



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 §

No. 449, 2013

Defendants Below,
Appellants.

v.

WMI LIQUIDATING TRUST,

Plaintiff Below,
Appellee.

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

APPELLANTS' REPLY BRIEF

/s/ Edward M. McNally
Edward M. McNally (ID No. 614)
Patricia A. Winston (ID No. 5248)
MORRIS JAMES LLP
500 Delaware Avenue, Suite 1500
Wilmington, DE 19801
Telephone: (302) 888-6880

*Attorneys for National Union Fire
Insurance Company of Pittsburgh,
Pa. and Chartis Property Casualty
Company*

/s/ Joseph H. Huston, Jr.
Joseph H. Huston, Jr. (ID No. 4035)
STEVENS & LEE
1105 North Market Street, 7th Floor
Wilmington, DE 19801
Telephone: (302) 425-3310

- and –

Michael R. Goodstein
BAILEY CAVALIERI LLC
10 W. Broad Street, Suite 2100
Columbus, OH 43215-3422
Telephone: (614) 221-3155

*Attorneys for RSUI Indemnity Company
and Scottsdale Indemnity Company*

/s/ Thomas G. Macauley
Thomas G. Macauley (ID No. 3411)
MACAULEY LLC
300 Delaware Avenue, Suite 760
Wilmington, DE 19801
Telephone: (302) 656-0100

- and –

Charles C. Lemley (admitted *pro hac vice*)
John E. Howell (admitted *pro hac vice*)
WILEY REIN LLP
1776 K Street, N.W.
Washington, DC 20006
Telephone: (202) 719-7000
*Attorneys for XL Specialty Insurance
Company and Columbia Casualty Company*

/s/ Howard A. Cohen
Howard A. Cohen (ID No. 4082)
DRINKER BIDDLE & REATH LLP
1100 North Market Street, Suite 1000
Wilmington, DE 19801-1254
Telephone: (320) 467-4213

Attorneys for Houston Casualty Company

/s/ Francis J. Murphy

Francis J. Murphy (ID No. 223)
Kelley M. Huff (ID No. 5192)
MURPHY & LANDON
1011 Centre Road, Suite 210
Wilmington, DE 19805
Telephone: (302) 472-8103

*Attorneys for Arch Insurance Company;
Ace American Insurance Company; and
Those Certain Underwriters at Lloyd's,
London, Subscribing to Policy No.
B0509QA027908*

- and -

Kim W. West (admitted pro hac vice)
Alec H. Boyd (admitted pro hac vice)
CLYDE & CO US LLP
101 Second Street, 24th Floor
San Francisco, CA 94105
Telephone: (415) 365-9800

Attorneys for Arch Insurance Company

- and -

Ralph A. Guirgis
Sean R. Simpson
SEDGWICK LLP
3 Park Plaza 17th Floor
Irvine, California 92614-8540
Telephone: (949) 852-8200

*Attorneys for Ace American Insurance
Company; and Those Certain
Underwriters at Lloyd's, London,
Subscribing to Policy No.
B0509QA027908*

/s/ Timothy Jay Houseal

Timothy Jay Houseal (ID No. 2880)
YOUNG CONAWAY STARGATT &
TAYLOR LLP
Rodney Square
1000 North King Street
Wilmington, DE 19801
Telephone: (302) 371-6682

- and -

Ommid C. Farashahi
Michael T. Skoglund
Brian J. Watson
BATES CAREY NICOLAIDES, LLP
191 North Wacker Drive, Suite 2400
Chicago, IL 60606
Telephone: (312) 762-3200

Attorneys for AXIS Insurance Company

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ARGUMENT

The Trust's Answering Brief principally raises two arguments:

First, the Trust asserts that it has standing, not because the Insurers have failed to pay the Trust any covered loss, but because it holds a Defense Reserve for the Directors' and Officers' claims for defense fees.¹ As the existence of the Defense Reserve is not an injury-in-fact caused by the Insurers, the Superior Court's Order should be reversed.

