IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

Those Certain Underwriters at Lloyd's, London Who Subscribed Severally As Their Interests Appear Thereon And Not Jointly to Lloyd's Policy Number 390/J145210, and Drive Financial Services, LP,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 19804-VCP
National Installment Insurance Services, Inc.,	)	
Defendant.	)	

MEMORANDUM OPINION

Submitted: February 21, 2008
Decided: May 21, 2008

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PARSONS, Vice Chancellor.

On December 21, 2007, in a posttrial memorandum opinion, I found an intermediary insurance broker, National Installment Insurance Services ("NIIS"), liable to two parties to an insurance policy (the "Policy") that it brokered.[1] Those two parties are Drive Financial Services, L.P. ("Drive"), the insured, and Those Certain Underwriters at Lloyd's, London Who Subscribed Severally as Their Interests Appear Thereon And Not Jointly to Lloyd's Policy Number 390/J145210 ("Underwriters," and together with Drive, "Plaintiffs"), the insurer. This action is currently before me on two motions Plaintiffs filed after the Posttrial Opinion: (1) Plaintiffs' Joint Motion for Reargument ("Motion for Reargument"), filed on January 3, 2008; and (2) Plaintiffs' Motion for Leave to File a Fifth Amended Complaint ("Motion to Amend"), filed on January 13, 2008.[2]

For a description of the background facts relevant to this opinion, see the Posttrial Opinion. In short, Drive and Underwriters jointly sued NIIS for negligence and negligent misrepresentation in relation to the procurement of automobile VSI insurance for Drive's subprime automobile loan portfolio. Although I found NIIS liable to Underwriters for negligent misrepresentation, and to Drive for negligence and negligent misrepresentation,

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1 *See Those Certain Underwriters at Lloyd's, London Who Subscribed Severally As Their Interests Appear Thereon and Not Jointly to Lloyd's Policy Number 390/J145210 v. Nat'l Installment Servs., Inc. ("Posttrial Opinion")*, 2007 WL 4554453 (Del. Ch. Dec. 21, 2007).

2 In addition, Defendant NIIS filed a Motion to Amend Scheduling Order to Permit Defendant to File a Limited Surreply Brief ("Motion for Sur-Reply") on March 28, 2008. Based on my rulings on Plaintiffs' Motion for Reargument and Motion to Amend, I deny NIIS' Motion for Sur-Reply as moot.

I declined for the reasons stated in the Posttrial Opinion to grant all of Plaintiffs' requested relief. As more fully explained in this memorandum opinion, I deny Plaintiffs' Motion for Reargument because they have not shown a material misapprehension of fact or law. I also deny the Motion to Amend because it would be unduly prejudicial to NIIS and is not otherwise warranted under the circumstances.

I. PLAINTIFFS' MOTION FOR REARGUMENT

Plaintiffs contend this Court misunderstood material facts and misapplied law such that Underwriters and Drive should each receive relief in addition to that granted them in the Posttrial Opinion. Underwriters dispute my finding they were not entitled to receive $783,728 in commission expense and surplus lines tax they had repaid to Drive and seek an award of all or at least a portion of that amount. Drive contends I mistakenly applied Texas law instead of Maryland law, and misapplied Texas law, such that I should have determined NIIS' misrepresentations were the proximate cause of Drive's damages in the amount of $4,529,780.[3]

A. Legal Standard

A motion for reargument under Court of Chancery Rule 59(f) will be denied unless the court has overlooked a controlling decision or principle of law that would have controlling effect, or the court has misapprehended the law or the facts so that the

[3] *See* Mot. for Rearg. at 1-2, 14.

outcome of the decision would be different.[4] This standard is a highly flexible one, permitting reargument if it can be shown that the court's misunderstanding of a factual or legal principle is both material and would have changed the outcome of its earlier decision.[5] "Motions for reargument are also denied, however, when they are merely a rehash of arguments already made."[6] "Reargument under Court of Chancery Rule 59(f) is only available to re-examine the existing record; therefore, new evidence generally will not be considered on a Rule 59(f) motion."[7]

B. Underwriters

Underwriters claimed NIIS was liable to them for the tort of negligent misrepresentation and sought damages of $976,144.60.[8] After determining Maryland law was the most appropriate law for Underwriters' negligent misrepresentation claim, this Court found NIIS liable to Underwriters for some of its requested relief. Underwriters now contend the Court erred when it failed to award them $783,728 they paid to Drive to

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4 *Miles, Inc. v. Cookson Am., Inc.*, 677 A.2d 505, 506 (Del. Ch. 1995) (citing *Stein v. Orloff*, 1985 Del. Ch. LEXIS 540, at *5-6 (Sept. 25, 1985)).

5 *Blank v. Belzberg*, 2003 WL 21788086, at *1 (Del. Ch. July 24, 2003).

6 *Handloff v. City Council of Newark*, 2006 WL 2052685, at *2 (Del. Super. July 19, 2006); *Miles*, 677 A.2d at 506 (citing *Lewis v. Aronson*, 1985 Del. Ch. LEXIS 431, at *4 (June 7, 1985)).

7 *Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 2007 WL 4644708, at *1 (Del. Ch. Dec. 31, 2007) (citing *Miles*, 677 A.2d at 506). A litigant may move for reargument based on new evidence found after trial, only if they can show it could not have been discovered, after reasonable diligence, before or during trial. *Id.* (citing *Bata v. Bata*, 170 A.2d 711, 714 (Del. 1961)).

8 *See Posttrial Op.*, 2007 WL 4554453, at *7 (Del. Ch. Dec. 21, 2007).

compensate Drive for its allegedly unreimbursed commission and surplus lines tax ("SLT") expense. In the alternative, Underwriters assert this Court erred when it did not award them $52,246 in surplus lines tax and approximately $200,000 in commissions allegedly received by NIIS.

1. $783,728 in unreimbursed commission and SLT expense

Drive paid $2,612,320 for coverage under the Policy. Of that amount, Underwriters received only $1,828,592; the remainder of the premium paid by Drive, $783,728, was retained by third parties, including the intermediary brokers, as surplus lines taxes and commissions.[9] The exact breakdown of the $783,728, however, was never made clear in the parties' submissions, and is not readily ascertainable from the record. In fact, the record is inconclusive as to how much commission each of the three brokers to this transaction -- Cravens, Bankers, and NIIS -- actually received.[10]

Under Maryland law, to prove negligent misrepresentation a plaintiff must show:

> (1) the defendant, owing a duty of care to the plaintiff, negligently asserts a false statement; (2) the defendant intends that his statement will be acted upon by the plaintiff; (3) the defendant has knowledge that the plaintiff will probably rely on the statement, which, if erroneous, will cause loss or injury; (4) the plaintiff, justifiably, takes action in reliance on

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9 *See Posttrial Op.*, 2007 WL 4554453, at *12.

10 Even at this late stage of the litigation, Plaintiffs refer only to certain inconclusive deposition testimony and a number of cryptic exhibits to support their allegations as to the amounts paid for commissions and SLT expenses. *See* Mot. for Rearg. at 10 (citing JX 108 (Bagwell Dep.) at 85-89, 139-43; *id.* Exs. 16, 34-41; JX 22 (Letter from Bankers to Miniter, June 4, 2001)).

> the statement; and (5) the plaintiff suffers damage proximately caused by the defendant's negligence.[11]

With respect to the $783,728 in unrecovered commission and SLT expense, I ultimately found NIIS' negligent misrepresentation did not proximately cause that aspect of Underwriters' pecuniary loss. In particular, I held that "[w]hile, as part of a rescission, the insured should be refunded its entire premium (including commissions), Underwriters failed to provide adequate justification as to why they, as opposed to the brokers who received the commissions, had to return those sums."[12] The Motion for Reargument as to Underwriters' damages centers on that finding in the Posttrial Opinion.

