IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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-NC
National Installment Insurance Services, Inc.; Craven and Partners Limited, and Bankers Agency, Inc.	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: December 15, 2006
Decided: February 8, 2007

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PARSONS, Vice Chancellor.

In this case, Drive Financial Services, L.P. ("Drive") 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") have filed suit against three insurance brokers, Bankers Agency, Inc. ("Bankers"), National Installment Insurance Services, Inc. ("NIIS") and Craven and Partners Limited ("Craven"). Drive claims that Bankers, NIIS and Craven are liable for negligence and negligent misrepresentation in connection with the procurement of Policy No. 390/J145210, which is an insurance policy meant to cover Drive's portfolio of automobile loans (the "Policy"). Underwriters is asserting a claim against Defendants for negligent misrepresentation.

Underwriters has moved for summary judgment on its claim that NIIS and Craven (collectively, the "Defendants") made material misrepresentations to Underwriters when they solicited the Policy from Underwriters. Drive seeks summary judgment on its claim that NIIS and Craven are liable for negligence in connection with their procurement of the Policy.[1] Defendants have opposed these motions, and NIIS has moved for summary judgment against Drive on the negligence claim, arguing that Drive has not, and cannot, prove damages.

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[1] Plaintiffs' motion for partial summary judgment originally included Bankers also, and Bankers filed an opposition to the motion. At argument, however, Plaintiffs represented that they no longer sought summary judgment against Bankers and had entered into settlement negotiations with that defendant. Transcript of Argument on December 15, 2006 ("Tr.") at 9-10, 19.

I. BACKGROUND AND FACTS

A. The Parties

Plaintiff Drive is a Delaware limited partnership that manages a portfolio of automobile loans. Drive alleges that at all times during the procurement of the Policy and thereafter, it was in the business of acquiring and servicing subprime vehicle loans, and Defendants have not seriously questioned that assertion.[2] Drive commenced operations on August 1, 2000 when the Bank of Scotland purchased 49% of Drive's predecessor, First City Funding Corp., and changed the name to Drive Financial Services L.P.[3] First City Funding and its predecessor, Auto Loan Trust, had made automobile loans since at least 1995.[4]

Plaintiff Underwriters consists of numerous syndicates trading at Lloyd's, London who severally subscribed to the Policy, a Lender's Single Interest insurance policy issued to Drive covering loans attaching during the period February 1, 2001 to February 1, 2002.[5] Lender's Single Interest insurance is also commonly known as, among other things, Vendor's Single Interest ("VSI") insurance. With VSI insurance, a lender of automobile loans is reimbursed when a delinquent borrower's collateral is repossessed

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2 Pls.' Br. in Supp. of Their Joint Mot. for Partial Summ. J. ("POB") at 6; NIIS's Ans. Brief in Oppn. to Pls.' Joint Mot. for Partial Summ. J. against Defs. ("NIIS Ans. Brief") at 2.

3 Pls.' Third Am. Compl. ("Compl.") ¶ 4.

4 POB Ex. G.

5 Compl. ¶ 3.

and there is either uninsured physical damage or the collateral is unrecoverable.[6] If the Policy had remained in effect, claims made after February 1, 2002 would have been covered because the Policy contained so-called "run off" or "tail" coverage, which would have continued to protect Drive throughout the life of each covered loan, so long as the loan originated during the Policy period.

Defendants Bankers and NIIS are Maryland corporations from whom Drive solicited VSI insurance.

Defendant Craven is a private limited company registered in England. Craven is a registered Lloyd's, London broker who solicits insurance from Lloyd's, London's market on behalf of those seeking insurance, including those seeking insurance against U.S. liabilities.[7]

B. Facts and Procedural Background

In October 2000, Drive sent Bankers a policy application for VSI insurance. Bankers then enlisted NIIS, a managing general agent, to help obtain insurance on behalf of Drive. NIIS in turn enlisted Craven to solicit coverage from Lloyd's, London. Craven succeeded in obtaining the Policy from Underwriters. The VSI insurance policy Craven obtained is the Policy that represents the source of this dispute. As is the custom in the

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6 POB at 1 n.1.

7 Compl. ¶ 6.

London insurance market, Craven dealt exclusively with NIIS and had no contact with either Drive or Bankers.[8]

The designations of "A," "B," "C" and "D" quality loans are terms of art in the insurance industry denoting risks involved in a particular type of loan. Prime paper is A quality. B quality is nonprime. C and D class loans are subprime. A quality paper poses the least risk of default by the borrower, and D quality the greatest.

