

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

E. I. du PONT de NEMOURS )  
& COMPANY, ) C.A. No. 99C-12-253 JTV  
)  
Plaintiff, )  
)  
v. )  
)  
ALLSTATE INSURANCE )  
COMPANY, et al. )  
)  
Defendants. )

*Submitted: November 21, 2007*

*Decided: February 29, 2008*

John E. James, Esq., and Richard L. Horwitz, Esq., Potter, Anderson & Corroon, Wilmington, Delaware for E.I. du Pont de Nemours & Company.

Brian L. Kasprzak, Esq., and Dawn Courtney Doherty, Esq., Marks, O'Neill, O'Brien & Courtney, P. C., Wilmington, Delaware for Defendants Stonewall Insurance Company.

*Upon Consideration of Defendant DuPont's*

*Motion For Leave To File*

*Second Amended Complaint*

**GRANTED**

**VAUGHN, President Judge**

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## ORDER

Upon consideration of plaintiff E.I. du Pont de Nemours & Company's motion for leave to file a second amended complaint, the opposition of defendant Stonewall Insurance Company, and the record of the case, it appears that:

1. DuPont's motion for leave to file an amended complaint seeks two objectives: (1) to remove from the case reference to the defendants with whom DuPont has entered into settlements, and (2) to add a bad faith claim against Stonewall.

2. The facts of the case are extensively set forth in two prior opinions of the Court and will not be repeated here.<sup>1</sup>

3. Stonewall opposes DuPont's motion for leave to amend the complaint to assert a bad faith claim. It contends that allowing the amendment would be futile because DuPont cannot establish bad faith. It contends that to establish bad faith, the insured must show that the insurer's denial of benefits was "clearly without any reasonable justification."<sup>2</sup> It contends that there are numerous coverage issues which remain unresolved, which render DuPont's claim meritless.

4. A motion for leave to amend is within the sound discretion of the court<sup>3</sup> and leave "shall be freely given when justice so requires."<sup>4</sup> In the absence of substantial

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<sup>1</sup> *E. I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 2006 Del. Super. LEXIS 327; *E. I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 879 A.2d 929 (Del. Super. 2004);.

<sup>2</sup> *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 440 (Del. 2005).

<sup>3</sup> *Wilson v. Wilson*, 2005 Del. Super. LEXIS 12, at \*2.

<sup>4</sup> Super. Ct. Civ. R. 15(a).

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prejudice or legal insufficiency, the court must exercise its discretion in favor of granting leave to amend.<sup>5</sup> However, a motion to amend must be denied if the amendment would be futile in the sense that it would not survive a motion to dismiss under Rule 12(b)(6).<sup>6</sup> The standard for assessing the legal sufficiency of a proposed amended complaint is the same standard applicable to a motion to dismiss under Rule 12(b)(6)<sup>7</sup> — all allegations in the amended complaint must be accepted as true,<sup>8</sup> and the proposed amendment will not be dismissed unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.<sup>9</sup>

5. The cases relied upon by Stonewall appear to be ones where the proposed amendment failed to state a claim upon which relief could be granted, where the court determined that the proposed amendment could not survive a motion to dismiss, where it otherwise was legally insufficient, or where it involved facts which contradicted other facts pled by the movant. In this case the proposed amended pleading appears to be legally sufficient, and it does not appear that granting leave to amend will cause any legal prejudice to Stonewall. Applying the standard set forth above, I conclude that the motion for leave to amend the complaint as requested

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<sup>5</sup> *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 263 (Del. 1993); *Franklin Balance Sheet Inv. Fund v. Crowley*, 2006 Del. Ch. LEXIS 188, at \*9.

<sup>6</sup> *Cartanza v. Lebeau*, 2006 Del. Ch. LEXIS 63, at \*7.

<sup>7</sup> *FS Parallel Fund L.P. v. Ergen*, 2004 Del. Ch. LEXIS 160, at \*6; *Fitzgerald v. Cantor*, 1998 Del. Ch. LEXIS 199, at \*2.

<sup>8</sup> *Atamian v. Gorkin*, 1999 Del. Super. LEXIS 143, at \*5.

<sup>9</sup> *Id.*

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should be ***granted*** provided that any defendant against whom Stonewall has asserted a cross-claim will not be removed from the case reference.

**IT IS SO ORDERED.**

          /s/ James T. Vaughn, Jr.            
President Judge

oc: Prothonotary  
cc: Order Distribution  
File