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[11] *Martens Chevrolet, Inc. v. Seney*, 439 A.2d 534, 539 (Md. 1982).

[12] *Posttrial Op.*, 2007 WL 4554453, at *13. I further found:

> [T]he claimed shortfall stems from Underwriters' reimbursement to Drive of its entire premium as part of the Settlement and their and Drive's subsequent settlements with Craven and Bankers. Based on the record, I find Underwriters could have negotiated a different settlement agreement whereby they were not responsible for broker commissions, particularly since the brokers were Drive's, and not Underwriters', agents. Alternatively, Underwriters could have taken an assignment of, or otherwise preserved, Drive's claims against Craven and Bankers, such that, for example, NIIS could have pursued them if it ultimately reimbursed Underwriters for the disputed commissions. I therefore deny Underwriters' claim to recover as damages the difference between the premium they returned to Drive, and what they actually received.

Id. at *13.

Three insurance brokers participated in the procurement of the Policy: Bankers, NIIS, and Craven.[13] NIIS and the other two insurance brokers were agents of Drive and not agents of Underwriters.[14] Before Underwriters received their portion, brokerage commissions were subtracted from Drive's policy payments.[15] The question then is whether, as part of a rescission of the Policy, Underwriters was obligated not only to

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[13] *See id.* at *2 ("Drive sent Bankers a policy application for VSI insurance in October 2000. Bankers enlisted NIIS to obtain insurance on behalf of Drive. NIIS in turn enlisted Craven to solicit coverage from Lloyd's, London.").

[14] *See Am. Cas. Co. of Reading, Pa. v. Ricas*, 22 A.2d 484, 487 (Md. 1941) ("An insurance broker is ordinarily employed by a person seeking insurance, and ... is to be distinguished from the ordinary insurance agent, who is employed by insurance companies to solicit and write insurance by, and in the company."); *Dist. Agency Co. v. Suburban Delivery Serv. Inc.*, 167 A.2d 874, 877 (Md. 1961) (broker was agent of the insured in obtaining insurance, but was agent of insurer in collecting premiums); *H & R Block*, 735 A.2d at 1054; *Sadler v. Loomis Co.*, 776 A.2d 25, 36-37 (Md. Ct. Spec. App. 2001); *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 498-99 (4th Cir. 1998). This finding may seem counterintuitive in light of the fact the premium ultimately paid by Drive includes the commissions charged by Drive's insurance brokers. *Cf.* Mot. for Rearg. at 10 (citing JX 87 (Adams Dep.) at 147-48 for the proposition Drive was unaware of the portion of the insurance premium that went to its brokers). Underwriters, however, have made no persuasive showing the insurance brokers were agents of Underwriters and not of Drive.

"[C]ourts applying Maryland agency law have considered three characteristics as having particular relevance to the determination of the existence of a principal-agent relationship: (1) the agent's power to alter the legal relations of the principal; (2) the agent's duty to act primarily for the benefit of the principal; and (3) the principal's right to control the agent." *See Green v. H & R Block, Inc.*, 735 A.2d 1039, 1047 (Md. 1999); *Beyond Sys. v. Realtime Gaming Holding Co.*, 878 A.2d 567, 582-83 (Md. 2005). There has been no showing Underwriters had such a relationship with NIIS, or either of the other two brokers.

[15] *See* Mot. for Rearg. at 10.

return the premiums it ultimately received from Drive, but also to refund commission and SLT expenses Drive incurred and effectively paid to others.

None of the parties in their posttrial briefing, or more recently in their arguments regarding the Motion for Reargument, squarely addressed this issue. In their posttrial briefing, Underwriters did not cite any controlling Maryland authority and instead relied on *In re Texas Association of School Boards*,[16] for the proposition, "that in order to obtain a full rescission, an insurer must return all premiums paid by the insured."[17] In *Texas Association*, in the context of determining whether a policy's maximum coverage amount represented consideration for purposes of a choice of venue statute, the court stated in *dicta* that "if risk has never attached because an insurance policy was void *ab initio*, the insured is entitled to a return of all premiums paid."[18] *Texas Association*, however, does not require the insurer to compensate the insured for the insured's own commission expense in obtaining the insurance in issue.

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[16] 169 S.W.3d 653, 659 (Tex. 2005). Underwriters also relied on 17A Am. Jur. 2d Contracts § 574 for the general proposition that a party wishing to rescind a contract must return the opposite party to the status quo ante.

[17] Pls.' Jt. Post-trial Reply Br. ("Posttrial PRB") at 10. Plaintiffs' opening brief and NIIS' answering brief are designated "Posttrial POB" and "Posttrial DAB," respectively.

[18] 169 S.W.3d at 659 (citing *Am. Nat'l Ins. Co. v. Smith*, 13 S.W.2d 720, 723 (Tex. Civ. App. 1929) ("Premiums paid upon a void policy of insurance may be recovered because 'the underwriter receives a premium for running the risk of indemnifying the insured, and whatever cause it may be owing to, if he does not run the risk the consideration for which the premium or money was paid into his hands fails, and therefore he ought to return it.'")).

I find the citations in Underwriters' Motion for Reargument similarly unpersuasive. In *Stumpf v. State Farm Mutual Automobile Insurance Co.*,[19] the court noted the automobile insurance company, as part of its rescission of an insurance policy based upon the insured's misrepresentations, initially returned only the amount in premiums it received and directed the insured to separately collect the commission payment from the insured's broker, and that several weeks later the insurer also returned to the insured the broker's commission expense.[20] Nothing in *Stumpf*, however, indicates the legal reasoning behind the commission expense repayment or that the court ordered that repayment; thus, *Stumpf* does not stand for the proposition the insurer was *obligated*, as part of its rescission of the policy, to refund the insured's broker's commission fees. Underwriters also cite two treatises to show that to effect a rescission, the insurer must repay all of the premiums to the insured. The cases cited in those treatises, however, where relevant, involve situations where the insurer was required to repay premiums inclusive of the insurer's agent commissions, and not situations where the insurer paid the insured's broker commissions.[21]

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[19] 251 A.2d 362 (Md. 1969).

[20] *See id.* at 371. The court discussed the timing of the payments within the context of determining the effectiveness of the rescission under the rule that, "in order to rescind effectively, the insurer 'must proceed without unreasonable delay after the fraud is discovered to rescind the contract, and to manifest its determination to the other party.'" *Id.* (quoting *Stiegler v. Eureka Life Ins. Co.*, 127 A. 397, 402 (Md. 1925)).

[21] *See* 43 AM. JUR. 2d *Insurance* § 923 (citing *Dixie Fire Ins. Co. v. Wallace*, 156 S.W. 140, 141-42 (Ky. 1913); *AFCO Credit Corp. v. Brandywine Ski Ctr., Inc.*,

Furthermore, by choosing not to submit the terms of their settlement agreements with the two other brokers, Craven and Bankers, Underwriters (and Drive) contributed to the creation of a record from which this Court could not rule out the likelihood of a double recovery if the Court granted Underwriters' requested relief. Although Underwriters claim, "there is no evidence that [they] have been made whole by Craven and Bankers for the commissions they received,"[22] their failure to enter the settlement agreements into evidence detracts from Underwriters' proof of damages and leaves open the possibility that, in effect, they were made whole.[23]

Underwriters' unilateral decision, as part of their settlement with Drive, to compensate Drive for its unrecovered commission expense may have been practical and in Underwriters' best interest, but they have not shown they were *required* to make that payment as a result of NIIS' negligent misrepresentation. For these reasons, I will not

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610 N.E.2d 1032, 1034 (Ohio Ct. App. 1992)); 5 COUCH ON INS. § 79:25 (citing, among other cases, *Fidelity-Phenix Fire Ins. Co. v. Queen City Bus & Transfer Co.*, 3 F.2d 784 (4th Cir. 1925); *Waller v. N. Assur. Co.*, 19 N.W. 865, 865-67 (Iowa 1884)); *cf. Ratchford v. United States Cent. Underwriters Agency, Inc.*, 492 F. Supp. 137, 140 (E.D. Mo. 1980) (upon cancellation of insurance policies, insurer was required to pay the insured their full premiums, including the insurer's agents' commissions).

