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**IN THE SUPREME COURT OF OHIO**

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THE LINCOLN ELECTRIC COMPANY,

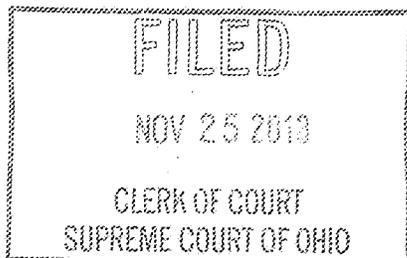
*Plaintiff-Petitioner,*

-against-

TRAVELERS CASUALTY AND SURETY COMPANY, ET AL.,

*Defendants-Respondents*

Supreme Court Case No. 2013-1088



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On Certified Question from  
the United States District Court,  
Northern District of Ohio, Eastern Division

District Court Case No. 1:11CV2253

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**BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF  
PLAINTIFF-PETITIONER THE LINCOLN ELECTRIC COMPANY**

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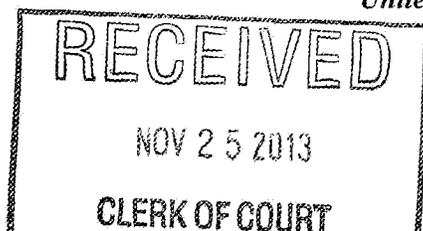
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## I. INTRODUCTION

*Amicus curiae* United Policyholders respectfully submits this Memorandum of Law in support of Plaintiff-Petitioner The Lincoln Electric Company (“Lincoln Electric”).

The Federal District Court for the Northern District of Ohio has certified to this Court the following question:

May an insured who has accrued indemnity and defense costs arising from progressive injuries, and who settles resultant claims against primary insurer(s) on a pro rata allocation basis among various primary insurance policies, employ an “all sums” method to aggregate unreimbursed losses and thereby reach the attachment point(s) of one or more excess insurance policies?

The Federal District Court “seeks a judicial determination of the above question by the Supreme Court of Ohio given: the lack of controlling precedent from the Supreme Court of Ohio concerning the proper method of allocating unreimbursed losses under these circumstances; conflicts between precedent issued by Ohio courts; conflicts between precedent from Ohio courts and the United States Court of Appeals for the Sixth Circuit,” and other reasons. The resolution of this question will impact policyholders in Ohio and elsewhere since Ohio has a robustly developed jurisprudence on many insurance issues which courts in other jurisdictions look to for guidance.

## II. STATEMENT OF INTEREST OF *AMICUS CURIAE*

United Policyholders, a non-profit 501(c)(3) organization founded in 1991, serves as an independent information resource and a voice for insurance consumers in all 50 states. Donations, foundation grants and volunteer labor fuel the organization. United Policyholders’ Board of Directors includes the former Chief Justice of the Arizona Supreme Court, as well as the former Washington State Insurance Commissioner.

United Policyholders divides its work into three program areas: (1) the *Roadmap to Recovery* program provides tools and resources that help individuals and businesses solve insurance problems that can arise after an accident, illness, disaster, or other adverse event; (2) the *Roadmap to Preparedness* program promotes insurance and financial literacy as well as disaster preparedness; and (3) the *Advocacy and Action* program advances policyholders' interests in courts of law, legislative and public policy forums, and in the media.

United Policyholders participates in the proceedings of the National Association of Insurance Commissioners ("NAIC") as an official consumer representative. United Policyholders interfaces with the Insurance Division of the Department of Financial Services when providing disaster recovery and claim help through a "Roadmap to Recovery" program. United Policyholders maintains an extensive, publically-available library of publications, legal briefs, sample policies, forms and articles on commercial and personal lines insurance products, coverage and the claims process on its website, [www.unitedpolicyholders.org](http://www.unitedpolicyholders.org).

In addition to serving as a resource for individual and commercial policyholders, United Policyholders monitors legal and marketplace developments. United Policyholders has participated in legislative and other public forums related to home, auto and title insurance rates and claim practices, and is currently working on superstorm Sandy recovery.

