

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

WMI LIQUIDATING TRUST, )

Plaintiff, )

v. )

C.A. No. N12C-10-087 MMJ CCLD

XL SPECIALTY INSURANCE )

COMPANY; NATIONAL UNION )

FIRE INSURANCE COMPANY OF )

PITTSBURGH, PA; COLUMBIA )

CASUALTY COMPANY; AXIS )

INSURANCE COMPANY; ACE )

AMERICAN INSURANCE )

COMPANY; ARCH INSURANCE )

COMPANY; RSUI INDEMNITY )

COMPANY; CHARTIS PROPERTY )

CASUALTY COMPANY, Formerly )

known as "AIG Casualty Company;" )

HOUSTON CASUALTY )

COMPANY; THOSE CERTAIN )

UNDERWRITERS AT LLOYD'S )

LONDON SUBSCRIBING TO )

POLICY NO. B0509QA027908, also )

known as "Lloyd's Underwriter )

Syndicate No. 2488 AGM London;" )

and SCOTTSDALE INDEMNITY )

COMPANY, )

Defendants. )

Submitted: April 25, 2013

Decided: July 30, 2013

On Defendants' Motion to Dismiss  
**DENIED**

**OPINION**

Paul D. Brown, Esquire, Joseph B. Cicero, Esquire, Ann M. Kashishian, Esquire, Cousins Chipman & Brown, LLP, David M. Stern, Esquire (Argued), Lee R. Bogdanoff, Esquire, Matthew C. Heyn, Esquire, Klee, Tuchin, Bogdanoff & Stern LLP, Attorneys for Plaintiff

Edward M. McNally, Esquire, Patricia A. Winston, Esquire, Morris James LLP, Attorneys for Defendants National Union Fire Insurance Company of Pittsburgh, PA and Chartis Property Casualty Company

Thomas G. Macauley, Esquire, Macauley LLC, Daniel J. Standish, Esquire, Charley C. Lemley, Esquire (Argued), John E. Howell, Esquire, Wiley Rein LLP, Attorneys for Defendants XL Specialty Insurance Company and Columbia Casualty Company

Joseph H. Huston, Jr., Esquire, Stevens & Lee, Michael R. Goodstein, Esquire, Bailey Cavalieri LLC, Attorneys for Defendants RSUI Indemnity Company and Scottsdale Indemnity Company

Francis J. Murphy, Esquire, Kelley M. Huff, Esquire, Attorneys for Defendants Arch Insurance Company, Ace American Insurance Company, and Those Certain Underwriters at Lloyd's, London, Subscribing to Policy No. B0509GA027908

Howard A. Cohen, Esquire, Drinker Biddle & Reath LLP, Attorneys for Defendant Houston Casualty Company

Timothy Jay Houseal, Esquire, Young Conway Stargatt & Taylor LLP, Ommid C. Farashahi, Esquire, Michael T. Skoglund, Esquire, Brian J. Watson, Esquire, Bates Carey Nicolaides, LLP, Attorneys for Defendant AXIS Insurance Company

**JOHNSTON, J.**

## **FACTUAL AND PROCEDURAL CONTEXT**

Plaintiff WMI Liquidating Trust (“Trust”) filed a Complaint on October 8, 2012 against the above-captioned Insurers (collectively “Defendants”), seeking compensation for breach of contract, breach of the duties of good faith and fair dealing, and declaratory judgment. All claims concerns various insurance policies obtained by Washington Mutual, Inc. (“WMI”), and Defendants’ alleged failure to honor the terms of the policies. WMI declared bankruptcy on September 26, 2008, and the Trust is WMI’s successor.

Defendants issued directors and officers liability insurance policies with a coverage period from May 1, 2008 to May 1, 2009. WMI paid approximately \$15 million in premiums to obtain \$250 million in insurance coverage.

“Side A” policies provide coverage only for directors and officers seeking indemnification or advancement when the company cannot or will not advance or indemnify litigation costs. The company is the beneficiary of “Side B” policies when the company has advanced or indemnified officers and directors, and the company is seeking reimbursement. “ABC” policies come into play when the company (as well as directors and officers under specified circumstances) has potential liability and the company is seeking reimbursement for defense costs, judgments, or other cash outlays. “Specialty” coverage is for losses in excess of

applicable retentions. In this case, a \$50 million retention applies to the Side B coverage.

