

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

AMERICREDIT FINANCIAL SERVICES, INC. ,	:	NO. 17 – 0437
d/b/a GM FINANCIAL,	:	
Plaintiff	:	
	:	CIVIL ACTION - LAW
vs.	:	
	:	
ERIN R. STARR and JUSTIN L. STARR,	:	
Defendants	:	Non-jury Trial

**OPINION AND VERDICT**

Before the Court is Plaintiff’s request for a judgment for sums allegedly owed on a vehicle retail installment sale contract, and Defendant Erin Starr’s Counter-Claim asserting an alleged violation of the Unfair Trade Practices and Consumer Protection Law. A trial was held on April 16, 2018. The matter is now ripe for decision and the Court enters the following:

**FINDINGS OF FACT**

1. On November 21, 2011, in connection with their purchase of a vehicle, Defendants entered a Retail Installment Sale Contract (“the Contract”) with Blaise Alexander Chevrolet.<sup>1</sup> The contract included the purchase by Defendants of “Guaranteed Asset Protection” for the additional sum of \$680.00.<sup>2</sup> This “GAP coverage” was detailed in an addendum to the Contract which states that it “amends” the Contract.<sup>3</sup>
2. Also on November 21, 2011, the Contract was assigned by the dealership to AmeriCredit Financial Services, Inc., Plaintiff herein.<sup>4</sup>

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<sup>1</sup> See Plaintiff’s Exhibit No. 2.

<sup>2</sup> Id.

<sup>3</sup> See Defendants’ Exhibit No. 1.

<sup>4</sup> See Plaintiff’s Exhibit No. 3.

3. Defendants made all required payments under the Contract up to the time that the vehicle was damaged in an accident, the date of which was not established, and made no further payments thereafter.
4. Defendants were divorced by the time of the accident and the vehicle was in Defendant Erin Starr's possession and control at that time.
5. The insurance company which provided liability insurance on the vehicle, Nationwide, declared the vehicle a total loss and paid to Plaintiff the value of the vehicle at the time of loss. After this payment, there remained due and owing under the Contract the sum of \$6,893.83.<sup>5</sup>
6. The GAP Addendum to the Contract provides: "In the event of a Total Loss to the Covered Vehicle, We agree to waive Our rights against You for the amount due under a Payable Loss."<sup>6</sup>
7. The GAP Addendum also provides that it "does not apply: ... [t]o any loss arising out of any dishonest, fraudulent, criminal, illegal or intentional act committed by You or permitted by You."<sup>7</sup>
8. Plaintiff notified Defendant Justin Starr on November 5, 2014 that his insurance company had declared the vehicle a total loss but that the insurance proceeds did not satisfy the balance on the account, and asked him to "resolve the existing deficiency balance".<sup>8</sup>
9. By seeking payment of the balance of the loan and by filing the instant action, Plaintiff did not waive its rights against Defendant for the amount due as it had agreed to do in the GAP Addendum.

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<sup>5</sup> See Plaintiff's Exhibit No. 5.

<sup>6</sup> See Defendant's Exhibit No. 1.

<sup>7</sup> Id.

<sup>8</sup> See Plaintiff's Exhibit No. 4.

10. Plaintiff did not assign the Contract or the GAP Addendum to another entity.<sup>9</sup>

11. Plaintiff did not provide the GAP coverage but the identity of the entity which did so was not placed in evidence.<sup>10</sup>

## **DISCUSSION**

### **Plaintiff's claim for Balance Due**

Plaintiff seeks the balance due under the Contract as the remaining payments were not made after the vehicle was wrecked and totaled. Defendants admit that no further payments were made but assert that under the GAP Addendum, Plaintiff is not entitled to seek the balance due as it agreed to “waive [its] rights against [them] for the amount due under a Payable Loss” and its failure to do so constitutes a breach of contract. Plaintiff counters that an exclusion in the addendum, specifically, the exclusion for “any loss arising out of any dishonest, fraudulent, criminal, illegal or intentional act committed by You or permitted by You”, applied to make the GAP Addendum inapplicable. Plaintiff offered no evidence in support of this assertion, however.

“Where an insurer relies on a policy exclusion as the basis for its denial of coverage..., the insurer has asserted an affirmative defense, and accordingly, bears the burden of proving such defense.” Spece v. Erie Insurance Group, 850 A.2d 679, 682 (Pa. Super. 2004), *quoting* Madison Construction Company v.

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<sup>9</sup> In response to the Court's question whether the Contract or Addendum had been assigned, Plaintiff's representative, Mr. Mogish, testified that he did not know, and no documentation to show any assignment was introduced into evidence.

