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Case Number 167,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

REBECCA CLARK and JAMES SMITH, on behalf of themselves and all others similarly situated,	)	
Plaintiffs Below/Appellants,	)	No. 167, 2015
v.	)	On Appeal from the Superior Court of the State of Delaware in and for New Castle County
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	)	C.A. No. N14C-02-188 JRJ
Defendant Below/Appellee.	)	

APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This case involves a putative class action filed against defendant State Farm Mutual Insurance Company ("State Farm") regarding its practices of paying statutory interest pursuant to 21 *Del. C.* § 2118B.

In February 2014, Plaintiffs Rebecca Clark and James Smith ("Plaintiffs") filed a complaint alleging that State Farm had improperly deducted statutory interest payments made pursuant to 21 *Del. C.* § 2118B from the limits of their Personal Injury Protection ("PIP") coverage. *See* A021 ¶ 1 (Proposed Class Action Complaint). Plaintiffs quickly abandoned that theory after the uncontroverted evidence showed that the required statutory interest was paid *in addition to*, not deducted from, Plaintiffs' policy limits. *See generally* (B1-6) Motion for Summary Judgment. Facing summary judgment, Plaintiffs moved for leave to amend their complaint to add a claim for a declaratory judgment based on a theory that State Farm violated 21 *Del. C.* § 2118B, not for failing to pay the statutory interest, but for overreliance on the statute and paying the statutory interest too often. *See* A081 (Motion for Leave to Amend).

It is undisputed that State Farm complied with 21 *Del. C.* § 2118B in paying interest each and every time it made a PIP payment to Plaintiffs that required an interest payment. Plaintiffs' requested declaration directly contradicts the plain language of 21 *Del. C.* § 2118B, as Plaintiffs attempt to assert a claim based on 21 *Del. C.* § 2118B where the undisputed facts show that State Farm has complied with the statute to its letter. Rather than seeking a claim against State Farm for violation of 21 *Del. C.* § 2118B, Plaintiffs are asking this Court to assume the role of the state

legislature and issue a declaration that would rewrite § 2118B and replace its statutory interest provision with a requirement that all PIP claims be paid within 30 days after presentment. But this is not the law.

Plaintiffs have received the PIP coverage to which they are entitled, and all statutory interest payments have been made. *See* March 30, 2015 Opinion Denying Plaintiffs' Motion for Leave to Amend ("Opinion") at 9. Because Plaintiffs could not allege any actual or future injury under existing Delaware law, the Superior Court correctly determined that there was no case or controversy ripe for review and that the proposed amendment would be futile. *See id*. Accordingly, the Superior Court denied Plaintiffs' motion for leave to amend their complaint. Plaintiffs have appealed. This Court should affirm the Superior Court.

SUMMARY OF ARGUMENT

1. State Farm denies Plaintiffs' first argument that they have brought this action, not as policyholders in their capacity as insureds, but in their capacity as *owners* of State Farm. Plaintiffs did not raise this argument before the Superior Court, and they cannot raise this argument for the first time on appeal. Moreover, even if it was properly presented, the claim would be futile because Plaintiffs have not alleged any actual or imminent injury as owners. Plaintiffs' proposed complaint does not allege any injury as owners, and contrary to Plaintiffs' assertion, State Farm has, at all times during the administration of Plaintiffs' claims, complied with 21 *Del. C.* § 2118B with respect to every PIP payment issued to Plaintiffs as insureds.

2. State Farm also denies Plaintiffs' second argument. As the Superior Court recognized, Plaintiffs' proposed amended complaint does not present an actual case or controversy that is ripe for review. Plaintiffs have suffered no concrete, particularized economic harm because Plaintiffs received exactly what they were entitled to – compensation under their PIP policies, and statutory interest as required by 21 *Del. C.* § 2118B. Moreover, Plaintiffs are not facing any actual or imminent legal harm and they seek nothing more than an advisory opinion from the court.

3. State Farm denies Plaintiffs' third argument, in which they assert that they have standing to pursue their proposed claims under the voluntary cessation doctrine. The voluntary cessation doctrine does not apply. State Farm did not modify its practices for purposes of this litigation or in an attempt to moot Plaintiffs' claims. State Farm has, at all times during the administration of Plaintiffs' PIP claims, paid the claims in accordance with the policies and with 21 *Del. C.* § 2118B.

STATEMENT OF FACTS

On February 20, 2014, Plaintiffs filed a four-count putative class action complaint, alleging that State Farm violated subsection (d) of 21 *Del. C.* § 2118B by deducting statutory interest from Smith's or Clark's Personal Injury Protection ("PIP") coverage limits rather than making the interest payments separate from and in addition to the coverage limits. *See* A021, A030-A034 (Proposed Class Action Complaint). The evidence, however, showed just the opposite. Interest had not been deducted from Smith or Clark's PIP limits.

A. Plaintiff James Smith

Plaintiff James P. Smith was insured under an automobile policy with State Farm. *See* (B2-3) Motion for Summary Judgment at 1-2. That policy included $100,000 in Personal Injury Protection ("PIP") coverage. *Id.* at 2 (B3). On September 26, 2011, Smith was involved in an automobile accident. *Id*. Thereafter, he submitted a claim to State Farm for PIP coverage relating to the accident. *Id.* In connection with his PIP claim, State Farm paid Smith $13,734.14 in lost wages and $86,265.86 in medical bills, which totaled his $100,000 policy limit. *Id.*

Because of the timing of various claim payments, State Farm was also obligated under 21 *Del. C.* § 2118B to make interest payments. *Id.* Those separate interest payments totaled $19.35. *Id.* They are in addition to the $100,000 policy limit that was paid on Smith's PIP claim. *Id.* The interest payments were not subtracted from Smith's applicable PIP coverage. *Id.*

B. Plaintiff Rebecca Clark

Plaintiff Rebecca Clark was insured under an automobile policy with State Farm. That policy included $100,000 in PIP coverage. *Id.* On January 24, 2013, Clark was involved in an automobile accident. *Id.* Thereafter, she submitted a claim to State Farm for PIP coverage relating to the accident. *Id.* As of June 3, 2014, State Farm had paid $5,364.25 in lost wages and $65,459.35 in medical bills on Clark's PIP claim, which totals $70,823.60 of her $100,000 policy limit.[1] *Id.*

Because of the timing of various claim payments to Clark, State Farm was also obligated under 21 *Del. C.* § 2118B to make statutory interest payments. *Id.* At the time of State Farm's motion for summary judgment, those separate interest payments totaled $384.53. *Id.* They were paid in addition to the $70,823.60 of her total $100,000 policy limit that had been paid. *Id.* The interest payments have not been subtracted from Clark's applicable PIP coverage. *Id.*

C. The Underlying Litigation

Because State Farm paid the statutory interest in addition to the policy limits, on June 19, 2015, State Farm moved for summary judgment on Plaintiffs' claims. *See generally* (B1-46) Mot. for Sum. Judg. In support of its motion for summary judgment, State Farm submitted an affidavit from Tracey Beidleman, an Auto Claim Section Manager of First Party Medical Claims for State Farm who explained that "[i]t is State Farm's policy and practice to pay statutory interest penalties incurred pursuant to 21 *Del. C.* § 2118B in addition to, and not to deduct these penalties from,

[1] These figures were the most up-to-date data available at the time of State Farm's motion for summary judgment in June 2014.

an insured's limits of Personal Injury Protection coverage." *See* (B34) Exhibit 2 to State Farm's Motion for Summary Judgment at ¶ 6.