The Columbia Casualty Company Side A policy limit is \$25 million. The Columbia policy provides that coverage attaches only if the applicable limits of the ABC policies “have been exhausted by reason of losses paid thereunder by the underlying insurer of the Insured.” The remaining Side A policies are in excess of the Columbia policy.

The allegations in this case arise out of Defendants’ refusal to provide coverage for a claim against certain WMI directors and officers (“D&Os”). On September 10, 2008, WMI D&Os allegedly authorized or allowed \$500 million to be transferred to Washington Mutual Bank. Fifteen days later, Washington Mutual Bank was seized by its regulators. On September 26, 2008, WMI filed for bankruptcy protection in the Bankruptcy Court for the District of Delaware.

On April 27, 2009, the Committee appointed in the WMI bankruptcy sent a letter titled “Notice of Circumstances Resulting in Potential Claims” to WMI and certain D&Os. WMI joined the Committee in sending a demand letter, dated October 13, 2011 (“Demand Letter”), to the D&Os. The Demand Letter stated the intent to pursue litigation against the D&Os, unless the parties negotiated a resolution. The claims against the D&Os alleged improprieties in connection with

the \$500 million transfer, and demanded payment of \$500 million for alleged breach of duties to WMI.

The Bankruptcy Court confirmed WMI's plan. The Trust has asserted the claim against the D&Os set forth in the Demand Letter. WMI purportedly has acknowledged that the D&Os are entitled to indemnification and advancement of defense costs in connection with the allegations set forth in the Demand Letter, subject to objections as to amount.

In response to the Demand Letter, several D&Os and WMI sought coverage from Defendants. Defendant XL Specialty Insurance Company took the position that the Demand Letter would be treated as a claim under the policy issued by XL Specialty for the policy period from 2007 to 2008. Other Defendants that issued policies for 2007-2008 allegedly have agreed that defense costs in connection with the Demand Letter may be advanced under those policies, subject to reservations of rights, including subrogation to the D&Os' indemnification. (Policies issued covering the 2008-2009 period are the subject of this lawsuit.)

Defendants denied coverage on the grounds that: the Demand Letter claim is an "interrelated claim" with class-action lawsuits brought by WMI's former shareholders, and therefore is excluded by the "Interrelated Claims Exclusions";

and the Demand Letter claim falls within the “Insured v. Insured” policy exclusion.

The Bankruptcy Court approved a reserve of \$65 million for payment of the D&O indemnification claims. The reserve allocated for defense costs (\$55 million) has been reduced, through stipulation among the Trust and the D&Os, to \$18,239,743 (“Reserve”).

On February 15, 2012, WMI filed an action in the United States Bankruptcy Court for the District of Delaware, which was similar in most respects to the action presently before the Court.<sup>1</sup> The Bankruptcy Court dismissed WMI’s action for lack of jurisdiction. The Bankruptcy Court also ruled that the declaratory judgment claims were not ripe.

After that matter was dismissed, the Trust, as WMI’s successor, filed the present action with this Court. The Complaint asserts three claims for relief. Count I alleges that Defendants breached their obligations under the policies by denying coverage for the D&O defense costs and by failing to attempt to settle the claim against the D&Os. Count II alleges that Defendants have breached the implied covenant of good faith and fair dealing by denying coverage in bad faith. Count III seeks a declaratory judgment of the parties’ rights and obligations under

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<sup>1</sup> *In re Washington Mutual, Inc.*, No. 08-12229 (Bankr. D. Del. 2012).

the policies because there is a ripe and actual controversy regarding the scope of Defendants' obligations.

Defendants have filed this Motion to Dismiss. The Motion seeks relief under Superior Court Civil Rule 12(b)(1) for lack of jurisdiction on the basis that the case is not ripe for adjudication, and under Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

### **STANDARD OF REVIEW**

#### ***Motion to Dismiss***

When reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must determine whether the claimant “may recover under any reasonably conceivable set of circumstances susceptible of proof.”<sup>2</sup> The Court must accept as true all non-conclusory, well-pled allegations.<sup>3</sup> Every reasonable factual inference will be drawn in favor of the non-moving party.<sup>4</sup> If the claimant may recover under that standard of review, the Court must deny the motion to dismiss.<sup>5</sup>

### **ANALYSIS**

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<sup>2</sup> *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

<sup>3</sup> *Id.*

<sup>4</sup> *Wilmington Sav. Fund. Soc’y, F.S.B. v. Anderson*, 2009 WL 597268, at \*2 (Del. Super.) (citing *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005)).