<sup>10</sup> Mr. Mogish also testified that although Plaintiff did provide GAP coverage at times, it had not done so in this instance.

Harleysville Mutual Insurance Company, 735 A.2d 100, 106 (Pa. 1999). This principle is applicable here. Plaintiff is relying on the exclusion of the GAP Addendum as the basis for its claim that it need not waive its rights (to seek payment), and must therefore prove that the exclusion applies.<sup>11</sup>

Plaintiff's argument, that the GAP Addendum was raised by Defendants as an affirmative defense and thus the burden is theirs, is misplaced. While Defendants rely on the GAP Addendum in denying having breached the Contract, Plaintiff is the party relying on the exclusion to excuse its alleged breach. Defendants have proved the applicability of the GAP Addendum, but it remained for Plaintiff to prove the applicability of the exclusion. This Plaintiff failed to do.

Finally, Plaintiff attempts to shift the burden of proof by focusing the dispute on another entity, the "GAP Provider", arguing that *it* was not the Provider, the decision to deny GAP coverage was made by the Provider and Defendants have the burden to show that the Provider's denial of coverage was improper. This argument is also misplaced. While the Court would agree with Plaintiff if Plaintiff had assigned the GAP Addendum to another entity, there was no evidence of such an assignment and thus the Court must conclude that the Addendum was not assigned. Plaintiff thus remained contractually responsible for the coverage, and it was therefore Plaintiff that had the burden to prove the applicability of the exclusion to support that decision to deny coverage.

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<sup>11</sup> The Court will not speculate why no evidence was offered on this issue, but notes that Plaintiff could easily have offered testimony from the police officer who investigated the accident, or the testimony of Defendant Erin Starr (by issuing a Notice to Attend requiring her appearance under Pa.R.C.P. 234.3).

### **Defendant's Claim for Violation of UTPCPL**

Defendant Erin Starr seeks attorney's fees based on a claim that Plaintiff violated the Unfair Trade Practices and Consumer Protection Law, specifically Section 201-2(4), which prohibits "unfair or deceptive acts or practices", defined to include "(xxi) [e]ngaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding." 73 P.S. Section 201-2(4)(xxi). Defendant claims that "by attempting to collect a debt that was covered by the GAP insurance", Plaintiff engaged in fraudulent or deceptive conduct. Defendant has proven only that Plaintiff breached the contract by failing to waive its rights to pursue the balance due, however. There is no evidence to show "fraudulent or deceptive conduct" on Plaintiff's part.

A party seeking to assert a claim under the fraudulent conduct provisions of Pennsylvania's Unfair Trade Practices and Consumer Protection Law must first establish the elements of common-law fraud. Giangreco v. United States Life Ins. Co., 168 F.Supp.2d 417 (E.D. Pa. 2001). The first element of common law fraud is a "false representation of an existing fact or a non-privileged failure to disclose". Fisher v. Aetna Life Ins. & Annuity Co., 39 F.Supp.2d 508, 511 (M.D. Pa. 1998), affirmed 176 F.3d 472, certiorari denied 528 U.S. 816.

Here, Defendant contends that Plaintiff violated the UTPCPL by having attempted to collect a debt that was covered by the GAP insurance, apparently asserting that Plaintiff's representation that the GAP coverage did *not* apply (because of the exclusion) was false.<sup>12</sup> To prove the falsity of the representation, however, Defendant must prove that the debt *was* covered and this requires proof that the exclusion did not apply. In this instance, therefore, *Defendant* has the

burden to prove the non-applicability of the exclusion. Like Plaintiff, Defendant did not offer any evidence on this issue.

Accordingly, the Court draws the following:

### **CONCLUSIONS OF LAW**

1. Plaintiff's failure to waive its rights against Defendants for the amount due on the Contract following Nationwide's payment of the loss constitutes a breach of that Contract.
2. Plaintiff is not entitled to a judgment against Defendants for the balance due.
3. Defendant Erin Starr has not shown a violation by Plaintiff of Pennsylvania's Unfair Trade Practices and Consumer Protection Law.
4. Defendant Erin Starr is not entitled to a judgment against Plaintiff for her attorney's fees.

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<sup>12</sup> Defendant Erin Starr did not address her Counter-Claim in argument to the Court at the time of trial, raising the issue only in her pleadings and Trial Memorandum.

**VERDICT**

AND NOW, this            day of April 2018, for the foregoing reasons, the Court finds in favor of Defendants and against Plaintiff on Plaintiff's claim, and in favor of Plaintiff and against Defendant Erin Starr on Defendant Starr's Counter-Claim.

BY THE COURT,

Eric R. Linhardt, Judge

cc: David Apothaker, Esq., Apothaker Scian, PC  
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