
| Service | Allied World National Assurance Company | Appellee | Casarino, Marc S | White & Williams LLP-Wilmington | Attorney in Charge | E-Service |
| Service | Berkley Insurance Company | Appellee | Cline, Joanna J | Troutman Pepper Hamilton Sanders, LLP-Wilmington | Attorney in Charge | E-Service |
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| Service | Endurance American Insurance Company | Appellee | Keener, Carmella | Cooch & Taylor Pa-Wilmington | Attorney in Charge | E-Service |
| Service | Illinois National Insurance Company | Appellee | Heyman, Kurt M | Heyman Enerio Gattuso & Hirzel LLP | Attorney in Charge | E-Service |
| Service | Illinois National Insurance Company | Appellee | Nelson, Aaron M | Heyman Enerio Gattuso & Hirzel LLP | Attorney in Charge | E-Service |
| Service | Jarden LLC, f/k/a and as successor by merger to Jarden Corporation | Appellant | Baldwin, David J | Berger Harris LLP | Attorney in Charge | E-Service |
| Service | Navigators Insurance Corporation | Appellee | Katzenstein, Robert J | Smith Katzenstein & Jenkins LLP | Attorney in Charge | E-Service |

Additional Recipients (0)

**Case Parties**

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