IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

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KAREN ABRAMS, on behalf of herself and all others similarly situated,	:	APRIL TERM, 2001
	:	No. 503
Plaintiffs	:	
v.	:	COMMERCE PROGRAM
TOYOTA MOTOR CREDIT CORPORATION,	:	
Defendant	:	Control No. 071049

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OPINION

Plaintiff, Karen Abrams ("Abrams"), on behalf of herself and all others similarly situated, has filed this consumer class action against defendant, Toyota Motor Credit Corp. ("TMCC"), challenging the legality of the early termination formula set forth in TMCC's standard motor vehicle lease on the grounds that this formula is unfair, deceptive and unreasonable because it shifts the risk of residual value inflation to lessees who terminate early while this risk is normally borne by TMCC and is not caused by the early termination, itself. As such, TMCC allegedly receives a windfall in excess of what it would receive if the lease had been carried to term because the residual value in the lease is overstated and exceeds the actual value of the car at early termination.

Presently before the court are the Preliminary Objections of TMCC, setting forth demurrers to each claim in the Complaint and asserting that Abrams lacks capacity to sue.

For the reasons set forth, the demurrers are **Sustained** and the Complaint is **Dismissed**.

BACKGROUND

The operative facts, as pled in the Complaint, are as follows. On or about September 24, 1997, Abrams executed a Closed End Motor Vehicle Lease Agreement ("Lease") for a 1998 Toyota Camry for personal, family and household purposes. Compl., ¶ 16. See Compl., Exhibit A. The Lease required Abrams to make monthly payments of $322.00[1] for a period of thirty-six (36) months or until August, 2000. Compl., ¶ 16, 19; Compl., Exhibit A, ¶ 13. The Lease disclosed the residual value of the car as $13,358.52. Id. at ¶ 19; Compl., Exhibit A, ¶ 7. The Lease also included an option of "Voluntary Early Termination" which stated the following:

> If you are not in default under the Lease, you may terminate this Lease at any time prior to the end of the Lease Term. If you do so, you have the following options:
>
> > a. You may buy the Vehicle and pay us the Amount Due on Early Termination (Paragraph 27); or
> >
> > b. You may turn in the Vehicle at the place we direct and pay us the Amount Due on Early Termination (Paragraph 27) minus the Fair Market Value (Paragraph 28).

Compl., Exhibit A, ¶ 25. The Amount Due on Early Termination, which must be paid under either of the two early termination options, is calculated as follows:

> The Amount Due on Early Termination is the sum of a. through d. minus e.:
>
> > a. Any unpaid Monthly Payments then due;

[1]The monthly payment comprised lease charges and depreciation charges in the amount of $295.41 and taxes in the amount of $26.59. Compl., Exhibit A, ¶ 11.

b. Any other amounts you are obligated to pay under this Lease;

c. Any official fees and taxes owing, or imposed in connection with the lease termination;

d. The Adjusted Capitalized Cost (Paragraph 5);[2] [minus]

e. All depreciation amounts in the Base Monthly Payments that have come due (Paragraph 29).[3]

Id. at ¶ 27. Further, the Lease defines "Fair Market Value" as follows:

a. The price we [TMCC] receive when we dispose of the Vehicle at public or private sale (you [lessee] must pay us the actual and reasonable expenses of sale); or

b. The highest offer we receive for disposition of the Vehicle; or

c. If the Vehicle has been lost, stolen or damaged beyond reasonable repair, the

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[2]Adjusted Capitalized Cost is the agreed upon value of the car at lease inception minus any cash, net trade-in allowance, rebates or other credits. Compl., Exhibit A, ¶ 5.

[3]Paragraph 29 of the Lease provides the following:

Depreciation Amounts: Each Base Monthly Payment consists of Lease Charge and depreciation. Lease Charge is earned by us on a "constant yield" basis. The Lease Charge part of each Base Monthly Payment is determined by:

a. Adding the remaining depreciation balance and the Residual Value;
b. Subtracting from that sum an amount equal to 1 Base Monthly Payment; and
c. Multiplying the difference determined in step b. above by the constant rate which will amortize the Total Depreciation over the Lease Term by the payment of the Base Monthly Payments.

The part of each Base Monthly Payment not allocated to Lease Charge is credited to depreciation. At any given time, the "remaining depreciation balance" is the difference between the Total Depreciation and all depreciation amounts in the Base Monthly Payments that have come due.

Compl.,Exhibit A, ¶ 29.

amount received by us from your insurance settlement; or

d. The amount of a professional appraisal of the wholesale value of the Vehicle you obtain . . . .

Id. at ¶ 28.

Abrams terminated the Lease at the end of January, 2000, seven months early from the Lease's termination date. Compl., ¶ 21. As alleged, TMCC assessed early termination charges against Plaintiff in the amount of $2,091.38, which was paid to TMCC on February 8, 2000. Id. at ¶¶ 22, 25. Pursuant to the early termination formula, the early termination charge consisted of unpaid monthly payments due; other amounts due under the Lease; official fees and taxes owing, if any; plus the Adjusted Capitalized Cost of $20,080.99 minus the Fair Market Value. Id. at ¶¶ 23-24. In contrast to the assumed end-of-term Residual Value of $13,358.52, the Fair Market Value of plaintiff's vehicle at the time of termination, seven months early, was allegedly $12,700.00. Id. at ¶ 24.