In 2000, when Drive submitted its policy application for VSI insurance, it alleges that its loan portfolio consisted entirely of C and D class loans.[9] NIIS represented to Craven that (1) Drive's expiring portfolio consisted of B and C class loans, and (2) that Drive's future portfolio would consist of A and B quality loans.[10] Craven made these same representations to Underwriters when it solicited the insurance at Lloyd's. Underwriters issued the Policy, which only covers A and B class paper, for loans attaching during the 12 month period beginning February 1, 2001. The Policy Cover Note (a brief, but binding, summary of the Policy and its major conditions) that Craven provided to NIIS clearly indicates in the "Information" section that Underwriters was insuring a portfolio of loans, 90% of which would be A class paper and 10% of which

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8 Schematically, the parties' relationships and interactions can be represented by the chain, Drive (insured) ↔ Bankers (primary domestic insurance broker) ↔ NIIS (secondary domestic insurance broker) ↔ Craven (London insurance broker) ↔ Underwriters (London insurer). It should be noted, however, that the chain is not completely linear; NIIS, for example, had communications not only with Bankers and Craven, but also with Drive.

9 POB at 6.

10 POB Ex. G.

would be B class.[11] The Cover Note NIIS sent to Bankers was almost an exact duplicate of the Craven-to-NIIS Cover Note, including Craven's letterhead and authorizing signatures. The NIIS-to-Bankers Cover Note, however, excludes the part of the "Information" section limiting the insurance to a portfolio consisting of 90% A and 10% B paper, along with information relating to commissions.[12] Bankers faxed to Drive a duplicate of the NIIS-to-Bankers Cover Note; thus, it likewise omits any mention of the limitations on the Policy.[13] Drive was not otherwise informed of the limited and incommensurate nature of the coverage it received. Thus, in the end, Drive did not know that it was only insured for A and B quality loans, despite the fact that the loans it carried generally were of lesser quality. Underwriters, on the other hand, did not know that they had insured a portfolio of subprime loans.

When Drive began reporting losses that were much higher than what normally would be expected from a portfolio of A and B quality loans, Underwriters investigated and discovered that Drive was a subprime lender. In August 2002, Underwriters filed suit against Drive seeking declaratory relief and rescission of the Policy, or in the alternative, reformation of the Policy to conform it to the representations made by Drive, Bankers, NIIS and Craven. In December 2002, Underwriters and Drive entered into a settlement agreement which had the effect of rescinding the Policy (the "Settlement

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11 POB Ex. H.

12 Answering Br. of Def. Craven and Partners Ltd. in Opp'n to Pls.' Mot. for Partial Summ. J. ("Craven Ans. Br.") Ex. E.

13 POB Ex. K.

Agreement"). Pursuant to the Settlement Agreement, Underwriters refunded Drive's premium along with $783,728 for "surplus lines tax and brokerage and commissions retained by Drive's brokers."[14] Drive credited Underwriters for claim payments Drive received under the Policy.[15]

Thereafter, Drive realigned itself with Underwriters and they now jointly are pursuing this litigation against Bankers, NIIS and Craven. Plaintiffs, in their Third Amended Complaint ("Complaint"), seek damages for Defendants' negligence in failing to procure the requested coverage, failing to advise Drive that the requested coverage was not obtained, obtaining a voidable policy and failing to advise Drive of the limitations on the coverage that was obtained. Plaintiffs also assert claims of negligent misrepresentation against Defendants. As mentioned above, Drive seeks summary judgment on its negligence claim, while Underwriters has moved for summary judgment on its negligent misrepresentation claim. In a cross motion, NIIS seeks summary judgment on Drive's negligence claim on the ground that Drive has not suffered any damages. After extensive briefing, the Court heard argument on these motions on December 15, 2006. Based on the parties' arguments, briefs and supporting evidence, the Court's opinion is as follows.

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14 POB at 9.

15 *Id*.

II. ANALYSIS

C. Summary Judgment Standard

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[16] When considering a motion for summary judgment, the evidence and the inferences drawn from the evidence are to be viewed in the light most favorable to the nonmoving party.[17]

1. Jurisdiction

In its answering brief, NIIS objects to this Court's jurisdiction to adjudicate Drive's negligence claim. NIIS concedes that the Court of Chancery has exclusive jurisdiction over causes of action for negligent misrepresentation, or what is sometimes called "equitable fraud."[18] NIIS argues, however, that Drive has not adequately pled a claim for negligent misrepresentation and that Underwriters' claims against Drive for the equitable remedies of reformation and rescission of the Policy are moot because of the Settlement Agreement, and thus cannot provide a basis for this Court's jurisdiction. According to NIIS, therefore, Drive's only well-pleaded claim is for negligence, which is a legal cause of action for which Drive, if successful, has an adequate remedy at law.

