IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

Fred Beemus, and Cathi Beemus,
husband and wife,

Plaintiffs,

v.

Interstate National Dealer Services, Inc.;
Chrysler Corp.; Travelers Indemnity Company;
Brokerage Professionals, Inc.; Primus
Automotive Financial Services, Inc.; and
Mackay-Swift, Inc.,

Defendants.

No. GD98-9583

OPINION AND ORDER OF COURT

Honorable Robert P. Horgos

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

Fred Beemus, and Cathi Beemus, husband and wife, Plaintiffs, v. Interstate National Dealer Services, Inc.; Chrysler Corp.; Travelers Indemnity Company; Brokerage Professionals, Inc.; Primus Automotive Financial Services, Inc.; and Mackay-Swift, Inc., Defendants.	No. GD98-9583

OPINION

HORGOS, J. February 6, 2002

Plaintiffs, Fred Beemus and Cathi Beemus, filed a Complaint in civil action as a class action against Interstate National Dealer Services, Inc. (Interstate), Chrysler Corp., Travelers Indemnity Company (Travelers), Brokerage Professionals, Inc., Primus Automotive Financial Services, Inc. (Primus), and Mackay-Swift, Inc. (Mackay). The case was discontinued with prejudice as to Defendant Chrysler Corp. by Order dated March 31, 2000 and Brokerage Professionals, Inc. was dismissed as a Defendant.

Plaintiffs seek to represent a class of Pennsylvania car buyers who (1) purchased from car dealers motor vehicle service contracts administered by the Defendant, Interstate, and insured by the Defendant, Travelers, and (2) financed those purchases through installment contracts. Plaintiffs allege that Defendants engaged in a scheme to overcharge the purchasers for Interstate service contracts.

Interstate filed a Petition to Compel Arbitration which this Court granted on December 8, 1999. On January 4, 2000, the Court entered an Order granting Plaintiffs' Request to Stay the Order of December 8, 1999 until the Court decided other outstanding arbitration issues. By Order dated February 20, 2001, the Court continued the stay of the Order of December 8, 1999 compelling arbitration pending the determination of class certification.

The cause of action arose out of Plaintiffs' purchase of an automobile from Mackay on June 17, 1997. Plaintiffs also purchased a service contract issued by Interstate from Mackay. (Complaint, paragraph 14, Exhibit A). The car and the service contract were financed through an installment contract that was subsequently assigned to Primus. Plaintiffs allege that Mackay overcharged them for the price of the contract and that after paying Interstate, Brokerage Professionals, Inc., and the Escrow Trustees pursuant to an Administrator Agreement entered into by those parties, that Mackay improperly retained a significant portion of the sales amounts. (Complaint, paragraphs 20, 36). Before the Court are the Preliminary Objections to Plaintiffs' First Class Action Complaint filed by Interstate, Travelers, Primus and Mackay.

For the reasons set forth herein, Defendants' Preliminary Objections will be sustained in part and denied in part.

PRELIMINARY OBJECTIONS OF MACKAY-SWIFT, INC.

In Count I of the Complaint, Plaintiffs aver that Mackay violated the Motor Vehicle Sales Finance Act, 69 P.S. 601 et seq. (MVSFA) "in contracting for and charging charges in connection with the sales of Interstate's service contracts in excess of that allowed by 69 P.S. 631." (Complaint, paragraph 64). Mackay filed a demurrer to Count I, arguing that the MVSFA does not provide Plaintiffs with a private cause of action. According to Mackay, the statute may be enforced only by the Commonwealth and not by consumers because the MVSFA is a penal statute that does not

provide for a private right of action to sue for monetary damages. The other Defendants have raised the same argument in their Preliminary Objections.