<sup>5</sup> *Spence*, 396 A.2d at 968.

The parties' contentions are many and varied. The Court will limit its analysis only to those questions necessary to resolve the pending Motion.

## **Standing**

### ***Standard of Review***

The standing requirement - that matters brought before Delaware courts must constitute actual cases or controversies - is not included in Delaware's Constitution.<sup>6</sup> However, it has been recognized consistently by Delaware courts that this requirement is a necessary prerequisite for plaintiffs to bring claims, as a rule of judicial restraint.<sup>7</sup>

The Delaware Supreme Court has adopted the standing requirements articulated by the United States Supreme Court,<sup>8</sup> and by the Third Circuit Court of Appeals:

(1) the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant and not the result

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<sup>6</sup> *Stratton v. Am. Ind. Ins. Co.*, 2011 WL 208933, at \*4 (Del. Super.).

<sup>7</sup> *Dover Historical Soc. v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1110-11 (Del. 2003).

<sup>8</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 555 (1992).

of the independent action of some third party not before the court; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.<sup>9</sup>

### ***Defendants' Contentions***

Defendants argue that Delaware law does not permit an injured party to maintain a direct action against a tortfeasor's insurer.<sup>10</sup> Instead, Defendants claim that the Trust should be treated in the same manner as any third-party plaintiff because the Trust's "true interest in this action is as the purported holder of a claim against the Directors and Officers."

Defendants contend that Plaintiff's suit should be dismissed due to lack of standing. Defendants rely on *In re DBSI, Inc.*,<sup>11</sup> for the principle that a litigation trustee with claims against an insured has no legally-protected interest sufficient to afford standing.<sup>12</sup>

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<sup>9</sup> *Dover*, 838 A.2d at 1110 (citing *Lujan*, 504 U.S. at 560-61 and *Society Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 175-76 (3d Cir. 1998)).

<sup>10</sup> *Empire Fire & Marine Ins. Co. v. Miller*, 2012 WL 1151031, at \*4 (Del. Com. Pl.).

<sup>11</sup> 2012 WL 2501090 (Bankr. D. Del.).

<sup>12</sup> *Id.* at \*12 (litigation trustee with claims against insured individuals lacked legally-protected interest sufficient for standing to intervene at a later stage in an interpleader proceeding concerning policy proceeds).

Defendants also argue that both Washington law and Delaware Law<sup>13</sup> mandate that an insured party does not have an interest sufficient to sue an insurer directly for breach of contract or of the duty of good faith.<sup>14</sup> Defendants conclude, therefore, that the Trust has no standing to bring an action for breach of contract or the duties of good faith and fair dealing under the ABC or Side A policies. Additionally, the Specialty policy states that no action may be taken against the Insurer until the amount of the obligation has been finally determined either by judgment after trial, or by written agreement among the Insured, the claimant, and the Insurer.

Defendants further contend that the Trust cannot establish itself as an Insured Person with standing to sue under the Side A policies. According to Defendants, because the Side A policies afford coverage only for Insured Persons, and the D&Os are direct promisees, the Trust, as a mere successor to the

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<sup>13</sup>Because WMI was incorporated in Washington, and is listed in the policies as having a Washington address, Defendants argue that Washington has the more significant relationship to this case. However, there does not appear to be any substantive difference between Delaware and Washington law for purposes of the Motion to Dismiss. Therefore, the Court need not decide the choice of law issue at this stage in the proceedings.