On August 18, 2014, while State Farm's summary judgment motion was still pending, Plaintiffs filed a motion for leave to amend their complaint, quickly abandoning their theory of deductions of statutory interest payments from policy limits in favor of a new theory based on State Farm's alleged "routine failure" to pay claims within 30 days.[2] *See* A072 (Brief in Support of Motion for Leave to Amend); (B54) Proposed Amended Complaint at 8. Plaintiffs' proposed amended complaint sought a declaratory judgment based on this new theory.

On March 30, 2015, the Superior Court denied Plaintiffs' motion for leave to amend their complaint, concluding that the proposed amendment would be futile "because no actual controversy exists" and that Plaintiffs' requested declaration

[2] In their Opening Brief, Plaintiffs contend that they abandoned their initial theory of the case, not through any fault of their own, but because of "State Farm's record-keeping practices." Opening Brief on Appeal at 1 ("State Farm's record-keeping practices made it practically impossible to either prove or disprove the offending conduct."). While not relevant to the issues before this Court on appeal in any event, these assertions mischaracterize State Farm's actions and distort the history of this case. Plaintiffs had ample opportunity to present evidence in support of this initial theory, had such evidence existed. Plaintiffs never sought to depose State Farm affiant Tracey Beidleman and never put forward any evidence even attempting to rebut her testimony. Moreover, State Farm collected and timely produced more than 9,000 pages of documents constituting Plaintiffs' claim files. Upon receipt of those files, Plaintiffs' counsel demanded that State Farm identify what document in the file would "debunk" Plaintiffs' theory. In response, State Farm pointed Plaintiffs to its motion for summary judgment, including the affidavit and payment logs definitively showing that interest payments are not deducted from the PIP limits. *See* (B99-100) State Farm's October 8, 2014 Letter to the Court. State Farm made it clear how it tracked PIP limits and how any interest payments are made separate from those limits.

The undeniable truth is Plaintiffs asserted claims under an "interest theory" that had absolutely no basis in fact. Plaintiffs pleaded for State Farm to "debunk" it, and as a result, State Farm spent considerable time and effort doing so. Then, as Plaintiffs were putting State Farm and the Superior Court through that exercise, and with summary judgment closing in, Plaintiffs wholesale abandoned it.

would amount to a "non-justiciable advisory or hypothetical opinion." Opinion at 9-10. The Superior Court concluded:

> [T]he record reflects that the statutory interest was paid *in addition to* Plaintiffs' PIP claim. Thus, Plaintiffs already received the benefit of their bargain. . . . ***Because State Farm has complied with § 2118B***, Plaintiffs have failed to plead any additional injury, or any additional injury that may immediately occur in the future.

Id. at 9 (emphasis added).

Moreover, the Superior Court rejected Plaintiffs' argument that "the value of their policy is reduced going forward because Plaintiffs bargained for PIP claims that are paid or denied within 30 days," and concluded that even assuming these allegations to be true, "Plaintiffs have failed to allege sufficient facts from which it can reasonably be inferred that State Farm's alleged practice constitutes repudiation of the contractual obligations owed by State Farm . . . ." *Id.* at 11.

ARGUMENT

I. PLAINTIFFS' NEWLY-ASSERTED THEORY BASED ON THEIR STATUS AS "OWNERS" OF STATE FARM DOES NOT SAVE THEIR PROPOSED CLAIM

A. Question Presented

Does Plaintiffs' proposed amendment present an actual case or controversy ripe for review and for which Plaintiffs have standing, when Plaintiffs assert for the first time on appeal that they are proceeding in their capacity as *owners* of State Farm, and despite the fact that Plaintiffs have not alleged any actual or imminent injury related to their alleged rights as owners?

B. Standard of Review

Superior Court Rule 15 provides that after a responsive pleading has been filed, the plaintiff may amend the complaint "only by leave of court or by written consent of the adverse party." Super. Ct. Civ. R. 15(a). Where the proposed amendment would be futile, leave to amend the complaint should be denied. *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011); *see also FS Parallel Fund, L.P. v. Ergen*, 2005 WL 1950199, at *2 (Del. 2005) (affirming denial of motion for leave to amend because the proposed amendments would be futile).

"A motion for leave to amend a complaint is futile where the amended complaint would be subject to dismissal under Rule 12(b)(6) for failure to state a claim." *Price*, 26 A.3d at 166. Therefore, a denial of a motion for leave to amend, like a grant of a Rule 12(b)(6) motion, is renewed *de novo* to determine whether the trial judge erred as a matter of law. *See id.* The Court must "view the complaint in the light most favorable to the non-moving party, accepting as true all well pleaded

allegations and drawing reasonable inferences that logically flow from them." *Id.* However, the Court should not "accept conclusory allegations unsupported by specific facts." *Id.*

C. Merits of Argument

More than a year and a half ago, Plaintiffs began this litigation by asserting that State Farm had improperly deducted statutory interest payments from the limits of Plaintiffs' PIP policies. When the uncontroverted evidence proved that to be false, Plaintiffs were forced to abandon their initial theory of the case in favor of a new, and equally unviable theory – that despite State Farm's compliance with 21 *Del. C.* § 2118B, Plaintiffs were denied the benefit of the bargain based on State Farm's alleged failure to pay or deny claims within 30 days. Now that the Superior Court has rejected that claim, Plaintiffs try to pivot to a *third* theory of the case *never raised in the Superior Court* and outside the four corners of Plaintiffs' complaint. This is not only a new argument, but an effort by Plaintiffs to inject an entirely new type of claim into their proposed amended complaint while the rejection of a different type of claim is on appeal in this Court. This desperate attempt to save this lawsuit is just as futile as the other discarded and rejected theories raised in the court below.

1. Plaintiffs' Argument Was Never Presented to the Superior Court

Delaware Supreme Court Rule 8 states that only "questions fairly presented to the trial court may be presented for [appellate] review . . . ." Supr. Ct. R. 8. As this Court has recognized, "[i]t is a basic tenet of appellate practice that an appellate court reviews only matters considered in the first instance by a trial court. Parties are not free to advance arguments for the first time on appeal." *Delaware Elec. Co-*

op., Inc. v. Duphily, 703 A.2d 1202, 1206 (Del. 1997).