22 Mot. for Rearg. at 12.

23 Similarly, it is unclear whether Drive, through Plaintiffs' settlement agreements with Bankers and Craven, has received any payments from those parties based on Drive's commission expense. I note, however, that under Drive's settlement agreement with Underwriters, Drive assigned the preponderance of any recoveries from the three brokers to Underwriters such that, absent a new agreement, Drive probably would not have received any such recovery in advance of Underwriters. *See* PX 37 (Settlement Agreement between Drive and Underwriters) at 3.

grant reargument on my holding that Plaintiffs did not show NIIS' negligent misrepresentation was the proximate cause of Underwriters' damages of $783,728.[24]

2. SLT

Part of the $783,728 Underwriters paid to Drive included reimbursement of SLT paid by Drive.[25] Underwriters now claim the SLT amounted to $52,246. Before considering whether Underwriters has a valid claim against NIIS for SLT paid by Drive, I must determine whether Underwriters appropriately may raise that issue on a motion for reargument. Reargument is only available to re-examine the existing record; it is not an opportunity to introduce new evidence.[26]

This aspect of Underwriters' motion, however, attempts to make a new argument and to introduce new facts. In Underwriters' posttrial briefing, they never presented a request for $52,246 or any other specific amount of SLT. Similarly, because

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[24] My finding that Underwriters have not shown they had a legal obligation to Drive to pay Drive's own commission expense is reinforced by the manner in which Drive's brokers were compensated. Underwriters admit "the involved brokers subtracted their commissions before the funds were transmitted to Underwriters." Mot. for Rearg. at 10. Drive's brokers, therefore, received their compensation from Drive and not from Underwriters.

[25] *See* Stip. ¶¶ 30-31. "Surplus lines . . . would be a position being taken by an alien carrier, or a carrier that does not have a filed position or is not able to take a filing position in any state. As such, they would be subject to a surplus lines tax from whichever state they would be operating in; principally, the difference." Tr. at 332 (Adams). "Surplus lines policy is able to be written without the benefit of going through a filing with the state." *Id.* In order to obtain a surplus lines policy, "there is a requirement in most states that there be at least two, perhaps three, declinations from a filed and an admitted carrier for a particular line of business that you are intending to write." *Id.* at 333.

[26] *See* note 7 *supra*.

Underwriters failed to adduce evidence at trial breaking out the $783,728 payment into specific broker commissions and taxes, I would have to entertain new evidence to prove that $52,246 in surplus lines tax actually was paid, or draw speculative inferences from the minimal information available in the record.[27] Because Underwriters makes a new argument and effectively seeks to rely on new evidence, I deny their request for reargument as to the handling of the alleged SLT payment.[28]

3. NIIS' commission expense

Arguing in the alternative, Underwriters also assert it would be inequitable for the Court to deny completely Underwriters' requested relief of $783,728, and thereby allow the negligent party, NIIS, to retain their commissions. I might have been sympathetic to such an argument had it been made in conjunction with the trial or posttrial argument. In fact, it was not. Rather, Underwriters' request for NIIS' commission is another attempt

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[27] Underwriters do not cite any evidence of the payment of $52,246 in SLT. Instead, they rely on a letter that states only that the applicable tax rate is 2%. *See* Mot. for Rearg. at 13 (citing PX 90 (Letter from NIIS to Bagwell of Craven, Mar. 9, 2001) at CRA 000357). Underwriters did not introduce any witness testimony or other evidence at trial to link the information in this letter to the amount of SLT taxes actually paid and by whom.

The parties stipulated "Drive paid $2,612,320 in premium *inclusive* of surplus lines tax for 32,654 loans under the Policy." Stip. ¶ 30 (emphasis added). The $2,612,320 figure, however, represents premiums to Underwriters, Drive's commission expense, and the SLT. Underwriters have pointed to no evidence from which this Court could determine on which sum the tax was applied. Two percent of $2,612,320 is $52,246.40, but that means only that Underwriters applied the 2% tax to the entire stipulated amount, including even the SLT tax itself. From the record created at trial, I cannot determine whether the asserted amount is correct.

[28] *See Miles, Inc. v. Cookson Am., Inc.*, 677 A.2d 505, 506 (Del. Ch. 1995).

to introduce a new legal argument and additional facts through their Motion for Reargument.

As I understand Underwriters' argument, even if I find Underwriters have not proven their claim for damages based on the brokers' commission expense, I still should preclude NIIS, under traditional principles of equity, from retaining a commission for an insurance policy that was rescinded due to NIIS' own negligence. Underwriters did not make that argument before the Posttrial Opinion issued. Nor have they shown that the evidence at trial is sufficient to prove what, if any, commission NIIS actually received.

As discussed earlier, Underwriters' previous submissions never broke out the $783,782 into the commissions received by the three brokers and the SLT. Instead, Underwriters base their assertion NIIS received $205,502 in commission solely on NIIS' own posttrial answering brief.[29] But Underwriters' reliance on NIIS' brief is misplaced; NIIS categorically denies having received *any* commission relating to this transaction.[30] Underwriters responds that, "NIIS' position that it did not receive this commission as cash in hand is of no moment because a commission was in fact paid for NIIS and NIIS in fact received the benefit of this commission as part of the sale of its business immediately following the inception of the Policy."[31] This may be true, but the time for

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29 *See* Mot. for Rearg. at 13 (citing DAB at 9 n.7).

30 *See* DAB at 9 n.7 ("NIIS itself did not receive any commission in this transaction. Its share of the commission *would* have amounted to $205,502.") (emphasis added).

31 Mot. for Rearg. at 13.

introducing such proofs has passed. Underwriters have presented no argument to justify admitting additional proofs on this issue in the context of their Motion for Reargument. NIIS' posttrial description of the commissions it *would* have received is not sufficient to prove what they actually received in commissions, nor does it suffice to quantify any benefit it received as part of a sale. Underwriters' belated attempt to introduce new evidence regarding NIIS' commission is impermissible.[32]

Underwriters apparently made a tactical decision to present at trial evidence only of the full amount they paid to Drive beyond the return of the $1,828,592 Underwriters themselves received. That amount was $783,728, but Underwriters made no attempt to prove the exact nature and amounts of the separate components of that total. Perhaps, they were concerned that doing so might invite the Court to award something less than the full amount they sought in damages. In any event, Plaintiffs have not shown the Court misapprehended the law or the facts relating to Underwriters' damages claim. Therefore, I deny Plaintiffs' Motion for Reargument to the extent it involves Underwriters' claim for damages.