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16 Ct. Ch. R. 56(c).

17 *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).

18 *Mark Fox Group, Inc. v. E.I. du Pont de Nemours & Co.*, 2003 Del. Ch. LEXIS 71, at *18 (July 2, 2003).

Whether or not Drive has adequately pleaded a claim for relief based on negligent misrepresentation, this Court can adjudicate Drive's negligence claim under the equitable "clean-up" doctrine. "[I]t is settled law that when equity obtains jurisdiction over some portion of the controversy it will decide the whole controversy and give complete and final relief, even though that involves the grant of a purely law remedy such as a money judgment."[19] The general policy underlying the clean-up doctrine is judicial economy and fairness to the parties. More specifically, this Court will exercise its discretion to hear the entire controversy if, for example, there are common issues of fact underlying both the legal and equitable claims or if doing so will avoid multiple lawsuits, promote judicial efficiency, avoid great expense and afford complete relief in one action.[20]

Setting aside the issue of whether the Settlement Agreement has mooted the reformation and rescission claims, there is no dispute that Underwriters adequately has pled a claim for negligent misrepresentation and that this Court has jurisdiction to hear it. Moreover, Drive's claim for negligent misrepresentation, although not the subject of a motion for summary judgment, is still before this Court. NIIS has not moved to dismiss that claim, despite having had notice of it since Plaintiffs filed their Complaint in July 2004, well over two years ago. As is set forth more fully in Sections D and E, *infra*, the resolution of Underwriters' negligent misrepresentation claim will require determination of many of the same factual issues involved in Drive's negligence claim. This Court's

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19 *Wilmont Homes, Inc. v. Weiler*, 202 A.2d 576, 580 (Del. 1964).

20 *Getty Ref. & Mktg. Co. v. Park Oil, Inc.*, 385 A.2d 147, 150 (Del. Ch. 1978).

exercise of jurisdiction over the negligence claim, therefore, will save both the public and the parties the expense of duplicative litigation and provide the parties with final relief in one action. Thus, the Court rejects NIIS's jurisdictional challenge and will hear Drive's negligence action.

Drive has moved for summary judgment on its negligence claim. Before addressing that motion, however, I believe it will be helpful to take up Underwriters' motion for summary judgment on its negligent misrepresentation claim.

D. Underwriter's Motion for Summary Judgment for Negligent Misrepresentation

"To state a *prima facie* case for equitable fraud, plaintiff must … satisfy all the elements of common law fraud with the exception that the plaintiff need not demonstrate that the misstatement or omission was made knowingly or recklessly."[21] Therefore, to adequately plead a claim for negligent misrepresentation, a plaintiff must allege that the defendant (1) made a false representation, usually one of fact; (2) with an intent to induce the plaintiff to act or to refrain from acting; (3) which caused the plaintiff, in justifiable reliance on the representation, to act or refrain from acting; and (4) caused damage to the plaintiff as a result of such reliance.[22]

Plaintiffs' primary allegations of misrepresentation are set forth in paragraph 63 of the Complaint, where they aver that Defendants represented to Underwriters that Drive's

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[21] *Mark Fox Group*, 2003 Del. Ch. LEXIS 71, at *17 (quoting *Zirn v. VLI, Corp.*, 681 A.2d 1050, 1061 (Del. 1996)).

[22] *Mark Fox Group*, 2003 Del. Ch. LEXIS 71, at *16-17; *Zirn*, 681 A.2d at 1060-61.

future portfolio would consist of 90% A and 10% B class loans. Plaintiffs also allege that Defendants represented that Drive's future portfolio would not contain any C or D class loans. Additionally, the Complaint alleges that Defendants informed Underwriters that Drive would attempt to verify that loan applicants had primary, first-party insurance in place to cover losses.[23] Underwriters' motion for summary judgment, however, is premised entirely on the allegation that Defendants misrepresented the content of Drive's expiring loan portfolio and the nature of Drive's business as a subprime lender.[24] Specifically, Plaintiffs allege, and have produced competent evidence that, Defendants represented to Underwriters that Drive's expiring portfolio consisted of B and C class loans, and that Defendants failed to inform Underwriters that the portfolio, in fact, contained D quality loans.[25]

In addition to opposing Underwriters' motion on substantive grounds, Defendants also argue that the factual allegations of misrepresentation set forth in the motion differ from those set forth in Plaintiffs' Complaint. Because of this, Defendants claim they failed to receive proper notice of Plaintiffs' claims from the Complaint and have been prejudiced because they failed to ask certain questions, seek certain documents and pursue relevant lines of inquiry during the discovery process. Plaintiffs' response to this

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23 Compl. ¶ 63.