Despite these clear principles, Plaintiffs now argue that they have standing as "owners" of State Farm, even though this issue was never raised before the trial court and is not the basis for the claims asserted in Plaintiffs' Complaint. Because Plaintiffs never presented this issue, it was not addressed in the trial court's ruling on the motion for leave to amend. *See generally* Opinion at 5-12. As the trial court recognized, in the motion for leave and their proposed complaint, Plaintiffs' allegations were based only on their rights as *policyholders* in their capacities as insureds. *See id.* at 4-5.

Plaintiffs alleged that *as policyholders*, they had been denied the benefit of the bargain. *See, e.g.*, A088 (Brief in Support of Motion for Leave to Amend) ("In short, the plaintiffs are entitled to the benefit of their bargain – in this case, the bundle of rights . . . for which they paid. Having been deprived of that "full bundle," the plaintiffs have standing to seek declaratory relief."); B60 Proposed Amended Complaint ¶ 41 ("State Farm's practice . . . operates to diminish the value of the insurance protection sold by State Farm to its Delaware auto policyholders.").[3] Plaintiffs also alleged that *as policyholders*, State Farm's practice constituted an alleged repudiation of the contract. *See, e.g.*, B60 Proposed Amended Complaint ¶ 40 ("State Farm's practice . . . constitutes a repudiation of the contractual obligations

[3] *See also* A084 (Brief in Support of Motion for Leave to Amend) ("[I]f State Farm has adopted a widespread practice of ignoring the statutory 30-day deadline – then the plaintiffs have been deprived of the benefit of their bargain, and the contract rights for which they paid have been reduced."); (B90) Reply in Support of Motion for Leave to Amend at 2 ("State Farm policyholder[s] [are] being cheated out of premium dollars."); *see generally* A104, line 20 through A105, line 17, A107, lines 7-14. (Hearing on Motion for Leave to Amend, 10/15/14, Tr.)

owed by State Farm to its Delaware policyholders"). But nowhere did Plaintiffs assert, as they do now, that they were bringing their claims in their capacity as alleged *owners* of the company. Nowhere in their briefs did Plaintiffs cite to the case law that they now present to this Court.[4] *See* Plaintiffs' Opening Brief on Appeal at 15. And nowhere did Plaintiffs allege that State Farm's lawful practice of paying statutory interest under 21 *Del. C.* § 2118B "placed the company's brand at risk," or "betrayed the interests of its owners." *See* Plaintiffs' Opening Brief on Appeal at 16.

Plaintiffs point to a quote from the October 15, 2014 hearing on their motion for leave to amend the complaint in an attempt to justify the question that they have posed to this Court. *See* Plaintiffs' Opening Brief on Appeal at 14 (citing A98-A99). In his opening statement during the hearing, Plaintiffs' counsel said:

> The question before the Court is whether these two plaintiffs who are actual State Farm policyholders, and because State Farm is a mutual company happen to be owners of the company to boot, even have standing to mount a legal challenge to State Farm's practice of systematically violating the 30-day standard and failing to give their policyholders what they paid for, which is essentially what the motion is about.

See A98, line 21 – A99, line 6. Reviewed in context, the record makes clear that the mention of Plaintiffs as "owners . . . to boot" was a passing comment, an aside to Plaintiffs' statement regarding their rights as policyholders and the alleged failure to give "policyholders what they paid for." *Id.* In the hour-long hearing, Plaintiffs

[4] The terms "shareholder", "stockholder", and "fiduciary duty", prevalent in Plaintiffs' argument here, do not appear anywhere in Plaintiffs' briefing or proposed complaint below.

never again mentioned Plaintiffs' rights as "owners" of State Farm. This passing reference – never asserted in briefing or the proposed amended complaint – is insufficient to justify consideration of this issue on appeal.[5] *See, e.g.*, *Clark v. Clark*, 47 A.3d 513, 518 (Del. 2012) (vague, passing reference presented in connection with evidence on another topic was insufficient to preserve the legal argument for appeal); *In re Philadelphia Stock Exch., Inc.*, 945 A.2d 1123, 1134 & n.12 (Del. 2008) (concluding that a potential objection mentioned in a preliminary document, but never pursued in briefing or discussed at the appropriate hearing, was not fairly presented to the trial court and could not be considered on appeal).

2. Plaintiffs Cannot State a Viable Claim Based on a Theory of their Rights as "Owners" of State Farm

Although Plaintiffs cannot assert this argument for the first time on appeal, even if it were properly presented to this Court, Plaintiffs cannot state a viable claim under their theory that their rights as "owners" were somehow violated by State Farm's alleged conduct, for several reasons.

a. Plaintiffs Do Not Have Standing Because They Have Not Alleged Any Actual or Imminent Injury as Owners of State Farm

Even if Plaintiffs' theory based on their rights as "owners" had properly been presented to the trial court, their motion for leave to amend was correctly denied because any proposed amendment under this theory would also be futile. Plaintiffs have not – and cannot – allege that they have suffered any actual or imminent harm

[5] In support of their argument that Plaintiffs brought this action as "owners," Plaintiffs also cite to their brief in support of their motion for leave to amend the complaint. *See* Plaintiffs' Opening Brief on Appeal at 14 (citing A083-A088). However, this citation to a five-page span of their brief – five pages that constitute Plaintiffs' entire argument on standing – does not include any reference to Plaintiffs as "owners" of State Farm. *See* A083-A088.

in their positions as "owners" of State Farm. Therefore, Plaintiffs lack standing to bring claims under this new theory of the case.

"Standing is a threshold question that must be answered by a court affirmatively to ensure that the litigation before the tribunal is a 'case or controversy' that is appropriate for the exercise of the court's judicial powers." *Dover Historical Soc. v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1111 (Del. 2003). In order to satisfy the standing requirement, a plaintiff must show that he or she has suffered an injury-in-fact. *Id.* Even if no actual injury has occurred, a plaintiff may still have standing if harm is "imminent." *Id.* However, the injury cannot be speculative or hypothetical. *Id.*; *see also Baker v. Hartford Underwriters Ins. Co.*, 2011 WL 2709236 (D. Del. July 12, 2011).

