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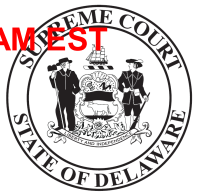

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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 Below,
Appellants.

v.

WMI LIQUIDATING TRUST,

Plaintiff Below,
Appellee.

No. 449, 2013

Upon Appeal from the Superior Court for the State of Delaware in and for New Castle County, C.A. N12C-10-087 MMJ CCLD

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NATURE OF PROCEEDINGS

The plaintiff, WMI Liquidating Trust, filed its Complaint in the Superior Court seeking a ruling regarding insurance coverage for a $500 million demand letter claim the Trust purports to hold against former directors and officers of Washington Mutual, Inc. The Defendants moved to dismiss the Complaint under Superior Court Rules of Civil Procedure 12(b)(1) and 12(b)(6) because: (a) the Trust lacks standing and otherwise fails to state a claim upon which relief may be granted; and (b) its declaratory judgment count does not present a ripe "actual controversy." The Defendants argued that the Trust had incurred no loss that could conceivably be covered under any of the insurance policies at issue and was, in fact, seeking an advisory opinion regarding insurance coverage for a lawsuit the Trust might in the future file against the former directors and officers, which would violate Delaware's prohibition on direct actions by claimants against insurers.

In an order entered July 31, 2013 (the "Order," Ex. A hereto), the Superior Court denied the Defendants' motion to dismiss. The Superior Court concluded that the Trust has standing under Superior Court Civil Rule 12(b)(1) and that the Complaint presents ripe controversies and states claims upon which relief may be granted. On August 23, 2013, the Superior Court granted the Defendants' timely application for certification of an interlocutory appeal of the Order. This Court accepted this interlocutory appeal on September 9, 2013.

SUMMARY OF ARGUMENT

1. The Trust has no standing to sue the Defendants for damages or other relief. The insurance proceeds allegedly at issue could be payable only to or on behalf of individual insured persons for the costs of defending themselves in a claim brought by the Trust. No amounts are payable to the Trust itself, other than potentially in its role as a plaintiff in a future lawsuit, and the Defendants' decision that such amounts are potentially covered under a different set of policies is not an injury in fact to the Trust. Nor has the trust incurred any other amounts that are fairly traceable to any action by the Defendants.

2. Even if the Trust did not otherwise lack standing, the Trust's request for declaratory judgment does not assert an "actual controversy."

(a) A party may seek declaratory relief only with respect to its own rights or other legal relations. The Trust seeks here to assert alleged rights of the individual insured persons it threatens to sue. The Trust's speculative concern with the amount of insurance coverage available to cover its prospective litigation targets is not a justiciable legal interest.

(b) The dispute asserted by the Trust—even if it otherwise were justiciable—is not and may never be ripe. The Trust cannot show that it has incurred any amount of potentially covered loss, or that the former directors and officers ever will incur amounts in excess of the other insurance policies that are currently affording coverage or amounts in excess of the funds set aside to pay their defense expenses.

STATEMENT OF FACTS

I. Washington Mutual and the Trust

A. Washington Mutual was obligated to pay litigation defense costs of its Directors and Officers.

Washington Mutual filed a chapter 11 bankruptcy petition on September 26, 2008. A27.[1] Several of its former directors and officers filed bankruptcy proofs of claim for payment of defense costs and any liability incurred in claims brought against them. A32. Washington Mutual's obligations to make such payments are controlled by its organizational documents, contracts with the former directors and officers, and Washington corporate law. A314-15. Washington Mutual objected to some of the claims and moved to estimate all of the claims at $0. A32. The Trust now administers the claims. *Id.*

B. Washington Mutual's October 2011 demand letter

In October 2011, Washington Mutual and its unsecured creditors committee sent a letter (the "Demand Letter") to certain of Washington Mutual's former directors and officers (the "Directors and Officers") demanding $500 million for alleged breaches of fiduciary duty. A14, A244-50. The Trust asserts that it now holds the Demand Letter claim. A16.

C. The $18 million Defense Reserve

Washington Mutual and the Directors and Officers disputed the amount of funds to be reserved for Washington Mutual's obligations to pay the Directors' and Officers' defense costs. A32. Washington Mutual eventually acknowledged it

[1] References to the Appendix to Appellants' Opening Brief are styled "A###."

"do[es] not dispute the obligation to advance defense costs on behalf of" the Directors and Officers, but preserved the right to object to the amount. A232. The Trust and Directors and Officers later stipulated to a reserve of $18,239,743 for defense fees and costs associated with the Demand Letter and any related litigation (the "Defense Reserve"). A32. Although Washington Mutual entered chapter 11 proceedings, approximately $7 billion in assets already have been distributed to creditors, and claims equivalent in priority to the Directors' and Officers' defense costs claims have generally been paid in full, with interest. *Washington Mut., Inc. v. XL Specialty Ins. Co.*, 2012 WL 4755209, at *3 (Bankr. D. Del. Oct. 4, 2012).

II. The Policies

The Defendants (also referred to here as the "Insurers") issued directors and officers liability insurance policies (the "08-09 Policies") to Washington Mutual for the May 1, 2008 to May 1, 2009 policy period. A diagram of the 08-09 Policies can be found at A172. The Trust alleges that it succeeds to Washington Mutual's rights under the 08-09 Policies. A16.

A. The ABC Policies

Two of the 08-09 Policies afford specified liability coverage for claims against directors and officers of Washington Mutual and certain claims against Washington Mutual itself. The Defendants refer to these traditional D&O policies as the "ABC Policies." Defendant XL Specialty issued the primary ABC Policy (the "Primary ABC Policy"), which includes three distinct insuring agreements, only two of which are potentially relevant:

Insuring Agreement (A) affords direct coverage to Insured Persons for amounts Washington Mutual is not permitted to pay on their behalf. It states that the "Insurer shall pay *on behalf of the Insured Persons* Loss" resulting from specified Claims "except for Loss which [Washington Mutual] is permitted or required to pay on behalf of the Insured Persons as indemnification." A48. (emphasis added). Coverage for non-indemnifiable loss incurred by insured persons is known as "Side A" coverage.