The Superior Court certified this case for interlocutory appeal in part because the Trust's purported standing presented an issue of first impression in Delaware. The Trust's position would require this Court to break new ground by permitting a plaintiff to sue based on a purported harm resulting from its own voluntary stipulation to hold a defense reserve or based on its mere status as a "contracting party." But the Trust cannot stipulate to its own standing any more than it can sue as a "contracting party" without an injury-in-fact. The existence of the Defense Reserve is not an injury to the Trust and is not, in any event, traceable to the Insurers' coverage positions. The Trust could litigate its purported objections to the Directors' and Officers' claims in the bankruptcy court whenever it chooses, but it cannot sue the Insurers in the Delaware courts based on its own claims administration decisions. Moreover, the Superior Court could not in this lawsuit order the release of the Defense Reserve to redress the Trust's supposed injury in any event.

¹ Unless otherwise indicated, capitalized terms have the same meaning as in the Appellants' Opening Brief ("AOB").

Second, the Trust asserts that it has alleged a controversy ripe for declaratory judgment with respect to \$250 million in insurance proceeds on the basis that the Demand Letter asserts a claim for \$500 million in alleged damages. But the Trust has no interest in such damages in the capacity in which it purports to bring this action, i.e., as the enforcer of the Directors' and Officers' rights to defense costs coverage. Moreover, Delaware law does not permit the Trust to bring a direct action against insurers in its capacity as a claimant against the Directors and Officers. And the Trust does not dispute that it seeks a coverage determination for a two-year old demand letter, for which defense costs are being advanced under other policies. Because no loss that would be covered under the 08-09 Policies has been incurred or is imminently likely to be incurred, no justiciable controversy is presented. Issuance of a declaratory judgment would be speculative and constitute an inappropriate advisory opinion.

The Superior Court therefore erred by denying the Insurers' motion to dismiss the Complaint. The Trust effectively concedes that it is entitled to recover nothing under any of the 08-09 Policies and that insurers have already agreed under other policies to advance the very defense amounts for which the Trust purports to seek coverage. Accordingly, regardless of any purported status as a "purchaser" of the 08-09 Policies, the Trust has not suffered the injury-in-fact necessary to establish standing and does not assert any ripe controversy against the Insurers.

I. The Defense Reserve is not an injury-in-fact caused by the Insurers.

The Trust largely acknowledges that it must suffer an injury-in-fact to establish standing, whether or not it stands in the shoes of the “purchaser” of the 08-09 Policies.² Yet the Trust does not dispute that it has not suffered a single dollar of covered loss under any of the 08-09 Policies. Nor does the Trust dispute that *no one* has incurred any loss that could be covered under the 08-09 Policies but has not already been paid by other insurers.

The Trust instead attempts to conjure an injury because it holds the Defense Reserve: cash *it elected* to segregate for the Directors’ and Officers’ claims for defense fees owed by Washington Mutual. AAB at 11; A260, 266-67. The Trust’s theory that its decision to hold the Defense Reserve is an injury caused by the Insurers is not reasonable in light of the Complaint and appropriately-considered documents. Thus, the Trust cannot meet its burden to demonstrate standing.

A. There is no causal link between the Insurers’ actions and the Defense Reserve.

The Trust’s central premise—that the Defense Reserve is necessary because of the Insurers’ coverage position—is incorrect. The Trust asserts that “[i]f the [08-09] Policies were funding the Asserted Claim defense, the Reserve would not be necessary[.]” AAB at 17. But the Trust does not dispute that other policies *are* funding defense costs for the Demand Letter. It is illogical to assert that the Defense Reserve is necessary—or that the Trust is harmed—because defense costs

² The Trust frames the inquiry here as whether it has standing *if* an alleged breach of the 08-09 Policies “causes the Trust harm.” Appellee’s Answering Brief (“AAB”) at 10. Moreover, it asserts that “[t]his suit is . . . about the Reserve[.]” AAB at 17.

are paid from one set of policies instead of another. Rather, the Defense Reserve derives from the independent indemnification rights of the Directors and Officers to payment of defense fees by Washington Mutual. *See* AOB at 3. Those rights simply are not rooted in insurance policies, and the Defense Reserve for those rights therefore could not be “fairly traceable” to any action or failure to act by the Insurers. *See Dover Historical Soc’y v. City of Dover Planning Comm’n*, 838 A.2d 1103, 1110 (Del. 2003); AAB at 5-6.

1. The Insurers’ coverage positions did not cause the Directors’ and Officers’ claims for defense fees from Washington Mutual, Washington Mutual’s objections, or the establishment of the Defense Reserve.