Here, Plaintiffs do not have standing to pursue their proposed claims as "owners" of State Farm because they have failed to allege that they have suffered any actual or imminent injury-in-fact. Plaintiffs assert for the first time in their Opening Brief on Appeal that State Farm's alleged conduct has violated state and federal law, "placed the company's brand at risk," and "generally betrayed the interest of its owners." *See* Plaintiffs' Opening Brief on Appeal at 16. However, none of these allegations appear in the proposed amended complaint. Moreover, Plaintiffs have failed to explain how they have been harmed in their capacity as owners. For example, Plaintiffs do not allege that they have been injured by reduced equity in State Farm, by increased risk of litigation or regulatory investigation, or by devaluation of the company's brand name, goodwill, or other intangible assets. Plaintiffs also make no allegations that they may experience this type of harm in the

future. Plaintiffs' proposed claim attempts to allege harm as policyholders in their capacities as insureds. Because Plaintiffs do not (and cannot) allege that they have suffered any actual or imminent injury-in-fact as owners, Plaintiffs lack standing and their proposed amendment would be futile. Therefore, the Court should affirm the Superior Court's order denying Plaintiffs' Motion for Leave to Amend.

b. No Fiduciary Relationship Exists Between Plaintiffs and State Farm

As explained above, Plaintiffs' assertion that they may pursue their claims as "owners of State Farm" never appeared in the pleadings and was not properly raised in the court below. However, Plaintiffs seem to argue that they may pursue their claims as "owners" based a fiduciary duty owed to Plaintiffs by State Farm. *See* Plaintiffs' Opening Brief on Appeal at 15. But Plaintiffs' only support for their claim comes from a single trial court decision from Rhode Island. *See id.* (citing *Heritage Healthcare Services, Inc. v. Beacon Mut. Ins. Co.*, 2004 WL 253547 (R.I. Super. Ct. Jan. 21, 2004)). In that case, the court allowed the plaintiff to assert a breach of fiduciary duty claim where the plaintiff alleged that the insurer had failed to distribute dividends to the policyholders as required by the defendant's Shared Earning Endorsement policies. *See Heritage Healthcare Services, Inc.*, 2004 WL 253547, at *1.[6] Since *Heritage* is the only case cited by Plaintiffs, presumably they envision a similar breach of fiduciary duty claim in their capacities as "owners of State Farm."

[6] The breach of fiduciary duty claim was ultimately dismissed by the court in *Heritage* based on the business judgment rule. *Id.* at *6-8.

First, while Rhode Island courts may have allowed claims based on this theory of mutual company policyholders as "owners," there is no Delaware authority to support Plaintiffs' claim.[7] As Delaware courts have continuously recognized, "the relationship between an insurer and an insured generally is not fiduciary in character." *See Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 114 (Del. 2006); *see also Corrado Bros. v. Twin City Fire Ins. Co.*, 562 A.2d 1188, 1192 (Del. 1989) (no fiduciary relationship between insurer and insured); *see also Crosse v. BCBSD, Inc.*, 836 A.2d 492, 494 (Del. 2003) (no fiduciary duty between non-profit health insurance company and plan participants).

Second, Plaintiffs' proposed claims are distinguishable from the claims at issue in *Heritage*, which challenge the distribution of dividends. There, "the claims as alleged implicate[d] the policyholders' rights as owners rather than as insureds." *Heritage*, 2004 WL 253547, at *5. The court noted that "whether a mutual insurance company owes a fiduciary duty to its policy holders hinges on the claim involved," and concluded that in that particular circumstance, "the policyholders, as owners, were entitled to the same fiduciary duty as owed to stockholders."[8] *Id.* at *5.

[7] Notably, it appears that Plaintiffs' counsel unsuccessfully asserted a similar argument in prior litigation against another insurer. *See Thomas v. Harford Mut. Ins.*, 2004 WL 1102362, at *1 (Del. Super. Apr. 7, 2004) (noting, in dicta, that earlier in the case, the court had denied plaintiffs' attempt to amend the complaint to bring claims of breach of fiduciary duty against the insurer) (Spadaro, J., appearing as counsel for the plaintiff).

[8] The cases cited in *Heritage* are based on similar facts, including issues regarding dividend payments and corporate restructuring. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Superior Court*, 114 Cal. App. 4th 434 (2003) (involving allegations by policyholders that defendant insurance company and board of directors failed to pay promised dividends); *Silverman v. Liberty Mut. Ins. Co.*, 2001 WL 810157, at *6 (Mass. Super. July 11, 2001) (challenging a proposed Plan of Reorganization proposed and approved by the insurer's board of directors); *see also Rieff v. Evans*, 630 N.W. 2d 278 (Iowa 2001) (involving allegations against the company and its board of directors regarding changes to the corporate structure, including alleged improper demutualization).

Conversely, Plaintiffs' proposed claims are a far cry from those typically brought as "owners" of a mutual insurance company. Plaintiffs' claims originated based on facts related to State Farm's handling of claims under Plaintiffs' PIP policies. In these circumstances, Delaware law is clear that no fiduciary relationship exists. *See Corrado Bros.*, 562 A.2d at 1192.

c. Plaintiffs Have Failed to Plausibly Allege Any Facts Which Would Rebut the Business Judgment Rule

Although no fiduciary relationship exists for purposes of Plaintiffs' claims, even if State Farm owed Plaintiffs a fiduciary duty in connection with its practices under 21 *Del. C.* § 2118B, Plaintiffs have failed to plausibly allege that State Farm acted in bad faith, or otherwise set forth any facts that would overcome the business judgment rule.[9]

"The business judgment rule is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company [and its shareholders]." *Emerald Partners v. Berlin*, 787 A.2d 85, 90-91 (Del. 2001). In order to state a viable claim for breach of fiduciary duty, a plaintiff must plead, with sufficient particularity, facts which would rebut the presumptive applicability of the business judgment rule; namely, that the company and its board of directors violated the duty of care, the duty of loyalty, or the duty of good faith. *See id.*

[9] State Farm recognizes that Plaintiffs have not made any allegations regarding State Farm's directors or officers. State Farm faces the challenge in this brief of addressing an unstated "owners" claim raised by Plaintiffs for the first time on appeal. Since Plaintiffs' argument appears to be based on corporate fiduciary duty, the strong presumption of the business judgment rule should extend to and defeat any such claim just as it did in *Heritage*, the one case cited by Plaintiffs.

Nowhere in their proposed amended complaint do Plaintiffs make any allegation that State Farm, or any of its directors or officers, has acted in bad faith or against the best interest of the company. Moreover, Plaintiffs' generalized allegations that State Farm has violated Delaware law or has "willfully ignored" § 2118B are insufficient to overcome the presumption created under the business judgment rule. *See Heritage*, 2004 WL 253547, at *7-8.

d. The Superior Court Does Not Have Jurisdiction Over Plaintiffs' Claims Based on State Farm's Alleged Fiduciary Duty

In any event, to the extent that Plaintiffs assert claims as "owners" of State Farm rather than as policyholders, dismissal was also proper based on the Superior Court's lack of jurisdiction over claims based on breach of fiduciary duty. *Reybold Venture Grp. XI-A, LLC v. Atl. Meridian Crossing, LLC*, 2009 WL 143107, at *3 (Del. Super. Jan. 20, 2009) (dismissing for lack of subject matter jurisdiction a claim based on an alleged breach of fiduciary duty because the Chancery Court has exclusive jurisdiction of such claims, which are based in equity).