Plaintiffs have not cited any cases in which a Pennsylvania appellate court has specifically held that the MVSFA provides for a private right of action; nor have Defendants relied on any Pennsylvania case law which establishes that the MVSFA is solely a penal statute which provides no private right of action. There exist, however, several Pennsylvania Superior Court cases which clearly recognize a private right of action under the statute and have addressed consumers' claims under the MVSFA on the merits. See, e.g.: Pysh v. Security Pacific Housing Service, 416 Pa. Super. 64, 610 A.2d 973 (1992) (examining methods of calculating amounts of unearned interest charge to be rebated to purchasers under the MVSFA and rejecting Plaintiffs' challenge to Defendant's method of calculation); Livingston v. Vanguard Federal Sav. Bank, 386 Pa. Super. 496, 563 A.2d 175 (1989) (reinstating Plaintiffs' MVSFA claims which the lower court had dismissed on grounds of preemption).

Moreover, the Court should construe a statute, if possible, in such a way as to give effect to all its provisions. 1 Pa. C.S. 1921(a). It should also be guided by the premise that in passing the statute the legislature did not intend an absurd result. 1 Pa. C.S. Section 1927(1). Finally, provisions in a statute for a penalty or forfeiture for its violation shall not be construed to deprive an injured person of the right to recover from the offender damages sustained by reason of the violation of such statute. 1 Pa. C. S. 1929.

This Court concludes that Plaintiffs have an affirmative right of action against Mackay. Recognition of such a right gives full effect to the provisions of the MVSFA, which clearly state that a buyer is entitled to a "refund or credit" of overcharged monies. It also prevents the absurd result that would be engendered by preventing the buyer from exercising its

legislatively ordained right to a "refund or credit" of overcharged monies. Moreover, the mere presence of criminal penalties in the MVSFA does not exclude a private right of action by buyers against sellers.

The Court will, therefore, deny the Preliminary Objections raising the argument that Plaintiffs have no private right of action under the MVSFA .

Count VI of Plaintiffs' Complaint sets forth a claim for breach of fiduciary duty against Mackay. Specifically, Plaintiffs allege that Mackay and the other car dealers "contractually agreed to be fiduciaries and hold car buyers' service contract proceeds as a fiduciary in trust before paying those proceeds into the Interstate and Brokerage Escrow Accounts." (Complaint, paragraph 74). Plaintiffs state that Mackay had a "fiduciary duty" under the contract entered into by Mackay, Interstate, Travelers and Brokerage Professionals, Inc. (Complaint, Exhibit C). Plaintiffs, however, do not set forth any facts upon which a fiduciary duty owed to Plaintiffs can be established. The Agreement on which Plaintiffs base their claim of a fiduciary duty indicates that the car dealer agreed to hold funds in trust for the benefit of the administrator (Interstate), and the managing agent (Brokerage Professionals). This provision ensures that the dealer promptly and timely pay the monies to the managing agent and administrator. This provision does not confer any benefits on the car buyer who is not a party to this Agreement.

Plaintiffs do not set forth any other facts upon which a fiduciary relationship between Mackay and the Plaintiffs can be established. Because Plaintiffs have failed to allege the existence of a fiduciary duty owed by Mackay to the Plaintiffs, Mackay's demurrer to Count VI must be sustained and Count VI of Plaintiffs' Complaint will be dismissed.

Mackay also filed a demurrer to Counts I and VI arguing that Mackay did not sell and, is

not alleged to have been involved in, every service contract sale in the Commonwealth of Pennsylvania. Other car dealers have sold Interstate service contracts in the Commonwealth of Pennsylvania. Plaintiffs' Complaint defines the class as "all car buyers in Pennsylvania who have contracted in their motor vehicle installment contracts to finance Interstate service contracts on their vehicles within six years of the filing of this Class Complaint." (Complaint, paragraph 54). In the context of a class action Complaint, it is understood that the claims against Mackay are stated only by the class members who purchased their contracts from Mackay. Plaintiffs so concede. (Plaintiffs' Memorandum in Opposition to Preliminary Objections filed by Mackay-Swift, Inc., pp. 10-11). The Class Action Complaint will be interpreted to state claims against Mackay only on behalf of those class members who purchased their Interstate service contracts from Mackay. The Preliminary Objections in the Nature of a Demurrer to Counts I and VI will be denied.