24 Tr. at 16-18. Plaintiffs have not abandoned the other aspects of their misrepresentation claims. Underwriters simply elected to limit their motion for summary judgment to this one category of alleged misrepresentations.

25 POB at 17; POB Ex. G.

argument is weak.[26] At argument, Plaintiffs did not dispute that the allegations of misrepresentation in the Complaint differ from the allegations in the motion for summary judgment. Instead, they argued that the misrepresentations are documents submitted as exhibits to the Complaint and therefore Defendants have had sufficient notice of them.[27]

The Court is concerned by the fact that Plaintiffs' *third* amended complaint still does not set forth the specific allegations that form the basis for an aspect of Underwriters' claim against Defendants for negligent misrepresentation. Court of Chancery Rule 9(b) requires that fraud be pled with particularity. This rule almost certainly extends to negligent misrepresentation (equitable fraud) as well,[28] and it is highly doubtful that mere oblique references to documents attached to a complaint as exhibits suffice to meet this particularity requirement. Nevertheless, I decline to deny

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[26] Although Drive has made a claim against Defendants for negligent misrepresentation, it has not sought summary judgment on that claim. I refer to the "Plaintiffs" throughout most of this section because, as discussed below, Drive has moved for summary judgment against Defendants for negligence in procuring a voidable insurance policy. The voidability of the Policy is grounded in the same alleged misrepresentations that form the basis of Underwriters' claim for negligent misrepresentation. Because Drive and Underwriters' arguments as to these two claims overlap considerably, I refer to them as "Plaintiffs" for purposes of exposition.

[27] Tr. at 54-56.

[28] *See In re Dataproducts Corp. S'holders Litig.*, 1991 Del. Ch. LEXIS 149, at *20 (Aug. 22, 1991).

Underwriters' motion for these procedural reasons because I find that the motion fails on the merits.[29]

Having reviewed the parties' submissions, the Court denies Underwriters' motion because there are disputed issues of material fact regardless of whether one looks at the factual allegations set forth in the Complaint, or those set forth in the motion for summary judgment. First I address the allegations in the Complaint. Although Drive contends that its future portfolio was never intended or projected to be 90% A and 10% B class loans,[30] NIIS has produced testimony that Drive told them that their lending business would change because the Bank of Scotland had become a major shareholder and had set forth new credit criteria. Robert William Adams, a principal at NIIS who communicated with both Drive and Craven, testified in his deposition that he spoke on the telephone to Steve Trent, the Executive Vice President of Drive, and that Trent told him that Drive's loan portfolio in the future would be mostly prime paper.[31] In late 2001, Adams sent a letter to Craven indicating that he had several communications with Drive's

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29 Furthermore, in the circumstances of this case, I find NIIS's procedural objection unpersuasive. The challenged allegations of misrepresentation contained in the motion for summary judgment are grounded in documents well known to Defendants. In addition, Defendants have failed to demonstrate any substantial prejudice from the allegedly deficient pleading or to pursue any of the procedural means available to minimize possible prejudice, such as a motion to dismiss this aspect of Underwriters' claims or for additional discovery under Rule 56(f). Thus, Plaintiffs may seek leave of the Court to amend the Complaint to conform it to the evidence.

30 POB at 7.

31 Adams Dep. at 116-17.

Chief Operating Officer who had indicated to Adams that Drive would be implementing more stringent credit standards and that most of their loans going forward would be A quality.[32] If Drive represented that its future portfolio was going to be A and B quality paper, NIIS and Craven may not have made a misrepresentation to Underwriters when they solicited coverage for Drive. Indeed, even if Drive was going to continue to make C and D quality loans, it may only have wanted (perhaps for financial reasons) to insure the A and B class loans. If that was the case, Defendants may not have made a false representation to Underwriters when they said that Drive's future portfolio (at least the one for which they were seeking insurance) would be A and B quality loans. The credibility of Adams' testimony cannot be determined until trial. At this stage in the proceedings, viewing the evidence in the light most favorable to the nonmoving party, there are disputed issues of material fact that preclude the Court from granting Underwriters' motion for summary judgment.

Next, I consider the factual allegations in the motion for summary judgment, i.e. that Defendants misrepresented the nature of Drive's expiring portfolio and the nature of its business as a subprime lender. Defendants contend that Underwriters has not shown, and could not show, that they reasonably relied on those representations.