C. Drive

In its Motion for Reargument, Drive contends the Court erred by applying Texas instead of Maryland law, and in applying Texas law itself. To the extent Drive is correct that Maryland law should apply, the burden of proving the availability of alternate insurance coverage (or lack thereof) would fall upon NIIS. To obtain reargument,

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[32] *See Miles*, 677 A.2d at 506.

however, Drive must demonstrate that my decision was predicated upon a misunderstanding of a material fact or a misapplication of the law such that the outcome of that decision would have been different.[33] Based on the record presented at trial, I am convinced that even if NIIS had the burden under either Maryland or Texas law of proving the unavailability of alternate insurance that would have covered Drive's losses, NIIS has met that burden. Thus, the asserted misapplication of the law would not have affected the outcome reflected in the Posttrial Opinion.

1. The Court's decision to apply Texas instead of Maryland law

Drive contends Maryland law should have been the choice of law for proximate cause and not Texas law. In their opening brief in support of their motion for summary judgment, Drive and Underwriters argued, in a footnote, for the application of Maryland law.[34] In my subsequent summary judgment opinion, I applied Maryland law to Drive's claims, but expressly stated the application of Maryland law was not definitive.[35] Neither party discussed which state's law governed Drive's claims in the Joint Pretrial Order. In their posttrial opening brief, Plaintiffs argued, "Maryland law applies with respect to the

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33 *See Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 2007 Del. Ch. LEXIS 185, at *1-2 (Dec. 31, 2007) (citing *Goldman v. Pogo.com Inc.*, 2002 WL 1824910, at * 1 (Del. Ch. July 16, 2002); *Stein v. Orloff*, 1985 WL 21136, at *2 (Del. Ch. Sept. 26, 1985)).

34 *See* Pls.' Br. in Supp. of Their Joint Mot. for Partial Summ. J. at 12 n.8.

35 *See Certain Underwriters at Lloyd's, London v. Nat'l Installment Ins. Servs., Inc. ("Underwriters I")*, 2007 WL 1207106, at *7 n.26 (Del. Ch. Feb. 8, 2007, as revised Apr. 16, 2007)) ("[T]he Court assumes, without holding, that Maryland law governs."). The referenced footnote appears in the revised opinion, which coincidentally was issued one week after Plaintiffs' opening posttrial brief.

claims at issue in this lawsuit . . . ."[36] In its answering brief, NIIS urged the Court to apply Texas law to Drive's claims.[37] Drive's reply brief advocated holding NIIS to its previous choice of Maryland law, but did not otherwise respond to NIIS' argument for applying Texas law.[38] Drive now cites non-Delaware law for the proposition that "where a party acquiesces to the application of a certain state's law in briefings and at trial, such acquiescence is an implied stipulation that such state's law should apply and is a waiver of that party's right to argue another state's law applies in later proceedings."[39]

Assuming, only for purposes of addressing Plaintiffs' Motion for Reargument, Maryland law applies because NIIS waived the choice of law issue, this aspect of Plaintiffs' motion still would be denied. Under Maryland law, NIIS would have to prove the unavailability of alternate insurance coverage as an affirmative defense.[40] Based on my determination that Texas law applied and my interpretation of the governing Texas law, I did not need to decide for purposes of the Posttrial Opinion whether NIIS had

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36 POB at 17 n.12.

37 *See* DAB at 24-25.

38 *See* PRB at 18-19.

39 Mot. for Rearg. at 15 (citing *Neely v. Club Med Mgmt. Servs., Inc.*, 63 F.3d 166, 180 n.10 (3d Cir. 1995); *R.L. Clark Drilling Contrs. v. Schramm, Inc.*, 835 F.2d 1306, 1308 (10th Cir. 1987)).

40 *See Posttrial Op.*, 2007 WL 4554453, at *15 (Del. Ch. Dec. 21, 2007) (citing *Patterson Agency, Inc. v. Turner*, 372 A.2d 258 (Md. Ct. Spec. App. 1977)); *see also* DAB at 24-25; PRB at 18 (citing *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 499 (4th Cir. 1998))); Mot. for Rearg. at 16 (citing *Patterson Agency* for the proposition that "under Maryland law, NIIS would have had the burden of proving the unavailability of coverage as an affirmative defense.").

proven the unavailability of alternate insurance coverage as an affirmative defense. From the evidence presented at trial and for the reasons stated in the Posttrial Opinion, however, I am convinced NIIS satisfied this burden as well, and demonstrated Drive would not have been able to cover its damages under an alternate policy.[41]

2. The Court's application of Texas law

Drive also contends I erred in concluding Texas required Drive to prove the availability of alternate insurance coverage. In the Posttrial Opinion, I relied on *Lin v. Metro Allied Insurance Agency, Inc.*, for the proposition that "[i]mplicit in a case alleging negligent failure to obtain insurance is the requirement that the loss be one that is covered in *some* policy."[42] A colorable argument may be made I erroneously relied on *Lin* because *Lin* was an unpublished opinion, which is not precedential under Texas law.[43] My reliance on *Lin* for that proposition, however, is immaterial because the court in *Lin* relied on *Stinson v. Cravens, Dargen & Co.*,[44] a case widely cited for the proposition that

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41 *See Posttrial Op.*, 2007 WL 4554453, at *16-20.

42 *See* 2007 WL 4554453, at *15 n.179 (citing *Lin v. Metro Allied Ins. Agency, Inc.*, 2007 WL 2518996, at *5 (Tex. App. Aug. 31, 2007)).

43 *See* TEX. R. APP. PROC. 47.7 ("Opinions not designated for publication . . . have no precedential value but may be cited with the notation, '(not designated for publication).'").

44 579 S.W.2d 298, 300 (Tex. Civ. App. 1979) ("Implicit . . . is the requirement that the loss is one insured against in *some* policy.").

an "agent is not liable to the applicant for failing to procure a policy of insurance when . . . the insured did not prove the existence of such facts as are essential to recovery."[45]

Against this weight of authority, Plaintiffs cite later Texas precedent under the Texas Deceptive Trade Practices -- Consumer Protection Act ("DTPA").[46] The DTPA is to "be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices . . . ."[47] "[T]hat purpose is, in part, to encourage consumers to litigate claims that would not otherwise be economically feasible and to deter the conduct the DTPA forbids."[48] Plaintiffs cite *Parkins v. Texas Farmer Ins. Co.*, where the court noted "[the insured] was not required to offer any policy, that he either held or believed he held, into evidence in

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45 3 COUCH ON INS. § 46:64; *see also* 4 TEXAS TORTS AND REMEDIES § 70.10[5]; 10 AM. JUR. PROOF OF FACTS 3d 579 § 11 (citing *Stinson* as an example of "the majority rule"); *Bayly, Martin & Fay, Inc. v. Pete's Satire, Inc.*, 739 P.2d 239, 243 (Colo. 1987) (citing to *Stinson* for the majority rule, and distinguishing Maryland law as an example of the minority); *accord* 12-82 APPLEMAN ON INSURANCE LAW AND PRACTICE § 82.1[B] ("the agent's negligence does not proximate[ly] cause the insured's loss because no insurance could have been obtained covering the loss in question.").

46 *See* TEX. BUS. & COM. CODE ANN. §§ 17.41-17.63.

47 *Id.* § 17.44. The DTPA grants consumers a cause of action for false, misleading, or deceptive acts or practices. *See* TEX. BUS. & COM. CODE § 17.50(a)(1); *Amstadt v. United States Brass Corp.*, 919 S.W.2d 644, 649 (Tex. 1996) (citing *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 173 (Tex. 1980)). The DTPA defines a "consumer" as "an individual . . . who seeks or acquires by purchase or lease, any goods or services." TEX. BUS. & COM. CODE § 17.45(4).