II. PLAINTIFFS' MOTION WAS PROPERLY DENIED BECAUSE PLAINTIFFS HAVE FAILED TO ALLEGE ANY ACTUAL OR IMMINENT INJURY OR TO PRESENT AN ACTUAL CONTROVERSY RIPE FOR REVIEW

A. Question Presented

Did the Superior Court properly deny Plaintiffs' Motion for Leave to Amend the Complaint when Plaintiffs have failed to allege any actual or imminent injury in connection with the alleged diminution in value of their auto policies or to present an actual controversy that is ripe for review?

B. Standard of Review

Superior Court Rule 15 provides that after a responsive pleading has been filed, the plaintiff may amend the complaint "only by leave of court or by written consent of the adverse party." Super. Ct. Civ. R. 15(a). Where the proposed amendment would be futile, leave to amend the complaint should be denied. *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011); *see also FS Parallel Fund, L.P. v. Ergen*, 2005 WL 1950199, at *2 (Del. 2005) (affirming denial of motion for leave to amend because the proposed amendments would be futile).

"A motion for leave to amend a complaint is futile where the amended complaint would be subject to dismissal under Rule 12(b)(6) for failure to state a claim." *Price*, 26 A.3d at 166. Therefore, a denial of a motion for leave to amend, like a grant of a Rule 12(b)(6) motion, is renewed *de novo* to determine whether the trial judge erred as a matter of law. *See id.* The Court must "view the complaint in the light most favorable to the non-moving party, accepting as true all well pleaded allegations and drawing reasonable inferences that logically flow from them." *Id.*

However, the Court should not "accept conclusory allegations unsupported by specific facts." *Id.*

C. Merits of Argument

The trial court correctly denied Plaintiffs' motion for leave to amend. As the court recognized, State Farm has complied with 21 *Del. C.* § 2118B by paying statutory interest, and Plaintiffs have failed to plead any other injury or any injury that may occur in the future. Instead, Plaintiffs seek a declaration which amounts to nothing more than an advisory opinion admonishing State Farm for an alleged "practice," despite the fact that Plaintiffs have received all of the benefits to which they were entitled under their policies and under § 2118B. Plaintiffs' case is based on an odd and legally invalid theory, and the requested declaration would require the Court to rewrite § 2118B. Therefore, this Court should affirm the trial court's order denying Plaintiffs' motion for leave to amend.

1. Plaintiffs Do Not Have Standing to Pursue the Proposed Claim

The trial court correctly denied Plaintiffs' Motion for Leave to Amend because Plaintiffs do not have standing to pursue their proposed claims. "Standing is a threshold question that must be answered by a court affirmatively to ensure that the litigation before the tribunal is a 'case or controversy' that is appropriate for the exercise of the court's judicial powers." *Dover Historical Soc. v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1111 (Del. 2003). In order to satisfy the standing requirement, a plaintiff must show that: (1) he or she has suffered an injury-in-fact; (2) a causal connection exists between the injury and the challenged conduct; and

(3) it is likely, as opposed to merely speculative, that a favorable decision will redress the injury. *Id.*

Plaintiffs attempt to avoid the standing requirement by arguing that "a litigant seeking declaratory relief need not have suffered actual harm." Plaintiffs' Opening Brief on Appeal at 19. However, "[w]hile the Declaratory Judgment Act may allow courts to adjudicate some issues before . . . an injury has occurred," even in actions requesting only declaratory relief, a plaintiff must still establish that he has standing to pursue the claim. *Cartanza v. DNREC*, 2009 WL 106554, at *2-3 (Del. Ch. Jan. 12, 2009). The Declaratory Judgment Act "does not confer standing on plaintiffs to challenge an action that, of itself, does not injure plaintiffs." *Id.*; *see also Empire Fire and Marine Ins. Co. v. Miller*, 2012 WL 1151031 at *4 (Del. Ct. Cm. Pl. Apr. 5, 2012) ("[T]he party bringing the claim bears the burden to establish standing irrespective of the type of cause of action asserted. . . . Stated differently, the Declaratory Judgment Act does not independently establish the requisite jurisdictional standing to pursue a claim seeking declaratory relief.").

Although they seek only a declaratory judgment, Plaintiffs are not excused from establishing standing. In order to proceed with their proposed claim, Plaintiffs must show that they have suffered an injury-in fact, traceable to the conduct of State Farm, and that a favorable judgment will redress their injury. Because Plaintiffs cannot do so, their Motion to Amend was correctly denied.

a. Plaintiffs Have Not, and Cannot, Allege Any Injury-in-Fact

To establish injury-in-fact, the alleged harm must be a) concrete and

particularized; and b) actual or imminent, not conjectural or hypothetical. *See Dover Historical Soc.*, 838 A.2d at 1111; *Baker v. Hartford Underwriters Ins. Co.*, 2011 WL 2709236 (D. Del. July 12, 2011). Conclusory allegations that the defendant has violated a certain "right" are insufficient to establish injury-in-fact. Instead, a plaintiff must show how he has been harmed by the alleged violation. *See T & R Land Co. v. Wootten*, 2006 WL 2640962, at *3 (Del. Ch. Sept. 7, 2006) ("Merely having the paper authority to enforce a [right] does not equate to suffering an "injury-in-fact" if the [right] is violated. A plaintiff in T & R's position must show why the failure to comply . . . affects it.").

i. Plaintiffs Have Not Alleged Any Actual or Imminent Harm

Plaintiffs' brief and proposed amended complaint are filled with vague and conclusory allegations that Plaintiffs have been deprived of certain "rights" afforded by 21 *Del. C.* § 2118B, including the right to timely coverage determinations and prompt payment of claims. *See* Plaintiffs' Opening Brief on Appeal at 20. However, Plaintiffs do not explain how the alleged practice has affected them or describe any concrete, particularized harm. As the Superior Court recognized, State Farm has paid the statutory interest required under 21 *Del. C.* § 2118B. Opinion at 9-10; *see also* (B2-3) State Farm's MSJ at 1-2. And as Plaintiffs themselves admitted, these payments were made separate from, and in addition to, the payments made towards Clark's and Smith's policy limits. *See, e.g.*, A102, line 20 through A103, line 3 (Hearing on Motion for Leave to Amend, 10/15/14, Tr.); *see also* Opinion at 9-10;

State Farm's MSJ at 1-2. Plaintiffs do not allege that any statutory interest payments were not made or that the interest was improperly calculated or incorrectly paid.