Insuring Agreement (B) affords coverage "*on behalf of the Company* [of] Loss which the Company is required or permitted to pay as indemnification to any of the Insured Persons" resulting from covered Claims. *Id.* (emphasis added). Such coverage to reimburse the entity's costs of indemnifying directors and officers is commonly known as "Side B" coverage. It is undisputed that Insuring Agreement (C) is not relevant here.

The Primary ABC Policy is not triggered until the applicable retention is paid. A40, A52-53, A85. A $50 million retention applies to Insuring Agreement (B), meaning that XL Specialty is not obligated to pay any amounts under the Primary ABC Policy until $50 million of covered Loss is first paid. Washington Mutual is "deemed to provide indemnification to the Insured Persons to the fullest extent permitted by law." A53. The Primary ABC Policy also provides:

> The Retention applicable to INSURING AGREEMENT (B) shall apply to any Loss as to which indemnification by [Washington Mutual] is legally permissible, whether or not actual indemnification is made unless such indemnification is not made by [Washington Mutual] solely by reason of its financial insolvency. In the event of financial insolvency, the Retention(s) applicable to INSURING

AGREEMENT (A) shall apply.

Id. Defendant National Union Fire Insurance Company of Pittsburgh, Pa. issued a policy that is excess of the Primary ABC Policy and attaches only after the full limits of the Primary ABC Policy and applicable retention have been paid. A181.

B. The Side A Policies

The remaining Defendants issued "Side A" policies that afford no coverage whatsoever for Washington Mutual or the Trust. Instead, these policies afford coverage *only* for individual directors and officers of Washington Mutual. Defendant Columbia Casualty Company issued the "Primary Side A Policy." A23-24. Under the Primary Side A Policy, "the Insurer shall pay on behalf of the Insured Person all Non-Indemnified Loss resulting from any Claim first made against the Insured Person during the Policy Period . . . for a Wrongful Act." A102. In relevant part, coverage under the Primary Side A Policy attaches only if the applicable limits of the ABC Policies "have been exhausted by reason of losses paid thereunder by the underlying insurer or the Insured." A101-02, A106. The remaining Side A policies are excess of and generally follow the terms of the Primary Side A Policy. A24-25.

III. Insurers have agreed to advance defense costs for the Demand Letter under policies the Trust has not targeted in this lawsuit.

Washington Mutual and its creditors' committee copied most of the Insurers on the Demand Letter. A250. Thereafter, certain Insurers including XL Specialty sent letters to counsel for the Directors and Officers informing them that the Demand Letter would be treated as a Claim under directors and officers liability

insurance policies issued for the 2007 to 2008 policy period (the "07-08 Policies"). A208. And insurers that issued 07-08 Policies, including XL Specialty, agreed that defense costs in connection with the Demand Letter could be advanced under such policies, subject to reservations of rights. *See* A6, A43, A212, A220-21. The Trust does not allege that any defense costs for its claim against the Directors and Officers have not been paid under those other policies.

IV. Procedural History

Washington Mutual—succeeded by the Trust—filed a similar lawsuit in the United States Bankruptcy Court for the District of Delaware. *See Washington Mutual, Inc. v. XL Specialty Ins. Co.*, 2012 WL 4755209, at *1. The bankruptcy court dismissed that action due to a lack of bankruptcy court jurisdiction and because certain counts were not ripe. *Id.* at *5-6. That court concluded that the Defense Reserve has no meaningful impact on creditors in relation to the massive distributions contemplated by the bankruptcy plan. *See id.* at *3.

The Trust then filed the Complaint in this action in the Superior Court, alleging that the Insurers breached the 08-09 Policies by denying coverage to the Directors and Officers for the Demand Letter. A33. The Trust also asserts that the Insurers' denial constitutes a breach of the duty of good faith and fair dealing. A34-35. The Trust further seeks declaratory judgment that coverage is available to the Directors and Officers without satisfaction of a retention for their defense costs and other amounts associated with the Demand Letter and, apparently, any litigation the Trust may ever bring based on the allegations of the Demand Letter. A35-37.

The Trust does not allege that it has paid or incurred any amounts that are covered under the 08-09 Policies. It asserts instead that it has suffered "damages and out of pocket expenses." A33. The purported "damages" the Trust has identified consist of the fact that it has established the Defense Reserve as a compromise of its estimation dispute with the Directors and Officers and the Trust's attorneys fees incurred in litigating with the Directors and Officers concerning Washington Mutual's obligations to them. A240.

The Insurers moved to dismiss the Complaint under Civil Rules 12(b)(1) and (6) because the Trust lacks standing and the Complaint otherwise fails to state a claim upon which relief may be granted or to present an "actual controversy." The Superior Court denied the Insurers' motion, determining that the Trust alleges an injury in fact and that the "Trust has standing under Superior Court Civil Rule 12(b)(1)." Order at 13. The Superior Court also rejected the Insurers' argument that the Trust has not asserted an actual controversy and that its declaratory judgment count is not ripe. The Superior Court concludes that "[t]he 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." Order at 21-22.

ARGUMENT

I. Introduction

The Trust contends it has the right to assert a $500 million claim against the Directors and Officers for breaches of their fiduciary duties to Washington Mutual. The Trust has not sued the Directors and Officers. Instead, it filed this action to challenge insurance coverage positions certain Defendants took back in late 2011 with regard to the Demand Letter. The ruling the Trust seeks here would permit it—or any trustee of a bankrupt Delaware entity—to ascertain the amount of insurance coverage available for any hypothetical settlement or judgment it might obtain in a lawsuit against the Directors and Officers *before* it decides whether to file such a suit.