48 *Amstadt*, 919 S.W.2d at 649. "DTPA claims generally are . . . punitive rather than remedial." *PPG Indus. v. JMB/Houston Ctrs. Ltd. P'ship*, 146 S.W.3d 79, 89 (Tex. 2004).

order to prove that he was injured under the DTPA,"[49] and *State Farm Fire & Casualty Co. v. Gros*, where the court noted, "in a suit involving a violation of the DTPA . . . it is not necessary for the plaintiff to prove that the promised coverage could have been obtained from another source in order to establish producing cause."[50]

Plaintiffs have made no showing, however, as to how the DTPA, which concerns consumer protection, applies to a pure negligence claim involving sophisticated commercial parties. To the contrary, the Texas Supreme Court explicitly has found the DTPA to be inapplicable to commercial transactions not involving consumers.[51]

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49 645 S.W.2d 775, 776 (Tex. 1983) (citing *Royal Globe Ins. Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688 (Tex. 1979)).

50 818 S.W.2d 908, 913 (Tex. App. 1991) (citing *Royal Globe Ins.* and *Parkins*).

51 "Only a 'consumer' can maintain a cause of action directly under the DTPA." *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 386 (Tex. 2000) (citing TEX. BUS. & COM. CODE § 17.50(a); *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 351 (Tex. 1987)). In *Amstadt*, as part of addressing the question "whether the Legislature intended that upstream suppliers of raw materials and component parts be liable under the DTPA when none of their misrepresentations reached the consumers," the court held:

> Although the DTPA was designed to supplement common-law causes of action, we are not persuaded that the Legislature intended the DTPA to reach upstream manufacturers and suppliers when their misrepresentations are not communicated to the consumer. Despite its broad, overlapping prohibitions, we must keep in mind why the Legislature created this simple, nontechnical cause of action: to protect consumers in consumer transactions. Consistent with that intent, we hold that the defendant's deceptive conduct must occur in connection with a consumer transaction . . . .

919 S.W.2d at 646, 649.

Therefore, I find *Stinson* states the law in Texas for proximate causation for negligence; that a Texas court recently followed *Stinson* in *Lin* buttresses that finding. I am convinced the record in this case demonstrates there was no alternate insurance coverage available to Drive that would have covered its losses. I therefore deny Plaintiffs' Motion for Reargument to the extent it contends the Court erred by applying Texas, rather than Maryland, law and in its application of Texas law.

3. The testimony of James Gilpin

Relatedly, Plaintiffs contend this Court misunderstood the testimony of James Gilpin, because I found he testified that subprime VSI insurance "would" have been as high as $220 per loan but the record at one point shows he stated only that it "could" be that high.[52] I concluded Gilpin's testimony did not "demonstrate the existence of an alternate VSI insurance policy for $80 or more per loan that would have covered the losses Drive claims . . . ."[53] Ultimately, I found "Drive has shown VSI insurance for subprime loans was available in 2001, but not that such coverage was available at prices or on terms comparable to the Policy, or that it would have covered Drive's loss."[54]

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[52] Gilpin testified as follows: "In the 2001 time frame a large -- [A] rated carrier would probably be in the $35 range. No deductible. Sub-prime could be as high as $220 with $500 to a thousand dollar deductible. That would probably be the range as I recall back in 2001." PX 107 (Gilpin Dep.) at 58. Citations in the form "PX" refer to Plaintiffs' trial exhibits.

[53] *Posttrial Op.*, 2007 WL 4554453, at *18 (Del. Ch. Dec. 21, 2007).

[54] *Id.* at *19.

I may have misstated Gilpin's testimony in the sense that "would" should have read "could," but I did not misapprehend his testimony. Moreover, the alleged misapprehension is immaterial and would not have changed the outcome of my decision. Whether Gilpin testified alternative subprime VSI insurance "could" cost $220 or "would" cost $220 per loan, the totality of his testimony still supports my conclusion on the unavailability of alternative coverage that realistically would have covered Drive's losses.[55] This is true whether Gilpin's testimony is considered in isolation or in conjunction with the other evidence recited in the Posttrial Opinion. Therefore, I deny Plaintiffs' Motion for Reargument on this testimonial issue.

Because Plaintiffs have not demonstrated any material misapprehension of law or fact that would have changed the outcome reflected in my Posttrial Opinion, their Motion for Reargument is denied in its entirety.

II. PLAINTIFFS' MOTION TO AMEND THE COMPLAINT

After the Posttrial Opinion, Plaintiffs moved to amend the Complaint for the fifth time to bring a claim by Drive under Texas Insurance Code Art. 21.21, also known as the Unfair Competition and Unfair Practices Act (hereinafter "UCUPA"), for unfair and deceptive trade practices in the business of insurance.[56] Plaintiffs contend, because NIIS

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55 *See id.* at *20 ("One plausible inference . . . is that the best policy Drive could have obtained would have cost somewhere between $125 and $220 per loan . . . .").

56 *See* Mot. to Amend at 1; *id.* Ex. 1 (proposed Fifth Am. Compl.) ¶¶ 64-68. Effective April 1, 2005, Art. 21.21 was re-codified in § 541 of the Texas Insurance Code. *See* Act of June 21, 2003, 78th Leg., R.S., ch. 1274, § 1, 2003 Tex. Gen.

first raised the issue of applying Texas law in its posttrial answering brief and I relied on Texas substantive law to decide proximate cause for Drive's negligent misrepresentation claim, they should be able to add a new claim at this late stage of the litigation.[57] NIIS answers that Plaintiffs' motion merely attempts to reargue portions of the case they already lost, is inequitable and impermissible under Rule 15, and in any case would be futile.[58]

Laws 3611. For convenience, I will refer to the relevant statute as Art. 21.21, as Plaintiffs do.

"The purpose of [the UCUPA] is to regulate trade practices in the business of insurance by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." Art. 21.21 § 1(a).

[57] *See* Pls.' Opening Br. in Supp. of Their Mot. for Leave to File a Fifth Amend. Compl. ("MTA POB") at 13-14. NIIS' answering brief and Plaintiffs' reply brief are designated respectively as "MTA DAB" and "MTA PRB."

[58] The parties have engaged in extensive briefing on the underlying merits of the Texas statutory claim. In fact, Plaintiffs' Motion to Amend also seeks the entry of judgment in their favor on that claim based on the evidence presented at trial. *See* MTA POB at 22; MTA PRB at 15. For its part, NIIS urges this Court to deny Plaintiffs' motion to amend as futile. "A court will not grant a motion to amend . . . if the amendment would be futile." *Cartanza v. LeBeau*, 2006 Del. Ch. LEXIS 63, at *7 (Apr. 3, 2006). An amendment is futile if it would not survive a motion to dismiss under Rule 12(b)(6). *Cartanza*, 2006 Del. Ch. LEXIS 63, at *7; *see also* 3 MOORE'S FEDERAL PRACTICE § 15.15[3]. "Where . . . the plaintiff makes no new allegations but rather requests additional relief, the amendments are futile if the existing allegations in the Complaint or the evidence presented to date cannot be read to posit circumstances entitling the plaintiff to the new relief it requests." *Cantor Fitzgerald, L.P. v. Cantor*, 1999 Del. Ch. LEXIS 134, at *4 (June 15, 1999) (citing *Nufarm v. RAM Research*, 1998 Del. Ch. LEXIS 182, at *12 (Sept. 15, 1998)). Because I deny Plaintiffs' Motion to Amend on procedural

A. The Applicable Standard

Plaintiffs moved to amend their Complaint under Court of Chancery Rule 15.[59] Generally, Rule 15 allows for liberal amendment in the interest of resolving cases on the merits.[60] Under Rule 15(a), a "party may amend the party's pleading . . . by leave of [the] Court . . . and leave shall be freely given where justice so requires." "A motion for leave to amend a complaint is always addressed to the discretion of the trial court."[61] "In the absence of undue prejudice, undue delay, bad faith, dilatory motive or futility of amendment, leave to amend should be granted."[62] In addition, Rule 15(b) provides in relevant part that when "issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."[63]

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grounds, I need not address the merits of the proposed statutory claim or whether the proposed amendment would be futile.