Additionally, Plaintiffs do not argue that they have experienced any other damages. For example, despite their lengthy discussion of the statute's purpose and legislative history, Plaintiffs offer no evidence of any consequential damages such as "financial hardship" or "damage to personal credit ratings." *See* B51, Proposed Amended Complaint at 5. They have not shown that any claims have gone unpaid, that services have been denied, or that they have experienced any actual harm which would constitute an injury-in-fact. *See Baker v. Hartford Underwriters Ins. Co.*, 490 F. App'x 467, 468 (3d Cir. 2012) (affirming an order dismissing claims that certain PIP claims "were arbitrarily and systematically denied . . . or were paid late by Hartford and that Hartford had a regular business practice of denying claims without reasonable basis" in violation of 21 *Del. C.* § 2118 because the plaintiff failed to allege that he suffered any injury-in-fact).

The proposed amended complaint also fails to allege any future harm. Even if no actual injury has occurred, a plaintiff may still have standing if harm is "imminent." *See Dover Historical Soc.*, 838 A.2d at 1111. However, the injury cannot be speculative or hypothetical. *Id.* Here, neither Plaintiff has asserted that they will experience any cognizable harm in the future. Moreover, Smith has exhausted the limits of his PIP policy. Therefore, Smith cannot be harmed from the alleged practice unless he experiences another covered event under his PIP policy. In order for Smith to be harmed by a delayed payment, it would require that he be involved in another automobile accident; that the accident is covered under his PIP

policy; that State Farm makes a coverage determination or pays a claim outside of the 30-day window; and, that Smith suffers cognizable harm from that delay. This remote risk is a far cry from the "imminent" injury required to establish standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992).

Moreover, for many of the allegedly delayed payments, Plaintiffs cannot, as a matter of law, claim that they suffered any injury. The majority of the claim payments under Clark's and Smith's PIP policies were not even payable to Plaintiffs, but rather were paid to medical providers that submitted claims directly to State Farm. For any delayed payment on those claims, it is the medical providers, not Plaintiffs, that are the "claimants" under 21 *Del. C.* § 2118B (and thus, entitled to the statutory interest payments that were made by State Farm on these claims). *See Sammons v. Hartford Underwriters Ins. Co.*, 2011 WL 6402189, at *3 (Del. Super. Dec. 15, 2011), *aff'd*, 49 A.3d 1194 (Del. 2012). To the extent that Plaintiffs' claims are based on delayed payments to third parties, Plaintiffs do not have standing to challenge a violation of Section 2118B.

ii. Plaintiffs' Allegations of "Benefit of the Bargain" Are Insufficient to Establish Standing

Plaintiffs' vague allegations that they have suffered a "diminution of value" of their policies, or that they have been denied the "benefit of the bargain" also fail to save their proposed claim. Contrary to their assertions, Plaintiffs have received the exact benefits to which they were entitled – $100,000 in PIP coverage provided consistent with the insurance contract and Delaware law. *See* Opinion at 9 ("[T]he statutory interest was paid *in addition* to Plaintiffs' PIP claim. Thus, Plaintiffs

already received the benefit of their bargain."). But Plaintiffs conveniently ignore this and instead argue that they have an absolute right under 21 *Del. C.* § 2118B for their claims to be resolved within 30 days. Although some courts have suggested that the protections of Section 2118B may be implied in an insurance policy, Plaintiffs are not entitled to some benefit based on their mischaracterization of Section 2118B. Plaintiffs cannot rely on the 30-day language while ignoring the remainder of the statute.

Moreover, Plaintiffs have failed to allege any "concrete or particularized" harm. Plaintiffs cannot simply claim that they were deprived of some "bundle" of rights without even attempting to describe the value of that bundle or how they were harmed by losing it. *See, e.g.*, *Horvath v. Keystone Health Plan East, Inc.*, 333 F.3d 450 (3d Cir. 2003) (dismissing claims alleging that the plaintiff overpaid for an HMO plan). Delaware law requires more. Plaintiffs' generalized references to their "bundle of rights" are insufficient to establish standing. *See Barry v. Town of Dewey Beach*, 2006 WL 1668352, at *4 (Del. Ch. June 8, 2006) ("Plaintiffs have set forth almost precisely the type of generalized grievance that constitutes the classic example of a harm that will not, by itself, confer standing . . . .").

iii. The Cases Cited by Plaintiffs Do Not Apply

It is clear that Plaintiffs cannot allege any injury-in-fact that would give them standing to pursue their proposed claim, and the cases to which Plaintiffs cite do not change this conclusion. For example, in *Boswell v. Liberty National Life Insurance Co.*, 643 So.2d 580 (Ala. 1994), the plaintiffs alleged that they were fraudulently induced into purchasing a new insurance policy that they believed provided

additional coverage, when in fact, coverage was more limited. Similarly, *Gooch v. Life Investors Insurance Company of America*, 264 F.R.D. 340 (M.D. Tenn. 2009) involved the defendant's alleged refusal to pay certain charges that were covered by the plaintiffs' insurance policy. The alleged conduct would leave the plaintiffs liable for the balance on certain medical bills and deprive them of coverage. Neither case applies to Plaintiffs' proposed claim. Here, Plaintiffs purchased a policy from State Farm that provided $100,000 in PIP coverage. They each made claims under their policy, and those claims were paid, along with the statutory interest required under 21 *Del. C.* § 2118B. Unlike in *Boswell* or *Gooch*, Plaintiffs have received exactly the PIP coverage that they bargained for.

Additionally, in *Horvath v. Keystone Health Plan E., Inc.*, 333 F.3d 450 (3d Cir. 2003), the plaintiff brought claims under the Employee Retirement Income Security Act (ERISA), alleging that the defendant HMO breached its fiduciary duty by failing to disclose certain information about the plan administration. The Third Circuit concluded that the plaintiff had standing to seek injunctive relief requiring that the HMO disclose certain information in accordance with its statutory obligations. The plaintiffs in *Horvath* had not received the required information. Conversely, in this case, the claimants have received the statutory interest to which they are entitled. Moreover, although the *Horvath* court allowed certain claims to proceed, it held that the plaintiff lacked standing to recover damages based on the alleged loss of the benefit of the bargain or the diminished value of the policy – the very "harm" that Plaintiffs allege here. *See Horvath*, 333 F.3d at 456-57.

b. Plaintiffs' Requested Declaratory Judgment Would Not Redress Any Alleged Injury.

Plaintiffs' failure to allege any injury-in-fact is fatal to their proposed claim. However, Plaintiffs' amendment would also be futile because they cannot explain how the requested relief will address their purported injury. *See Dover*, 838 A.2d at 1110 ("[I]t must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.") (quoting *Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 175-76 (3d Cir. 2000)).