The Trust does not dispute that the Directors’ and Officers’ claims for defense fees were made *before* the coverage decisions that the Trust challenges. A32. Nor does the Trust dispute that it and the Directors and Officers *voluntarily agreed* to establish the Defense Reserve and to establish conditions upon which the reserve could be released, rather than pursue its objections to the claims or its contention that the claims should be estimated at zero. A258-59, 266-67, 271-72. The Trust’s unsupported assertions that the “Bankruptcy Court required” the Defense Reserve, which the Trust was “forced” to maintain, cannot be squared with the voluntary nature of this agreement. AAB at 1, 5. Because the Trust voluntarily agreed to establish the Defense Reserve in response to claims based on Washington Mutual’s separate and prior indemnification obligations, the Defense Reserve cannot be “fairly traceable” to the Defendants’ actions rather than to the independent action of third parties. Instead, the Defense Reserve is the result of

the Trust's voluntary decision to forego obtaining a ruling on the Directors' and Officers' claims.

The fact that the Trust later stipulated voluntarily that the Defense Reserve could be released if, among other conditions, coverage is found to be "available" under the 08-09 Policies does not make the Insurers' coverage positions the cause of the Defense Reserve. *See* A272. The Trust cannot gain standing through a voluntary stipulation. *Cf. Thompson v. Lynch*, 990 A.2d 432, 434 (Del. 2010) ("It is settled law that parties may not confer subject matter jurisdiction by agreement[.]"). Were the Trust and the Directors and Officers to agree to release the Defense Reserve if a particular horse won next year's Kentucky Derby, their stipulation would not make the Defense Reserve traceable to the losing horse. Their stipulation here is likewise irrelevant to the Trust's standing.

The Trust does not dispute that a voluntary agreement cannot create standing, but suggests in a footnote that this rule does not apply because its agreement was the result of coercion by the Insurers. AAB at 17 n.3. To support its suggestion, it alludes to the "determinative or coercive effect" that the federal government in *Bennett v. Spear*, 520 U.S. 154, 169 (1997), had upon state agencies obliged to follow its opinions. Even if the Insurers possessed the coercive powers of the federal government, which they clearly do not, no such "determinative or coercive effect" is alleged in the Complaint. The Trust does not explain or allege any means by which the decision to advance defense costs to the Directors and Officers under the 07-08 Policies instead of under the 08-09 Policies "coerced" the Trust or the Directors and Officers into establishing the Defense Reserve.

In addition, the Trust's statement that the Defense Reserve can be released "only if the Trust establishes the existence of insurance coverage" is incorrect. AAB at 2. The Trust asserted objections to the Directors' and Officers' claims for defense fees, and those objections have been pending for more than three years. Washington Mutual's bankruptcy plan requires the Trust to litigate its objections to a "Final Order" unless it chooses in its sole discretion to withdraw them. Appendix to Appellants' Reply Brief ("AR") at 4. If the Trust prevails on its objections, the Defense Reserve will be released notwithstanding the Trust's stipulation with the Directors and Officers. Thus, the Trust has complete discretion whether to seek the release of the Defense Reserve through litigation of its purported objections. The Trust's consensual side agreement with the Directors and Officers allowing the release of the Defense Reserve upon the occurrence of other contingencies does not generate a causal relationship between the Defense Reserve and the Insurers' coverage positions.

2. Regardless of the outcome, this lawsuit will not allow the Defense Reserve to be released.

Even if the Defense Reserve were a cognizable injury traceable to the Insurers, the Trust would lack standing because it is not even "speculative" that the Trust's purported injury would be redressed by a favorable decision here. *See Dover*, 838 A.2d at 1110. Instead, it is certain that the ruling sought by the Trust here will *not* redress the Trust's purported injury because the Superior Court cannot order the release of the Defense Reserve. The Trust concedes this point, admitting that, at best, a victory here could make the release of the Defense

Reserve somewhat “more likely.” AAB at 21. This is so because the Trust’s agreement with the Directors and Officers provides that the Defense Reserve could be released if the Trust obtains findings that, among other things, the Insurers are not entitled to subrogation for amounts paid under the 08-09 Policies. A272. The Trust contends that it would be in an “impossible situation” without this lawsuit because its assertions regarding the Insurers’ subrogation rights are unripe absent actual payments under the 08-09 Policies. AAB at 21; *In re Washington Mut., Inc.*, 2012 WL 4755209, at *6 (Bankr. D. Del. Oct. 4, 2012).