Finally, Mackay seeks a dismissal of Plaintiffs' Complaint under Pa. R.C.P. 1028(a)(2) which authorizes dismissal of a pleading that fails "to conform to law or rule of court...." Mackay, however, does not identify any law or rule of court to which the Complaint fails to conform. Instead, Mackay argues that Plaintiffs' Class Action Complaint fails to conform to a prior Court Order allowing Plaintiffs to amend their Complaint. Mackay cites no authority for its argument and the Preliminary Objection based on Pa. R.C.P. 1028(a)(2) will be denied.

PRELIMINARY OBJECTIONS OF INTERSTATE NATIONAL DEALER SERVICES, INC.

According to Count V of the Complaint, Interstate is vicariously liable for the car dealers' violations of the MVSFA and breaches of fiduciary duty because the car dealers were Interstate's agents when they engaged in the conduct at issue. Interstate asserts several

Preliminary Objections to Plaintiffs' vicarious liability claims seeking the dismissal of Count V.

Interstate first argues that the MVSFA does not authorize a private right of action. For the reasons set forth earlier in this Opinion, this Preliminary Objection will be denied.

Interstate also seeks the dismissal of the claims against it on the grounds that vicarious liability is not authorized or contemplated by the MVSFA and that, as a matter of law, Interstate could not act as Mackay's principal for purposes of vicarious liability.

This Court previously addressed the issue of whether vicarious liability can be imposed under the MVSFA and concluded that it could not in Homziak v. General Electric Capital Warranty, GD2000-1707 (May 21, 2001). As discussed in Homziak, an analysis of the MVSFA is constrained by the dictates of 1 Pa. C.S.1504, which provides:

> In all cases where a remedy is provided or a duty is enjoined or anything is directed to be done by statute, the directions of the statute shall be strictly pursued, and no penalty shall be inflicted...further than shall be necessary for carrying such statute into effect." 1 Pa. C.S. 1504.

"Where the words of a statute are clear and free of ambiguity, the letter of it is not to be disregarded." 1 Pa. C.S. Section 1921(b). Indeed, where the Legislature has provided a remedy, or a duty is enjoined, the direction of the statutory scheme is to be strictly adhered to. *See* 1 Pa. C.S. Section 1504, Reliance Ins. Co. v. Richmond Machine Co., 309 Pa. Super. 430, 434, 455 A.2d 686, 688 (1983), Comw. of Pennsylvania, Dept. of Public Welfare v. Portnoy, 129 Pa. Comw. 469, 478-79, 566 A.2d 336, 340 (1989).

Section 618 of the MVSFA provides:

> Any such costs which the seller has collected from the buyer, or which have been included in the buyer's obligation under the installment contract which are not disbursed by the seller, as contemplated, shall be immediately refunded or credited to the buyer. 69 P.S. Section 618 (emphasis added).

There is no language in the MVSFA which explicitly indicates that vicarious liability is contemplated under the Act. Moreover, the use of the word "refund" in Section 618 suggests that a remedy against a party that did not receive the excess costs that allegedly violate the MVSFA is not available. Plaintiffs claim that the car dealer, Mackay, improperly retained the portions of sales proceeds of the Interstate service contract purchased by the named Plaintiffs and all other members of the proposed class. Plaintiffs seek to recover the alleged improper payments to Mackay. Because Interstate is not alleged to have received the improperly charged funds, Interstate cannot "refund" or "credit" Plaintiffs.

Moreover, it is well settled law in Pennsylvania that the three basic elements of agency are: "the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking." Basile v. H&R Block, 563 Pa. 359, 367, 761 A.2d 1115, 1120 (2000). The Court explained that unless the parties agreed to an agency relationship, it is not the court's place to imbue such a relationship with heightened legal qualities that the parties did not agree upon. Id., 563 Pa. at 371, 761 A2d at 1122. The court further explained:

> [A]gency results only if there is an agreement for the creation of a fiduciary relationship with control by the beneficiary. (citation omitted). The burden of establishing an agency relationship rests with the parties asserting the relationship. (citation omitted). 'An agency relationship is a fiduciary one, and the agent is subject to a duty of loyalty to act only for the principal's benefit.' Sutliff v. Sutliff, 515 Pa. 393, 404, 528 A.2d 1318, 1323 (1987).