It is clear that the Trust seeks an impermissible advisory opinion. Courts are not in the business of advising litigants whether a potential defendant will have sufficient insurance coverage to make it worth the litigant's while to file a lawsuit in the first instance. Indeed, the Trust tacitly acknowledged below that an allegedly injured claimant cannot file a direct action against an insurer in Delaware and purported not to base its standing on its status as a claimant. The only real question, then, is whether the Trust in its Complaint successfully conceals the non-justiciable nature of the requested advisory relief behind the artifice of a garden-variety dispute between alleged parties to a contract. The Trust attempts to cloak itself in the guise of an insured company seeking to enforce the Directors' and Officers' rights to coverage for the defense of litigation brought against them. No amount of artful pleading, however, can change the following facts:

(a) No lawsuit has been filed against the Directors and Officers; one may never be filed; and if one is filed, the Trust will be the plaintiff seeking damages from the Directors and Officers;

(b) The claim for which the Trust contests coverage is based on a demand letter that the Trust itself asserts against the Directors and Officers;

(c) In connection with the Demand Letter, the Directors and Officers have not incurred, and may never incur, a single dollar in covered defense costs that has not been paid by insurance policies not at issue;

(d) The Trust has not paid a single dollar that conceivably could be covered under any of the policies at issue here and has adamantly disclaimed any intention of advancing defense costs to the Directors and Officers; and

(e) Even if the Trust began paying defense costs, it has $18.5 million set aside specifically for that purpose, and it would not be entitled to insurance coverage unless it first satisfied a $50 million deductible.

In reality, the Trust is not acting as an insured entity seeking to protect the Directors and Officers from litigation; rather, it is acting as a separate entity formed for the specific purpose of *pursuing* litigation against the very individuals it claims to protect. The Trust is not entitled to insurance coverage under the policies at issue here and has not suffered, and is not imminently likely to suffer, any injury that conceivably could be traced to the Defendants' conduct. Because the Trust fails to meet its burden to establish standing to bring this lawsuit or that the action otherwise asserts a justiciable actual controversy, the Defendants seek reversal of the Order of the Superior Court denying their motion to dismiss.

II. The Trust lacks standing to sue the Insurers.

A. Questions Presented

Does the Trust have standing to sue the Insurers for money damages or declaratory relief even though (a) the Trust is owed no benefits under the 08-09 Policies; (b) the Trust is the party threatening to sue the alleged beneficiaries; and (c) neither the Trust nor the Directors and Officers have incurred or are imminently likely to incur any covered loss not paid under other insurance policies?

These issues were raised by the Insurers in the Superior Court at, *e.g.*, A147-53 and A284-92, and addressed in the Order at 8-13.

B. Standard and Scope of Review

An order denying a motion to dismiss is reviewed *de novo*, as are questions of justiciability. *Crescent/Mach I Partners, L.P. v. Dr Pepper Bottling Co.*, 962 A.2d 205, 208 (Del. 2008); *Preston v. Bd. of Adjustment of New Castle Cnty.*, 772 A.2d 787, 789 (Del. 2001).

Under Superior Court Rule 12(b)(6), the Court may dismiss a plaintiff's claim for "failure to state a claim upon which relief can be granted." Del. Super. Ct. Civ. R. ("Rule") 12(b)(6). Reasonable factual inferences will be drawn in favor of the non-moving party, but the Court need not "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party." *Price v. E.I. duPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011). The Court may consider documents referred to in or integral to the complaint and matters subject to judicial notice. *See*, *e.g.*, *In re Gen. Motors (Hughes) S'holder Litig.,* 897 A.2d 162, 169 (Del. 2006). "Unlike the standards

employed in Rule 12(b)(6) analysis, the guidelines for the Court's review of [a] Rule 12(b)(1) motion are far more demanding of the non-movant. The burden is on the Plaintiff[] to prove jurisdiction exists. Further, the Court need not accept Plaintiff[']s factual allegations as true and is free to consider facts not alleged in the complaint." *Appriva S'holder Litig. Co. v. EV3, Inc.*, 937 A.2d 1275, 1284 n.14 (Del. 2007). The Trust's Complaint ought to be dismissed whether the standards for Rule 12(b)(1) or 12(b)(6) are applied.

C. Merits of Argument

1. Injury-in-fact is an indispensable ingredient of standing.

The Trust, as the party invoking the jurisdiction of the courts, bears the burden to establish standing. *Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1110 (Del. 2003). This Court has plainly recognized the requirements of standing to bring a lawsuit, including specifically that:

> (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 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.

Id.

The Trust seeks to determine the potential for insurance coverage for an imagined judgment or settlement in any lawsuit it might bring against the Directors and Officers before it decides whether to bring such a lawsuit at all. The Trust

prudently disclaimed below that it relies on its purported rights as a claimant to provide standing, in seeming acknowledgment that Delaware law does not allow purportedly injured parties to bring direct actions against insurers. A238. *E.g.*, *Kaufmann v. McKeown*, 193 A.2d 81, 83 (Del. 1963) ("[T]his is not a State where a direct action is permitted against [a liability insurer]."). But this lawsuit is not, as the Trust has asserted, "a routine lawsuit between contract counterparties." A234. The Trust is not entitled to insurance coverage. It purports to seek defense costs for the Directors and Officers it threatens to sue, even though it holds funds for their defense and insurers have agreed to advance those defense costs under other policies. Whether the Trust sues as a claimant against the Directors and Officers or under the guise of protecting the interests of the Directors and Officers, its efforts to manufacture a dispute are both out of the ordinary and beyond the bounds of justiciability.

To sidestep the injury-in-fact requirement, the Trust suggested below that it has an "absolute right" to sue to "enforce" the 08-09 Policies. A237. The Order appears to accept this reasoning, finding that "the Trust has alleged: an injury in fact (denial of insurance coverage)." Order at 13. The approach is flawed because an alleged denial of coverage *to the Directors and Officers* is not an injury *to the Trust*. And absent an injury, the Trust has no standing to sue the Insurers in Delaware courts. This is true irrespective of general platitudes concerning the supposed rights of a contracting party to "enforce" a contract.

This Court has recognized, albeit outside the insurance context, that "contracting party" status is no substitute for injury in fact. In *HLSP Holdings*

Corp. v. Fortune Mgmt, Inc., the Court held that a corporate party to an agreement "could invoke the jurisdiction of the Superior Court for any injury *it* suffered" as a result of an alleged breach of contract but lacked standing to sue regarding alleged injuries to its shareholders. 2010 WL 528470, at *3 (Del. Feb. 15, 2010) (emphasis added). Indeed, "[t]he traditional concept of standing confers upon the corporation the right to bring a cause of action for *its own injury*." *Id.* (emphasis added) (quoting *Schoon v. Smith*, 953 A.2d 196, 201 (Del. 2008)). The plaintiff in *HLSP Holdings* did not show that it—as opposed to its stockholders—was injured by any alleged breach of contract. Because of the absence of injury to the plaintiff itself, this Court concluded that the plaintiff lacked standing to sue for breach of a contract, even though it was a party to the contract. *Id.* Other courts have similarly rejected attempts by a plaintiff to sue without an injury merely because of the plaintiff's status as a party to an agreement.[2] Accordingly, whether or not the Trust succeeds to the contractual rights of Washington Mutual, the Trust must establish an injury to itself in order to proceed.