United Policyholders seeks to assist courts throughout the United States by filing *amicus curiae* briefs in insurance cases. United Policyholders has filed briefs in the Ohio courts. See, e.g., Pennsylvania General Ins. Co. v. Park-Ohio Indus., Inc., 126 Ohio St. 3d 98, 2010-Ohio-2745, 930 N.E.2d 800 (2010); Pilkington North America, Inc. v. Travelers Cas. & Sur. Co., 112 Ohio St. 3d 482, 2006-Ohio-6551, 861 N.E.2d 121 (2006); Glidden Co. v. Lumbermens Mut. Cas. Co., No. 81782, 2004 WL 2931019 (Ohio Ct. App. Dec. 17, 2004); Goodyear Tire &

Rubber Co. v. Aetna Cas. & Sur. Co., 95 Ohio St. 3d 512, 2002-Ohio-2843, 769 N.E.2d 835 (2002). United Policyholders has also filed *amicus curiae* briefs in numerous cases before the United States Supreme Court. See, e.g., Fuller-Austin Insulation Co., v. Highlands Ins. Co., 549 U.S. 946 (2006); Philip Morris USA v. Mayola Williams, 547 U.S. 1162 (2006); Aetna Health, Inc. v. Davila, 542 U.S. 200 (2004); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003); Rush Prudential HMO v. Debra Moran, 533 U.S. 948 (2001), *aff'd*, 536 U.S. 355 (2002); Humana Inc. v. Forsyth, 525 U.S. 299 (1999).; The U.S. Supreme Court referenced United Policyholders' *amicus curiae* brief in its opinion in Humana, Inc. v. Forsyth, 525 U.S. 299 (1999).

United Policyholders has a vital interest in ensuring that insurance companies fulfill the promises they make to their policyholders. While insurance companies are in business to earn profits through risk assumption, businesses and individuals rely on insurance to protect property and livelihoods. United Policyholders seeks to prevent insurance companies from shifting risk back to policyholders through schemes that are not authorized by insurance contracts or public policy. The organization works to counterbalance the widely-represented interests of the insurance industry by advocating for large and small policyholders in courts throughout the country.

In the case at bar, United Policyholders appears as *amicus curiae* to address certain questions before the Court that are of significance well beyond the specific facts of this litigation. These important issues will affect policyholders nationwide. No party to this case has contributed directly or indirectly to the preparation of this brief.

### III. STATEMENT OF FACTS

As to the operative facts, *amicus curiae* United Policyholders adopts the Statement of the Case and the Statement of Facts of Lincoln Electric.

### IV. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. 1: Ohio Public Policy Favoring Settlements Requires That Ohio Law On Trigger and the “All Sums” Issues Be Applied Without Regard to Settlements With Other Insurance Companies Under Other Insurance Policies.**

The vast majority of civil cases are resolved by settlement or otherwise before trial. Indeed, the percentage of state civil cases making it to trial has been about 1.3 percent.<sup>1</sup> A rule which reduces the rights of policyholders under a liability insurance policy based only upon the settlement approach taken with a separate liability insurance company with regard to separate insurance policies, will likely negatively impact the ability to settle multi-party insurance cases. Given the predominance of settlement in civil cases, the effect will be extreme.

Settlements cannot change Ohio law, only the legislature or this Court may do so. Settlement will be discouraged if each settlement entered must be evaluated for its possible effect upon the legal rules used to evaluate a policyholder’s rights under different liability insurance policies, sold by different insurance companies,. Such a result would be contrary to Ohio public policy. Kirschbaum v. Dillon 58 Ohio St. 3d 58, 69, 567 N.E.2d 1291 (1991).

**Proposition of Law No. 2: Ohio Law is and Should Remain Consistent with The Insurance Industry’s Prior Representations That Policyholders Are Entitled to Designate Which General Liability Insurance Policy Will Respond to “All Sums” Liability of A Continuing Injury.**

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<sup>1</sup> Ostrum, Strickland & Hannaford, Examining Trial Trends in State Courts 1976-2002, 1 J. Empirical Legal Studies 755 (2004) (“One particular study of 22 states concluded that there were only 13 jury trials for every 1,000 civil dispositions, a meager 1.3%.”), cited in Judge, Vella & Jones, DRI’s Jury Preservation Task Force, 54 No. 11 DRI for Def. 10 (2012).