With this background, Abrams filed the class action Complaint, setting forth claims under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-2 et seq., Article 2A-504 of the Uniform Commercial Code ("UCC") as adopted in Pennsylvania at 13 Pa.C.S.A. § 2A504, Restitution for Unlawful Penalty, and Declaratory and Injunctive Relief. Compl., counts I-IV. Defendant filed Preliminary Objections to the Complaint, asserting, *inter alia*, that:

> (1) the named plaintiff lacks capacity to sue because she did not pay any early termination charge, but she assigned her lease to Wilkie Lexus ("Wilkie") who, if anyone, paid the termination charge;
>
> (2) plaintiff fails to state a cause of action for which relief can be granted under each count of the Complaint; and
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> (3) plaintiff failed to attach documentation that TMCC actually charged plaintiff a termination fee or attach a writing that payment was made.

This court will address these objections *seriatim*.

DISCUSSION

I. Standing

Preliminary objections asserting lack of capacity to sue may be asserted pursuant to Rule 1028(a)(5) of the Pennsylvania Rules of Civil Procedure [Pa.R.C.P.]. As summarized recently by the Pennsylvania Commonwealth Court:

> There are three requirements for a party to have standing to litigate an issue: the party must have a substantial interest in the subject matter of the litigation; the interest must be direct; and the interest must be immediate and not a remote consequence . . . . A 'substantial' interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law. A 'direct' interest requires a showing that the matter complained of caused harm to the party's interest. An 'immediate' interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it and is shown where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or the constitutional guarantee in question. . . . Both the immediacy and directness requirements primarily depend upon the causal relationship between the claimed injury and the action in question.

George v. Pennsylvania Public Utility Comm'n, 735 A.2d 1282, 1286 (Pa.Commw.Ct. 1999)(citations omitted). See also, Wm. Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 191-96, 346 A.2d 269, 280–84 (1975)(generally stating the standards for standing to sue). Additionally, "[d]amage or legal injury is essential to a right to sue in an action at law." Sixsmith v. Martsolf, 413 Pa. 150, 154, 196 A.2d 662, 664 (1964).

TMCC first asserts that Abrams lacks standing to challenge the early termination charge because

she failed to allege who paid the charge and she, in fact, assigned her obligations under the Lease to Wilkie in connection with her acquisition of a new Lexus. Def. Mem. of Law, at 7. TMCC, therefore, contends that the early termination charge which may otherwise have been due was paid by Wilkie, who, if anyone, was the real party in interest. Id. at 7-10. Additionally, TMCC demurs to the entire Complaint on the ground that Abrams has failed to allege that she suffered any compensable injury. Id. at 7. In support of this argument, TMCC attaches documentation which evidences that Wilkie paid off the remainder of Abrams's Lease on her Toyota Camry and that title to this vehicle was transferred to Wilkie. See Def. Mem. of Law, Exhibits B, C and D.

In response, Abrams argues that the fact that Wilkie, who is really TMCC's dealer, purchased her car for $14,791.38 does not demonstrate that she "assigned" her Lease to Wilkie, but that the form lease prohibits such assignment and the pay-off amount included the "Fair Market Value" for the car in the amount of $12,700 plus the early termination charge of $2,091.38. Pl. Mem. of Law, at 2-3. Abrams also maintains that the early termination charge of $2,091.38 was charged by Wilkie to her credit card in connection with the transaction and was passed to TMCC by Wilkie. Id. at 3. Abrams also argues that TMCC failed to demonstrate that any "assignment" was made and that the factual issue of whether she paid the early termination charge cannot be resolved on preliminary objections. Id. at 10, 26.

This court now overrules defendant's objection to the named plaintiff's standing to sue since it is unclear on the present record that she did not pay the early termination charge or suffer any compensable injury as a result of such payment.

In the Complaint, Abrams explicitly alleges that "TMCC assessed early termination charges against [Abrams] in the amount of $2,091.38, which was paid to TMCC on February 8, 2000." Compl., ¶ 22.

However, Abrams did not allege who paid the termination charge. This court may consider the documents attached to defendant's Preliminary Objections, evidencing that Wilkie paid off the balance on Abrams's Lease, since these documents form a part of the basis of the suit even though Abrams did not attach them to the Complaint. See, e.g., Conrad v. Pittsburgh, 421 Pa. 492, 495 n.3, 218 A.2d 906, 907 n.3 (1966)(allowing a court to rely on documents, which are part of the foundation of the suit, even though plaintiff does not attach such documents to its complaint); Detweiler v. School Dist. of Hatfield, 376 Pa. 555, 559, 104 A.2d 110, 11 (1954)(allowing the court to review the documents attached to defendants' preliminary objections were such documents formed the foundation of the lawsuits, but not accepting, as true, the averment as to the legal effect of such documents). However, the use of such collateral information should be strictly limited. See 220 Partnership v. Philadelphia Electric Co., 437 Pa.Super. 650, 655-56, 650 A.2d 1094, 1096-97 (1994)(cautioning against broad use of collateral facts).