Basile v. H&R Block, Id. 563 Pa. at 367, 368, 761 A.2d at 1120.

The pleadings do not set forth facts which establish an agency relationship. There are no facts stated which indicate that Interstate controlled Mackay's sale of the service contracts and the prices charged by Mackay for the service contracts. In paragraph 8 of the Complaint,

Plaintiffs aver:

> 8. Mackay and other car dealers throughout Pennsylvania, acted as Interstate's agents to sell its service contracts. As agents for Interstate, these dealers were required to (1) use Interstate's promotion materials and other forms, as prepared and directed by Interstate; (2) follow the instruction procedures and underwriting requirements required by Interstate; and (3) repair cars under Interstate's service contracts only as authorized by Interstate. In fact, Interstate's guidelines not only regulated the handling of service contract payments to the dealers, but also enables Interstate to regulate the dealer's costs of parts and labor.

These allegations do not constitute the type of "control" by a principal which could give rise to vicarious liability. Mackay offered the service contracts using Interstate's promotional materials but Interstate did not dictate the price to be charged, which is at the very core of Plaintiffs' claims against Mackay. Mackay offered the service contract as a service to their purchasers of automobiles. Mackay did not, however, have final approval of the sale of the contract. The Administrators Agreement, entered into by Interstate and the car dealers, provided that the dealer agreed to sell the service contracts contingent upon Interstate's right to reject the sale. (Complaint, Exhibit C).

In Basile, the Court stated:

> The special relationship arising from an agency agreement, with it concomitant heightened duty, cannot arise from any and all actions, no matter how trivial, arguably undertaken on another's behalf. Rather, the action must be a matter of consequence or trust, such as the ability to actually **bind** the principal or alter the principal's legal relations. Indeed, implicit in the long-standing Pennsylvania requirement that the principal manifest an intention that the agent act on the principal's behalf is the notion that the agent has authority to alter the principal's relationships with third parties, such as binding the principal to a contract. Notably, the Restatement, which we have cited with approval in this area in the past, specifically recognizes as much.

Basile v. H&R Block, Id. 563 Pa. at 370, 761 A.2d at 1121. (Emphasis in original).

Here, while Mackay played an important role in offering the service contracts for sale, Mackay did not have the authority to bind Interstate to a contract. Interstate had the right of final approval of the contract between itself and a consumer. This arrangement does not give rise to an agency relationship as defined by the Pennsylvania Supreme Court in Basile.

Based on the Plaintiffs' failure to plead facts sufficient to give rise to an agency relationship between Mackay and Interstate, as well as the language of the MVSFA and the remedies available under the statute, the Court concludes that vicarious liability cannot be applied to Interstate in this context and Counts V and IX which are based upon the vicarious liability of Interstate will be dismissed.

In Count III of the Complaint, Plaintiffs seek the imposition of a constructive trust on behalf of Plaintiffs to recoup the service contract proceeds that Interstate has received from the sale of Interstate service contracts that, according to Plaintiffs, are void under Pennsylvania law. The basis of the constructive trust claim is that "Interstate's service contracts constitute the sale of insurance." (Complaint, paragraph 67). Plaintiffs allege that because Interstate and the dealers were not licensed to sell insurance, the sale violated public policy and was illegal. (Complaint, paragraphs 68, 69).

Plaintiffs allege that the service contracts are insurance but failed to plead any facts upon which this Court can conclude that a service contract is actually an insurance contract. Nor do Plaintiffs cite any legal precedent in support of such a finding.