Ohio law on trigger and allocation as expressed, for example, in Pennsylvania General Insurance Co. v. Park-Ohio Industries, Inc., 126 Ohio St. 3d 98, 2010-Ohio-2745, 930 N.E.2d 800, syllabus 1, 99, 102, 105; and Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co., 95 Ohio St. 3d 512, 516, 2002-Ohio-2843, 769 N.E.2d 835, at ¶ 5, follows the “continuous trigger” approach to activating liability insurance policies, and the “all sums” approach to the allocation issue raised by the insurance industry. Ohio law is consistent with the insurance industry’s understanding of these keystone principles of liability insurance. These principles are not altered by settlements with other insurance companies on some basis other than the “all sums” rule.

The insurance industry always has understood that standard-form general liability policies obligate insurance companies to pay in full — “all sums” — for a continuing injury. The insurance industry’s previous litigation postures are consistent with the statements and analyses made by the insurance industry at the time the policy language was written regarding how the policy language should apply. These contemporaneous statements and analyses — sometimes called “drafting history” — emphasize the intentional omission of any allocation provision (pro-rata or otherwise) in standard-form general liability insurance policies. Allowing the insurance industry to benefit from a decision inconsistent with the industry’s own understanding as reflected by the drafting history undermines basic fairness and consistency crucial to proper working of the liability and insurance system. It also diminishes the benefit of the insurance for which policyholders — large and small — paid for with hard-earned premium dollars over decades.

Indeed, the drafters of the general liability standard forms<sup>2</sup> clearly understood that the promise to indemnify “all sums” required insurance companies to pay the whole of a policyholder’s liability, even if only a portion of the continuous injury took place during the policy period.<sup>3</sup> Richard A. Schmalz, Assistant Counsel of appellant Liberty Mutual Insurance Company, told the Mutual Insurance Technical Conference in 1965 that there was “no pro-ration formula in the policy, as it seemed impossible to develop[] a formula which would handle every possible situation with complete equity.”<sup>4</sup> The Assistant Secretary of appellant Liberty Mutual, Gilbert Bean, agreed:

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<sup>2</sup> In the 1960’s, domestic insurance companies, acting through industry trade associations, including the National Bureau of Casualty Underwriters, the Insurance Rating Board, and the Mutual Insurance Rating Board (all predecessors of the Insurance Services Office, Inc. (“ISO”), formed by merger in 1971), established several committees which engaged in the process of revising the standard-form general liability policy. These committees, which consisted of the insurance industry’s most respected experts and legal counsel, developed a revised standard-form general liability insurance policy, substituting the concept of “occurrence” for the “accident” trigger used in the prior, 1955 standard-form policy. See Eljer Mfg., Inc. v. Liberty Mut. Ins. Co., 972 F.2d 805, 810-12 (7th Cir. 1992); American Home Prods. Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1500-03 (S.D.N.Y. 1983), aff’d as modified, 748 F.2d 760 (2d Cir. 1984); Montrose Chem. Co. of Cal. v. Admiral Ins. Co., 897 P.2d 1, 14 (Cal. 1995) (“Most courts and commentators have recognized that the presence of standardized industry provisions and the availability of interpretive literature are of considerable assistance in determining coverage issues.”); Hoechst Celanese Corp. v. National Union Fire Ins. Co., 623 A.2d 1128, 1129 n.1 (Del. Super. Ct. 1992) (noting “most if not all insurers use ISO standard-form language in their policies” and “most insurers do in fact use ISO language nearly or completely verbatim”). The result was the 1966 standard-form general liability policy, the insuring agreement of which remained unaltered in the subsequent 1973 standard-form general liability policy.