<sup>14</sup>*See Riverfront Landing Phase II Owners' Ass'n v. Assurance Co. of Am.*, 2009 WL 1952002, at \*3 (W.D. Wash.); *In re World Health Alternatives, Inc.*, 396 B.R. 805, 811 (Bankr. D. Del. 2007); *In re Allied Digital Technologies Corp.*, 306 B.R. 505, 513 (Bankr. D. Del. 2004); *Empire Fire & Marine Ins. Co. v. Miller*, 2012 WL 1151031, at \*4 (Del. Com. Pl.); *NCF Fin. Inc. v. Webforia, Inc.*, 2006 WL 2244328, at \*2 (Wash. Ct. App.); *Burr v. Lane*, 517 P.2d 988, 994 (Wash. Ct. App. 1974).

promissee or third-party beneficiary, lacks standing to assert the rights of the Insured.

***Standing Pursuant to Rule 12(b)(1)***

In *Federal Savings and Loan Insurance Corporation v. Oldenburg*,<sup>15</sup> the Court considered an analogous situation. The insurance company in *Federal* issued a policy to the insured corporation. The corporation filed for bankruptcy, and FSLIC became the receiver of the assets of the corporation. Relying on enabling legislation, as well as on public policy, the *Federal* Court ruled that as the receiver, FSLIC had all the rights and claims that the bankrupt corporation would have had.<sup>16</sup>

FSLIC alleged that the corporation's directors and officers had committed wrongful acts which, if proved, would trigger coverage under the *Federal* policy. The policy required *Federal* to pay on behalf of the corporation's officers or directors for losses resulting from claims made against the officers or directors individually. *Federal* denied coverage, contending that FSLIC did not have

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<sup>15</sup>671 F.Supp. 720 (D. Utah. 1987).

<sup>16</sup>*Id.* at 722-23.

standing to bring an action because FSLIC was a tort victim, and thus could not bring a direct action against the tortfeasor's insurance company.<sup>17</sup>

The *Federal* Court held that FSLIC had standing because it had all of the rights of the bankrupt corporation. The Court reasoned that the corporation had purchased the insurance policy for the benefit of the officers and directors.

Even though the effect of this action is to allow FSLIC to receive a declaration that the directors FSLIC is suing have insurance coverage for their wrongful acts, procedurally FSLIC is bringing this action as the contracting party seeking to enforce the third party beneficiary rights of the directors. A person who makes a contract for the benefit of a third party can enforce the contract. 17 Am.Jur.2d Contracts § 297 (1964).

Since Federal has denied all coverage for all defendants under the policy FSLIC has standing to seek a declaration that the officers and directors of [the corporation] have coverage under the insurance policy. From the record before this court it appears that if FSLIC can prove the directors committed any wrongful acts Federal will have a duty to pay the directors pursuant to [] the insurance contract.<sup>18</sup>

In *Wedtech Corporation v. Federal Insurance Company*,<sup>19</sup> the corporation purchased directors and officers liability coverage. The policies required payment

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<sup>17</sup>*Id.* at 725.

<sup>18</sup>*Id.*

<sup>19</sup>740 F.Supp. 214 (S.D.N.Y. 1990).

for certain losses for which the insured corporation indemnified its officers and directors. The corporation filed for Chapter 11 bankruptcy. A series of lawsuits was filed against the corporation's former officers and directors. The insurance company notified the corporation that it was rescinding the policies on the grounds of alleged concealment and falsification of material information.<sup>20</sup>

The corporation and the bankruptcy creditors committee filed suit, seeking a declaratory judgment that the policies were in full force and effect with respect to the officers and directors. The insurance company moved to dismiss on the ground that there was no justiciable controversy.<sup>21</sup>

In considering the issue of standing, the *Wedtech* Court ruled:

The policies are clearly third-party beneficiary contracts, in which Federal is the promisor, Wedtech is the promisee and the officers and directors third-party beneficiaries. Under New York law, a promisee for the benefit of third parties may enforce the promise on behalf of the third parties....Wedtech can clearly bring this action in an effort to enforce Federal's obligation to pay the directors and officers.<sup>22</sup>

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<sup>20</sup>*Id.* at 216-17.

<sup>21</sup>*Id.* at 217.

<sup>22</sup>*Id.* at 219 (However, the *Wedtech* Court declined to decide whether the creditors committee had standing.)