[2] *See Rosen v. Tenn. Comm'r of Fin. & Admin.*, 288 F.3d 918, 931 (6th Cir. 2002) (rejecting the argument that "breach of an agreement, without more, can serve to confer standing on a party to the agreement" because a party "must assert his own legal interests"); *In re Fontainebleau Las Vegas Contract Litig.*, 716 F. Supp. 2d 1237, 1248-49 (S.D. Fla. 2010) (to demonstrate standing, parties must be the intended beneficiaries of the particular promise to other contracting parties); *Alexander v. United States*, 640 F.2d 1250, 1253 (Ct. Cl. 1981) ("[T]hat [Plaintiffs] signed the agreement is not controlling; they may have enforceable rights under some of its provisions and not have enforceable rights under other provisions.").

2. The Trust has suffered no injury in fact that is fairly traceable to the Insurers.

a. The Trust has no right to any policy proceeds.

Although the ABC Policies afford coverage in certain situations directly to Washington Mutual, no right of Washington Mutual or the Trust to receive coverage is at issue here. The Trust could be entitled to policy proceeds under the Side B coverage of the ABC Policies if and only if it incurred costs on behalf of Washington Mutual's directors and officers in excess of the applicable $50 million retention. A40, A52-53, A85. The Trust undisputedly has paid no defense costs or other covered amounts on behalf of the Directors and Officers, much less amounts in excess of $50 million. Accordingly, the Side B coverage grant of the ABC Policies is not at issue.

Only the Side A coverage therefore could conceivably be involved here. Side A coverage, whether under the ABC Policies or the Side A Policies, affords coverage only to Insured Persons—individual directors and officers. The Trust is not an Insured Person—and Washington Mutual was not an Insured Person. Indeed, because Side A coverage is payable solely on behalf of individual insured persons, numerous courts have held that such coverage is not property of a bankruptcy estate. *E.g.*, *In re Downey Fin. Corp.*, 428 B.R. 595, 608 (Bankr. D. Del. 2010) (holding that policy proceeds were not property of the estate where only Side A coverage was payable and debtor had not exhausted the retention to implicate Side B indemnification coverage). Thus, the Trust could not have acquired rights to such coverage through the bankruptcy process, because such

coverage was not property of Washington Mutual's estate to begin with. Accordingly, even as Washington Mutual's successor, the Trust is not entitled to Side A coverage.

Because it has not paid or otherwise incurred any covered losses under the 08-09 Policies, the Trust is not injured by a coverage position under those policies. A recent opinion reached a similarly straightforward conclusion in the health insurance context. *Baker v. Hartford Underwriters Ins. Co.*, 490 F. App'x 467 (3d Cir. 2012). The court there held that an insured suffers no "actual injury" where the insured has not paid or otherwise incurred amounts for which coverage allegedly has been denied, even though the insured alleged that such amounts remained unpaid. *Id.* at 469. Here, the Trust has not incurred or paid any purportedly covered amounts. Moreover, any defense costs incurred in connection with the Demand Letter have been advanced under other insurance policies and are not unpaid. Accordingly, there is nothing for the Trust to recover under the 08-09 Policies and no injury to the Trust.

b. The Defense Reserve is not an injury traceable to the Insurers.

The Trust contended below that it is harmed because it has established the Defense Reserve to satisfy Washington Mutual's obligations to pay the Directors' and Officers' defense costs. A236. The Trust moreover claims that it "might be liable to the [Directors and Officers] if there is no coverage." A242. These theories mistake the fundamental nature of the Side A coverage the Trust is presuming to "enforce." Side A coverage does not alleviate the requirement that

Washington Mutual—or the Trust as its successor—pay the Directors' and Officers' defense costs if it is able to do so. Side A coverage exists for the circumstance in which Washington Mutual—or the Trust as its successor—*is unable* to pay such costs.

Although it has reserved $18 million, the Trust has argued that it remains unable to pay the Directors' and Officers' defense costs—essentially because the Trust itself continues to object to such payment. A232, A239. This misses the point. The Side A coverage is potentially available to the Directors and Officers only if Washington Mutual or the Trust cannot pay their defense costs. Side A coverage by definition is unavailable if the Trust does pay. In light of the applicable retention, Side B coverage would not be available to reimburse the Trust for defense costs it advanced unless and until it had spent $50 million. Accordingly, the Trust would suffer no compensable injury even if it *actually paid* the entire $18 million amount of the Defense Reserve. The very fact of payment would itself demonstrate unequivocally that the amounts paid are not recoverable under the 08-09 Policies. As such, the mere fact that the Trust holds money that it might in the future pay cannot plausibly constitute an injury, when such a payment would in no event be covered by the 08-09 Policies.

Moreover, the Trust fails the second prong of the standing test articulated in *Dover*: traceability to the challenged conduct. Washington Mutual's obligations to its Directors and Officers are not created or governed by insurance policies. Those obligations are creatures of Washington state law, Washington Mutual's organizational documents, and contracts between Washington Mutual and the

Directors and Officers. Either the Trust is obligated to pay the Directors' and Officers' defense costs or it is not. Whether insurance coverage is available for any such payments—or in their absence—is wholly independent from whether the Trust is obligated to make or reserve for the payments in the first instance. In addition, the Defense Reserve was voluntarily stipulated to by Washington Mutual and the Trust. An injury-in-fact cannot be one caused by the "independent action of some third parties" or, implicitly, by the action of third parties in concert with the Trust or its predecessor. *See Dover*, 838 A.2d at 1110. Simply stated, the Insurers did not cause the creation of the Defense Reserve.