Under this theory, Plaintiffs appear to seek a five-part declaration, stating that: (1) State Farm must pay or deny claims within 30 days of receipt of the claim; (2) State Farm must fully investigate claims within 30 days; (3) State Farm must communicate a coverage determination within 30 days; (4) State Farm has adopted a "practice" of failing to pay or deny claims within 30 days; and (5) the "practice" is inconsistent with Delaware law. Pls.' Mot. at 6; Pls.' Proposed Compl at 13 (B59).

As State Farm explained to the Superior Court, Plaintiffs' requested declaration would, in effect, require all Delaware insurers to pay or deny a PIP claim within 30 days, without exception. This is not a request for a declaration that State Farm must comply with the law, but rather, a request that the law be rewritten entirely. Section 2118B(c) provides that a claimant is entitled to prompt resolution of his or her claim, but if the insurer fails to meet the 30-day deadline, the claimant then has the right to recover statutory interest and to pursue any other claims at law.[10]

[10] "When an insurer receives a written request for payment of a claim . . . the insurer shall promptly process the claim and shall, no later than 30 days following the insurer's receipt of said [request], make payment of the amount of claimed benefits that are due to the claimant or . . . provide the claimant with a written explanation of the reasons for [a] denial. If an insurer fails to comply with

21 *Del. C.* § 2118B(c). Plaintiffs cannot base their proposed amended complaint on some alleged right for every claim to always be resolved within 30 days. That is not what is required under Delaware law. Plaintiffs cannot ask the Court to rewrite the statute and nullify the statutory interest provision. It is for the legislature, not Plaintiffs, to decide the proper remedy for a delayed PIP payment.

Plaintiffs cannot, through the guise of this litigation, change the provisions of 21 *Del. C.* § 2118B simply because they believe its requirement of statutory interest is an insufficient deterrent. Moreover, the requested declaration would provide no immediate benefit. Instead, if Plaintiffs received a delayed payment or claim decision at some point in the future, they would simply be entitled to recover the same statutory interest and damages currently available to them – damages which they do not allege they have incurred in past instances of this "practice."[11] Plaintiffs do not have standing to seek a declaration to which they are not entitled or to pursue a claim for which there is no injury.

c. Plaintiffs Do Not Have Standing Simply Because They Seek to Represent a Class.

Finally, Plaintiffs cannot rely on the claims of unnamed class members to establish standing. The standing analysis does not change simply because Plaintiffs

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the provisions of this subsection, then the amount of unpaid benefits due from the insurer to the claimant shall be increased at the monthly rate [below] . . . ." 21 *Del. C.* § 2118B(c).

The "claimant" entitled to the interest payment is often a medical provider or other third party, not the insured. *See Sammons v. Hartford Underwriters Ins. Co.*, 2011 WL 6402189, at *3 (Del. Super. Dec. 15, 2011), *aff'd*, 49 A.3d 1194 (Del. 2012) (discussed *infra* at 11-12).

[11] As Judge Carpenter recognized in the July 16, 2014 hearing on State Farm's Motion for a Protective Order, at least from the initial Complaint, it is unclear how Clark and Smith stand to benefit from this action. *See* A061, line 20 through A063, line 23 (Hearing on Motion for Protective Order, 7/16/14, Tr.).

seek to represent a class. Plaintiffs' Motion for Leave and proposed amended complaint attempt to allege a "widespread" practice, emphasizing the number of files on which State Farm has paid statutory interest and arguing that a class action may be appropriate under Superior Court Civil Rule 23(b)(2). *See, e.g.*, A021-22, A033 (Brief in Support of Motion for Leave to Amend). However, "[a] plaintiff may not use the procedural device of a class action to boot strap himself into standing he lacks under the . . . substantive law." *Murphy v. United Servs. Auto Ass'n*, 2005 WL 1249374, at *2 (Del. Super. May 10, 2005). Without cognizable injury to Clark and Smith, the named Plaintiffs, the action cannot proceed. *See id.* The fact that Plaintiffs seek to represent a proposed class is irrelevant for the purpose of the standing analysis, and the class allegations cannot save Plaintiffs' proposed amended complaint. *See Baker v. Hartford Underwriters Ins. Co.*, 490 F. App'x 467, 469 (3d Cir. 2012) ("A potential class representative must demonstrate individual standing vis-as-vis (sic) the defendant; he cannot acquire such standing merely by virtue of bringing a class action.").[12]

2. Plaintiffs' Proposed Claim is Futile Because There is No Actual Controversy that is Ripe for Review.

Plaintiffs' proposed amendment is also futile because their new claim is not an actual controversy ripe for review. Plaintiffs have not experienced damages or

[12] Plaintiffs point to a class certification decision by the Ninth Circuit in an attempt to argue that their claims may proceed despite the fact that they, themselves, have not been harmed by the alleged practice. *See* Plaintiffs' Opening Brief on Appeal at 25. However, that court was addressing standing of absent class members for purposes of class certification. It was not relaxing the clear requirement that named class representatives must have standing. In any event, Delaware courts are clear that a plaintiff cannot use a class action to obtain standing he lacks individually. *See Murphy*, 2005 WL 1249374, at *2.

alleged imminent harm, and therefore, a declaratory judgment would be improper.

Delaware courts are authorized to entertain an action for a declaratory judgment so long as an "actual controversy" exists between the parties. *XI Specialty Ins. Co. v. WMI Liquidating Trust*, 93 A.3d 1208, 1216-17 (Del. 2014). In order for a claim to qualify as an actual controversy that may be reviewed by the Court, four requirements must be satisfied: (1) the action must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest 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. *See id.*

Delaware courts cannot render advisory opinions, and a declaratory judgment claim cannot be based only on "uncertain [or] contingent events." *Id.* at 1217-18. Rather, in order for a court to hear a claim for a declaratory judgment, "[t]here must be in existence a factual situation giving rise to immediate, or about to become immediate, controversy between the parties." *Ackerman v. Stemerman*, 201 A.2d 173, 175 (Del. Ch. 1964). A party seeking a declaratory judgment must show that the failure to resolve the controversy will have an immediate and practical impact upon him. *See Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1241 (Del. Ch. 1987).

In a recent Superior Court decision brought by Plaintiffs' counsel against Travelers Commercial Insurance Company, the plaintiffs alleged that Travelers improperly adopted a practice of failing to reach a coverage determination on PIP

claims within the 30 days provided under § 2118B and sought a declaration that this practice constituted a repudiation of the contractual benefits under the policy. *Myers v. Travelers Commercial Ins. Co.*, 2015 WL 351953, at *1-2 (Del. Super. Ct. Jan. 26, 2015). Like Plaintiffs here, the parties in *Myers* failed to allege any actual harm, and the requested declaration was not an actual controversy ripe for adjudication.