Further, the Pennsylvania Supreme Court has stated the requirements for the imposition of a constructive trust as follows:

> A constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. (citations omitted). Although it is not stated clearly in

> every opinion, one necessary aspect of the defendant's holding title to property is that he must have acquired it in some way that creates the equitable duty in favor of the plaintiff. In Chambers v. Chambers, supra. at 54-55 (176 A.2d 673), we quoted from Justice Cardozo's opinion in Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 122 N.E. 378, 380 (1919), where he stated 'A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee....' Constructive trusts arise when the legal title to property is obtained by a person in violation, express or implied, of some duty owed to the one who is equitably entitled. (citation omitted).

Pierro v. Pierro, 438 Pa. 119, 127, 264 A.2d 692, 696 (1970).

Here, Plaintiffs do not plead that an inequitable benefit has been conferred on Interstate. The only portion of the service contract price which Plaintiffs complain of in the Complaint is the amount that Mackay charged over and above the amount received by Interstate. The named Plaintiffs do not complain about the portion of the service contract price that Interstate did receive, or assert that Interstate did not fulfill its obligations under the service contract. There is no basis on which to conclude that Interstate retained an "inequitable benefit" under the service contract. Therefore, Plaintiffs' constructive trust claim against Interstate must fail and Count III of Plaintiffs' Complaint will be dismissed.

Count VIII of Plaintiffs' Complaint alleges that Interstate has aided and abetted its agent-car dealer's breach of fiduciary duty by authorizing the dealers to retain allegedly illegal charges.

No Pennsylvania appellate court has recognized a cause of action for aiding and abetting a breach of fiduciary duty. This Court need not address the issue because no fiduciary duty running from Mackay to the Plaintiffs have been found. Therefore, no cause of action has been stated for aiding and abetting such a breach of duty and Count VIII of Plaintiffs' Complaint will be dismissed.

For all of the foregoing reasons, Interstate's Preliminary Objections to Counts III, V, VIII and IX of Plaintiffs' Complaint will be sustained and those Counts dismissed with prejudice.

PRELIMINARY OBJECTIONS OF TRAVELERS INDEMNITY COMPANY

Count IV of Plaintiffs' Complaint asserts a constructive trust claim against Travelers. Plaintiffs state that Travelers "directly or indirectly" participated in the sale of Interstate service contracts. (Complaint, paragraph 5). Travelers provided an excess insurance policy insuring the risk that the dealer's escrow funds would be insufficient to fulfill all service contract commitments made to car buyers (Complaint, paragraph 16). Travelers received a fee for the sale of the insurance policies (Complaint, paragraph 18).

Plaintiffs do not allege that the named Plaintiffs or any of the purported class members entered into an agreement or insurance contract with Travelers. There are no allegations that the named Plaintiffs or purported class members entered into an agreement with Travelers for future repairs of any vehicle purchased from Mackay. In Plaintiffs' "class allegations," common questions of law and facts are set forth describing ten specific issues that must be addressed in a class action. Travelers was not mentioned in any one of these ten stated issues. (Complaint, paragraph 56).

The only payment obtained by Travelers was in exchange for the excess insurance policy sold to Mackay. There are no facts set forth to substantiate a claim that Travelers was somehow unjustly enriched in the sale of the excess insurance policies to Mackay and other car dealers. Because there are no facts alleged to support the imposition of a constructive trust against Travelers, Count IV of Plaintiffs' Complaint will be dismissed with prejudice.

PRELIMINARY OBJECTIONS OF PRIMUS AUTOMOTIVE FINANCIAL SERVICES, INC.

Primus acquired the Beemus/Mackay motor vehicle installment contract in approximately June, 1997. (Complaint, paragraph 9). Count II of Plaintiffs' Complaint alleges that Primus, "by virtue of the holder provisions in each of the Beemuses and class members' motor vehicle installment contracts, is contractually liable to the Beemuses and class Plaintiffs to the same extent as Mackay and other dealers who contracted for and financed the Interstate service contracts." (Complaint, paragraph 66). Count VII of the Complaint avers a breach of fiduciary duty claim against Primus (Complaint, paragraph 77).