Nor are amounts the Trust may have incurred in opposing the Directors' and Officers' attempts to secure satisfaction of Washington Mutual's defense costs obligations fairly traceable to conduct of the Insurers. Whether there is coverage under the 08-09 Polices—as opposed to the 07-08 Policies—does not impact Washington Mutual's separate obligations to the Directors and Officers. Years before the Demand Letter was sent, the Directors and Officers began seeking to enforce those obligations, and Washington Mutual objected and moved to estimate the Directors' and Officers' defense expense claims. Any costs to the Trust due to its litigation activity therefore are the "result of the independent action of some third party not before the court"—Washington Mutual and the Directors and Officers—and not of any action or inaction of the Insurers. *Id.* To assert that the Insurers' coverage positions somehow caused the Trust to incur legal fees relating to its claims administration process distorts cause and effect. The coverage positions were issued years after the Directors and Officers filed their claims for

defense expenses from Washington Mutual, and could not have caused any related costs. Any costs the Trust incurred are the result of its own actions in response to the independent actions of the Directors and Officers.

3. A ruling in the Trust's favor would not redress its purported injury.

Even if the Trust could show an injury, it must "be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* The Trust contends—incorrectly—that the Insurers have somehow caused it to agree to establish and maintain the Defense Reserve. However, even if this Court were to affirm the Order, and the Trust were to prevail in this litigation, the Trust would not be entitled to release the Defense Reserve that it voluntarily established. The Directors and Officers stipulated that the Trust could release the Defense Reserve if, and only if, the Trust obtained a judicial declaration that the Insurers have no subrogation rights for any amounts they pay under the 08-09 Policies. A272-73. The Trust, however, does not seek such a declaration that the Insurers have no subrogation rights (nor could it ever obtain such a declaration under the express terms of the 08-09 Policies). The Trust sought that declaration in the bankruptcy court, which rejected the question as not ripe. It remains unripe. The Trust's inability to establish that success in this lawsuit would redress even a purported injury forecloses it from establishing standing.

4. The cases on which the Superior Court appeared to rely are not controlling.

The Superior Court appeared to rely on twenty-year old cases from federal trial courts in other states cited by the Trust in support of its "absolute right" theory of standing. Although these cases arise in the context of directors and officers liability insurance, they are materially distinct from this case and ought not to inform the justiciability requirements of the Delaware courts.

Federal Savings & Loan Insurance Corp. v. Oldenburg, 671 F. Supp. 720 (D. Utah 1987), does not provide a persuasive basis to depart from the requirement that a plaintiff must first suffer an injury in fact to establish standing. There, a bank regulator, the FSLIC, filed a lawsuit against directors and officers of a failed bank, which the regulator had taken over. Within the context of that proceeding, the regulator sought a declaratory judgment that a so-called "regulatory exclusion" did not bar coverage for the regulator's claim against the bank's directors and officers. The court concluded first that the exclusion the insurer relied upon was unenforceable, because it would "seriously hamper the FSLIC in carrying out its duties." *Id.* at 724.[3]

The *Oldenburg* court also concluded that the regulator had standing to seek a declaration that the directors and officers had coverage under the policy. *Id.* The *Oldenburg* court did not consider, however, whether the regulator there had suffered any injury in fact, as would be required by *Dover*. Nor did the court consider whether the regulator would have standing to seek damages for purported

[3] On this point, *Oldenburg* has been rejected by numerous courts. *E.g., FDIC v. Aetna Cas. & Sur. Co.*, 903 F.2d 1073, 1079 (6th Cir. 1990) (disapproving of the public policy reasoning of Oldenburg as against Supreme Court authority).

breaches of contractual and implied duties to the failed bank's directors, as the Trust seeks here. Moreover the *Oldenburg* regulator had already filed a lawsuit against the directors who sought coverage, so its dispute was not a fishing expedition for insurance funds available to potential litigation targets. Further, the justiciability picture in *Oldenburg* is distinct because that proceeding already included the directors who would be entitled to coverage. Courts have viewed standing requirements to be lessened where at least some adverse parties in a proceeding present a justiciable controversy. *See*, *e.g.*, *City of Colorado Springs v. Climax Molybdenum Co.*, 587 F.3d 1071, 1081 (10th Cir. 2009) (discussing lessened justiciability concerns with so-called "piggyback standing"). In addition, a regulator like the FSLIC or FDIC has independent statutory investigatory powers, which courts have stated includes the ability to explore whether litigation would be cost-effective. *E.g.*, *Resolution Trust Corp. v. American Cas. Co.*, 787 F. Supp. 5, 7 (D.D.C. 1992) (enforcing subpoena by bank regulator concerning insurance coverage). Moreover, at the time, the FSLIC statutorily succeeded to "all the powers of the association's members, officers, and directors" pursuant to then 12 U.S.C. § 1454(d)(11). The Trust has no such powers.

In any event, a federal court has in recent years rejected an argument relying on *Oldenburg* that is substantively analogous to the Trust's argument here. *XL Specialty Ins. Co. v. Perry*, 2011 WL 9700995 (C.D. Cal. Nov. 30, 2011). There, the FDIC sought to intervene in coverage litigation between several insurers and their individual insureds concerning Side A coverage. Like the Trust, the FDIC asserted that it had an interest in the subject insurance policies as a "contract party"

and "successor to the Bank as a procurer of the D&O Policies." Reply to Opp'n to Mot. to Intervene, *Perry*, 2011 WL 8069666 (C.D. Cal. filed Nov. 7, 2011). The court rejected the FDIC's contention that it had any legally protected interest in the coverage dispute between the insurers and the insured persons. Rather, the FDIC as a claimant against the insured persons had only "the hope of an eventual judgment" against the insured persons. *Perry*, 2011 WL 9700995, at *4. The Trust is similarly situated and similarly lacks standing, despite its allegation that it succeeds a contracting party.

The Order also discussed *Wedtech Corp. v. Federal Insurance Co.*, 740 F. Supp. 214 (S.D.N.Y. 1990). *Wedtech*, however, is materially distinct from this case. There, Wedtech Corporation challenged an insurer's determination that directors and officers liability policies were rescinded and void *ab initio* as to all of Wedtech's directors and officers. *Id.* at 216. Wedtech contended that it had indemnified its officers and challenged this wholesale rescission of the policies. *Id.* at 220.

