

ALERT

Washington Mutual Liquidating Trust Coverage Case Is Not Ripe

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The Delaware Supreme Court has held that a liquidating trust's coverage action against insurers of directors and officers of Washington Mutual, Inc. was not ripe. *XL Specialty Ins. Co. v. WMI Liquidating Trust*, No. 449, 2013 (Del. May 28, 2014). The Court therefore reversed the lower court's denial of the insurers' motion to dismiss the case. Wiley Rein represented the primary traditional D&O and Side A insurers and presented the argument before the Court.

The trust filed the lawsuit against the insurers seeking a declaratory judgment and alleging breach of contract and breach of the duty of good faith based on the insurers' denial of coverage for a demand by Washington Mutual and a creditors committee against the company's former directors and officers. The trust sought a declaration that the demand was covered under policies issued by the insurers and asserted that it held a reserve of \$18 million to potentially satisfy Washington Mutual's indemnification obligations to the former directors and officers. The insurers moved to dismiss the lawsuit in the trial court, which denied the motion.

On an interlocutory appeal, the Delaware Supreme Court concluded that the trust's claims against the insurers were not ripe. According to the Court, the trust sought a declaratory judgment "that, if made, would necessarily be premised on uncertain and hypothetical facts and that ultimately may never become necessary." The Court reasoned that, because other policies were advancing defense costs, the trust had not pled facts to establish a reasonable likelihood that the targeted policies would be implicated. If the targeted policies were never implicated, any determination about coverage under those policies "would be based on pure speculation about future events."

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The Court therefore reasoned that the dispute between the trust and the insurers had not yet assumed a “concrete and final form” and that the trust had not established a present or likely harm that established a cognizable interest in an immediate resolution of the coverage dispute. The potential that claims would go unpaid had yet to become a “real world” problem, the Court held. Moreover, the trust’s establishment of a reserve to potentially satisfy Washington Mutual’s indemnification obligations was an “illusory” harm to the trust because those “potential obligations exist whether or not coverage is available to the D&Os.” The Court concluded that “[t]he Trust’s only interest in having its dispute litigated now is apparently to receive judicial guidance about how much coverage *would* be available to the D&Os *if* the Trust were to initiate litigation against them.” However, “[t]he Trust’s desire to receive advice is not a cognizable interest that will justify a Delaware court exercising its jurisdiction to decide this dispute.”

Because the Court found the trust’s declaratory judgment count to be unripe, it concluded that the counts for breach of contract and breach of the implied duty of good faith and fair dealing necessarily were also unripe.

The opinion is available [here](#).