The installment contract assigned by Mackay to Primus contained the federally required FTC Holder Notice through which the subsequent assignees of the contract become liable for claims and defenses that the debtor could assert against the seller:

> NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

Plaintiffs claim that the FTC Holder Notice renders Primus liable for all affirmative claims that they are entitled to bring against Mackay in connection with the purchase and sale of Plaintiffs' motor vehicle and service contract. Primus filed Preliminary Objections pursuant to Pa. R.C.P. 1028(a)(4) arguing that the Plaintiffs' Complaint fails to state a cause of action against Primus. Primus argues that Pennsylvania law does not recognize affirmative actions to recover against a creditor simply because the creditor is a holder of a contract. Primus contends that under the Holder rule, Plaintiffs may bring an affirmative action for recovery against a

holder only if the Plaintiffs can allege and establish that they have received little or nothing of value under their installment contract assigned to the Defendant or that their claim in the action exceeds the remainder of the debt owed under the contract, and that Mackay's breach with respect to the motor vehicle and service contract must be so substantial that rescission and restitution of the installment contract are justified. Primus argues that Plaintiffs' claims against it are not based on such allegations and thus must fail.

This Court previously addressed this issue in Homziak v. General Electric Capital Warranty Corp., GD2000-1707 (May 21, 2001) and concluded that a Plaintiff may bring claims against a holder of a contract based upon the Holder Notice without first setting forth a claim for rescission and restitution. The rationale relied on in Homziak is applicable to the arguments set forth by Primus.

Many courts have ruled that the Holder Notice allows an affirmative claim only in situations in which rescission is proper. Ford Motor Credit Co. v Morgan, 404 Mass. 537, 536 N.E. 2d 587 (Mass. 1989); In Re Hillsborough Holdings Corp., 146 B.R. 1015, 1021 (Bankr. M.D. Fla. 1992); Felde v. Chrysler Credit Corp., 219 Ill. App. 3d 530, 162 Ill. Dec. 565, 580 N.E. 191, 196 (1991); Mount v. LaSalle Bank Lake View, 926 F. Supp. 759, 764-65 (N.D. Ill. 1996).

Those courts generally rely on a portion of the official Statement of Basis and Purpose published by the FTC concomitantly with the Holder Rule, which states, in pertinent part:

> This rule is directed at the preservation of consumer claims and defenses...From the consumer's standpoint this means that a consumer can: (1) defend a creditor suit for payment of an obligation by raising a valid claim against the seller as a set-off, and (2) maintain an affirmative action against a creditor who has received payments for a return of monies paid on account. The latter alternative will only be available where a seller's breach is so substantial that a court is persuaded that rescission and restitution are justified.

Federal Trade Commission, Preservation of Consumers' Claims and Defenses, Final Regulation and Statement of Basis and Purpose, 40 Fed. Reg. 53505, 53524.

Other courts have rejected the idea that the FTC commentary can be applied to limit the scope of the Holder Rule. This approach is exemplified by Oxford Finance Companies, Inc. v. Velez, 807 S.W. 2d 460 (Tex. App. 1991) where the court stated:

> The clear and unambiguous language of the [Holder Rule] notifies all potential holders that, if they accept an assignment of the contract, they will be 'stepping into the seller's shoes.' The creditor/assignee will 'become subject' to any claims or defenses the debtor can assert against the seller. [The Holder Rule] does not say that a seller will be liable only if the buyer received little or nothing of value under the contract. Nor does the provision purport to limit liability in such fashion Id. 807 S.W. 2d at 463.

See also Lozada v. Dale Baker Oldsmobile, Inc. 91 F. Supp. 2d 1087 (W.D. Mich. 2000); Simpson v. Anthony Auto Sales, 32 F. Supp. 2d 405, 409 n. 10 (W.D. La. 1998); Riggs v. Anthony Auto Sales, Inc., 32 F. Supp. 2d 411, 416 n. 13 (W.D. La. 1998); Van Vels v. Premium Athletic Center of Plainsfield, Inc., 182 F.R.D. 500, 508 (W.D. Mich. 1998).