The Trust’s “situation” is of its own making—it is not an injury caused by the Insurers. Moreover, the Trust’s situation is no more “impossible” than that of any other would-be litigant seeking an advisory opinion from a Delaware court. Principles of standing and ripeness would not bar the Trust from litigation if it could show that it actually had incurred a loss. What is impermissible—by design—is for the Trust to obtain an advisory opinion by engineering a lawsuit when it has suffered no cognizable injury and when victory will not remedy the conditions of which it complains. The bankruptcy court already serves as the venue for the Trust to seek the release of the reserve it agreed to set. The Trust seeks a “path” outside the bankruptcy court to undo the reserve, but cannot take a shortcut by obtaining an advisory opinion in Delaware courts. AAB at 21.

B. The Defense Reserve is not an injury to the Trust.

Washington Mutual’s obligations to pay the Directors’ and Officers’ defense fees exist (or do not exist) independent of whether or not there is insurance coverage for such amounts. *See* AOB at 3. If holding the Defense Reserve were a

cognizable injury, it would follow that actually paying the Defense Reserve on behalf of the Directors and Officers would likewise constitute an injury to the Trust. However, the Trust would not be entitled to coverage—and could not recover damages—under the 08-09 Policies, even if it actually paid out the entire \$18.2 million it has reserved. The ABC Policies, which potentially afford coverage for corporate indemnification, could only be triggered for such costs after a \$50 million retention is satisfied. A40.³ The Trust expressly concedes that the \$50 million retention applies “under Side B,” that is, “the coverage for WMI” or for the Trust as its purported successor. AAB at 18 n.4. The Trust could not be injured by holding funds that, in light of these policy provisions, it could not recover if actually paid.

The Trust nevertheless asserts that the retention should not apply because it “is not legally permitted to indemnify or to advance costs to the [Directors and Officers] until and unless the D&O Claims are allowed.” AAB at 19-20. But the Trust itself has complete discretion to “settle, compromise or withdraw any objections to Claims” and thus cause them to be allowed; there is no legal bar to the Trust fulfilling Washington Mutual’s obligations to the Directors and Officers. AR4. Moreover, if the Trust actually paid the Defense Reserve, the retention indisputably would apply, because the Trust would be legally permitted to make the payments and by definition would not be unable to do so “solely by reason of

³ The Trust plainly could not recover such amounts under the Side A Policies, which do not cover the Trust’s payment of costs on behalf of insured individuals and can be triggered only in the absence of such payment. A102, 105.

its financial insolvency.” A53. Thus, again, the Trust itself is artificially manufacturing the condition that it claims causes it injury.

The Trust also makes an unprecedented argument that the \$50 million retention does not apply based on Delaware corporate law distinguishing between statutorily-required indemnification of liability following a lawsuit and advancement while the suit proceeds. AAB at 17-18. As an initial matter,⁴ the Trust’s argument flies in the face of the language of the Primary ABC Policy, under which the retention applies to “*any* Loss as to which indemnification . . . is legally permissible,” including defense expenses, and XL Specialty will “advance Defense Expenses on a current basis *in excess of the applicable Retention*[.]” A53 (emphasis added). This language could not make it more clear that the retention does, in fact, apply to the advancement of defense expenses. Moreover, Delaware corporate law is not applicable—Washington Mutual was organized under Washington law—and under Washington Mutual’s organizational documents and common usage, the term “indemnification” is inclusive of “advancement” of defense fees.⁵ In any event, the Trust’s arguments that the retention does not apply

⁴ The Insurers are aware of no case anywhere in which a court has held that the retention of a directors and officers liability policy did not apply to the payment of defense costs when indemnification is legally permissible. The Trust’s strange assertion, if accepted, would be a major reordering of the terms of such insurance.

⁵ See, e.g., A314-15 (“Article VIII of [WMI’s] Bylaws grants indemnification of directors and officers in advance of the final disposition of a proceeding[.]”); Webster’s II New Collegiate Dictionary (3d ed. 2005) (defining “indemnify” as “to make compensation to for damage, loss or injury”); see also *Kaung v. Cole Nat’l Corp.*, 884 A.2d 500, 509 (Del. 2005) (acknowledging that “the right to advancement ‘is a subsidiary element of the right to ultimate indemnification’”) (citation omitted).

in these circumstances does not demonstrate that it has suffered any injury, when it has not paid a single dollar—much less \$50 million—in allegedly covered loss.