Wedtech, like *Oldenburg*, did not address whether Wedtech had allegedly suffered injury in fact. The issue before the *Wedtech* court was limited to "only whether the policies were void *ab initio* with respect to each and every director." *Id*. at 219. An insured entity's efforts to seek a declaration that a policy is not void with respect to all indemnification of its directors is materially distinct from the allegation here, where the Trust asserts that it has been injured by a denial of coverage to the *insured persons*, whom the Trust itself has not indemnified.

At bottom, *Wedtech* is a declaratory judgment case concerning the continuing validity of insurance policies brought by an insured entity that contended it was indemnifying its directors. In sharp contrast to that scenario, here the Insurers have not asserted their policies to be void and the Trust has not even allegedly indemnified the Directors and Officers. Unlike *Wedtech*, the Trust here purports to seek money damages from insurers based on their positions regarding coverage to which the Trust never could be entitled.

The only Delaware cases the Trust cited below in support of its standing argument—though not discussed in the Order—are likewise unhelpful to its position. In *Madison Realty Partners 7, LLC v. Ag ISA, LLC*, 2001 WL 406268 (Del. Ch. Apr. 17, 2001), the parties did not dispute the standing of the "contracting party" plaintiff that was directly entitled to benefits under the contract. Here, the Trust is not entitled to benefits under the 08-09 Policies, and its standing is very much in dispute. And *In re Digex, Inc. Shareholders Litigation*, 2004 WL 3090615 (Del. Ch. Nov. 18, 2004), raised in the Trust's opposition to certification of this appeal, merely provided that a special committee of a merger participant could obtain specific performance of a promise in a settlement agreement to pay amounts owed to the committee's own legal advisors. None of the cases the Trust cited below permits a "party to a contract" to sue for damages under contractual and extra-contractual theories to "enforce" the rights of other contract parties who it threatens to sue. Nor do they purport to bestow standing upon a party—like the Trust here—that has suffered no concrete injury. *See*, *e.g.*, *HLSP Holdings Corp. v. Fortune Mgmt. Inc.*, 2009 WL 924538, at *2 (Del. Super.

Ct. Mar. 31, 2009) (plaintiff is "not conferred standing solely by virtue of its status as a contracting party in the absence of any showing of injury."), *aff'd*, 2010 WL 528470 (Del. Feb. 15, 2010).

5. The Order erroneously concludes that the Trust has standing.

The *Dover* injury-in-fact analysis requires that the Trust establish both a concrete injury and that the injury is traceable to an action of the Defendants. The Superior Court in its Order enigmatically concludes that the Trust has alleged "an injury in fact (denial of insurance coverage)" and "a causal connection between the injury and Defendants' conduct (breaches of contract and duties of good faith and fair dealing)." Order at 13. But the denial of coverage of which the Trust complains *is* the alleged breach. The Superior Court concludes erroneously that the insurers' denial of coverage was both the cause of a supposed injury and the injury itself. This cannot be. Under *Dover*, the Trust must establish that *it* suffered an injury *because of* the Defendants' alleged denial of insurance coverage.

The Trust cannot establish such an injury, because (1) it has paid no amounts covered under the 08-09 Policies, and (2) the monetary amounts it allegedly has incurred or reserved are required either by Washington Mutual's independent obligations to its Directors and Officers or by the Trust's voluntary litigation and claims processing decisions. Because no injury is traceable to the 08-09 Policies or the Insurers' coverage decisions under those policies, the Trust lacks standing to bring this lawsuit.

III. The Trust's request for declaratory judgment does not assert an "actual controversy."

A. Questions Presented

1. Does the Trust's request for declaratory relief present an "actual controversy" even though the Trust seeks a declaration regarding obligations allegedly owed to the absent Directors and Officers rather than any legitimate legal right or interest of the Trust?

2. Assuming, solely for argument's sake, that the Trust's declaratory judgment count was otherwise justiciable, is the count ripe even though the Trust has not incurred any covered loss, does not allege any reasonable likelihood that the defense costs it purports to seek will ever exceed the insurance and other amounts available to fund them, and has not initiated litigation against the Directors and Officers?

These issues were raised by the Insurers in the Superior Court at, *e.g.*, A164-70 and A299-302, and addressed in the Superior Court's Order at 18; 21-22.

B. Standard and Scope of Review

An order denying a motion to dismiss is reviewed *de novo*, as are questions of justiciability. *Crescent/Mach I Partners, L.P.*, 962 A.2d at 208; *Preston*, 772 A.2d at 789. Courts have some discretion to grant declaratory relief but may not address issues as to which there is no "actual controversy." *See Gannett Co. v. Bd. of Managers of the Del. Criminal Justice Info. Sys.*, 840 A.2d 1232, 1237-38 (Del. 2003) (vacating judgment of the Superior Court to the extent there was no actual controversy between the parties).

C. Merits of Argument

Apart from the Trust's failure to meet the *Dover* standing requirements,[4] the Trust fails to establish the declaratory judgment prerequisite of an "actual controversy":

> (1) It 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; (4) the issue involved in the controversy must be ripe for judicial determination.

Stroud v. Milliken Enters., Inc., 552 A.2d 476, 479-80 (Del. 1989). The Superior Court's conclusion that the Complaint asserts a ripe controversy should be reversed because the Trust asserts the rights of absent third parties and does not, in any event, assert a ripe controversy.

1. The Trust attempts to assert the rights of the Directors and Officers it threatens to sue.

The Superior Court determined that "[t]he Trust's claims present controversies: which involve the rights or other legal relations of the Trust in seeking declaratory relief." Order at 21-22. The Order does not identify, however,

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[4] The Trust has the burden to establish standing to assert the declaratory judgment count of the Complaint as well as the counts seeking damages. This Court has stated that, "while the Declaratory Judgment statute . . . may be employed as a procedural device to advance the stage at which a matter is traditionally justiciable, the statute is not to be used as a means of eliciting advisory opinions from the courts." *Stroud*, 552 A.2d at 479 (internal quotation marks and citations omitted). The Court of Chancery similarly has noted that the Declaratory Judgment Act "does not confer standing on plaintiffs to challenge an action that, of itself, does not injure plaintiffs." *Cartanza v. DNREC*, 2009 WL 106554, at *3 (Del. Ch. Jan. 12, 2009). For all the reasons set forth above, the Trust lacks standing to seek declaratory judgment as well as to assert breach of contract or fiduciary duty.

the "rights or other legal relations" belonging to the Trust that are at issue. The Trust contends that it has a "right" to "enforce" the 08-09 Policies, but the rights to the Side A coverage purportedly at issue belong to the Directors and Officers—the only parties for whom such coverage is payable—not the Trust.