59 Rule 15 is modeled on FED. R. CIV. P. 15. *See Utz v. Utz*, 1998 Del. Ch. LEXIS 167, at *4 (Aug. 10, 1998). Delaware courts routinely look to the federal courts' application of FED. R. CIV. P. 15. *See, e.g.*, *id.*; *State ex rel. Structa-Bond, Inc. v. Mumford & Miller Concrete, Inc.*, 2002 Del. Super. LEXIS 206, at *8 (Sept. 17, 2002).

60 *See Utz*, 1998 Del. Ch. LEXIS 167, at *4; *see also Foman v. Davis*, 371 U.S. 178, 181-82 (1962).

61 *Bokat v. Getty Oil Co.*, 262 A.2d 246, 251 (Del. 1970).

62 *Cantor Fitzgerald*, 1999 Del. Ch. LEXIS 134, at *4 (citing *Fox v. Christina Square Assoc., L.P.*, 1995 Del. Ch. LEXIS 89, at *5 (June 19, 1995)).

63 Ct. Ch. R. 15(b). Further, such an amendment "may be made upon motion of any party at any time, even after judgment." *Id.*

B. May Plaintiffs Amend the Complaint Under Rule 15(a)?

1. Timeliness of the amendment?

Plaintiffs cite no Delaware case where a court has applied Rule 15(a) to allow an amendment after trial and the issuance of a posttrial opinion. Instead, Plaintiffs rely on one treatise, which states, "courts have not imposed any arbitrary timing restrictions on a party's request for leave to amend and permission has been granted under Rule 15(a) at various stages of the litigation: . . . [including] after a judgment has been entered . . . ."[64] The few examples discussed in that treatise, however, bear no resemblance to the circumstances of this case. Plaintiffs do not seek, for example, a mere realignment of the parties[65] or to advance a claim no longer barred for lack of jurisdiction.[66]

There is an inherent conflict between Rule 15(a)'s relatively liberal standard for amendment of the pleadings and the relatively stricter standard for setting aside or vacating a judgment under Rules 59 and 60. As respected commentators have noted:

> Most courts faced with the problem have held that once a judgment is entered the filing of an amendment cannot be allowed until the judgment is set aside or vacated under Rule

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64 6 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FED. PRACTICE AND PROCEDURE ("WRIGHT & MILLER") § 1488 (2008); *see also id.* n.11.

65 *See Saalfrank v. O'Daniel*, 533 F.2d 325, 330 (6th Cir. 1976) ("Rule 15 . . . may be availed of to permit an amendment after judgment and a realigning of parties. However, this may only be done if all parties have notice of the issues being tried and no prejudice will result.").

66 *See U.S. v. New York*, 82 F.R.D. 2, 3-5 (N.D.N.Y. 1978) (attorney general given leave to amend complaint to assert Title VII claims previously dismissed for want of jurisdiction).

> 59 or Rule 60. . . . *To hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy favoring finality of judgments and the expeditious termination of litigation.* Furthermore, the draftsmen of the rules included Rules 59(e) and 60(b) specifically to provide a mechanism for those situations in which relief must be obtained after judgment and the broad amendment policy of Rule 15(a) should not be construed in a manner that would render those provisions meaningless.[67]

The circumstances of this case are slightly different in that no final judgment has been entered yet.[68] Nevertheless, for purposes of Plaintiffs' motion, I see no basis for treating the Posttrial Opinion with less deference than a final judgment in terms of the quoted policy interests in favor of the expeditious termination of litigation. The fact that this protracted litigation is now at the stage of a motion for reargument under Court of Chancery Rule 59(f), rather than a motion to alter or amend a judgment, is immaterial.[69]

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[67] 6 WRIGHT & MILLER § 1489 (emphasis added). Analogously, at least one court has denied a motion to amend an answer because it was "a transparent attempt on the part of the defendants to manufacture a defense after their liability had already been established." *Ford Motor Co. v. Auto Supply Co.*, 661 F.2d 1171, 1176 (8th Cir. 1981) (affirming, and quoting, lower court's decision to deny motion to amend after summary judgment).

[68] Subject to the pending Motions for Reargument and to Amend, however, the parties have agreed to a proposed form of Final Order and Judgment. *See* Letter from Francis J. Murphy, Plaintiffs' counsel, to the Court (Jan. 14, 2008).

[69] NIIS also contends Plaintiffs' Motion to Amend should be denied as an untimely motion for a new trial under Rule 59(a) or for reargument under 59(f). Under Rule 59(a), I may grant a new trial, which would allow me to "open the judgment if one has been entered, take additional testimony, amend or make new . . . legal conclusions, and direct the entry of a new judgment." Rule 59(b) provides that a motion for a new trial must be served within ten days of entry of judgment. A motion for reargument under Rule 59(f) must be filed within five days after the

A number of courts, exercising their discretion under Rule 15(a), have refused to allow an amendment after a posttrial opinion when the moving party had an opportunity to assert the amendment during trial but waited until after judgment before requesting leave; these courts based their conclusions on the moving party's unreasonable delay.[70] Here, Plaintiffs have had the opportunity to make their claim under UCUPA since the beginning of the litigation. In fact, Drive's original complaint in its litigation in Texas against Underwriters and the three brokers (NIIS, Bankers, and Craven) included claims under Article 21 of the Texas Insurance Code. Still, Drive did not include such a claim in the initial complaint it later filed in this action or in any of the three amendments to the complaint it filed before trial. Plaintiffs' decision not to pursue claims under Texas law was purposeful, and may have been made to obtain a more lenient standard for finding

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filing of the court's opinion. The substantive issues raised by Plaintiffs' motion under Rule 15(a) are closely related to the issues raised in their Motion for Reargument under Rule 59(f). Yet, Plaintiffs did not file their Motion to Amend until January 13, 2008, more than ten days after this Court's Posttrial Opinion on December 21, 2007. Thus, the Motion to Amend is arguably also untimely under Rule 59.

[70] 6 WRIGHT & MILLER § 1489 (extensive citations omitted); *cf. Kiser v. Gen. Elec. Corp.*, 831 F.2d 423, 427-28 (3d Cir. 1987) ("[M]ere delay is not by itself enough to justify denial of leave to amend. The delay, to become a legal ground for denying a motion to amend, must result in prejudice to the party opposing the amendment . . . .") (citing *Sanders v. Clemco Indus.*, 823 F.2d 214, 217 (8th Cir. 1987)); *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 263 (Del. 1993) ("Delay alone is not a sufficient basis to deny amendment of the pleadings, although inexcusable delay . . . may justify denial.").

proximate cause under Maryland law. In any event, I find Plaintiffs' delay inexcusable.[71] Their chance to advance a claim under Article 21.21 in this action has come and gone.[72]

2. NIIS would be unduly prejudiced

I also find that allowing Plaintiffs to file their fifth amended complaint would be unduly prejudicial to NIIS because it has not had the opportunity to prepare to meet the unpleaded issues Plaintiffs seek to insert into the litigation at this late stage.[73] "'Prejudice to the nonmoving party is the touchstone for the denial of an amendment.'"[74]

Article 21.21 provides a separate cause of action for negligent misrepresentation.[75] NIIS is prejudiced by not having had the opportunity to conduct this litigation and the trial in the context of a pending claim under Article 21.21, which provides that a claimant

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71 This litigation has been pending since August 2002. During the first several years it was pending, Plaintiffs had no reason to presume Texas law would not be applicable. This Court, for example, did not render the *Underwriters I* summary judgment opinion until February 2007.