The Trust suggests that it is injured because the Defense Reserve “adversely affects all creditors entitled to distributions under [Washington Mutual’s bankruptcy] Plan” because “unsatisfied claims continue to accrue interest against the Trust, thereby depriving valid creditors of potential distributions and depleting their potential recoveries.” AAB at 6. The Trust appears to refer to the fact that valid bankruptcy claims against Washington Mutual accrue interest until paid. AR3. Such interest paid to certain creditors presumably could deplete recoveries of other creditors further down the bankruptcy waterfall. The Trust itself is not injured because the bankruptcy plan provides for interest on unpaid claims, and the net amount of payments out of the Trust would remain unchanged. While certain creditors might be enriched at the expense of others, the Trust lacks standing to pursue claims on behalf of the injured creditors. *Cf. Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 191 (Del. Ch. 2006) (“[L]itigation trusts formed as part of reorganization plans do not have standing to bring direct claims belonging to creditors[.]”), *aff’d*, 931 A.2d 438 (Del. 2007).

C. Without an injury-in-fact, the Trust cannot establish standing.

The Trust intermittently relies upon a purported “black letter” principle that a contracting party has the right to “enforce” a contract, even where it is entitled to no benefits and has suffered no injury. AAB at 12, 14. While asserting that Delaware authorities support this principle, the Trust ignores the most relevant decision from this Court, which holds that even a “contracting party” must *itself*

suffer an injury-in-fact to show standing. *HLSP Holdings Corp. v. Fortune Mgmt., Inc.*, 2010 WL 528470 (Del. Feb. 15, 2010). The cases the Trust discusses on pages 12 through 14 of its Answering Brief are therefore not instructive to the extent the Trust suggests they allow it to maintain this action absent an injury-in-fact. Under *Dover* and *HLSP*, a plaintiff must establish an injury to itself to meet its burden to demonstrate standing. *See id.* at *3 (holding that a “contracting party” has standing only to “bring a cause of action for its own injury”) (citation omitted); *Dover*, 838 A.2d at 1110 (stating that “the plaintiff must have suffered an injury” to show standing).

The Trust relies upon *Eureka Federal Savings & Loan Ass’n v. American Casualty Co. of Reading, Pennsylvania*, 873 F.2d 229, 230 (9th Cir. 1989), and *Branning v. CNA Insurance Cos.*, 721 F. Supp. 1180 (W.D. Wash. 1989), but directors and officers seeking coverage under the policies at issue were among the plaintiffs in both cases. AAB at 16.⁶ Those cases do not support the Trust’s effort unilaterally to assert the Directors’ and Officers’ rights to insurance coverage.

The Trust also highlights *Federal Savings & Loan Insurance Corp. v. Oldenburg*, 671 F. Supp. 720 (D. Utah 1987), and *Wedtech Corp. v. Federal Insurance Co.*, 740 F. Supp. 214 (S.D.N.Y. 1990), the out-of-state cases on which the Superior Court relied. Order at 9-10. As in *Eureka* and *Branning*, however, the insured individuals were also parties to *Oldenburg*. Moreover, *Oldenburg* does

⁶ The Trust parenthetically discusses *John Julian Construction Co. v. Monarch Builders, Inc.*, 306 A.2d 29 (Del. Super. Ct. 1973), in support of its standing “principle,” but that case is readily distinguishable. *John Julian* addressed whether a garnishor could derivatively pursue garnishees through an assumption of liability contract entered by the original debtor. *Id.* at 33. There was no question that the plaintiff there, unlike the Trust, had suffered an injury.

not discuss the injury-in-fact criterion that *HLSP* and *Dover* require, and no published opinion has relied on *Oldenburg* for the Trust’s “purchaser standing” principle in over 20 years. Indeed, a federal court recently rejected the FDIC’s reliance on *Oldenburg* to make an argument substantively identical to the Trust’s despite its alleged status as the “procurer” of the insurance policies. *XL Specialty Ins. Co. v. Perry*, 2011 WL 9700995, at *4 (C.D. Cal. Nov. 30, 2011). The Trust asserts that the FDIC in *Perry* did not in fact stand in the shoes of a purchaser of the policies, ignoring that the FDIC, like the Trust, *alleged* that it did so—yet its argument was rejected. Reply to Opp’n to Mot. to Intervene, *Perry*, 2011 WL 8069666, at n.4 (C.D. Cal. filed Nov. 7, 2011).