As discussed above, the Trust's assertion that it "might be liable" for the Directors' and Officers' defense costs absent coverage puts the cart before the horse. Until satisfaction of the $50 million retention, there could be no Side B coverage under the 08-09 Policies. The Trust has not paid a single dollar of defense costs—much less $50 million—or indicated that it is imminently likely to do so. Thus, Washington Mutual's potential rights to Side B coverage are not at issue here. *E.g., In re IndyMac Bancorp, Inc.*, No. 2:11-cv-02998-RGK (C.D. Cal. Aug. 24, 2011) (Ex. B hereto) (plaintiff lacked standing where it had not satisfied the retention of the primary policy and therefore "any injury to Plaintiff under even the first layer of coverage . . . is too speculative at this point.").

If the Trust does pay defense costs, there is by definition no Side A coverage for those amounts. *E.g.*, A48 (affording specified coverage "except for Loss which the Company [(*i.e.*, Washington Mutual)] is permitted or required to pay on behalf of the Insured Persons as indemnification."). And as discussed above, the Trust's obligations to pay the Directors' and Officers' defense costs exist whether or not the Demand Letter implicates the 08-09 Policies as opposed to the 07-08 Policies. *See* page 17-19 above. Accordingly, a determination whether there is coverage under the 08-09 Policies rather than the 07-08 Policies does not have any legal effect on the Trust's obligation to pay defense costs.

Nor does the Trust have any legal interest in whether the 08-09 Policies are implicated in paying a hypothetical judgment or settlement in connection with the Demand Letter. The Trust's "hope of an eventual judgment" against the Directors and Officers is not a legal interest in the 08-09 Policies, and the Trust specifically has disclaimed that it is suing in its capacity as a claimant. A238; *Colony Ins. Co. v. Schwartz*, 2013 WL 5308254, at *3 (D. Nev. Sept. 19, 2013) (denying motion by a claimant to intervene in insurance coverage litigation). In the capacity in which the Trust purports to sue—standing in the shoes of Washington Mutual, the "contracting party"— it has no conceivable *legal* interest in whether the 08-09 Policies are implicated in indemnifying for an ephemeral judgment or settlement in connection with the Demand Letter or potential related litigation. The Trust's speculative hope of a judgment against the Directors and Officers that may be covered by an insurance policy simply is not a legally protected interest in an insurance coverage dispute.

Delaware law does not permit a purportedly injured claimant to prosecute a direct action against a liability insurer. *See Kaufmann*, 193 A.2d at 83. What the General Assembly has not allowed by statute, the Trust may not achieve by creative pleading. The Trust's purported status as a "contracting party" does not afford the Trust access to the courts to seek the same advisory opinion it cannot seek when wearing its claimant hat. While Washington Mutual may have had some rights in the 08-09 Policies to which the Trust contends it succeeds, those rights are not at issue in this lawsuit. The rights involved here plainly are the Directors' and Officers' rights to Side A coverage under the 08-09 Policies and not

any rights or legal interests that belong to the Trust, which is the adversary of the Directors and Officers.

2. The Trust asserts no controversy that is ripe for adjudication.

The Superior Court also erred when it concluded that "the Trust's claims present controversies: which . . . are issues ripe for judicial determination." Order at 21-22. The claim the Trust purports to hold against the Directors and Officers is a two-year-old letter. The Trust can do no more than speculate that the Directors and Officers will ever require more funds to defend against the Demand Letter than are available under the insurance policies currently funding the defense efforts.

The law is "well-settled" that Delaware courts will not issue advisory opinions. *E.g.*, *Stroud*, 552 A.2d at 480. Courts "in Delaware, in particular, decline to exercise jurisdiction over cases in which a controversy has not yet matured to a point where judicial action is appropriate" or which are "dependent on supposition." *Id.* "If future events may obviate the need for declaratory relief, then the dispute is not ripe." *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 872 A.2d 611, 631-32 (Del. Ch. 2005), *aff'd in pertinent part and rev'd in part*, 901 A.2d 106 (Del. 2006). Declaratory relief is inappropriate where it is based on "uncertain and contingent events that may not occur as anticipated, or may not occur at all." *Energy Partners, Ltd. v. Stone Energy Corp.*, 2006 WL 2947483, at *11 (Del. Ch. Oct. 11, 2006) (finding requests for declaratory relief interpreting merger-related contracts to be unripe).

As courts have noted, "the world is full of people who would much prefer to have their courses of future conduct defined by advice from the courts, rather than by advice from their own lawyers predicting what courts are likely to do." *Maryland Ins. Co. v. Attorneys' Liability Assur. Soc'y, Ltd.*, 748 F. Supp. 627, 631 n.4 (N.D. Ill. 1990). But such preferences do not make a ripe controversy; a dispute must become sufficiently concrete even before declaratory relief may be granted. Consistent with this approach, Delaware trial courts have stated that a declaratory judgment action involving liability insurance policies is not ripe unless the plaintiff shows the policies "will probably be triggered[.]" *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 565 A.2d 268, 275 (Del. Super. Ct. 1989) (finding a ripe controversy where the plaintiff had paid damages over $49 million, some of which could be immediately recoverable under some of the policies at issue, and had presented evidence that it faced demonstrable liability from dozens of pollution sites). Put another way, there must, at minimum, be a "reasonable likelihood" that the policies will be implicated. *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co.*, 1994 WL 721790, at *5 (Del. Super. Ct. Aug. 5, 1994) (dismissing action against excess insurers where evidence did not demonstrate that policies were reasonably likely to be implicated), *rev'd on other grounds*, 673 A.2d 164 (Del. 1996); *see also North Am. Philips Corp. v. Aetna Cas. & Sur. Co.*, 565 A.2d 956, 959 (Del. Super. Ct. 1989) (declaratory judgment action was ripe where the insured had already incurred liability of $49 million and could project immediate future liability of $36 million more); *Mt. Hawley Ins. Co. v. Jenny Craig, Inc.*, 668 A.2d 763, 767 (Del. Super. Ct. 1995) (insured entity and individuals had entered a

settlement agreement under which they would be liable to claimants and sought coverage under policies covering *only* the entity, not the directors and officers.).