First, Drive sought coverage for new loans that would attach during the February 2001 to February 2002 period. The parties dispute the relevance of Drive's *expiring*

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[32] In paragraph 23, the Complaint avers that Adams' letter is attached thereto as Exhibit L, but no exhibits actually are attached to Plaintiffs' Complaint. The Adams letter is attached, however, as Exhibit L to Plaintiffs' Motion for Leave to File a Second Amended Complaint, filed November 27, 2002.

portfolio to such new loans, and to what extent Underwriters relied on information about Drive's past loan history.

Also, among the primary documents relied upon by Underwriters to support its motion are a cover sheet and statements of profits and loss it received from NIIS and Craven.[33] The first page of this set of documents clearly states that the credit quality of Drive's expiring portfolio is a "[m]ixture of B and C class loans." Documents attached to this cover page, however, show loss rates for other insurance carriers who had insured Drive (more accurately, Drive's predecessors) at various times during the five year period 1995-2000. These documents show the premiums Drive was charged, the loss ratios, number of claims per year, total claims and other information from which Underwriters may have been able to determine, with a reasonable degree of accuracy, the quality of Drive's expiring portfolio. Thus, whether Underwriters relied on the representation that the portfolio was B and C quality is unclear and, in any event, such reliance might not have been reasonable. Thus, disputed issues of fact exist as to one of the key elements necessary for stating a prima facie case of negligent misrepresentation.

Therefore, regardless of which set of factual allegations form the basis of Underwriters' claim for negligent misrepresentation, the allegations contained in the Complaint or those in the motion for summary judgment, there are disputed issues of material fact that preclude the Court from granting Underwriters' motion.

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[33] POB Ex. G.

E. Drive's Motion for Summary Judgment for Negligence

Drive has moved for summary judgment on its claim for negligence against Defendants. To state a cause of action for negligence, the plaintiff must show (1) the existence of a duty; (2) breach of that duty; (3) proximate causation; and (4) damages.[34] As I discuss more fully, *infra*, there are disputed issues of material fact regarding the existence and amount of Drive's damages. Consequently, the Court will not grant all the relief sought by Drive's motion for summary judgment. Nevertheless, the pleadings and evidence do demonstrate that there is no substantial controversy as to the fact that NIIS owed a duty to Drive to advise it of the limitations on the Policy NIIS obtained and that NIIS breached that duty. "A summary judgment, interlocutory in character, may be rendered on the issues of liability alone although there is a genuine issue as to the amount of damages, or some other matter."[35] Thus, as to elements (1) and (2) of Drive's negligence claim based on the failure of NIIS to advise Drive of the Policy limitations, I will enter an order under Rule 56(d) directing that those allegations be deemed established for purposes of all future proceedings in this action.

"An agent, employed to effect insurance, must exercise such reasonable skill and ordinary diligence as may fairly be expected from a person in his profession or situation, in doing what is necessary to effect a policy, in seeing that it effectually covers the

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[34] *Hall v. Dorsey*, 1998 Del. Super. LEXIS 490, at *5-6 (Nov. 5, 1998) (citing Prosser & Keeton, THE LAW OF TORTS §30 (5th ed. 1984)).

[35] Ct. Ch. R. 56(c).

property to be insured, in selecting the insurer and so on."[36] "As a general rule, a broker or agent who, with a view to compensation for his services undertakes to procure insurance on the property of another, but fails to do so with reasonable diligence, and in the exercise of due care, or procures a void or defective policy is personally liable to his principal for any damages resulting there from."[37]

Drive sets forth several theories for holding Defendants liable for negligence, but I find the evidence on only one of them sufficiently convincing to support even a partial summary judgment. First, Drive argues that NIIS and Craven are liable for negligence because they obtained a voidable policy from Underwriters. Drive claims that both NIIS and Craven knew that Drive was an exclusively subprime lender, yet they represented to Underwriters that Drive's portfolio consisted of B and C quality loans. Defendants also failed to inform Underwriters that Drive's portfolio contained D quality loans. Drive argues that because of these material misrepresentations, the Policy was voidable, and NIIS and Craven are liable for negligence for obtaining a voidable policy.

Whether the Policy was voidable depends upon whether or not NIIS and Craven made material misrepresentations to Underwriters, and if so, whether Underwriters relied upon those misrepresentations. I addressed these questions in Section D, *supra*, in the context of Underwriters' motion for summary judgment against Defendants for negligent misrepresentation. In that context, I found that there are disputed issues of material fact

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[36] 3 COUCH ON INSURANCE (3d ed.) § 46:30 (2006) (quoted in *Lowitt v. Pearsall Chem. Corp. of Md.*, 219 A.2d 67, 73 (Md. 1966)).

