IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

CUTTING EDGE SPORTS, INC., t/a SOFTBALL AMERICA,	:	MARCH TERM, 2003
	:	No. 01835
Plaintiff,	:	
	:	COMMERCE PROGRAM
v.	:	
	:	Control No. 020120
BENE-MARC, INC., NORTHLAND INSURANCE COMPANY, and U.S. RISK UNDERWRITERS, INC.,	:	
Defendants,	:	
v.	:	
NORTH AMERICAN SPORTS FEDERATION,	:	
Additional Defendant.	:	

ORDER

AND NOW, this 2nd day of May, 2006, upon consideration of plaintiffs' Petition for Leave to File and Serve Second Amended Complaint and to Join Defendants, the responses thereto, and all other matters of record, it is hereby **ORDERED** that said Petition is **GRANTED** in part as follows:

1. Plaintiffs may join Northland Insurance Company and U.S. Risk Underwriters, Inc. as defendants.
2. Plaintiffs may file a Second Amended Complaint setting forth the proposed claims for breach of contract and unjust enrichment against Bene-Marc, Inc., Northland Insurance Company, and U.S. Risk Underwriters, Inc.
3. Plaintiffs shall have twenty (20) days from the date of entry of this Order to file and serve a Second Amended Complaint that conforms to the terms of this Order.

It is further **ORDERED** that the remainder of the Petition is **DENIED**, and plaintiffs may not assert the proposed claims for violation of the Unfair Trade Practices and Consumer Protection Law or for negligence against any of the defendants.

BY THE COURT,

_____

HOWLAND W. ABRAMSON, J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

CUTTING EDGE SPORTS, INC., t/a SOFTBALL AMERICA,	:	MARCH TERM, 2003
	:	No. 01835
Plaintiff,	:	
	:	COMMERCE PROGRAM
v.	:	
	:	Control No. 020120
BENE-MARC, INC., NORTHLAND INSURANCE COMPANY, and U.S. RISK UNDERWRITERS, INC.,	:	
Defendants,	:	
v.	:	
NORTH AMERICAN SPORTS FEDERATION,	:	
Additional Defendant.	:	

OPINION

Class plaintiffs have moved to join Northland Insurance Company ("Northland") and U.S. Risk Underwriters, Inc. ("U.S. Risk") as defendants and to amend their previously amended class action Complaint to add claims against all defendants for violation of the Unfair Trade Practices and Consumer Protection Law ("UTPCPL") and for negligence.

I. The Applicable Standards For Amendments Of Pleadings.

"Amendments to pleadings will be liberally allowed to secure a determination of cases on their merits." Capobianchi v. BIC Corp., 446 Pa. Super. 130, 134, 666 A.2d 344, 346 (1995). "Leave to amend lies within the sound discretion of the trial court and the right to amend should be liberally granted at any stage of the proceedings unless there is an error of law or resulting

prejudice to an adverse party." Werner v. Zazyczny, 545 Pa. 570, 584, 681 A.2d 1331, 1338 (1996).

> The prejudice, however, must be more than a mere detriment to the other party because any amendment requested certainly will be designed to strengthen the legal position of the amending party and correspondingly weaken the position of the adverse party. The mere fact that the adverse party has expended time and effort in preparing to try a case against the amending party is not such prejudice as to justify denying the amending party leave to amend by asserting [a claim or] an affirmative defense which has a substantial likelihood of success.

Capobianchi, 446 Pa. Super. at 134, 666 A.2d at 346.

"The right to amend will be withheld if there does not appear to be a reasonable possibility that amendment will be successful." Spain v. Vicente, 315 Pa. Super. 135, 142, 461 A.2d 833, 837 (1983). "If the proposed amendment is against a positive rule of law, its allowance would be futile." Tanner v. Allstate Ins. Co., 321 Pa. Super. 132, 138-9, 467 A.2d 1164, 1167 (1983). In other words, the proposed amendment must satisfy the preliminary objection standards, and "a court is not required to allow amendment of a pleading if a party will be unable to state a claim on which relief could be granted." Werner, 545 Pa. at 584, 681 A.2d at 1338.