Wedtech involved a corporation that, unlike the Trust here, alleged that it was indemnifying its director and an insurer that, unlike the Insurers here, sought to rescind the policies as to any future indemnification by *Wedtech* and for all insureds, including the director who was incurring defense costs. *Wedtech*, 740 F. Supp. at 219 (“[T]he Court has . . . been asked . . . only whether the policies were void *ab initio*[.]”). Accordingly, the court found that at least one beneficiary of the insurance would suffer *immediate* injury if the court did not rule on the validity of the policies covering *Wedtech*’s alleged indemnification. *Id.* at 221. The distinction is not, as the Trust asserts, one of the “scope” of an alleged breach of contract, but of relative status of the parties and the relief sought. Here, the Trust is not indemnifying anyone, and the Insurers have not sought to invalidate the Policies as to all possible beneficiaries. Moreover, even if *Wedtech* supported “purchaser standing” in some context, it provides no basis for the Trust’s standing

here, where no beneficiary of the 08-09 Policies is suffering immediate or even imminent injury absent a ruling in this case.⁷

II. The declaratory judgment count is not justiciable.

The Trust frames the Superior Court’s denial of the Defendants’ motion to dismiss its declaratory judgment count as an exercise of discretion. AAB at 3, 26. Whatever the precise boundaries of declaratory judgment discretion, this Court has held that the Superior Court may not exercise such jurisdiction where there is no “actual controversy” between the parties. *Gannett Co., Inc. v. Bd. of Managers of the Del. Crim. Justice Info. Sys.*, 840 A.2d 1232, 1237 (Del. 2003) (“[T]o exercise declaratory judgment jurisdiction, there must be an ‘actual controversy’[.]”). Moreover, a controversy that is “dependent on supposition” is not appropriate for declaratory relief. *Stroud v. Milliken Enters., Inc.*, 522 A.2d 476, 480 (Del. 1989).

⁷ The Trust contends in a footnote that, even absent the Defense Reserve and even if no amounts were required to be paid for defense costs, it would have standing to enforce the Defendants’ “good faith obligations under Washington insurance law.” AAB at 24 n.6. First, standing in Delaware courts is a matter of Delaware law, regardless of whether Washington substantive law would apply. In any event, the Trust does not suggest that it can allege any injury-in-fact with respect to such duties. See *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 196 P.3d 644, 669 (Wash. 2008) (holding that insured must show “actual harm” with respect to such an “independent” allegation of bad faith).

Second, the Trust cites *Moratti ex rel. Tarutis v. Farmers Insurance Co. of Washington*, 254 P.3d 939, 942 (Wash. Ct. App. 2011), which discusses, in a different context, insurers’ duties regarding settlement “when an insured’s liability is likely.” Even if the *Moratti* analysis were applicable here—and it is not—the Complaint does not allege any facts from which the Court could conclude that “liability is likely” for the Directors and Officers in connection with the Demand Letter, so there is no predicate for any purported settlement duties. Moreover, as the Trust has disclaimed that it is suing on behalf of the Directors and Officers or in its capacity as a claimant, it has no interest in such a duty. In any event, a claim for breach of a “duty to settle” does not even accrue, for statute of limitations purposes, until “the final judgment is entered” in the underlying claim. *Id.* Plainly, there has been no such final judgment here.

Here, the Trust seeks to adjudicate rights belonging to others when it is both speculative and contingent that any amounts implicating the 08-09 Policies will ever be incurred. Such an advisory declaratory judgment is not within the Superior Court's power to award.

A. The Trust seeks to adjudicate the Directors' and Officers' alleged rights to Side A Coverage.

The Trust purports not to be pursuing the rights of the Directors and Officers. AAB at 28. Instead, the Trust seeks to premise its request for declaratory relief on its purported interest in the “release of the Reserve to Trust beneficiaries.” AAB at 33. Whether the propriety or necessity of the Defense Reserve presents a ripe claim—and one that the Trust has standing to pursue—is irrelevant because that is not the question on which the Trust has sought a declaratory judgment. That issue is pending before the bankruptcy court, where it can be adjudicated any time the Trust chooses to litigate its objections to the Directors' and Officers' claims. In its request for declaratory relief, however, the Trust has asked the Superior Court to adjudicate the Insurers' obligations under the 08-09 Policies' Side A coverage to pay defense costs incurred by the Directors and Officers. Indeed, the Trust concedes that “the D&Os (not the Trust) are the parties entitled to policy proceeds” if it were to prevail in this litigation. AAB at 17. These alleged rights to policy proceeds plainly are those of absent third parties. The Trust's agreement with the Directors and Officers to maintain the Defense Reserve subject to certain conditions does not bestow upon the Trust a right to or legal interest in Side A coverage that does not otherwise exist.