[37] *Lowitt*, 219 A.2d at 73 (internal citations and quotations omitted).

that preclude summary judgment. The same disputed issues of fact that defeated Underwriters' motion require denial of Drive's motion for summary judgment on its claim of negligence for obtaining a voidable policy.

Drive's next two arguments fail for a similar reason. Drive argues that Defendant's were negligent in failing to procure the insurance it requested, which was for C and D quality loans, and for failing to inform Drive that they had not obtained the coverage it requested. For the reasons set forth in Section D above on Underwriters' negligent misrepresentation claim, there is a disputed issue of material fact as to what type of insurance Drive requested. If Drive represented that its future portfolio was going to be mostly prime paper, NIIS and Craven may not have acted negligently when they solicited coverage for mostly A quality loans. Also, since there is a factual dispute about what type of coverage Drive requested, the Court cannot determine on summary judgment whether NIIS and Craven failed to inform Drive that they had not obtained the coverage requested.

Drive's fourth argument relates to NIIS only,[38] and I grant Drive partial relief on that aspect of its motion. Drive contends that NIIS is liable for negligence for failing to communicate key limitations on the coverage contained in the Policy. After procuring the Policy, Craven sent a Cover Note to NIIS which clearly indicates that Underwriters was insuring a portfolio of 90% A and 10% B loans.[39] The Cover Note NIIS sent to

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[38] Tr. at 10-11.

[39] POB Ex. H.

Bankers, however, made no mention of this critical limitation on the Policy offered by Underwriters.[40] Throughout its briefing on the various motions at issue, NIIS has never proffered any explanation for its failure to communicate the limitations on the Policy or pointed to any exculpatory evidence.[41]

Although there is a genuine dispute about what type of coverage Drive requested, the specific limitation of having to maintain 90% A loans, and no subprime loans, should have been communicated to Drive. This limitation clearly appears in the Cover Note from Craven, and its unexplained omission in the NIIS-to-Bankers Cover Note reflects a material breach of NIIS's duty as an insurance broker. A broker exercising the reasonable skill and ordinary diligence to be fairly expected from a person in her profession would have communicated this important limitation. Instead, it appears to have been redacted from the Craven Cover Note, and NIIS has never explained why. Thus, I find that NIIS acted negligently. As to the first two elements of the *prima facie* case for negligence, duty and breach, I find that NIIS had a duty to communicate the 90% A and 10% B limitation of the Policy, and breached this duty by failing to communicate this limitation to Bankers and ultimately to Drive. Accordingly, the only issues remaining for trial on this aspect of Drive's negligence claim against NIIS are whether its breach of duty proximately caused Drive damages, and if so, the amount of the damages.

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40 Craven Ans. Br. Ex. E.

41 *See* Dep. of William Robert Adams ("Adams Dep.") at 161.

2. NIIS's motion for summary judgment for lack of damages

NIIS has moved for summary judgment arguing that, even if Drive successfully shows that NIIS breached a duty owed to it, Drive has not, and cannot, prove that it has suffered any damages. NIIS argues that Drive's statistical analysis and projections of its damages for the period of 2002 to 2005 are methodologically flawed and inadequately supported by the record. NIIS also argues that Drive has not shown that alternative, subprime, VSI insurance was available for the period covered by the Policy, or if it was available, that the premiums would not have exceeded the losses for which Drive was seeking the insurance.

Summary judgment will be denied when the legal question presented needs to be assessed in the "more highly textured factual setting of a trial."[42] The Court "maintains the discretion to deny summary judgment if it decides that a more thorough development of the record would clarify the law or its application."[43] Having reviewed the parties' evidence and argument, I have concluded that NIIS is not entitled to summary judgment both because there are disputed issues of material fact regarding the fact and quantum of damages on Drive's negligence claims and because there are questions of law which need further elucidation in the more factually developed context of a trial.

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42 *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 n.3 (Del. Ch. 1987) (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948)).