72 A plaintiff's request for leave to amend may be denied when it reasserts a previously abandoned claim. *See* 3 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 15.15[3] (2007) (citing *Louisiana v. Litton Mortgage Co.*, 50 F.3d 1298, 1303-04 (5th Cir. 1995)).

73 "Prejudice in this context means a lack of opportunity to prepare to meet the unpleaded issue." 6A WRIGHT & MILLER § 1493.

74 *Zen Invs., LLC v. Unbreakable Lock Co.*, 2008 U.S. App. LEXIS 8898, at *4-5 (3d Cir. Apr. 24, 2008) (quoting *Boileau v. Bethlehem Steel Corp.*, 730 F.2d 929, 938 (3d Cir. 1984)).

75 *See St. Luke's Hosp. v. Great West Life & Annuity Ins. Co.*, 38 F. Supp. 2d 497, 502 n.11 (S.D. Tex. 1999) (citing *Hermann Hosp. Sys. v. MEBA Med. & Benefits Plan*, 959 F.2d 569, 577 (5th Cir. 1992)); *Memorial Hosp. Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236, 244 (5th Cir. 1990) (citing *Royal Globe Ins. Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688, 693 (Tex. 1979)).

like Drive may recover its losses under the insurance Policy without regard to whether it could prove the existence of alternate coverage.[76]

Furthermore, Plaintiffs' claim in their proposed fifth amended complaint to recover their costs and attorneys' fees under Article 21.21 is unduly prejudicial. Before their Motion to Amend, Plaintiffs did not assert any basis for recovering the attorneys' fees they incurred after the date of their settlement other than the "American Rule."[77] Under their proposed amendment, Plaintiffs seek to recover any fees available to them under Texas Insurance Code Article 21.21 § 16.[78] The belated addition of this claim also would cause undue prejudice to NIIS. Presumably, NIIS constructed its legal strategy based on the amount of potential damages it was likely to face if it was unsuccessful.

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[76] "[I]n a suit involving a violation of the DTPA as well as article 21.21 of the Texas Insurance Code, it is not necessary for the plaintiff to prove that the promised coverage could have been obtained from another source in order to establish producing cause." *State Farm Fire & Cas. Co. v. Gros*, 818 S.W.2d 908, 913 (Tex. App. 1991) (citing *Royal Globe Ins.*, 577 S.W.2d 688; *Parkins v. Texas Farmers Ins. Co.*, 645 S.W.2d 775 (Tex. 1983)).

For purposes of this memorandum opinion, I need not decide whether NIIS' conduct would be covered by Art. 21.21, whether the holding in *Gros* would apply to NIIS' new statutory claim, or even if that holding would apply to nonconsumer transactions as covered under Art. 21.21. *See generally Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 385-87 (Tex. 2000) (analyzing interplay between Art. 21.21 and DTPA).

[77] "[U]nder the 'American Rule,' Delaware courts do not award attorneys' fees absent some special circumstance." *Estate of Carpenter v. Dinneen*, 2008 Del. Ch. LEXIS 40, at *68 (Mar. 26, 2008) (citing *Slawik v. State*, 480 A.2d 636, 639 (Del. 1984)).

[78] Pls.' Fifth Am. Comp. ¶ 68; *see also* MTA POB at 20-21.

Had NIIS known it might be liable for Plaintiffs' reasonable attorneys' fees under Art. 21.21, it may have proceeded differently.[79]

For the reasons stated, I will not grant Plaintiffs' request for leave to amend their Complaint under Rule 15(a).

C. May Plaintiffs Amend their Complaint Under Rule 15(b)?

Plaintiffs also seek leave to amend under the first part of Rule 15(b), which authorizes amendment of the pleadings to conform to issues "tried by express or implied consent of the parties."[80] In that context, Rule 15(b) is designed to cure the situation where "the course of the trial departs so materially from the image of the controversy pictured in the pleadings or by the discovery process that it becomes necessary to adjust the pleadings to reflect the case as it actually was litigated in the courtroom."[81] NIIS never expressly or implicitly consented to try the proposed Texas statutory claim in this

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79 *See In re Kanak*, 85 B.R. 483, 488 (Bankr. N.D. Ill. 1988) ("Defendant would be denied a fair opportunity to defend because he had no chance to consider a different trial strategy or offer additional evidence relating to the merits or to the [attorneys'] fees requested. Such denial amounts to prejudice."). At the least, NIIS would have had an opportunity under Art. 21.21 § 16A to cap its exposure through the use of UCUPA's settlement and mediation framework.

80 Ct. Ch. R. 15(b). Plaintiffs did not invoke the second part of Rule 15(b), which allows for amendment of the pleadings in the context of an objection at trial that certain evidence is not within the issues framed by the pleadings. *See id.*

81 6A WRIGHT & MILLER § 1491. Furthermore, Rule 15(b) "is written upon the assumption that pleadings are not an end in themselves but are designed to assist, not deter, the disposition of litigation on its merits. . . . A trial judge in his discretion must always permit or deny the amendment by weighing the desirability of ending the litigation on its merits against possible prejudice or surprise to the other side." *Bellanca Corp. v. Bellanca*, 169 A.2d 620, 622 (Del. 1961).

action. Furthermore, the proposed amendment would be unduly prejudicial to NIIS for the reasons previously discussed.[82]

1. NIIS did not consent

Under the relevant part of Rule 15(b), the parties must consent, explicitly or implicitly, to the introduction of evidence of the unpleaded issue. Plaintiffs do not contend NIIS ever explicitly consented to Drive's Texas statutory claim; I therefore address whether NIIS implicitly may have consented to such a claim. Implied consent generally arises in two situations: (1) where unpleaded issues are introduced outside the complaint in another pleading or document and then treated by the opposing party as if pleaded; or (2) where the opposing party acquiesced to the introduction of evidence that related only to the unpleaded issue.[83] According to Plaintiffs, NIIS consented under the second scenario.

Plaintiffs contend NIIS impliedly consented to the additional UCUPA claim because NIIS itself asked this Court to apply Texas law, and "cannot now pick and choose which parts of Texas law should apply."[84] In that regard, I note that "[i]mplied consent . . . is . . . difficult to establish and seems to depend on whether the parties recognized that an issue not presented by the pleadings entered the case at trial. If they

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82 The first part of Rule 15(b) "does not expressly refer to prejudice as a basis for denying an amendment to conform to issues that have been introduced without objection; it only speaks of consent. Nonetheless, consideration of this factor is a valid exercise of the court's discretion . . . ." 6A WRIGHT & MILLER § 1493.

83 *See* 3 MOORE'S FEDERAL PRACTICE § 15.18[1].

84 MTA PRB at 14.

do not, there is no consent and the amendment cannot be allowed."[85] In other words, "it must appear that parties understood evidence introduced without objection was aimed at the unpleaded issue in order to constitute implied consent."[86] In arguing for the application of Texas law, NIIS did not concede that Plaintiffs' claims included *any* statutory cause of action that might have been available to Plaintiffs under Texas law, whether or not it had been pled. Rather, the parties tried this case based on the common law claims asserted in the operative pleadings. Plaintiffs have not shown any basis from which this Court reasonably could infer NIIS recognized that evidence brought forth in trial was designed to support a claim by Plaintiffs under the UCUPA. Indeed, the fact that Drive included such a claim in the abandoned Texas action, but did not assert it in this action supports the opposite conclusion. Hence, I find NIIS did not implicitly consent to the addition of a UCUPA claim at trial.

