An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-905

Filed 18 July 2023

Mecklenburg County, No. 21 CVS 13272

THE ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK, Plaintiff,

v.

JOHN TIGHE, SEAN ANTONY BEATTY, DENNIS WILLIAM CAHILL, CATHERINE ANN CARLINO, ANDRE LEFEBVRE, DAVID DEAN SHUMWAY, THEODORE GIL CHANDLER, DAVID MICHAEL DAVENPORT, LINDA YOUNG PETTIGREW, GWYN WALLACE FULLER, DANIEL ROBERT KEDDIE, JULIE ANN FORTUNE, JAMES FRANCIS MEEHAN, ARROWPOINT GROUP, INC., AND ARROWPOINT CAPITAL CORP., Defendants.

Appeal by plaintiff-appellant from order entered 12 July 2022 by Judge Louis A. Trosch, Jr., in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 March 2023.

R.L. Adams, PLLC, by R.L. Adams, and ArentFox Schiff LLP, by Julius A. Rousseau, III, Elliott M. Kroll, and James M. Westerlind, pro hac vice, for plaintiff-appellant.

James McElroy & Diehl, P.A., by Edward T. Hinson, Jr., Jennifer M. Houti, Alexandra B. Bachman, & Preston O. Odom, III, and Dentons US LLP, by Kenneth J. Pfaehler, pro hac vice, for defendant-appellees.

DILLON, Judge.

Plaintiff Roman Catholic Diocese of Brooklyn, New York, ("Plaintiff") appeals from the trial court's order dismissing its claim pursuant to Rules 12(b)(1) and 12(b)(6) of our Rules of Civil Procedure. We affirm.

I. Background

Plaintiff is comprised of 186 parishes and 210 churches. Between 1956 and 2000, Plaintiff purchased primary and excess general liability policies from Arrowood Indemnity Company ("Arrowood"), an insurance company incorporated in Delaware.

In 2004, Arrowood ceased issuing new policies and instead became engaged only in servicing existing claims, referred to as "run-off". In 2007, Arrowood was acquired by Arrowpoint Capital Corporation ("Arrowpoint"). This acquisition was approved by order (the "Denn Decision") issued 20 February 2007 by Matthew Denn, the Delaware Insurance Commissioner at the time. The Denn Decision governed the payment of dividends or distributions to the holding company, as well as salaries payable to employees of Arrowood, to "ensure that every dime intended for policyholders actually reaches the policyholders." The Denn Decision also appointed a claims monitor to monitor indemnity reserve adequacy, among other things. The Denn Decision remains effective and controls both parties to this action.

Plaintiff states in its complaint that, since Arrowpoint acquired Arrowood in 2007, the policyholder surplus (the amount earmarked to satisfy policyholders claims) has continually decreased. Plaintiff alleges that this is because the individual officers subject to this claim used Arrowood to their personal advantage by, among other

things: (1) submitting "materially incorrect filings to the Delaware Department of Insurance and other regulators", (2) paying "exorbitant salaries" to Arrowood officers, (3) paying excessive "management fees" which were intended to "siphon off funds", (4) paying "over $200 million into three pension funds for present and former employees", and (iv) paying health care insurance for retired Arrowood employees when it did not have the means to do so.

In 2019, New York passed the New York Child Victims Act ("CVA") which allowed individuals alleging they were sexually abused as a minor to bring suit even if the statute of limitation had run. Plaintiff subsequently tendered over 800 pedophilia claims to Arrowood for defense and indemnity. Whether these claims qualify for indemnity is currently unknown, pending litigation in federal court.

Plaintiff sued Defendants, bringing claims under both the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA") and New York General Business Law § 349 ("NY § 349").

On 12 July 2022, after a hearing on the matter, the trial court entered and order (the "Order") granting Defendants' motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6). Plaintiff timely appealed.

II. Standard of Review

Rule 12(b)(1) of our Rules of Civil Procedure allows for dismissal based upon a trial court's lack of subject matter jurisdiction. Rule 12(b)(6) allows for dismissal for failure to state a claim upon which relief can be granted. We review an order granting

dismissal pursuant to both *de novo*. *Taylor v. Bank of Am., N.A.*, 382 N.C. 677, 679, 878 S.E.2d 798, 800 (2022).

III.Argument

This is a claim by an insurance policyholder against its liability insurer, alleging that the insurer is not ensuring that it remains adequately capitalized to pay potential claims. The trial court dismissed Plaintiff's UDTPA claim, in part, based on its conclusion that "[t]he determinations that Plaintiff asks this Court to make are more properly brought in administrative proceeding in Delaware or in the courts of Delaware." We agree.

Since 2007, Plaintiff has been subject to the direct regulatory authority of the Delaware Insurance Commissioner. And, Plaintiff concedes that enforcement of the Denn Decision is the "subject of [its] Complaint". Defendants also state in their brief on appeal that Arrowood continues to operate "under the close oversight of the Delaware Department of Insurance."

Plaintiff has not attempted to bring suit in Delaware and has presented no convincing reason why it did not do so.

As the trial court found in its Order, the Delaware Insurance Commissioner, since 2007, has been responsible for monitoring the following:

> 1. The insurers shall not pay any dividends or other distributions to the holding company until the Delaware Insurance Department has determined that all policyholder claims reasonably capable of resolution have been paid and that sufficient funds exist to pay

> timely and properly all claims by their nature that cannot be resolved in a timely fashion.
>
> 2. No management personnel will receive any compensation beyond his or her base salary until the determination in (a) has been made.
>
> 3. Management compensation must be approved by the Delaware Insurance Department.
>
> 4. A claims monitor shall be appointed to be available to the Policyholders to receive all complaints, and to continually monitor indemnity reserve adequacy, litigation management, claims denials, and all other aspects of sound claims practices.
>
> 5. [Arrowood] and its relevant subsidiaries and affiliates submit to the personal jurisdiction of the courts of Delaware for the purposes of resolving any legal claims brought by policyholders.
>
> 6. [Arrowood] and its relevant subsidiaries and affiliates *submit to the ongoing jurisdiction of the Delaware Department of Insurance*, including but not limited to application of the state's unfair insurance practices statutes, with respect to the obligations it has made as a part of the subject transaction.

(Emphasis added.) Accordingly, because (1) both parties are still subject to the Denn Decision, (2) the Commissioner has been supervising Arrowood for nearly two decades, (3) the Denn Decision requires both parties to "submit to the ongoing jurisdiction" of the Commissioner, and (4) Plaintiff has not attempted to file suit in Delaware and has not stated any convincing reason for failing to do so, we agree with the trial court that Plaintiff's claim would be more appropriately brought in a Delaware forum.

AFFIRMED.

Judges COLLINS and RIGGS concur.

Report per Rule 30(e).