43 *Tunnell v. Stokley*, 2006 Del. Ch. LEXIS 37, at *5 (Feb. 15, 2006) (quoting *Cooke v. Oolie,* 2000 Del. Ch. LEXIS 89, at *37-38 (May 24, 2000)).

a. Claims accruing before the rescission of the Policy

The measure of damages against a broker for obtaining void or defective insurance is the amount of the insured's loss that would have been covered had the insured's requested coverage actually been obtained.[44] "In a suit against an insurance agent for his failure to obtain the desired coverage, he will usually be held liable for such amount as would have been recoverable under the insurance contract he should have obtained."[45] This view of damages is supported by the cases Plaintiffs cite in their briefs. For example, in *Hampton Roads Carriers, Inc. v. Boston Ins. Co.*,[46] the insured's broker negligently failed to procure insurance that covered the constructive total loss (where the cost of repairs exceeds the repaired value) of a shipping barge. Instead, the barge was only insured for actual physical total loss, e.g., sinking in waters from which it would be too deep to raise the barge. After the barge was rendered a constructive total loss, the broker was held liable for the amount of coverage that "should have been obtained."[47] The broker stood in the shoes of the insurer. Likewise, in *Consolidated Sun Ray, Inc. v. Lea*,[48] the broker negligently failed to procure "use and occupancy" insurance that would have covered the insured's losses stemming from loss of retail business due to fire. The

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44 *Lowitt v. Pearsall Chem. Corp. of Md.*, 219 A.2d 67, 73 (Md. 1966) (internal quotations and citations omitted).

45 16A-309 APPLEMAN ON INSURANCE LAW & PRACTICE (1st ed.) § 8831 (2006) (citing supporting cases).

46 150 F. Supp. 338 (D. Md. 1957).

47 *Id*. at 344.

48 276 F. Supp. 132 (E.D. Pa. 1967).

insured and insurer settled for less than what the full policy value would have been, and the broker was held liable for the difference. In neither of these cases is there any intimation that, to show damages, the insured needs to prove that comparable insurance was available at a comparable, or at least relatively favorable, price.

NIIS argues, however, that the availability of alternative VSI insurance, with comparable deductibles, tail coverage, premiums, etc. is an important part of Drive's claim for damages. According to NIIS, because Drive is seeking damages for losses caused by the rescission of the Policy, it must show that it was worse off after the rescission than it would have been had the Policy never been entered and it had purchased insurance elsewhere. Drive responds that NIIS, as its broker who committed negligence in obtaining the Policy, must stand in the shoes of the insurer. Yet, Drive also has attempted to show that comparable VSI insurance was available.

NIIS's motion for summary judgment raises legal issues that neither side adequately addressed in briefing or argument. One such issue is whether Drive must show that comparable VSI insurance was available at a cost-effective premium to prove its negligence claim. A related issue is, if the availability of alternative insurance is relevant, who bears the burden of showing that such alternative insurance was, or was not, available? If NIIS can show that such insurance was not available, or if Drive fails to show that it was, does that mean that Drive is not entitled to any damages? These questions need to be addressed by the parties in the context of a trial.

In addition to these legal issues, there are disputed issues of material fact related to damages that require denial of NIIS's motion. For instance, NIIS argues that comparable

VSI coverage for subprime loans was not available in 2001, and that even if it was, the premium rates would have exceeded the insurable losses alleged by Drive. In support of its position, NIIS offers the testimony of James Gilpin, an employee of Miniter Group, a third-party administrator of Drive's claims until November 2002. Gilpin testified that VSI for subprime automobile loans in 2001 was not carried by major carriers and, to the extent available, was expensive with high deductibles.[49] Gilpin also testified that subprime VSI could be as high as $220 per loan.[50] Drive's own expert, Robert R. McSorley ("McSorley"), testified in his deposition that if Drive's only alternative to the Policy was to purchase insurance at $220 per loan, the amount of loss caused by the rescission of the Policy would have been zero.[51]

Drive, however, contends that the evidence shows that it could have purchased comparable insurance at an economical rate. Although NIIS interprets Gilpin as testifying that comparable VSI insurance could "only" be obtained at $220 per loan, Drive cites other portions of the deposition that arguably do not support that proposition. Indeed, later in his deposition Gilpin was shown documents from his files relating to a proposal for VSI coverage from Interstate Indemnity Company for $80 per loan, and Gilpin admitted that he had forgotten about Interstate's offer.[52] Gilpin's conflicting and ambivalent testimony, the existence of a possible offer for VSI insurance as low as $54

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49 Gilpin Dep. at 58.

50 *Id*.

