

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE SOLERA INSURANCE	§	
COVERAGES APPEALS	§	No. 413, 2019
	§	418, 2019
	§	
	§	Court Below – Superior Court
	§	of the State of Delaware
	§	
	§	C.A. No. N18C-08-315-CCLD

Submitted: February 19, 2020

Decided: February 28, 2020

Before SEITZ, Chief Justice; TRAYNOR and MONTGOMERY-REEVES, Justices.

**ORDER**

After consideration of the motion for leave to file an *amicus curiae* brief and the opposition, it appears to the Court that:

(1) These consolidated interlocutory appeals arise from the Superior Court’s denial of the appellants-insurers’ motion for summary judgment. The Superior Court held, among other things, that factual issues precluded summary judgment on the issue of whether the appellee-insured’s late notice of the claim and failure to obtain the insurers’ consent before incurring defense expenses barred coverage for those expenses.<sup>1</sup> The United Policyholders (“UP”), a non-profit 501(c)(3) organization that advocates for insurance consumers, has filed a motion

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<sup>1</sup> *Solera Holdings, Inc. XL Specialty Ins. Co.*, 213 A.3d 1249, 1258-59 (Del. July 31, 2019).

for leave to file an *amicus curiae* brief in support of Appellee Solera Holdings, Inc.’s (“Solera”) position that, absent prejudice to the insurer, an insurer cannot deny coverage for a policyholder’s defense costs solely because the policyholder did not seek the insurer’s consent to incur those costs in advance.

(2) Solera consents to UP’s filing of an *amicus curiae* brief. Appellants ACE American Insurance Company and Federal Insurance Company have filed an opposition to the motion.<sup>2</sup> In their opposition, the insurers argue that the proposed brief: (i) introduces a new argument—that the primary insurance policy only requires “consent” and not “prior consent”—that does not appear in Solera’s answering brief; and (ii) duplicates arguments in the the answering brief that Solera’s failure to comply with the consent-to-defense condition should be excused in the absence of prejudice to the insurers.

(3) The privilege to be heard as *amicus curiae*, as well as the manner and extent of participation, rests within the sound discretion of the Court.<sup>3</sup> Permission to be heard *amicus curiae* is granted when the movant possesses “a unique perspective or expertise” in a case involving a question of “general public importance” and the Court finds that it would benefit from the movant’s “unique

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<sup>2</sup> According to UP, Appellant Illinois National Insurance Co. also opposes the motion. This insurer did not file anything in opposition to UP’s motion.

<sup>3</sup> *Giammalvo v. Sunshine Mining Co.*, 644 A.2d 407, 410 (Del. 1994).

supplemental assistance.”<sup>4</sup> Unless the movant’s ability to provide such assistance is readily apparent, the Court is reluctant to accept an *amicus curiae* brief where, as in this case, the parties are well-represented and where the joint consent of the parties is lacking.<sup>5</sup> When the parties are represented by counsel, an *amicus curiae* is precluded from presenting argument on an issue not included in the opening brief.<sup>6</sup>

(4) After reviewing Solera’s answering brief, UP’s motion and proposed *amicus curiae* brief, and the opposition to the motion, the Court has concluded that the motion to file an *amicus curiae* brief should be denied. The proposed *amicus curiae* brief raises an argument not made by Solera, contains arguments duplicative of arguments in the answering brief, and does not offer the Court unique supplemental assistance.

NOW, THEREFORE, IT IS ORDERED that UP’s motion for leave to file an *amicus curiae* brief is DENIED.

BY THE COURT:

/s/ Tamika R. Montgomery-Reeves  
Justice

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Turnbull v. Turnbull*, 644 A.2d 1322, 1324 (Del. 1994) (recognizing that when parties are represented by counsel an *amicus curiae* is precluded from presenting argument on an issue not included in opening brief).