II. Plaintiffs May Join Northland And U.S. Risk As Defendants.

Both Northland and U.S. Risk are already parties to this action and to a related action,[1] so neither will suffer prejudice by being added at this late stage in the proceedings. Northland was made an additional defendant in this action in December, 2003, and Northland subsequently joined U.S. Risk in December, 2005.[2] U.S. Risk and Northland do not seriously contend that

[1] Mehler v. Northland Insurance Company, Bene-Marc, Inc., U.S. Risk Underwriters, Inc., et al, January Term, 2004, No. 03254 (Phila. Co.). The plaintiff in that action is an assignee of the named plaintiff in this action, as was previously discussed in the court's opinion regarding class certification.

[2] U.S. Risk is Northland's agent and was apparently responsible for issuing the allegedly improper insurance policy involved here.

they will be prejudiced by plaintiffs' late assertion of breach of contract and unjust enrichment claims against them, so the Complaint may be amended to include such claims. However, all of the defendants dispute plaintiffs' right to assert UTPCPL and negligence claims against them.

III. Plaintiffs May Not Amend To Add A UTPCPL Claim Against Any Of The Defendants.

Under the UTPCPL, "any person who purchases or leases goods or services primarily for personal, family or household purposes" may bring a private action for unfair trade practices. 73 P. S. § 201-9.2. There is no allegation that any of the plaintiff softball leagues/teams purchased commercial liability insurance for personal, family or household purposes, so they are precluded from asserting a claim against the defendants under the UTPCPL.

IV. Plaintiffs May Not Amend To Assert A Negligence Claim Against Any Of The Defendants.

"No cause of action exists for negligence that causes only economic loss." Duquesne Light Co. v. Pa. Am. Water Co., 850 A.2d 701, 703 (Pa. Super. 2004).[3] In this case, plaintiffs' claimed damages constitute the difference between the amounts they paid for the insurance they received and the lesser amounts they claim they should have paid. Since plaintiffs' damages are solely economic, their claims for negligence fail.

Furthermore, negligence claims that essentially duplicate breach of contract claims fail under the gist of the action doctrine

> The 'gist of the action' doctrine operates to preclude a plaintiff from re-casting ordinary breach of contract claims into tort claims. . . .Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between

[3] The only exception to the economic loss doctrine is for claims brought against "a design professional" or someone else who is "in the business of providing information to others." Bilt-Rite Contractors, Inc. v. The Architectural Studio, 581 Pa. 454, 480-2, 866 A.2d 270, 286-7 (2005). In this case, the claim for negligence is not predicated upon poor professional advice, but rather upon false advertising and failure to issue proper insurance, so this exception to the economic loss doctrine does not apply.

> particular individuals. . . . In other words, a claim should be limited to a contract claim when the parties' obligations are defined by the terms of the contracts, and not by the larger social policies embodied by the law of torts. . . .[T]he doctrine bars tort claims: (1) arising solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where the liability stems from a contract; or (4) where the tort claim essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract.

Hart v. Arnold, 884 A.2d 316, 339-340 (Pa. Super. 2005). Since plaintiffs have asserted claims against defendants for breach of their contractual duties to provide the promised insurance to plaintiffs, plaintiffs may not also assert negligence claims against defendants for breach of such contractual duties.

Finally, even if plaintiffs were able to plead a negligence claim that is distinct from their contract claim, such a claim would be time barred.[4] *See* 42 Pa. C. S. § 5524 (statute of limitations for negligence is 2 years). The acts upon which such a claim would be based occurred no later than 2002, they were discovered by plaintiffs on or before March 2003, when this action was first filed, and the claims were not asserted until February, 2006, more than two years later.

[4] If the negligence claim is distinct from the breach of contract claim, then the negligence claim cannot be deemed to relate back to the original breach of contract claim for statute of limitations purposes. *See* Shaffer v. Pennsylvania Assigned Claims Plan Ins. Co., 359 Pa. Super. 238, 251, 518 A.2d 1213, 1220 (1986) ("[t]he general rule is that an amendment will not be permitted after the running of the statute of limitations if it introduces a new cause of action, but if the amendment would only amplify or enlarge the existing cause of action, it will be permitted."). In other words, the claim is either new and barred by the statute of limitations, or it is the same as the prior contract claims and barred by the gist of the action doctrine.

CONCLUSION

For all the foregoing reasons, plaintiffs' Petition for Leave to File and Serve Second Amended Complaint and to Join Defendants is granted in part and denied in part.

BY THE COURT,

_____

HOWLAND W. ABRAMSON, J.