Notwithstanding the exhibits attached to defendant's Preliminary Objections, it is not clear that Abrams did not pay the early termination charge, even if this charge was paid to Wilkie. Whether or not Wilkie is an agent and/or an authorized dealer of TMCC cannot be resolved at this juncture since such a relationship is not alleged in the Complaint and raises factual issues. It is also not clear whether the early termination charge was eventually passed from Wilkie to TMCC. Therefore, this court cannot conclude, as a matter of law, that Abrams lacks standing to challenge the legality of the termination charge.[4]

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[4]At oral argument, defense counsel argued that Wilkie must be considered an independent dealership and not an agent of TMCC, or the manufacturer, and that an agency relationship was not even pled in the Complaint. 10/25/01 N.T. 6-9. Further, counsel argued that if the deal negotiated between Abrams and Wilkie when Abrams turned in her Toyota Camry to Wilkie was a bad deal because Wilkie got a price from Toyota which was less than the fair market value, Abrams cannot charge TMCC with any wrong because they had not set the price and were not a part of the deal. Id.

Notwithstanding this conclusion, this court finds, as detailed below, that the Complaint fails to state a cause of action upon which relief can be granted.

II. Demurrer.

Under Pa.R.C.P. 1028(a)(4), preliminary objections may be asserted based on legal insufficiency of a pleading (demurrer). When reviewing preliminary objections in the form of a demurrer, "all well-pleaded material, factual averments and all inferences fairly deducible therefrom" are presumed to be true. Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa.Super.Ct. 2000). Preliminary objections, whose end result would be the dismissal of a cause of action, should be sustained only where "it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish [its] right to relief." Bourke v. Kazara, 746 A.2d 642, 643 (Pa.Super.Ct. 2000)(citation omitted). However, the pleaders' conclusions of law, unwarranted inferences from the facts, argumentative allegations, or expressions of opinions are not considered to be admitted as true. Giordano v. Ridge, 737 A.2d 350, 352 (Pa.Commw.Ct. 1999), aff'd. 559 Pa. 283, 739 A.2d 1052 (1999), cert. denied, 121 S.Ct. 307 (U.S. 2000). In addition, this court need not accept as true any averments in the complaint which conflict with exhibits that are properly attached to the complaint. See Baravordeh v. Borough Council of Prospect Park, 699 A.2d 789, 791 (Pa.Super.Ct. 1997)(affirming dismissal of complaint on preliminary objections)(citing Jenkins v. County of Schuylkill, 441 Pa.Super. 642, 648, 658

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at 13-14. As none of these assertions were part of the Complaint, or even the documents attached to the Preliminary Objections, this court cannot accept them as true. However, if the evidence were to later show that Wilkie must be considered independent of TMCC, and that Wilkie was the one who set the price and therefore responsible for the charge to Abrams, then Abrams would likely not have standing to sue TMCC.

A.2d 380, 383 (1995)).

A. Plaintiff Fails to State a Cognizable Cause of Action under the UTPCPL Where Plaintiff Failed to Sufficiently Allege How Defendant's Conduct Was Deceptive and a "Per Se" Violation May Not Be Made out by Reference to the Federal Consumer Leasing Act.

Defendant demurs to Count I of the Complaint - the claim under the UTPCPL - on two grounds: (1) that Abrams failed to state the common law elements of fraud which is necessary to state a claim under Section 201-2(4)(xxi) of the UTPCPL,[5] also known as the "Catchall Provision";[6] and (2) that an alleged violation of the federal Consumer Leasing Act ("CLA"),[7] or of Article 2A of the Uniform Commercial Code ("UCC"),[8] do not constitute "per se" violations of the UTPCPL because the underlying statutes do not provide for such treatment.

Count I of the Complaint sets forth, in pertinent part, the following allegations:

> 31. Defendant is a person engaged in trade or commerce as contemplated under the CPL.
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> 32. Plaintiff leased a motor vehicle from or through TMCC primarily for personal, family or household purposes.
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> 33. Defendant has engaged in conduct as described above which constitutes unfair or deceptive acts or practices which create a likelihood of

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[5]73 P.S. § 201-2(4)(xxi)

[6]As defendant correctly points out, plaintiff failed to cite to a specific provision of the UTPCPL, and, therefore, it appears that plaintiff is basing her cause of action under the Catchall Provision.

[7]The CLA, is codified at 15 U.S.C.A. §§ 1667 et seq., as an amendment to the Truth-in-Lending Act ("TILA"), codified at 15 U.S.C.A. §§ 1601 et seq.. Regulations for implementing the CLA, as promulgated by the Federal Reserve Board pursuant to 15 U.S.C.A. §§ 1604 and 1667f, are known collectively as Regulation M, and are found at 12 C.F.R. § 213.

[8]Article 2A of the UCC was adopted in Pennsylvania at 13 Pa.C.S.A. §§ 2A101 et seq.

confusion or of misunderstanding, including, but not limited to, the following:

(a) violating the federal Consumer Leasing Act and Regulation M thereto, by assessing and imposing charges upon lessees in the event of early termination or default that are not reasonable in light of the anticipated or actual harm caused to TMCC by the default or early termination, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy, which is a per se violation of the CPL;

(b) violating the federal Consumer Leasing Act and Regulation M thereto by shifting to the lessee the risk that the residual value of the car is inflated, thereby gaining windfall profits in excess of what TMCC would have been entitled to collect had the lease been fully performed, which is a per se violation of the CPL;

(c) applying an unreasonable early termination charge formula, in light of the anticipated harm caused by early termination, in violation of Article 2A of the Uniform Commercial Code, which is a per se violation of the CPL; and

(d) collecting an unlawful penalty from Plaintiff and members of the Class.