The Trust relies on the Superior Court decision in *Mt. Hawley Insurance Co. v. Jenny Craig, Inc.*, 668 A.2d 763 (Del. Super. Ct. 1995), to support its argument that it has standing to enforce its own rights under the 08-09 Policies. That case is not instructive here because the policy there covered *only* payments by the plaintiff corporation on behalf of its directors and officers. *Id.* at 767 (“[N]one of the directors are insureds. Only JCI is.”). There was no question whether the corporation sought to enforce the rights of others because there were no others that could be entitled to coverage. Here, in the absence of any payments by Washington Mutual or the Trust, the *only* rights conceivably at issue are the Directors’ and Officers’ direct rights to potential coverage under “Side A” of the ABC Policies and under the Side A Policies. So, while Jenny Craig, Inc. had a “direct interest” in seeking coverage for amounts it paid as indemnification, the Trust has no parallel interest. *See id.* at 766.⁸ Accordingly, the Trust fails to meet the threshold requirement for declaratory relief that the case involve *its* rights rather than those of the Directors and Officers, who are not parties to this lawsuit.

B. The Trust’s contention that the 08-09 Policies would be implicated by the Demand Letter is pure speculation.

1. A purported interest as “purchaser” of the 08-09 Policies does not extend to a hypothetical \$500 million judgment.

When the Trust discusses declaratory judgment, its view of what this case is “about” appears markedly to shift from the Defense Reserve. Instead, the Trust

⁸ *Jenny Craig* is further distinguishable because the “rights or other legal relations” element of the “actual controversy” requirement was not disputed—only ripeness was at issue. *Jenny Craig*, 668 A.2d at 766. There, the settlement for which coverage was disputed had already been entered and was large enough to implicate the insurer’s policy. *Id.* at 767.

asserts that the case is about coverage for a claim purportedly worth \$500 million, supposedly implicating \$250 million in insurance coverage. AAB at 33. But the amount of damages the Trust might recover if it ever decided to file a lawsuit and obtained a judgment against the Directors and Officers is relevant to the Trust only as a claimant seeking to bring an impermissible pre-suit direct action against the Insurers. The alleged damages have no relationship to the Defense Reserve or the Trust's supposed status as the "purchaser" of the 08-09 Policies and are not a valid basis for the Trust to seek declaratory judgment.

2. It is purely speculative that defense fees would exhaust the funds currently covering and reserved for the Directors' and Officers' defense.

The Trust argues that the Policies "do not require a settlement or judgment, or even a lawsuit, to give rise to a 'Claim'" and contends that judgments or final settlements are not a predicate to "coverage determinations generally." AAB at 29, 31. The Trust misses the point, which is not directed to "coverage determinations generally." The 08-09 Policies afford specified coverage for defense costs and for settlements or judgments. The Insurers do not contest that a declaratory judgment action *could* become ripe prior to a settlement or judgment if the plaintiff paid defense costs that should have been covered or could establish that such payment was sufficiently imminent. Here, in contrast, it is pure speculation whether the Directors and Officers will ever incur a single dollar of defense costs not covered by the policies currently advancing them, much less that the Trust will ever pay amounts that arguably should be covered under the 08-09 Policies. Accordingly,

no ripe controversy exists concerning defense costs for the Demand Letter.

Amounts other than defense costs, i.e, indemnification for a judgment or settlement, are even more speculative. A Demand Letter cannot give rise to liability on the part of the Directors and Officers: only a settlement or judgment could even theoretically implicate such amounts, and no such settlement or judgment exists. Absent even the filing of a lawsuit, the Trust cannot establish that a settlement or judgment is imminent and concedes that “liability . . . has not been established.” AAB at 33.