<sup>3</sup> Eugene R. Anderson, et al., Environmental Insurance Coverage in New Jersey: A Tale of Two Stories, 24 Rutgers L.J. 83, 203 (1992). The authors of this Article are policyholder counsel.

<sup>4</sup> Id. (quoting Richard A. Schmalz, The New Comprehensive General Liability and Automobile Program, Presentation Before the Mutual Insurance Technical Conference 6 (Nov. 15-18, 1965); see also Owens-Illinois v. United Ins. Co., 650 A.2d 974, 990 (N.J. 1994) (quoting Messrs. Bean and Katz); Eugene R. Anderson, et al., Liability Insurance Coverage for Pollution Claims, 59 Miss. L.J. 699, 729-30 (1989) (quoting Mr. Bean). Again, the authors of this article are counsel to policyholders and represent Amicus Curiae.

[I]f the injury or damage from waste disposal should continue after the waste disposal ceased, as it usually does, it could produce losses on each side of a renewal date, and in fact over a period of years, with a separate policy applying each year.

The policy limits are renewed every year, so the underwriter of a manufacturing risk may have his limits pyramid<sup>5</sup> under this new contract.<sup>6</sup>

Confirming the statements of Messrs. Schmalz and Bean, at an April 21, 1977 insurance industry meeting devoted to discussing the industry's response to claims for coverage for asbestos-related claims, a classic type of multiple policy period liability claim, the "majority" of the insurance company representatives present "contended" that, for continuing injuries, "each carrier on risk during any part of that period" could be "fully responsible" for the entire loss:

The majority view [held by the insurance industry representatives] was that coverage existed for each carrier throughout the period of time the asbestosis condition developed, *i.e.*, from the first exposure through the discovery and diagnosis. The majority also contended that each carrier on risk during any part of that period could be fully responsible for the cost of defense and loss.<sup>7</sup>

Thus, the drafting history is consistent with existing Ohio law on trigger and allocation and this Court should prevent an attack on those keystone principles of Ohio law. Simply put,

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<sup>5</sup> By "pyramid," Mr. Bean meant that policy limits in the multiple triggered years would all apply to the loss.

<sup>6</sup> Eugene R. Anderson, et al., Environmental Insurance Coverage in New Jersey: A Tale of Two Stories, 24 Rutgers L.J. 83, 203-04 (1992) (citing Gilbert L. Bean, New Comprehensive General and Automobile Program: The Effect on Manufacturing Risks, Presentation before the Mutual Insurance Technical Conference 6 (Nov. 15-18, 1965); see also Owens-Illinois, 650 A.2d at 990 (quoting Mr. Bean); Eugene R. Anderson, et al., Liability Insurance Coverage for Pollution Claims, 59 Miss. L.J. 699, 729-30 (1989) (quoting Mr. Bean); Thomas Baker & Eva Orlebeke, The Application of Per-Occurrence Limits from Successive Policies, 3 *Env't'l Claims J.* 411, 415 (1991).

<sup>7</sup> Memorandum of Meeting of Discussion Group, Asbestosis, held under the auspices of the American Mutual Insurance Alliance and American Insurance Association (April 21, 1977), quoted in Howard Ende, et al., Liability Insurance: A Primer for College and University Counsel, 23 J.C. & U.L. 609, 690 (Spring 1997) (emphasis added).

settlements with other insurance companies should not reduce the insurance otherwise available under clear existing Ohio law.

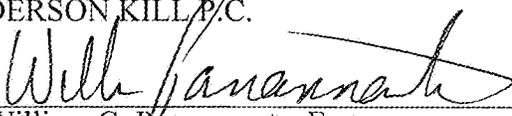
## V. CONCLUSION

For all of the foregoing reasons, *amicus curiae* United Policyholders respectfully requests that this Court should answer the certified question in the affirmative, to preserve these important insurance principles in Ohio law.

Dated: November 22, 2013  
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The undersigned hereby certifies that a copy of the foregoing **BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFF-PETITIONER THE LINCOLN ELECTRIC COMPANY** was served by regular U.S. Mail this 22 day of November, 2013, upon the following counsel:

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