As the Superior Court correctly recognized, like in *Myers*, Plaintiffs' proposed claim does not amount to an actual or justiciable controversy. Plaintiffs do not seek to bring this action in order to resolve any "uncertainty" or to preempt future litigation resolving the alleged conduct. Instead, Plaintiffs request that the court issue an advisory opinion which amounts to nothing more than "a declaration reprimanding [State Farm] for allegedly adopting this practice." *Id.* at *4 (Del. Super. Ct. Jan. 26, 2015).[13] Although Plaintiffs need not have suffered any past harm, in order for an "actual controversy" to be imminent, sufficient to warrant a declaratory judgment, Plaintiffs must allege must allege an ongoing or future wrong which for which they could bring viable claims. Plaintiffs cannot transform a futile claim for damages into something viable simply by disguising it as a request for declaratory judgment. If Plaintiffs do experience some harm in the future, they can bring an appropriate action at that time. *See Schick*, 533 A.2d at 1241.

[13] Plaintiffs cite to *Heathergreen Commons Condominium Association v. Paul*, 503 A.2d 636 (Del. Ch. 1985) for the proposition that a declaratory judgment is appropriate "when a party alleges that it purchased rights that an adverse party should recognize, [but refuses to]." Plaintiffs' Opening Brief on Appeal at 19-20. However, in *Heathergreen*, the landowners requested a declaratory judgment after being threatened with an injunction preventing them from building on the land at issue. The landowners faced an actual, imminent harm – loss of use of the land and interference with their specific plans to build on it. Here, Plaintiffs cannot articulate any similar, practical effect from the alleged "uncertainty."

III. THE VOLUNTARY CESSATION DOCTRINE DOES NOT APPLY

A. Question Presented

Does the voluntary cessation doctrine apply such that Plaintiffs need not establish standing, despite the fact that State Farm has not stopped or changed its practices as a result of this litigation or to avoid Plaintiffs' claims, but has, at all times during the administration of Plaintiffs' claims, paid the claims in accordance with terms of the policy and 21 *Del. C.* § 2118B?

B. Standard of Review

Superior Court Rule 15 provides that after a responsive pleading has been filed, the plaintiff may amend the complaint "only by leave of court or by written consent of the adverse party." Super. Ct. Civ. R. 15(a). Where the proposed amendment would be futile, leave to amend the complaint should be denied. *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011); *see also FS Parallel Fund, L.P. v. Ergen*, 2005 WL 1950199, at *2 (Del. 2005) (affirming denial of motion for leave to amend because the proposed amendments would be futile).

"A motion for leave to amend a complaint is futile where the amended complaint would be subject to dismissal under Rule 12(b)(6) for failure to state a claim." *Price*, 26 A.3d at 166. Therefore, a denial of a motion for leave to amend, like a grant of a Rule 12(b)(6) motion, is renewed *de novo* to determine whether the trial judge erred as a matter of law. *See id.* The Court must "view the complaint in the light most favorable to the non-moving party, accepting as true all well pleaded allegations and drawing reasonable inferences that logically flow from them." *Id.*

However, the Court should not "accept conclusory allegations unsupported by specific facts." *Id.*

C. Merits of Argument

Plaintiffs argue that under the voluntary cessation doctrine, they have some right to pursue a declaratory judgment action despite the fact that they have not alleged any cognizable injury. But contrary to Plaintiffs' assertions, this doctrine does not save their proposed claim. The voluntary cessation doctrine applies when a party has changed its practices during the interim of litigation, effectively mooting a plaintiff's claim. *See, e.g.*, *Already LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013); *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv.*, 528 U.S. 167, 189 (2000). Unless a defendant proves that the alleged conduct will not resume, a court may still rule on the legality of the alleged practice, rather than dismissing the claim as moot. *See Friends of the Earth*, 528 U.S. at 189.

As the trial court correctly recognized, State Farm has, at all times during the administration of Plaintiffs' PIP claims, complied with the terms of the policy and the requirements of 21 *Del. C.* § 2118B by paying statutory interest separate from, and in addition to, the policy limits. *See* Opinion at 9; *see also* A102, line 20 through A103, line 3. State Farm has not stopped or changed its practice as a result of this litigation or to avoid Plaintiffs' claims.

Plaintiffs' reference to *Cooper v. Charter Communications Entertainments, I, LLC*, 760 F.3d 103 (1st Cir. 2014) also fails to support Plaintiffs' requested amendment. In *Cooper*, although the defendant had paid the plaintiffs a credit for a past cable outage, as required under Connecticut law, the company denied that it had

any legal obligation to do so. 760 F.3d at 107. Therefore, the plaintiffs were entitled to seek declaratory judgment stating that for any future outages – which the court concluded would likely occur based on the local weather – the company was required to pay the credit in accordance with the statute. *Id.*

The defendant's position in *Cooper* is the exact opposite of State Farm's position as it relates to Plaintiffs' PIP coverage. State Farm acknowledges that claimants are entitled to statutory interest payments under 21 *Del. C.* § 2118B. It is undisputed that State Farm has paid all interest due in accordance with § 2118B.

Additionally, the voluntary cessation doctrine does not save Plaintiffs' claims, because it relates to the issue of mootness, not standing. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Serv.*, 528 U.S. 167, 189 (2000) (distinguishing mootness and standing). As the Supreme Court has explained, even if the voluntary cessation doctrine applies, a plaintiff still bears the burden of establishing actual or imminent injury sufficient to establish a viable claim. *See id.* at 190. While the voluntary cessation doctrine may save a case from dismissal after intervening events have caused the case to become moot, it cannot create a justiciable case or controversy where none existed before. *See, e.g.*, *Already LLC*, 133 S. Ct. at 726-27 ("The problem for Already is that none of these injuries suffices to support Article III standing. Although the voluntary cessation standard requires the defendant to show that the challenged behavior cannot reasonably be expected to recur, we have never held that the doctrine—by imposing this burden on the defendant—allows the plaintiff to rely on theories of Article III injury that would fail to establish standing in the first place.") (case cited by Plaintiffs, Br. at 29-30).

Here, Plaintiffs never had a viable claim based on State Farm's alleged failure to pay claims within 30 days. As discussed above, Plaintiffs received exactly what they were entitled to – PIP coverage and statutory interest under 21 *Del. C.* § 2118B. Moreover, Plaintiffs have failed to plead any actual injury or any injury that may immediately occur in the future. Despite their efforts to shift the burden to State Farm, the voluntary cessation doctrine does not change the analysis; Plaintiffs' proposed amendment is not an actual case or controversy that is ripe for review.

CONCLUSION

For the foregoing reasons, the trial court's order denying Plaintiffs' Motion for Leave to Amend the Complaint should be affirmed.

Respectfully submitted this 8th day of September, 2015.

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