34. As a direct and proximate result of TMCC's violations of Pennsylvania and common law, Plaintiff and the Class have suffered ascertainable losses thereby entitling them to an award of treble damages and attorneys' fees pursuant to the CPL. Plaintiff and every member of the Class has presumptively and justifiably relied, to their detriment, on TMCC's material misrepresentations and omissions, because they have paid all or a portion of TMCC's early termination charges as a direct result of the materially misleading statements and omissions by TMCC.

Compl., ¶¶ 31-34. The gravamen of Abrams's claim is that the early termination formula, through its operation, works a deception on the plaintiff and members of the Class by shifting to early terminators the risk that the actual value of the car at early termination will be less than the stated residual value while those who carry the lease to its full term do not have to pay such a charge. At oral argument, plaintiff's counsel

clarified that the claimed deception is due to the fact that the early termination formula hides that fact that the charge is not reasonably related to the harm caused by early termination. 10/25/01 N.T. 43.

Even taking the allegations in the Complaint as true, this court holds that Abrams failed to state a cause of action under the UTPCPL since the early termination formula is clearly set forth in the Lease and cannot be construed as "deceptive" as that term is construed under the UTPCPL. This court also holds that an alleged violation of the CLA, or of Article 2A of the UCC, does not constitute a per se violation of the UTPCPL.

First, this court's recent opinion in Weiler v. Smithkline Beecham Corp., March Term, 2001, No. 2422 (C.P. Phila. Oct. 8, 2001)(Herron, J.) determined that the inclusion of the word "deceptive" in the amended version of the UTPCPL indicated that a violation may be made under the Catchall Provision - Section 201-2(4)(xxi) - without proving all of the elements of common law fraud. Slip op. at 3-6. Specifically, this court stated the following, in pertinent part:

> In 1996, however, the Catchall Provision was amended to prohibit deceptive conduct in addition to fraudulent conduct as follows:
>
> > [(**xvii**)] (**xxi**) Engaging in any other fraudulent **or deceptive** conduct which creates a likelihood of confusion or of misunderstanding.
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> Act 146, P.L. 906, § 1, Dec.4, 1996. According to the Plaintiffs, this eliminates the requirement that they plead each element of common law fraud for violations of the Catchall Provision.
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> When construing a statute, "the legislature is presumed to have intended to avoid mere surplusage; thus, whenever possible, courts must construe a statute so as to give effect to every word contained therein." Berger v. Rinaldi, 438 Pa.Super. 78, 86, 651 A.2d 553, 557 (1994). If the legislature modifies the language of a given statute, the amendment "ordinarily indicates a change in the legislative intent." Commonwealth v. Pierce, 397 Pa.Super. 126, 130, 579 A.2d 963, 965 (1990)(citing Masland

v. Bachman, 473 Pa. 280, 289, 374 A.2d 517, 521 (1977)).

> Here, the insertion of the phrase "or deceptive" implies that either deceptive or fraudulent conduct constitutes a violation of the Catchall Provision and that deceptive conduct is not the same as fraudulent conduct. Moreover, it is clear from the legislative history of the Catchall Provision amendment that the General Assembly's intent was to expand the scope of the UTPCPL. See, e.g., Pa. Legis. Journal - Senate 1996, v. II, p. 2427-28 (discussing general motivations for UTPCPL amendments). This conclusion also comports with the Pennsylvania Supreme Court's instructions that the UTPCPL "is to be construed liberally to effect its object of preventing unfair or deceptive practices." Commonwealth v. Monumental Props., 459 Pa. 450, 460, 329 A.2d 812, 817 (1974). See also, Wallace v. Pastore, 742 A.2d 1090, 1093 (Pa.Super.Ct. 1999)(citing Monumental Properties and applying the UTPCPL liberally in a private action context). Given these circumstances, the Court must conclude that the purpose of the 1996 amendment was to eliminate the requirement that a plaintiff plead all the elements of fraud to sustain a claim under the Catchall Provision.[] To hold otherwise would be to find the word "deceptive" redundant and would clash with the rules of statutory interpretation. . . .

Id. at 3-5 (emphasis in original)(footnotes omitted). In light of Weiler and the authorities cited therein, a private plaintiff does not have to set forth all of the element of common law fraud to state a claim under the Catchall Provision of the UTPCPL.

However, the fact that the Catchall Provision does not require proof of all of the elements of common law fraud does not obviate the need to establish that TMCC's conduct was in fact deceptive and caused the alleged harm suffered by Abrams and the Class. As noted recently by the Pennsylvania Supreme Court:

> There is no authority which would permit a private plaintiff to pursue an advertiser because an advertisement might deceive members of the audience and might influence a purchasing decision when the plaintiff himself was neither deceived nor influenced. There is certainly nothing in the statute which suggests such a private right. The UTPCPL was enacted in 1968, and a private cause of action was added in 1976. The UTPCPL's "underlying foundation is fraud prevention." . . . Nothing in the legislative history suggests

> that the legislature ever intended statutory language directed against consumer fraud to do away with the traditional common law elements of reliance and causation.