The Court in Lozada v. Dale Baker Oldsmobile, Inc., supra. reasoned that many of the cases supporting a limited construction of the Holder Rule are themselves premised on a faulty construction of the Statement of Basis and Purpose quoted above. The Statement of Basis and Purpose is not a rule. Instead, it is a lengthy explanation of the history and reasoning for the implementation of the rule. As the Court pointed out, the rule simply mandates the inclusion of specific language in consumer credit transactions. The Statement of Basis and Purpose does not have the same force as the language of the regulation itself.

Moreover, the Court in Lozada pointed out that the Holder Rule itself is unambiguous. It requires the inclusion of language in all contracts without limitation on the types of "claims and defenses" which may be brought against the assignee. "The rule was adopted to exempt consumer credit transactions from the holder-in-due-course principles of commercial transactions. (Citations omitted) No basis exists for referring to the commentary to understand the meaning of language that is unambiguous on its face." Id. 91 F. Supp. 2d at 1095.

Finally, the original FTC Statement of Basis and Purpose is not limited to that portion cited above. Instead, in that same Statement, the FTC discusses at length the rationale for the Holder Rule, concluding that its purpose is to reallocate the costs of seller misconduct in the consumer market, "compelling creditors to either absorb seller misconduct costs or return them to sellers." 40 Fed. Reg. at 53523. The FTC also observed that "where a consumer claim or defense is valid, but limited in amount, a creditor may choose to accept less payment from the consumer to save transaction costs associated with pursuing the seller whose conduct gave rise to the claim." Id. This language indicates that the FTC contemplated that consumer claims could be smaller than total rescission and that it was for the assignee to determine which mechanism for allocating costs of seller misconduct best served its purposes. Lozada v. Dale Baker Oldsmobile, Inc., Id. 91 F. Supp. 2nd at 1095.

In short, the authority of the Statement of Basis and Purpose relied upon by Chase and the Courts that limit affirmative claims under the Holder Rule is, at best, inconclusive. With this in mind, it appears that the Court should defer to the clear, unambiguous language of the Holder Rule that allows a debtor to bring "any claim or defense" against an assignee. Permitting an aggrieved debtor to make an affirmative claim against an assignee without first pleading the elements of rescission advances the public policy goals of the Holder Rule. As

the Lozada Court noted, this is especially emphasized when one considers that often the sellers against whom a debtor's claim will arise are "fly-by-night" operations, difficult to serve with legal process or to collect judgment from if successfully served. Therefore, permitting a claim directly against an assignee offers the best assurance that a debtor will be made whole, and has the added benefit of reallocating the costs of seller misconduct to the banks and lending companies with whom they do business, in turn causing market forces to discourage sharp practices by sellers. Id. 91 F. Supp. 2d at 1096.

Plaintiffs, therefore, can bring claims against Primus based upon the Holder Notice without first setting forth a claim for rescission and restitution.

The Holder Notice does not create new rights or causes of action but serves as a vehicle through which a debtor/buyer can obtain affirmative recovery against an assignee of an installment contract. Once the Holder Notice is incorporated into a contract, one must look to the statutes, decisions and rules of Pennsylvania to determine the nature of assignee liability. LaBarre v. Credit Acceptance Corporation, 175 F.3d 640, 644 (8th Cir. 1999).

First, it is important to distinguish between Plaintiffs' MVSFA claims against Defendant Interstate and Defendant Primus. In the instance of Interstate, the crux of the analysis was whether the common law principle of vicarious liability could be incorporated into the statutory scheme. In the case of Primus, the sole question is whether the MVSFA affords Plaintiffs an affirmative claim against Mackay because, under the Holder Rule, Primus "steps into the shoes" of Mackay for purposes of liability.

