

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIAN MILLER et al. : CIVIL ACTION
: :
v. : :
: :
NISSAN MOTOR ACCEPTANCE : :
CORPORATION : NO. 99-4953

MEMORANDUM

Dalzell, J.

February 15, 2000

This case pits Nissan Motor Acceptance Corporation ("NMAC") against a putative class of automobile lessees. At issue is the early termination provision in the standard NMAC lease and the practices that accompany its implementation. Before us now is NMAC's motion to dismiss the complaint under Fed. R. Civ. P. 12(b)(6).

I. Background

A. Facts and Plaintiffs' Allegations

The plaintiffs¹, Brian Miller and Michael and Michelle Rose, each entered into a closed-end automobile lease agreement with NMAC. Miller's lease, for a 1997 Nissan Altima, was executed on December 26, 1996 and was a closed-end thirty-six month lease to terminate in December, 1999. The Roses' lease, for a 1996 Nissan Altima, was executed on March 25, 1996 and was a

¹As noted above, this is a putative class action. The plaintiffs allege that the leases they signed were materially similar to those entered into by other lessees. The issues raised by the instant motion to dismiss, however, do not require us to inquire further into the nature or validity of the class allegations.

closed-end thirty-nine month lease with a termination date of June, 1999.

Both Miller and the Roses sought to terminate their leases before the contractual termination date. In March, 1999 Miller asked NMAC for the amount that would be due were he to terminate his lease early, and NMAC informed him that the charge would be \$3,064.81, a figure that would be valid, NMAC reported, until March 19, 1999.² On March 22, 1999 the Roses turned in their leased car as part of a trade in for a new one. Nine days later, NMAC billed the Roses for an early termination liability of \$654.69.

Since the contract's terms are at the heart of this case, we reproduce the early termination clause of the leases in question³ in full:

18. Early Termination Liability: At any time after 12 monthly payments have been paid, I [the lessee] may terminate this lease on the due date of a monthly lease payment if this lease is not in default as disclosed in paragraph 19⁴, and I have given you [NMAC] 30 days written notice. Except as otherwise

²Evidently, Miller did not in fact incur this charge at the time, although since the filing of the Complaint he evidently has terminated his lease early and incurred such a charge. See Pl.'s Brief in Opp'n to Def.'s Mot. to Dismiss at 3 n.1.

³Plaintiffs aver, and NMAC does not dispute, that the clauses are identical as part of the standard lease. Since the quality of the photocopies of the lease attached to the Complaint prevents our verifying this in full, we will for this discussion take plaintiffs at their word.

⁴Paragraph 19 details the circumstances defining "default".

provided in paragraph 22⁵, if I terminate early, in addition to the amounts indicated in items a through d of paragraph 17⁶, I must pay you an Early Termination Charge which is determined as follows: First, all monthly lease payments, which under the terms of this lease, are not yet due and the residual value of the Vehicle are discounted to present value by the Constant Yield Method at the rate implicit in this lease (the "Adjusted Lease Balance"). This amount is then reduced by the Realized Value (and insurance loss proceeds) which you receive for the Vehicle. The balance due you is the Early Termination Charge which I will pay to you immediately. If there is an excess, however, you will not refund it to me.

The Realized Value will be determined in one of the following ways:

- a. You and I may enter into a written agreement as to the Vehicle's value;
- b. Within 10 days after I return the Vehicle, I may obtain at my expense, from an independent third party agreeable to both of us, a professional appraisal of the wholesale value of the Vehicle, which could be realized at sale at the end of the lease term; or
- c. If the Realized Value isn't determined under (a) or (b), then you will attempt to determine the Realized Value in a commercially reasonable manner in accordance with accepted practices in the automobile

⁵Paragraph 22 provides for the circumstance where the vehicle is lost through theft or destruction and NMAC accepts an insurance settlement.