This Court finds Defendants' reliance on *In re DBSI, Inc.*<sup>23</sup> to be misplaced. The question in *DSBI* was whether the liquidating trustees had standing to object to the payment of certain insurance policy proceeds in an interpleader action. The insurance policy at issue was liability coverage for the debtors' officers and directors.<sup>24</sup> The action was filed by the insurance company. The insurer, believing that the demands for coverage would exceed the maximum aggregate limit of liability under the policy, brought the interpleader requesting that the Court allocate the insurance proceeds.<sup>25</sup>

Several individual insureds filed motions for partial summary judgment, asking the Court to determine whether or not their claims were covered under the policy. The Chapter 11 Trustee moved for partial summary judgment, seeking coverage for certain costs incurred in connection with other civil actions alleging state securities law violations and a regulatory investigation.<sup>26</sup>

Following "extensive arguments" the *DBSI* Court ruled from the bench. Although the Court did not make a specific ruling at that point as to the Chapter 11 Trustee's standing, the Court's order considered the Trustee's motion, along

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<sup>23</sup>2012 WL 2501090 (Bankr. D. Del.).

<sup>24</sup>*Id.* at \*1.

<sup>25</sup>*Id.* at \*2.

<sup>26</sup>*Id.* at \*2-3.

with the other parties' motions, and allocated coverage. It was only after this initial ruling that the Court "asked the parties to submit briefing on whether Trustees *still have standing* to participate in this interpleader dispute."<sup>27</sup> The Court ultimately found that the Trustees had no further interest in the insurance proceeds because they already had received the defense costs reimbursement, there was no further possibility for coverage, and any future insurance proceeds were not property of the bankrupt estate.<sup>28</sup>

Having considered the relevant precedent, the Court finds that Plaintiff WMI Liquidating Trust has standing under Superior Court Civil Rule 12(b)(1). The Trust has alleged: an injury in fact (denial of insurance coverage), which is concrete, particularized, imminent and not hypothetical; a causal connection between the injury and Defendants' conduct (breaches of contract and duties of good faith and fair dealing), which is not the result of independent action by a third party; and that it is likely that the injury will be redressed by a favorable decision (if coverage is found to apply).

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<sup>27</sup>*Id.* at \*4 (emphasis added).

<sup>28</sup>*Id.* at \*10.

## **Declaratory Judgment and Actual Controversy**

### ***Standard of Review***

Delaware Courts are empowered to render declaratory judgments pursuant to the Declaratory Judgments Act.<sup>29</sup> The presence of an actual controversy is a prerequisite for declaratory relief.<sup>30</sup> Lack of an actual controversy acts as a bar to a party proceeding with a case requesting only declaratory judgment as a remedy.

An actual controversy exists where the following requirements are met: (1) the controversy involves the rights or other legal relations of the party seeking declaratory relief; (2) the controversy is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and adverse; and (4) the issue involved in the controversy must be ripe for judicial determination.<sup>31</sup>

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<sup>29</sup> 10 *Del. C.* § 6501 (“Except where the Constitution of this State provides otherwise, courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force and effect of a final judgment or decree.”).

<sup>30</sup> *Kirkwood Fitness and Racquetball Clubs, Inc. v. Mullaney*, 2011 WL 2623949, at \*2 (Del. Super.).

<sup>31</sup> *Rollins Intern., Inc. v. International Hydronics Corp.*, 303 A.2d 660, 662-63 (Del. 1973).

### *Defendants' Contentions*

Defendants present numerous arguments in support of their Motion to Dismiss. Defendants first argue that Specialty policy requires a \$50 million retention that must be applied prior to proceeding with the claims the Trust alleges. According to Defendants, the language of the policy requires WMI to provide indemnification, unless it is unable to indemnify due to financial insolvency. Defendants maintain that *In re Downey Financial Corporation*<sup>32</sup> establishes that WMI's completed Chapter 11 reorganization does not permit the Trustee to obtain indemnification coverage until the retention has been exhausted.<sup>33</sup>

Additionally, Defendants note that the Trust has acknowledged its obligation to advance defense costs in connection with the Demand Letter. Because the Trust still holds the cash reserve, Defendants contend that the failure to indemnify is not financial insolvency, but the Trust's election not to pay the claims. The Trust relies in part on Washington law to justify its position.<sup>34</sup> Defendants claim that these factors act as a bar to the Trust's requests for relief.