Weinberg v. Sun Company, Inc., 565 Pa. 612, _, 777 A.2d 442, 446 (2001)(citing Monumental Properties, 459 Pa. at 459, 329 A.2d at 816)(emphasis added). Under Weinberg, the fact that an advertisement or other representation might deceive its listener or might influence a purchasing decision is insufficient to state a claim under the UTPCPL. Id. at _, 777 A.2d at 446. In the wake of the Weinberg decision, it is now clear that a private plaintiff must establish reliance on an alleged material misrepresentation and that such reliance caused the plaintiff the alleged harm in order to state a cause of action under Section 9.2 of the UTPCPL.[9]

Here, contrary to the allegations that Abrams and the Class relied on TMCC's material misrepresentations and omissions, the Complaint fails to allege any material misrepresentation or omission. Even had plaintiff so alleged, the terms of the Lease, which was properly attached to the Complaint, would negate such an allegation. The early termination formula is explicitly set forth in Paragraph 25 of the Lease

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[9]Section 9.2(a) of the UTPCPL reads as follows:

> (a) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 2 of this act, may bring a private action to recover actual damages or one hundred dollars ($100), whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained, but not less than one hundred dollars ($100), and may provide such additional relief as it deems necessary or proper. The court may award to the plaintiff, in addition to other relief provided in this section, costs and reasonable attorney fees.

73 P.S. § 201-9.2.

and provides that if the lessee buys the vehicle or turns it in, he/she must pay the lessor the amount due on early termination. Compl., Exhibit A, ¶ 25. This amount is clearly spelled out as: any unpaid monthly payments then due; any other amounts due under the lease; any official fees or taxes owing, or imposed by virtue of the lease termination; and the adjusted capitalized cost minus all depreciation amounts in the base monthly payments. Id. at ¶ 27. The terms, "adjusted capitalized cost" and "depreciation amounts" are also defined in the Lease. Id. at ¶¶ 5 and 29, respectively. In addition, the other components which make up this formula, such as other charges and taxes or fees, are also explained in the Lease. Id. at ¶¶14, 15, 18,32. Contrary to plaintiff's contention, the fact that the lessor may not have explained to the lessee that the residual value as stated in the lease might exceed the actual value in the event that the lessee terminates early does not mean that the early termination formula is deceptive.

Plaintiff relies on certain dicta in American Financial Servs. Ass'n v. Federal Trade Comm'n., 767 F.2d 957 (D.C. Cir. 1985), a case seeking review of the Federal Trade Commission's credit practices rule, to support its contention that the Complaint adequately sets forth a deceptive trade practice under the UTPCPL. In a footnote in that case, addressing the distinction between deception and unfairness under the Federal Trade Commission Act, § 5 (a)(1), as amended, 15 U.S.C.A. § 45(a)(1),[10] the court stated that "[a] practice is deceptive when the consumer is forced to bear a larger risk than expected (*e.g.*, the consumer is misled) whereas a practice is unfair when the consumer is forced to bear a larger risk than an efficient market would require." 767 F.2d at 979-80, n. 27. Notwithstanding this dicta, this court finds that

[10]As stated in Monumental Properties, the Consumer Protection Law has regularly been interpreted by the Commonwealth Court as being based on the Federal Trade Commission Act. 459 Pa. at 461, 329 A.2d at 817. Under this rationale, this court may look to decisions involving that Act when reviewing claims under the UTPCPL. However, those decisions are not binding on this court.

the clear provisions in the Lease negate that Abrams or members of the Class were somehow misled simply because the early termination formula did not provide the consumer with an additional common sense explanation of the difference between fair market value and residual value.

Moreover, "per se" violations of the UTPCPL should be expressly provided for in the underlying statute. See, e.g., 73 P.S. § 1961 (providing that a violation of the automobile Lemon Law is also a violation of the UTPCPL); 73 P.S. § 2175 (the same treatment as to a violation of the Health Club Act); 75 Pa. C.S.A. § 7137 (as to the Odometer Tampering Act); 73 P.S. § 2190 (as to Credit Services Act); 73 P.S. § 2246 (as to Telemarketer Registration Act); 63 P.S. § 455.609 (as to Real Estate Licensing Act); and 66 Pa.C.S.A. § 2905 (as to Telephone Message Services Act). Neither the CLA nor the UCC provides that a violation of it is a "per se" violation of the UTPCPL.[11] Additionally, plaintiff relies on

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[11]It does not appear that a violation of the CLA is presently before this court because, as defendant points out, plaintiff missed the statute of limitations to bring such an action. See Def. Reply Br. at 7. Further, a claim under the CLA may preempt state law. 12 C.F.R. § 213.9 ("If a lessor cannot comply with a state law without violating a provision of this part, the state law is inconsistent . . . and is preempted, unless [it] gives greater protection and benefit to the consumer).

Though the CLA does not appear applicable, both parties refer this court to Miller v. Nissan Motor Acceptance Corp., 2000 WL 1599244 (E.D.Pa. Oct. 27, 2000)(Dalzell, J.), a remarkably similar class action which challenged the legality of an early termination charge under the CLA, in part, on grounds that the disclosed formula results in charges that are unreasonable in light of the actual harm caused to NMAC, the lessor, by the early termination, i.e., that the lease's formula shifts the risk of residual value inflation to the lessee and results in improper windfall profits to NMAC. 2000 WL 1599244, at *9. Though Miller is not controlling on the present case, this Court will briefly address it for purposes of completeness.