⁶Paragraph 17 is entitled "termination liability", and states that upon the contractual termination the following sums are due to NMAC: (1) a "disposition fee" of the lesser of \$250 or two monthly payments; (2) all past due monthly payments, late charges, and other charges; (3) any amounts due from excess wear and tear as defined in paragraph 16 of the agreement; (4) any excess mileage charge at lease maturity, or a pro-rated excess mileage charge for the period the lease was in effect. Paragraph 17 also states that for an early termination, an additional fee would be due as defined in paragraph 18, which is quoted in the text above.

industry for determining the value of used vehicles.

If you terminate this lease because I am in default under paragraph 19, in addition to the Early Termination Charge disclosed above, I must pay your costs of repossessing, storing and transporting the Vehicle as well as your costs of collection, including your court costs and your reasonable attorneys' fees to the extent permitted by applicable state law. Defaults of this lease are specified below.⁷

The plaintiffs base a number of claims on the early termination clause and other actions associated with early termination. Both sets of plaintiffs allege they did not or could not understand the lease's formula by which the "adjusted lease balance", "rate implicit in the lease", or early termination charge were calculated, and claim that NMAC did not explain such formulae either in the lease or elsewhere. Further, plaintiffs allege, the early termination charge is incomprehensible to the consumer, and the lease does not clearly and conspicuously disclose the early termination formula as the law requires, specifically the Consumer Leasing Act and Federal Reserve Regulation M promulgated thereunder.

⁷Since the plaintiffs attached copies of the lease agreements to their complaint, we are free to consider them, see Pension Ben. Guar. Corp. v. White Consol. Ind., 998 F.2d 1192, 1196 (3d Cir. 1993) ("To decide a motion to dismiss, courts generally consider only the allegations contained in the complaint, exhibits attached to the complaint and matters of public record."). Moreover, "[w]here there is a disparity between a written instrument annexed to a pleading and an allegation in the pleading based thereon, the written instrument will control." ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 n.8 (3d Cir. 1994).

Moreover, with respect to the early termination charge actually assessed, the Roses allege that NMAC did not use the contractual formula in calculating their termination charge, but rather some other formula. The Roses also claim that their early termination charge reflects charges through the next monthly anniversary of the lease, and that such a charge is not "reasonable" under 15 U.S.C. § 1667b(b).

B. Procedural History

On November 8, 1999, the parties entered into a stipulation to dismiss without prejudice certain portions of the complaint pending resolution of a separate case involving similar issues in our Court of Appeals. Specifically, the stipulation states that the plaintiffs' claims, alleged as a group in the sole count in the Complaint, fall into two categories: first, claims that NMAC's disclosures with respect to early termination charges were not in compliance with Regulation M⁸, and, second, the claims that the early termination formula violates 15 U.S.C. § 1667b(b)⁹. The parties stipulated that because the first set of claims was the subject of Judge Shapiro's decision in Applebaum v. Nissan Motor Acceptance Corp., No. 97-7256, 1999 WL 236601 (E.D. Pa., April 21, 1999), which is currently on

⁸Specifically, paragraphs 38A, 38B, and 38C of the Complaint.

⁹Specifically, paragraphs 38D and 38E of the Complaint.

appeal¹⁰, the first set of claims were dismissed without prejudice subject to their reassertion following the Court of Appeals's decision in Applebaum.

By the terms of this stipulation, then, the remaining claims before us are that: (1) the early termination charge is unreasonable because it is assessed to the next monthly anniversary of the lease, and therefore charges consumers for the use of the vehicle that the consumer does not enjoy;¹¹ and (2) NMAC uses a non-disclosed or unauthorized formula to compute early termination charges.

C. NMAC's Motion to Dismiss

NMAC filed the instant motion to dismiss under Fed. R. Civ. P. 12(b)(6), making essentially two arguments with respect to the early termination liability.¹² First, NMAC argues that 15 U.S.C. § 1667b(b) -- and consequently its "reasonableness" requirement -- does not apply to conditions a lessor attaches to early termination, as distinguished from the early termination

¹⁰Judge Shapiro had granted NMAC summary judgment on these claims. The appellate case number is 99-1373, and oral argument was held on January 11, 2000 before Chief Judge Becker and Judges Alito and Barry.