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<sup>32</sup>428 B.R. 595 (Bankr. D. Del. 2010).

<sup>33</sup> *Id.* at 603.

<sup>34</sup> *See* Wash. Rev. Code §23B.08.510(A).

Further, Defendants take the position that the Trust fails to state claims for breach of contract or the implied duties of good faith and fair dealing. Defendants argue that the Trust has failed to allege facts sufficient to show that it has suffered any damages from breach of the 2008-2009 policies, because no insurer has failed to pay any amount that would be due. Defendants assert that there can be no breach because the Trust has no present right to any insurance payments.

With regard to the Specialty policy, Defendants contend that indemnification by WMI is a condition precedent. Because the \$50 million retention has not been “satisfied,” Defendants argue that no contractual duties have been activated that would be subject to breach. It follows, according to Defendants, that the first excess policy terms cannot have been breached because the Trust failed to allege that the Side A coverage had been exhausted. Nor have the ABC policies been exhausted.

As to the claim of repudiation of coverage under the 2008-2009 policies, Defendants maintain that a determination of lack of coverage is not tantamount to a repudiation of the policies in question. To the contrary, Defendants cite several cases<sup>35</sup> in support of their position that “such a determination does not constitute a

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<sup>35</sup> *Jacobson v. Metro. Prop. & Cas. Ins. Co.*, 672 F.3d 121, 178 (2d Cir. 2012); *Evanoff v. Standard Fire Ins. Co.*, 534 F.3d 516, 521 (6<sup>th</sup> Cir. 2008); *Meyer v. Conlon*, 162 F.3d 1264 (10<sup>th</sup> Cir. 1998); *Isilon Sys., Inc. v. Twin City Fire Ins. Co.*, 2012 WL 1202331 (W.D. Wash.); *Sterling v. Provident Life & Accident Ins. Co.*, 619 F. Supp. 2d 1242, 1250 (M.D. Fla. 2009).

‘repudiation’ giving rise to an immediate breach of contract.” Defendants argue that repudiation is insufficiently alleged, and that the Court should not permit the Trust’s claims for breach to go forward because relevant case law precludes repudiation from being used as a theory for breach where a contract obligation has become unilateral.

Defendants also urge the Court to rule that the Trust has not sufficiently alleged facts demonstrating that the purported breaches proximately caused damages. Defendants state that the claims for breach must be dismissed because the Complaint alleges damages in a conclusory fashion. According to Defendants, the Complaint is bereft of any information or underlying facts respecting how the Trust was damaged. Defendants describe the damages listed in the Complaint as nothing more than “the costs of the Trust’s operations or a consequence of its decisions managing bankruptcy claims.”

Defendants conclude their argument respecting breach by asserting that there are insufficient facts alleged to support a claim for breach of the duty of good faith and fair dealing. First, Defendants argue that because the Trust cannot demonstrate a breach of the 2008-2009 policies, there can be no facts that show a bad faith breach of those policies. Defendants further contend that claims for bad

faith are legally inadequate because of the problems with standing and damages previously discussed.

Defendants argue that the Trust's request for a declaratory judgment is improper because it fails to assert an actual controversy. Because a potential future lawsuit and its outcome are entirely speculative, Defendants claim that this matter is too remote to constitute an actual controversy. Defendants urge the Court to rule that the Trust fails to satisfy the first requirement for an actual controversy because this matter does not involve the legal rights of the Trust. To the contrary, Defendants contend that the legal rights at issue are those of the D&Os, which cannot extend to the Trust.

Defendants assert that the Trust can have no legitimate interest in a declaration concerning indemnity for a judgment, settlement, or lawsuit that has not yet been initiated. Because the declaration sought is based upon uncertain and contingent events, this matter is not ripe for adjudication. Defendants maintain that the Trust's desire to proceed - in order to adjust its reserves, to make distributions to creditors, and to engage in settlement negotiations - is not enough to create an actual controversy.

As the facts are not fully developed, Defendants urge the Court to defer addressing any issues of Washington law at this time.

