IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

WMI LIQUIDATING TRUST,)
Plaintiffs,))
v.)
XL SPECIALTY INSURANCE) C.A. No. N12C-10-087 MMJ CCLD)
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: August 22, 2013 Decided: August 23, 2013

ORDER GRANTING LEAVE TO APPEAL FROM INTERLOCUTORY OPINION

- (1) Defendants have moved for an order certifying an interlocutory appeal to the Delaware Supreme Court. The determination of whether to certify an interlocutory appeal lies within the discretion of the trial Court and is analyzed under the criteria set forth in Supreme Court Rule 42(b). An interlocutory appeal will not be certified unless the Court finds that its decision: (1) determines a substantial issue; (2) establishes a legal right; and (3) satisfies one of the five criteria set forth in Rule 42(b)(i)-(v). Under Rule 42(b)(i), the Court may look to the criteria established by Rule 41.
 - (2) By Opinion dated July 30, 2013, this Court held:

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**.

(3) Defendants argue that interlocutory appeal pursuant to Supreme Court Rule 42 is justified for several reasons. First, Defendants contend that courts routinely have held that justiciability issues are appropriate for interlocutory

¹See, e.g., Tortuga Cas. Co. v. Nat'l Fire Ins. Co. of Pittsburgh, 1991 WL 247813, at *2 (Del.); State v. Superior Court, 141 A.2d 468, 471 (Del. 1968).

appeal. Whether a plaintiff has standing is a determination of a substantial issue, and establishes a legal right, under Rule 42(b).² Defendants further argue that orders impacting the availability of insurance coverage involve substantial issues meriting interlocutory appeal.³

- (4) Second, Defendants assert that no Delaware precedent provides clear guidance on the issue of "standing to sue the Defendants based on coverage positions they issued to the individuals the Trust is threatening to sue."

 Defendants refer to the Court's Opinion, in which it relied primarily on non-Delaware case law. An original question of law in Delaware may be the subject of a discretionary interlocutory appeal under Rules 42(b)(i) and 41(b)(i).
- (5) Third, Defendants state that an order sustaining the controverted jurisdiction of the Court meets the requirements of Rule 42(b)(ii). Defendants posit that the Court erred in rejecting their argument that the Trust lacks standing to sue under the policies at issues in this lawsuit.
- (6) Finally, Defendants contend that interlocutory review may terminate the litigation and may otherwise serve considerations of justice, as contemplated

²See Gentile v. Rossette, 2005 WL 3272361, at *2 (Del. Ch.); Zimmerman v. Braddock, 2005 WL 2622698, at *1 (Del. Ch.); Breslin v. Richard, 1994 WL 534905, at *1 (Del. Super.).

³See AT&T Corp. v. Clarendon Am. Ins. Co., 2006 WL 1360934, at *1 (Del. Super.); Shook & Fletcher Asbestos Settlement Trust v. Safety Nat'l Cas. Corp., 2005 WL 3007806, at *2 (Del. Super.).

by Rule 42(b)(v). Had the Court granted Defendants' Motion to Dismiss, the case obviously would have ended.

- (7) Plaintiff opposes certification of the interlocutory appeal. Plaintiff argues that the Trust will have an opportunity to obtain a merits adjudication on the key disputed coverage issues. Until that adjudication is obtained, no substantive legal right will be established or denied, and no appeal is proper.

 Additionally, Plaintiff contends that to the extent that there are unsettled issues of Delaware law implicated by this coverage dispute, there will be ample opportunity for the Delaware Supreme Court to address all of those issues on a full record following a final merits determination by this Court.
- (8) The Court finds that the July 30th Opinion determines substantial issues and establishes legal rights, as required by Rule 42(b). The Court ruled that Plaintiff 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). The Court held that Plaintiff has stated claims upon which relief can be granted. Specifically, Plaintiff'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.

- (9) The Court finds that the July 30, 2013 Opinion decides a question of law of first instance in Delaware. The Court, relying on non-Delaware precedent, held that Plaintiff has standing under Superior Court Civil Rule 12(b)(1). Therefore, interlocutory review is certified pursuant to Supreme Court Rules 42(b)(i) and 41(b)(i).
- (10) Further, the ruling that Plaintiff has standing is an order sustaining the controverted jurisdiction of the Court, meeting the requirements of Rule 42(b)(ii).
- (11) Finally, the Court finds that interlocutory review in this case may substantially reduce further litigation and otherwise serve considerations of justice, the criteria listed under Rule 42(b)(v).

THEREFORE, IT IS ORDERED that the Court's Opinion of July 31, 2013, is hereby certified to the Supreme Court of the State of Delaware for disposition in accordance with Rule 42 of that Court.

Ist Mary M. Johnston

The Honorable Mary M. Johnston