In Miller, the federal district court extensively analyzed leasing economics and granted summary judgment, in part, to the consumer plaintiffs, finding that the early termination formula was unreasonable under Section 1667b(b) of the CLA since it imposes upon an early terminating lessee the risk that the contract residual overstates the value of the car, while this risk is not imposed upon lessees who do not terminate early, nor is it related to any harm that accrues to NMAC as a result of the early termination.

Pekular v. Eich, 355 Pa.Super. 276, 513 A.2d 427 (1986) and Commonwealth v. Comcast Corp., 1994 WL 568479 (E.D. Pa. Oct. 11, 1994)(Brody, J.) for the proposition that a "per se" violation of the UTPCPL may be made, notwithstanding the absence of any reference in the statute to the UTPCPL. However, this court finds that those cases do not support that proposition. First, in Pekular, the Pennsylvania Superior Court held that the Unfair Insurance Practices Act ("UIPA") did not preclude a plaintiff from bringing a cause of action under the UTPCPL and that the UIPA does not provide "the sole and exclusive deterrent to alleged unfair or deceptive acts of insurers or their agents." 355 Pa.Super. at 290, 513 A.2d at 433. The court did allow for the possibility that alleged conduct which falls within the purview of certain sections of the UIPA may also be held to violate the UTPCPL. Id. at 285-86, 513

Id. at *29. The charge to the plaintiffs in that case for terminating early was over $2000 while, had they held the car to term, the further lease payments to NMAC would have totaled less than $500. Id. The court based this finding, in part, on the language in Section 2-718(1) of the UCC, codified in Pennsylvania as 13 Pa.C.S.A. § 2178(a), which requires that a liquidated damages provision must be "reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy." or be void as penalty. Id. at *27.

The plaintiffs, in that case, had also asserted state law claims under Pennsylvania's UTPCPL, Article 2A of the UCC, and seeking a "disgorgement of the early termination charges unlawfully assessed and collected." Id. at *32. However, Judge Dalzell's Opinion did not address those claims, but allowed for an appeal to be taken as to the grant of summary judgment on the CLA, stating that "we are loath to embark upon a host of undecided questions of state law, as applied to the 'thousands of Nissan Standard Leases outstanding nationwide'. . . when a real possibility exists that our Court of Appeals may not agree with the course we have taken . . . ." Id.

In this case, during oral argument, defense counsel handed to this court the Bench Opinion issued in Miller on September 24, 2001 from the Court of Appeals for the Third Circuit, which dismissed the appeal since the resolution of the CLA claim was not final in that case. This dismissal, and the inconclusive state of the Miller case, further leads this court to find little precedential value in that case.

A.2d at 432. The court also mentioned other cases which held that violations of other statutes may also be violations of the CPL. Id. at 287, 513 A.2d at 432. However, Pekular does not stand for the proposition that a violation of one statute would constitute a "per se" violation of the UTPCPL where the underlying statute fails to mention the UTPCPL. Further, in Comcast, the district court granted a motion to remand for lack of federal question jurisdiction, finding "there is no private, federal remedy under 47 U.S.C. § 543 of the Cable Act." 1994 WL 568479, at *1. The fact that the Attorney General's complaint asserted two "per se" violations of the UTPCPL based on violations of the Cable Act does not support the rule proposed by Abrams. Rather, this court finds that a "per se" violation of the UTPCPL may not be made out, absent a directive in the underlying statute.

For these reasons, this court sustains the demurrer to Count I of the Complaint.

B. Plaintiff Fails to State A Cognizable Cause of Action Under 2A-504 of the UCC Since That Provision Does Not Provide An Affirmative Right to Relief Under These Circumstances and the Claim is Barred by the Voluntary Payment Rule.

Defendant demurs to Count II o f the Complaint - the claim under the Article 2A-504 of the UCC on the following grounds: (1) this section of the UCC does not provide for a private right of action for recovering previously collected liquidated damages regardless of how the recovery is characterized; and (2) plaintiff's claim under Section 2A-504 is barred by the voluntary payment rule.

Count II of the Complaint sets forth the following allegations in pertinent part:

> 36. The Lease in issue constitutes a lease contract as contemplated in Article 2A of the Uniform Commercial Code.
>
> 37. The early termination formula constitutes a provision for liquidated damages, at common law, and as contemplated in Article 2A-504.
>
> 38. The early termination formula of the TMCC Lease is unreasonable as written and

> as applied, in light of the then-anticipated harm caused by the default or early termination.

Compl., ¶¶ 36-38. Pursuant to this count, Abrams seeks a declaration that the early termination formula is unreasonable as drafted and unenforceable as applied, as well as a disgorgement of all sums received by TMCC as a result of the early termination formula. Id. at "ad damnum" clause.

Taking the factual allegations in this count as true, this court holds that Section 2A-504 does not provide the remedy sought by plaintiff in the present instance and would otherwise be barred by the voluntary payment rule.