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85 6A WRIGHT & MILLER § 1493.

86 *Laird v. Buckley*, 539 A.2d 1076, 1080 (Del. 1988) (citing *MBI Motor Co. v. Lotus/East, Inc.*, 506 F.2d 709, 711 (6th Cir. 1974)). The Supreme Court also cited *Sw. Stationery & Bank Supply v. Harris Corp.*, 624 F.2d 168, 171 (10th Cir. 1980), for the proposition that implied consent should not be inferred when "evidence relevant to a properly pleaded issue also incidentally tends to prove [a] fact not pleaded." *Id.*; *see also Kanak*, 85 B.R. at 488 ("Where evidence claimed to show that an issue was tried by consent is relevant, as here, to an issue already in the case, and there was no indication when the evidence was offered that the plaintiff intended to raise a new issue or theory of recovery, amendment may be denied in the discretion of the trial court.") (citing *Hardin v. Manitowoc*, 691 F.2d 449, 457 (10th Cir. 1982)).

2. NIIS would be prejudiced

Although mere delay is generally an insufficient ground for denial of a motion to amend under Rule 15, "when the delay combines with other extrinsic factors that result in actual prejudice to the party opposing the motion, denial is appropriate."[87]

In *Miller v. Hob Tea Room*, the court found a plaintiff could not, "three months after the trial[,] . . . be permitted to amend to reinstate a theory consciously abandoned."[88] The plaintiff's proposed amendments would have impermissibly reintroduced theories the plaintiff had consciously abandoned earlier in the litigation.[89] In this case, Drive and Underwriters waited until after trial and after the Court's Posttrial Opinion to move to amend to assert the Texas statutory claim. The record shows, however, Plaintiffs consciously had abandoned that claim. Drive, a Texas corporation, elected not to include its Texas statutory claim when it filed this action, despite having asserted it in the earlier Texas litigation. Having made that strategic decision, Plaintiffs now must abide by it.

The primary consideration in determining whether to grant leave to amend under Rule 15(b) is prejudice to the opposing party. The principal test for prejudice when a party seeks to assert a new theory "is whether the opposing party was denied a fair

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87 *Johnson v. Trueblood*, 629 F.2d 287, 294 (3d Cir. 1980); *see also* 3 MOORE'S FEDERAL PRACTICE § 15.15[2].

88 75 A.2d 577, 578 (Del. Ch. 1950).

89 *Id.*

opportunity to defend and to offer additional evidence on that different theory."[90] "This rule obtains because an opponent must be given a fair chance to plan his defense to meet pleaded allegations."[91] Here, I conclude it would be unjust to subject NIIS to the UCUPA claim, especially since Plaintiffs' own strategic decision not to pursue that claim contributed materially to the delay in raising it.[92]

Finally, Plaintiffs' Motion to Amend under Rule 15(b) to add a new claim after losing an argument after trial is atypical. As the court noted in *DRR, L.L.C. v. Sears, Roebuck & Co.*, "[t]ypically, a litigant seeks to amend under Rule 15(b) after successfully arguing at trial some legal or factual matter that was not officially pled."[93] The plaintiff in the *DRR* case moved for reargument and to amend its complaint under Fed. R. Civ. P. 15(b) to add a new claim for negligent misrepresentation after the court had granted

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90 *Foraker v. Chaffinch*, 501 F.3d 231, 245 (3d Cir. 2007) (quoting *Evans Prods. Co. v. West Am. Ins. Co.*, 736 F.2d 920, 924 (3d Cir. 1984)); *see also* 3 MOORE'S FEDERAL PRACTICE § 15.15[2]. Thus, "when a plaintiff proposes under [Rule 15(b)] to amend a pleading to present an issue tried by 'implied consent,' even though that issue is relevant to a separate issue already present in the case, it would be unjust to the opposing party to consider a new theory of recovery after trial is complete." *In re Kanak*, 85 B.R. 483, 488 (Bankr. N.D. Ill. 1988) (citing *Cook v. City of Price*, 566 F.2d 699, 702 (10th Cir. 1977)).

91 *Cook*, 566 F.2d at 702 (citing *Otness v. United States*, 23 F.R.D. 279 (D. Ala. 1959)).

92 *See Darling Int'l, Inc. v. Baywood Partners, Inc.*, 2007 U.S. Dist. LEXIS 76826, at *8 (N.D. Cal. Oct. 2, 2007) ("[D]enial of the amendment is not unjust in the instant case since . . . [plaintiff] clearly contemplated bringing a claim for unjust enrichment but then made the strategic decision not to pursue the claim. Any delay in raising the unjust enrichment claim is largely of [plaintiff's] own making.")

93 171 F.R.D. 162, 165 (D. Del. 1997).

summary judgment to the defendants on the plaintiff's claim of fraud and strict liability. In denying the plaintiff's motion, the court made the following observation, which squarely applies to this case:

> The effect of the amendment [the plaintiffs] propose would be not to conform the pleadings to a judgment they have won, but to jeopardize and perhaps to overthrow a judgment they have lost. If amendment under 15(b) were permitted, a losing party, by motions to amend and rehear, could keep a case in court indefinitely, trying one theory of recovery or defense after another, in the hope of finally hitting upon a successful one. Courts draw a dividing line between this use of amendment and those uses aimed at conformity.[94]

Rule 15(b) motions "are intended to correct the theory of an existing claim and not to assert new and different claims."[95]

For all of these reasons, I deny Plaintiffs' Motion to Amend.

III. DEFENDANT'S MOTION TO FILE A SUR-REPLY

NIIS requests leave to file a sur-reply brief in response to Plaintiffs' brief in support of their Motion to Amend and their later reply brief. NIIS contends Plaintiffs' reliance on Rule 15(a) in their reply brief is prejudicial to NIIS because Plaintiffs' opening brief was based on Rule 15(b). The acceptance of a sur-reply brief is left to the

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94 *Id.* (punctuation omitted) (quoting *Hart v. Knox County*, 79 F. Supp. 654, 658 (E.D. Tenn. 1948)). *Cf. Bauler v. Pressed Steel Car Co.*, 81 F. Supp. 172, 174-75 (N.D. Ill. 1948) (losing party was granted leave to amend within context of a statute passed post judgment with retroactive effect).

95 *Pickwick Entm't, Inc. v. Theiringer*, 898 F. Supp. 75, 78 (D. Conn. 1995).

court's discretion.[96] Having decided to deny Plaintiffs' Motion to Amend based on the primary briefing on that motion, I deny NIIS' Motion for Sur-Reply as moot.

IV. CONCLUSION

For the reasons stated, I deny Plaintiffs' Motion for Reargument and Motion to Amend the Complaint.[97] Based on those rulings, I also deny NIIS' Motion for Sur-Reply as moot.

IT IS SO ORDERED.

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96 *See* Ct. Ch. R. 171(a) ("Unless otherwise ordered, no additional briefs or letters containing argument shall be filed without first procuring Court approval."); *see also Loppert v. WindsorTech, Inc.*, 2004 Del. Ch. LEXIS 201, at *1-2 (Sept. 21, 2004) (permitting plaintiff's sur-reply, "which is not consistent with the Court's rules," because it was necessitated by defendant's failure to comply with Rule 7(b)(1)); *Bank of Del. Corp. v. First Nat'l Bank of Georgetown*, 1983 Del. Ch. LEXIS 541, at *2 (Oct. 31, 1983).

97 As this memorandum opinion resolves the parties' outstanding motions, I am entering concurrently a final order and judgment in accordance with the parties' agreed upon form and an order for costs.