Such cases are in stark contrast to the facts here. The Trust is incurring no actual covered losses. Nor can the Trust plausibly allege that covered amounts have gone unpaid or likely will go unpaid in light of the insurance currently advancing defense costs. The Trust might sue the Directors and Officers or it might not. If suit is filed, the Directors and Officers might prevail against the Trust. The future is uncertain, but before any of these contingencies actually occurs, it is purely speculative to posit any real controversy concerning the payment of the Directors' and Officers' defense costs under the 08-09 Policies.

The mere fact that the Trust asserts that its claim against the Directors and Officers is for $500 million affords no basis to accept the Trust's contention below that there is "reasonable likelihood that each of the [08-09] Policies will be implicated in defending and indemnifying for" the Demand Letter. A235. No ripe controversy exists with respect to insurance coverage for a settlement or judgment that has not occurred and may never occur.

As a general matter, this Court will not define "rights which are only future or contingent." *Stroud*, 522 A.2d at 481 (internal quotation marks omitted). More specifically, in *Wal-Mart Stores, Inc. v. AIG Life Insurance Co.*, the Court agreed that a claim "for indemnification . . . is premature inasmuch as there are no judgments against [the plaintiff]." 901 A.2d 106, 117 (Del. 2006). In *Wal-Mart* this Court adopted the reasoning of the Court of Chancery, which noted that the plaintiff policyholder sought a declaration regarding indemnification from its

insurer in the event it was required to make payments to third parties arising from separate litigation. *Wal-Mart*, 872 A.2d at 631. This was not a "proper claim for declaratory relief" because "[c]ourts have declined to enter a declaratory judgment with respect to indemnity until there is a judgment against the party seeking it." *Id.* at 632. Other courts have similarly held that no ripe controversy can exist with respect to coverage for a settlement or judgment that has not occurred. *E.g.*, *Cincinnati Ins. Co. v. Jianas Bros. Packaging Co.*, 2010 WL 2710732, at *2 (W.D. Mo. July 7, 2010) (dispute concerning insurer's indemnity obligations was "highly speculative" where insured had only received demand letters and lacked "accurate means to estimate); *Maryland Ins. Co.*, 748 F. Supp. at 629. As the *Maryland Insurance* court trenchantly stated, "the *accomplishment* of . . . a settlement marks the bright line between a declaration of possible *future* rights and duties and a declaration of actual *present* rights and duties – the bright line between tomorrow and today, between nonjusticiability and justiciability[.]" *Id.* at 630. Possible future rights and duties are not justiciable.

For the same reasons, it is of no legal import that the Trust alleges that a declaration regarding coverage for the Demand Letter is somehow necessary to advise it regarding settlement negotiations. A37. The supposed "real-world need to shape settlement strategy" is simply not a sufficient basis on which to justify an advisory ruling concerning insurance coverage for a non-existent and hypothetical settlement. *Maryland Ins. Co.*, 748 F. Supp. at 630; *see also Amazon.com Inc. v. Underwriters at Lloyd's London*, 2005 WL 1312046, at *2 (W.D. Wash. June 1, 2005) (the desire to "speed the settlement process" did not create a ripe

controversy concerning insurance coverage). Indeed, "advice and guidance to Plaintiff as to how to proceed through settlement negotiations" is "precisely the type of abstract disagreement that the ripeness doctrine is designed to avoid." *American States Ins. Co. v. Component Tech., Inc.*, 420 F. Supp. 2d 373, 376 (M.D. Pa. 2005) (finding that declaration regarding an insurers' duty to indemnify insureds "for liabilities they may never incur" is not ripe). The Trust's interest in seeking a coverage determination to assist it in settlement negotiations is particularly unpersuasive here where no lawsuit has even been filed.

The Trust's further assertion that it is suffering "present harm" because it established the Defense Reserve does not create a ripe controversy, and it has no relevance to the legal issues the Trust presses. Interpretation of the 08-09 Policies has no legal effect on whether the Trust is required to satisfy Washington Mutual's obligations to its Directors and Officers. The Trust can point to no authority to the contrary. The Trust's decisions to oppose the Directors' and Officers' requests for indemnification and to then compromise that dispute by establishing the Defense Reserve do not result from the particular insurance coverage questions on which the Trust seeks an advisory opinion. Nor can they be redressed by the declarations sought.

The predicates for an actual controversy regarding insurance coverage—exhaustion of other policies or a settlement or judgment in an as-yet unfiled lawsuit—could give rise to a concrete dispute only "tomorrow," if ever at all. *Maryland Ins. Co.*, 748 F. Supp. at 630. Such contingencies may never occur. Absent a concrete dispute turning on the issues the Trust seeks to adjudicate, the

Trust has not met its burden to show a ripe controversy regarding coverage under the 08-09 Policies.

CONCLUSION

The Order of the Superior Court erroneously concluded that the Trust alleged an injury in fact traceable to the Insurers' conduct. In reality, the Trust has no right to coverage under the 08-09 Policies and no interest in them beyond the speculative prospect that it might one day recover as a claimant against the Directors and Officers. Accordingly, the Trust fails to meet its burden to establish standing either to assert breach of contract and breach of implied duties claims or to seek declarations concerning the rights of the Directors and Officers under the 08-09 Policies. Any controversy concerning such declarations is far from ripe, as the Trust has not filed any lawsuit against the Directors and Officers, has not itself paid any covered amounts, and cannot allege that anyone has incurred any covered amounts that were not paid by the other insurers that agreed to advance defense costs under the 07-08 Policies. For these reasons and those stated above, Appellants respectfully request that this Court reverse the Order with instructions to the Superior Court to dismiss the Complaint.