Section 2A-504 of the UCC, as adopted in Pennsylvania at 13 Pa.C.S.A. § 2A504, reads, in pertinent part, as follows:

> **(a) General rule**.-Damages payable by either party for default, or any other act or omission, including indemnity for loss or diminution of anticipated tax benefits or loss or damage to lessor's residual interest, may be liquidated in the lease agreement but only at an amount or by a formula that is reasonable in light of the then anticipated harm caused by the default or other act or omission.
>
> **(b) Invalidity or failure of purpose of remedy**.-If the lease agreement provides for liquidation of damages, and such provision does not comply with subsection (a), or such provision is an exclusive or limited remedy that circumstances cause to fail of its essential purpose, remedy may be had as provided in this division.
>
> **(c) Right of lessee to restitution**.-If the lessor justifiably withholds or stops delivery of goods because of the lessee's default or insolvency (section 2A525 or 2A526), the lessee is entitled to restitution of any amount by which the sum of his payments exceeds:
>
> > (1) the amount to which the lessor is entitled by virtue of terms liquidating the lessor's damages in accordance with subsection (a);
> >
> > (2) in the absence of those terms, 20% of the then present value of the total rent the lessee was obligated to pay for the balance of the lease term, or, in the case of a consumer lease, the lesser of such amount or $500. . . .

13 Pa.C.S.A. § 2A504. Under the clear and explicit terms of this section, the lessee's right to restitution only applies where the lessor withholds or stops delivery of the leased goods. Section 1504 of the Statutory Construction Act of 1972 compels this interpretation, where it provides that:

> In all cases where a remedy is provided or a duty is enjoined or anything is directed to be done by any statute, the directions of the statute shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the common law, in such cases, further than shall be necessary for carrying such statute into effect.

1 Pa.C.S.A. § 1504. See also, Miller, 2000 WL 1599244, at *31 (noting that the damages formula in 2A-504 does not apply in a remarkably similar class action simply because an early termination formula may be found unreasonable).

As a fallback position, Abrams argues that she has stated a valid equitable claim for disgorgement under the contractual doctrine of money had and received. The Pennsylvania Superior Court explains this doctrine as follows:

> 'Where one has in his hands money which in equity and good conscience belongs and ought to be paid to another, an action for money had and received will lie for the recovery thereof. No privity of contract is necessary to sustain this action, for the law, under these circumstances, implies a promise to pay.' And it makes no difference that it is from someone other than the plaintiff that the defendant received the money.

Hughey v. Robert Beech Assocs., 250 Pa.Super. 6, 11, 378 A.2d 425, 427 (1977)(citations omitted). See also, Solomon v. Gibson, 419 Pa.Super. 284, 288, 615 A.2d 367, 369 (1992)("[a] cause of action for money had and received entitles a party to relief where money is wrongfully diverted from its proper use and that money subsequently falls into the hands of a third person who has not given valuable consideration for it."). This court finds that this quasi-contractual doctrine does not apply in the present instance

Moreover, plaintiff's claim for disgorgement of monies paid pursuant to an allegedly unlawful early termination formula in TMCC's standard lease would otherwise be barred by the voluntary payment rule. This rule states that "[w]here, under a mistake of law, one voluntarily and without fraud or duress pays money to another with full knowledge of the facts, the money paid cannot be recovered." Acme Markets, Inc. v. Valley View Shopping Ctr., Inc., 342 Pa.Super. 567, 569, 493 A.2d 736, 737 (1985)(citing Ochiuto v. Prudential Ins. Co. of America, 356 Pa. 382, 384, 52 A.2d 228, 230 (1947)). "A mistake of law occurs where a person is truly acquainted with the existence or nonexistence of facts, but is ignorant of, or comes to an erroneous conclusion as to, their legal effect." Id. at 568, 493 A.2d at 737. In Acme Markets, Acme's lease required it to pay real estate taxes and costs during its initial term, but Acme continued to pay real estate taxes and maintenance costs after the lease had expired but while Acme continued to occupy the premises. Id. at 570, 493 A.2d at 738. Acme sought recovery of the payments made after the lease had expired but its claim was barred by the voluntary payment rule and Acme's mistake was deemed a mistake of law because of Acme's incorrect interpretation of the lease agreement. Id. See also, Coregis Ins. Co. v. Law Offices of Carole F. Kafrissen, 140 F.Supp.2d 461, 464 (E.D.Pa. 2001)(applying Pennsylvania's version of the voluntary payment rule to bar plaintiff's claim against defendant where money was paid to a third party under the mistaken understanding that plaintiff's interests could somehow be injured by an impending consent judgment between plaintiff and third party).

To escape this rule, Abrams asserts in her memorandum of law that her payment of the early termination charges "arose from at most mistake of fact which resulted from a misrepresentation by TMCC about the contractual balance due." Pl. Mem. of Law, at 20. Abrams also argues that TMCC induced this mistake by providing a payoff quote which contained an overcharge that plaintiff mistakenly

paid. Id. Notwithstanding this argument, there is no allegation in the complaint that TMCC misrepresented anything to the plaintiff, nor do the allegations make reference to TMCC providing a payoff quote to Wilkie and/or to plaintiff. Further, as noted above, the Lease clearly and explicitly sets forth the early termination formula, which negates the presumption of any misrepresentation. Compl., Exhibit A, ¶ 25. At best, the complaint implies that plaintiff paid the early termination charge to TMCC under the mistaken belief that the charge was lawful. Under this scenario, plaintiff's payment may have been made under a mistake of law and a claim for recoupment would be barred by the voluntary payment rule.

For these reasons, the court is sustaining the demurrer to Count II of the Complaint.