Therefore, the argument that the MVSFA defines and limits a buyer/debtor's rights against assignees to declaring a portion of the contract unenforceable is therefore irrelevant to this analysis. Pennsylvania law cannot be used to deny access to the rights permitted by the

Holder Rule. Under the Supremacy Clause of the United States Constitution, federal regulations have the same preemptive effect as federal statutes, and state laws are preempted if they conflict with federal regulations. Fidelity Fed. Savings and Loan Ass'n v. Cuesta, 458 U.S. 139, 153-54 (1982). Such a conflict arises when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Id. Thus, it must be determined whether the MVSFA provides Plaintiffs an affirmative right of action against MacKay which can thus be extended, by the Holder Rule, to encompass Primus.

As discussed earlier, the MVSFA states that any monies taken by the seller of automobiles in violation of its provisions are to be "immediately refunded or credited to the buyer." 69 P.S. 618. The Court has already concluded that Plaintiffs have an affirmative right of action against Mackay. Through application of the Holder Rule, Plaintiffs are able to assert the same claim against Primus as a holder of the installment contract. Therefore, Plaintiffs' claim against Primus under the MVSFA cannot be dismissed and the Preliminary Objections to Count II are denied.

Finally, Count VII of Plaintiffs' Complaint sets forth a breach of fiduciary duty claim against Primus. Plaintiffs allege that Primus, by virtue of the holder provision in the contracts is liable to the same extent as Mackay and the other car dealers who financed Interstate service contracts in their installment contracts. (Complaint, paragraph 77). The Court has already found that there can be no breach of a fiduciary duty by Mackay because Plaintiffs have failed to allege facts sufficient to support a finding of a fiduciary duty owed by Mackay to the Plaintiffs. Plaintiffs' claim against Primus for breach of fiduciary duty must also fail and Count VII of Plaintiffs' Complaint will be dismissed.

In summary, the Court will enter an Order sustaining the Preliminary Objections of Mackay to Count VI of Plaintiffs' Complaint, sustaining Interstate's Preliminary Objections to Counts III, V, VIII, and IX, sustaining Travelers Preliminary Objections to Count IV and Primus' Preliminary Objections to Count VII of Plaintiffs' Complaint and Counts III, IV, V, VI, VII, VIII and IX of Plaintiffs' Complaint will be dismissed with prejudice.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

Fred Beemus, and Cathi Beemus, husband and wife, Plaintiffs, v. Interstate National Dealer Services, Inc.; Chrysler Corp.; Travelers Indemnity Company; Brokerage Professionals, Inc.; Primus Automotive Financial Services, Inc.; and Mackay-Swift, Inc., Defendants.	No. GD98-9583

ORDER OF COURT

AND NOW, this 8th day of February, 2002, upon consideration of the Preliminary Objections filed to Plaintiffs' First Class Action Complaint by Defendants, Interstate National Dealer Services, Inc., Travelers Indemnity Company, Primus Automotive Financial Services, Inc., and Mackay-Swift, Inc., oral argument thereon and the briefs filed by the parties, it is ORDERED, ADJUDGED and DECREED as follows:

1. The Preliminary Objections of Mackay-Swift, Inc. to Count VI of Plaintiffs' First Class Action Complaint are sustained and Count VI is dismissed with prejudice; the remaining Preliminary Objections filed by Mackay are denied;

2. The Preliminary Objections of Interstate National Dealer Services, Inc. to Counts III, V, VIII, and IX are sustained and Counts III, V, VIII and IX of Plaintiffs' First Class Action Complaint are dismissed with prejudice;

3. The Preliminary Objections of Travelers Indemnity Company to Count IV are sustained and Count IV of Plaintiffs' First Class Action Complaint is dismissed with prejudice;

4. The Preliminary Objections of Primus to Count VII of Plaintiffs' First Class Action Complaint are sustained and Count VII is dismissed with prejudice; the remaining Preliminary Objections filed by Primus are denied.

By the Court,

Robert P. Borgos J.