It is inconsistent with Delaware law to argue that indemnification for a hypothetical settlement or judgment in a non-existent lawsuit presents a justiciable question. *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 117 (Del. 2006) (holding that a claim “for indemnification . . . is premature inasmuch as there are no judgments against [the plaintiff]”); *see also Stroud*, 522 A.2d at 481 (stating that this Court will not define “rights which are ‘only future or contingent’”) (citation omitted). The Trust’s characterization of *Wal-Mart* as an exercise of discretion based on “particular facts” ignores that this Court did not merely defer to the discretion of the Court of Chancery but expressly agreed with its reasoning that declaratory relief was not “proper” in light of the general principle that “[c]ourts have declined to enter a declaratory judgment with respect to indemnity until there is a judgment against the party seeking it.” *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 872 A.2d 611, 631-32 (Del. Ch. 2005) (citation and internal quotation marks omitted).

The Trust asserts that this matter constitutes a ripe controversy by comparing it to cases in which insureds had already incurred millions of dollars for which they sought coverage. AAB at 32-33. In *Hoechst Celanese Corp. v. National Union Fire Insurance Co. of Pittsburgh, Pa.*, 623 A.2d 1133 (Del. Super. Ct. 1992), the Superior Court found the dispute ripe where millions of dollars of loss had been incurred, more loss was imminent, and the court could not “draw a line . . . with any . . . certainty” between excess policies that would not be implicated and those that already had been or might be implicated. *Id.* at 1140. Similarly, in *North American Phillips Corp. v. Aetna Casualty & Surety Co.*, 565 A.2d 956, 962 (Del. Super. Ct. 1989), tens of millions of dollars of alleged loss had actually been incurred, and the insured seeking coverage alleged that it faced tens of millions more. Those cases involved multimillion dollar losses that had begun accruing and reasonably were expected to accrue further, raising questions about the extent to which excess insurance would be implicated. In such a context, it may or may not make sense to adjudicate rights under policies that are likely to be implicated alongside those already implicated.

Here, no one has incurred any unpaid covered losses. There is no question of line-drawing or avoiding *seriatim* decisions because there is simply no indication that the defense-costs-based controversy the Trust purports to be pursuing will ever be ripe with respect to *any* of the 08-09 Policies. The Trust’s contentions to the contrary depend 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).

3. Other factors do not compensate for the speculative nature of the Trust's lawsuit.

The Trust curiously asserts that “[a]ny future factual development relating to the interpretation of the Policy exclusions at issue and their application to the Asserted Claim could readily take place in the context of the action before the Superior Court.” AAB at 34. But the law provides no basis for proceeding with an unripe lawsuit with the hope that further factual development will make it ripe. Moreover, it is far from clear that relevant factual developments will occur at all, much less before a judgment would be entered in this litigation. The Trust cannot dispute that “future events may obviate the need for declaratory relief” because numerous circumstances could obviate the need to seek coverage under the 08-09 Policies. *Wal-Mart*, 872 A.2d at 631-32. For example, the Trust may never sue the Directors and Officers; or the Directors and Officers may prevail against the Trust using defense costs advanced under other policies; or the Trust may prevail but recover an amount insufficient to trigger the 08-09 Policies. With all these contingencies, the Trust cannot show that the 08-09 Policies would “probably be triggered” by the Demand Letter. *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 565 A.2d 268, 275 (Del. Super. Ct. 1989). Accordingly, in addition to the Trust’s failure of standing and its attempt to assert rights belonging solely to the Directors and Officers, the Trust’s effort to seek declaratory relief is speculative and therefore not ripe for adjudication.

CONCLUSION

The Trust seeks to forge a shorter path to its desired results by obtaining the Delaware courts' advice regarding whether there is insurance coverage for the Demand Letter before it decides whether to bring suit against the Directors and Officers. The Trust asserts that its stipulations with the Directors and Officers entitle it to the advisory opinion it seeks because it agreed to maintain—and on certain conditions release—the Defense Reserve. The Trust cannot write its own ticket into Delaware courts. It has the burden to establish an injury-in-fact that is fairly traceable to the challenged conduct, and it cannot do so by simply pointing to its own agreement to reserve for pre-existing corporate obligations. Nor can it find a route through the declaratory judgment mechanism, where it is not the party entitled to the coverage it seeks to establish and where there is no reasonable probability that coverage would ever be implicated based on a years-old demand letter to which other insurance policies are responding.

For the reasons set forth above and in the Appellants' Opening Brief, the Defendants respectfully request that the Court reverse the Order of the Superior Court with instructions to the Superior Court to dismiss the Complaint.