C. Plaintiff Cannot Maintain A Cause of Action for Restitution or Unjust Enrichment Where The Lease Governs Any Damages Which May Be Recovered

Defendant also demurs to Count III of the Complaint on the grounds that an unjust enrichment claim may not be asserted where the relationship is based on a written contract. In Count III, plaintiff again alleges that the early termination formula is a penalty clause which is unenforceable and unlawful under the CLA and the common law governing liquidated damages. Compl., ¶ 40. Plaintiff also alleges that this formula results in windfall proceeds to TMCC, for which it would be unjust to permit TMCC to retain these proceeds. Id. at ¶¶ 41-43.

Unjust enrichment is a quasi-contractual doctrine based in equity which requires a plaintiff to establish the following: (1) benefits conferred on defendants by plaintiffs; (2) appreciation of such benefits by defendants; and (3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendants to retain the benefit without payment of value. Wiernik v. PHH U.S. Mortgage Corp., 736 A.2d 616, 622 (Pa.Super.Ct. 1999), appeal denied, 561 Pa. 700, 751 A.2d 193

(2000). However, Pennsylvania law holds that a court "may not make a finding of unjust enrichment . . . where a written or express contract between the parties exists." Mitchell v. Moore, 729 A.2d 1200, 1203 (Pa.Super.Ct. 1999)(citation omitted). See also, Birchwood Lakes Community Ass'n v. Comis, 296 Pa.Super. 77, 442 A.2d 304, 308 (1982)(a plaintiff cannot recover on a claim for unjust enrichment if such claim is based on a breach of a written contract); Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989, 999 (3d Cir. 1987)(same).

Here, the Lease is clear and explicit and governs the parties' relationship. Abrams is incorrect in arguing that the "clarity" of the rule announced in Mitchell has been eroded over time since clearly Mitchell was only decided a mere two years ago. Moreover, as noted above, plaintiff is not entitled to the restitution remedy provided under Section 2A-504 of the UCC. Further, it does not appear that a common law remedy for restitution exists based on the facts of this case. Additionally, as explained above, plaintiff's claim for restitution would most likely be barred by the voluntary payment rule.

For these reasons, the demurrer to Count III is sustained and that count is dismissed.

D. Plaintiff Is Not Entitled To Declaratory And Injunctive Relief Absent of Having a Viable, Underlying Substantive Claim for Relief and Absent an Actual Controversy Which Is Imminent or Inevitable.

Defendant also demurs to Count IV of the Complaint which seeks injunctive and declaratory relief based on the claims in the other three counts. Defendant also asserts that plaintiff does not have standing to assert a claim for declaratory or injunctive relief since she cannot show that she will suffer some future and imminent harm but only seeks relief for past injuries. This court agrees.

Having dispensed with all of the underlying substantive claims, it does not appear that Abrams would have a "clear" right to relief or suffer imminent and irreparable harm, which are two requisite

elements for being entitled to an injunction. Summit Towne Centre, Inc. v. The Shoe Show of Rocky Mount, Inc., 2001 WL 1298870, at *2 (Pa.Super.Ct. Oct. 26, 2001). Additionally, in order to sustain a declaratory judgment action, a plaintiff must be able to show that "an actual controversy exists, is imminent or inevitable." Silo v. Ridge, 728 A.2d 394, 398 (Pa.Commw.Ct. 1999)(citation omitted). See also, Wagner v. Apollo Gas Co., 399 Pa.Super. 323, 327, 582 A.2d 364, 366 (1990) (noting also that a plaintiff must be able to show "a direct, substantial and present interest" to maintain a declaratory judgment action).

Here, it is clear that Abrams's transaction with TMCC terminated and no future damages will be assessed pursuant to the Lease. Rather, Abrams seeks money damages for past alleged injuries arising from the purportedly unlawful early termination formula. Absent a present interest and imminent controversy, Abrams is not entitled to injunctive or declaratory relief.

Therefore, the demurrer to Count IV is sustained and that count is dismissed.

CONCLUSION

For the reasons stated in this Opinion, this court is overruling the Objection, raising lack of standing. However, the demurrers to the Complaint are sustained and the Complaint is dismissed.[12] A contemporaneous Order, consistent with this Opinion, will issue.

BY THE COURT,

[12]Having sustained the demurrer to each count in the Complaint, this court need not address the Preliminary Objection, raising failure to attach a writing in contravention of Pa.R.C.P. 1019(i). Otherwise, this objection would be sustained because plaintiff failed to attach to her Complaint any document or other evidence that she actually paid the early termination charge, which is the subject of this lawsuit, and must be attached in order to comply with Pa.R.C.P. 1019(i).

JOHN W. HERRON, J.

Dated: December 5, 2001

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

– – –

KAREN ABRAMS,	:	APRIL TERM, 2001
on behalf of herself and all others	:	
similarly situated,	:	No. 503
	:	
Plaintiffs	:	
	:	
v.	:	COMMERCE PROGRAM
	:	
TOYOTA MOTOR CREDIT	:	
CORPORATION,	:	
	:	
Defendant	:	Control No. 071049

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ORDER

AND NOW, this 5th day of December, 2001, upon consideration of defendant's Preliminary Objections to the Class Action Complaint, plaintiff's opposition thereto, the respective memoranda, all other matters of record, having heard oral argument and in accord with the Opinion being contemporaneously filed with this Order, it is hereby **ORDERED** that:

1. the Preliminary Objections, asserting lack of capacity to sue, are **Overruled**;

2. the Preliminary Objections, asserting a demurrer to each count in the Complaint, are **Sustained**, and the Complaint is **Dismissed**.

BY THE COURT,

JOHN W. HERRON, J.