51 McSorley Dep. at 63-65.

52 Gilpin Dep. at 73-74.

per loan,[53] and the parties' dispute as to whether other potential insurers would have offered terms comparable to those found in the Policy, are sufficient to create material issues of fact that can only be resolved at trial.

b. Claims accruing after the rescission of the Policy

NIIS's argument against post-rescission damages draws support from Drive's questionable record keeping. Drive has records for the loss claims during the pre-rescission period from early 2001 until November 2002, when the claims were submitted to and processed by Miniter Group. The period from November 2002 to 2005, however, is a different story.[54] During this period, Drive did not maintain "claims" files for losses that otherwise would have been submitted to a claims administrator for eventual reimbursement. Drive's justification for this is that there was no policy and no claims administrator through which to process claims.[55] NIIS urges the Court to reject that excuse and argues that Drive should have kept such records because it has been participating in this litigation since 2002. Instead of presenting records for what its claims actually would have been, Drive instead proposes to prove its damages through the testimony of an accounting expert, McSorley. McSorley examined Drive's loss information for the 2001-2002 policy period and used it to project losses through 2005. Using a range of potential insurance premiums from $54 to $125 per loan to net out the

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53 Def. NIIS's Br. in Supp. of its Mot. for Summ. J. as to the Damages Claim of Pl. Drive ("NOB") Ex. I.

54 If the Policy had remained in effect, claims during this period would have been covered because of the Policy's "run off" or "tail" coverage.

55 Pls.' Joint Resp. to Def. NIIS's Mot. for Summ. J. ("Pls.' Joint. Resp.") at 15.

cost of the insurance, McSorley calculated Drive's damages to be between $2,963,994 and $5,060,766.[56]

NIIS challenges this approach on several grounds. First, it argues that Drive had an obligation to keep adequate records to enable it to pursue its damages claim in this litigation. NIIS also urges the Court summarily to reject as too speculative Drive's attempt to use past losses to project what damages *probably* were for the 2002-2005 period. Additionally, NIIS argues that McSorley's projections lack evidentiary support because they are based on the assumption that VSI insurance was available to Drive, at the rates posited by McSorley, during the period in question.

The Court questions Drive's failure to keep records, especially since Drive intended to pursue a claim for damages in this litigation, which was pending throughout the period in question. Although the cases Drive relies upon support the proposition that damages can be reasonably estimated and do not have to be calculated perfectly, they appear to involve circumstances where damages were inherently hard to prove.[57] Here, Drive's own recordkeeping policies have contributed to the difficulty in determining damages. I am not prepared to rule as a matter of law, however, that Drive cannot prove its damages using statistical methods and the approach espoused by McSorley. The

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[56] Transmittal Aff. of Jill A. O'Donovan filed Nov. 27, 2006 ("O'Donovan Aff.") Ex. F.

[57] *See, e.g.*, *Total Care Physicians, P.A. v. O'Hara*, 2003 Del. Super. LEXIS 261, at *11-17 (July 10, 2003) (difficulty proving lost profits due to nature of tort of misappropriation of trade secrets, and scope of misappropriation).

adequacy of Drive's evidence presents questions of material fact that cannot be decided on a motion for summary judgment.

NIIS further argues that McSorley's statistical projections are flawed because they rely on the assumption that alternative VSI insurance would have been available to Drive during the relevant period at the rates posited by McSorley. This argument parallels the argument presented in opposition to Drive's pre-rescission losses and presents the same legal issues. Moreover, when the record is viewed in the light most favorable to Drive, as the nonmoving party, there are disputed issues of material fact that preclude a grant of summary judgment. McSorley used four rates to arrive at his range of damages. These were $54, $80, $100 and $125 per automobile loan. NIIS argues that Drive lacks documentary evidence that these rates actually were available and that none of these alternative premiums were for coverage equivalent to the coverage contained in the Policy.

In discovery, however, Drive produced a letter from Paramount Preferred Underwriters, Inc. showing that Paramount quoted the $54 figure to Drive in November 2000.[58] Drive argues that the offered coverage was comparable, or would have been, if negotiations had continued. Whether the $54 offer was genuine, or was for comparable coverage, are questions of fact that cannot be determined on summary judgment. As for the other figures used by McSorley, they likewise are supported by testimony or documentation sufficient to create triable issues of material fact as to whether comparable

[58] NOB Ex. I.

insurance was available at the alleged rates.[59] Thus, NIIS's cross-motion for summary judgment is denied.

III. CONCLUSION

For the reasons set forth in this opinion, Underwriters' motion for summary judgment against NIIS and Craven for negligent misrepresentation is denied. NIIS's motion for summary judgment against Drive for failing to show damages is also denied. Drive's motion for summary judgment, on the issue of liability only, for negligence is denied as to Craven, and as to NIIS is denied in part and granted in part in that, pursuant to Court of Chancery Rule 56(d), the Court finds that there is no substantial controversy and it should be taken as established: (1) that NIIS had a duty to communicate to Drive all material limitations on the coverage provided by the Policy; and (2) that NIIS breached that duty.

IT IS SO ORDERED.

[59] *See* Pls.' Joint Resp. at 13-16.