***Claims Adequately Asserted Pursuant to Rule 12(b)(6)***

*In Hoechst Celanese Corporation v. National Union Fire Insurance*

*Company of Pittsburgh Pennsylvania*,<sup>36</sup> this Court considered a motion to dismiss a declaratory judgment action on the grounds that no justiciable controversy existed. The insured had been named as a defendant in numerous actions. Certain high level excess insurers moved to dismiss for lack of justiciability, arguing that the excess layer policies were not implicated until the lower level coverages were exhausted. Further, movants alleged that the excess insurers should be dismissed because the insured plaintiff had failed to establish a reasonable likelihood that damages from the liability claims would ever reach the excess coverage.<sup>37</sup> Therefore, the insurers argued that the controversy was not ripe for judicial determination.

The *Hoechst* Court utilized the balancing factors identified by the Court of Chancery in *Schick, Inc. v Amalgamated Clothing and Textile Workers Union*:<sup>38</sup>

(1) a practical evaluation of the legitimate interest of the plaintiff in a prompt resolution of the question presented;

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<sup>36</sup>623 A.2d 1133 (Del. Super. 1992).

<sup>37</sup>*Id.* at 1134-36.

<sup>38</sup>533 A.2d 1235 (Del. Ch. 1987).

- (2) the hardship that further delay may threaten;
- (3) the prospect of future factual development that might affect the determination made;
- (4) the need to conserve scarce resources; and
- (5) a due respect for identifiable policies of law touching upon the subject matter in dispute.<sup>39</sup>

The *Hoechst* Court found: “In the context of an insurance coverage action, absolute proof that an excess insurer’s policies will be triggered is by no means required in order to establish a ripe controversy.”<sup>40</sup> Nevertheless, the Court reasoned that it would be a waste of judicial resources and an unnecessary expense for the parties to continue with litigation where there is no reasonable likelihood that the excess coverage will ever be implicated.<sup>41</sup>

In this case, the Trust has made the following allegations. Defendants have denied coverage. The claim against the D&Os seeks \$500 million. The coverage available under all of Defendants’ policies is \$250 million. The Specialty policy has a \$50 million self-insured retention (“SIR”). However, the SIR does not apply

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<sup>39</sup>*Id.* at 1239.

<sup>40</sup>*Hoechst*, 623 A.2d at 1137 (citing *Monsanto Co. v. Aetna Cas. and Sur. Co.*, 565 A.2d 268, 275 (Del. Super. 1989)).

<sup>41</sup>*Hoechst*, 623 A.2d at 1137.

to advancement of legal fees. The SIR does not apply to indemnification in the event of financial insolvency. Although the policy does not define “event of financial insolvency,” the Trust contends that WMI’s Chapter 11 bankruptcy filing meets that requirement.

The Trust further asserts that the other excess policies have no SIR, and are required by their terms to provide coverage even if the Specialty policy does not. Additionally, the Trust argues that all Defendants have breached their obligations under the policies by failing to participate in settlement negotiations.

Finally, the Trust states that it has established reserves and that it is incurring costs and attorneys’ fees in litigating the D&Os’ proofs of claim, resulting in present damages. The Trust asserts that it is required to hold over \$18 million, rather than distribute that amount to Trust beneficiaries. While cash remains undistributed, creditors’ claims accrue interest that the Trust eventually must pay, thus decreasing funds available for distribution to other Trust beneficiaries.

Viewing the facts in the light most favorable to the non-moving party, the Court finds that Plaintiff WMI Liquidating Trust has stated claims upon which relief can be granted. The *Schick* factors weigh in favor of permitting this action to proceed. The Trust’s claims present controversies: which involve the rights or

other legal relations of the Trust in seeking declaratory relief; are claims asserted against Defendants, who have interests in contesting the claims; are among parties whose interests are real and adverse; and are issues ripe for judicial determination.

### **CONCLUSION**

The Court finds that Plaintiff WMI Liquidating Trust has standing under Superior Court Civil Rule 12(b)(1). Viewing the facts in the light most favorable to the non-moving party, the Court finds that Plaintiff has stated claims upon which relief can be granted pursuant to Rule 12(b)(6). Plaintiff's claims are ripe for judicial determination.

**THEREFORE**, Defendants' Motion to Dismiss is hereby **DENIED**.

**IT IS SO ORDERED.**

/s/ *Mary M. Johnston*  
The Honorable Mary M. Johnston