¹¹For convenience, we will refer to this alleged additional charge as the "overcharge".

¹²The motion to dismiss does not present any arguments specifically directed at paragraph 38E of the Complaint, which contains the allegation that NMAC in fact used an unauthorized or non-disclosed formula to calculate the early termination charge. Since the meaning of this omission is disputed, we will discuss this more below.

charge itself, which is addressed by that section.¹³ Second, NMAC argues that even if "reasonableness" does apply, the early termination provisions are in fact reasonable under § 1667b(b).

II. Analysis¹⁴

A. Application of § 1667b(b)

The first question here is whether the reasonableness requirement of 15 U.S.C. § 1667b(b) applies to the alleged "overcharge" that occurs because the early termination charge is calculated as of the monthly anniversary of the lease, rather than the actual date on which the vehicle is returned. 15 U.S.C. § 1667b(b) states:

(b) Penalties and charges for delinquency, default, or early termination

Penalties or other charges for delinquency, default, or early termination maybe specified in the lease but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the delinquency, default, or early termination, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.

¹³On the other hand, NMAC argues that 15 U.S.C. § 1667a(11), regarding disclosure, does apply to the early termination provision and NMAC's lease meets the requirements of that section.

¹⁴When considering a motion to dismiss a complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), we must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them. Dismissal under Rule 12(b)(6) . . . is limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved," Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990), see also H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989).

NMAC argues that this language does not apply to the alleged overcharge¹⁵ because, as alleged, the "overcharge" comes from the regular monthly payments rather than from any early termination charge. That is, if a vehicle is turned in before the monthly anniversary date, the payment for the lease between the turn-in date and the monthly anniversary has already been made as part of most recent monthly payment the consumer made. Definitionally, then, § 1667b(b), which refers to "charges" for "early termination", cannot in NMAC's view apply to the allegations here, where the question of the timing of vehicle turn-in is a condition of the lease, not a charge.

We find that on the language of the statute the alleged "overcharge" does not fall within the ambit of § 1667b(b). As the first step in construing a statute, we look to the language of the provision in question, see Murphy v. Dalton, 81 F.3d 343, 350 (3d Cir. 1996). As quoted above, § 1667b(b) requires that a "charge" for early termination must be reasonable. As the facts alleged in the complaint show, in assessing whether to terminate a lease early, a consumer may obtain from the lessor a dollar figure that must be paid if the lease is to be so terminated.¹⁶ Under the plain language of the statute, this figure must be the "charge" contemplated. Undoubtedly, there are other implicit

¹⁵Or, alternately, to the practice of calculating the early termination charge from the monthly anniversary rather than from the date of vehicle turn in.

¹⁶In particular, plaintiff Miller was told he would have to pay \$3,064.81.

costs associated with an early termination, one of which being that to the extent the consumer turns in the vehicle before the monthly anniversary, the consumer loses the use of the vehicle for some days of the month that have already been "paid for" in advance. However, this cost simply is not part of the "charge" the lessor levies as a result of the lessee's decision to terminate the lease.¹⁷ It is a sum already paid under the terms of the lease as a condition of the lease. If that sum were not already paid, in fact, the consumer would be in "default" as defined by paragraph 19(a) of the lease, and consequently would not even be eligible for early termination as the language of paragraph 18 quoted above shows. Simply because payment of the monthly lease fee was an ongoing condition of the lease does not make it part of the early termination charge.¹⁸

¹⁷Plaintiffs argue that the question of whether the alleged overcharge falls under the reasonableness provision is a question of fact for the jury in that irrespective of how it is characterized, the alleged overcharge is still money out of the consumers' pocket. Therefore, they claim, it is a question of fact as to whether the alleged overcharge is indeed part of the "early termination charge." As outlined above, we disagree: this is a question of what § 1667b(b)'s language encompasses, and we find it does not cover the overcharge alleged here. Similarly, "[i]f a written contract is clear and unambiguous, then the court construes the contract as a matter of law by its contents alone," Western United Life Assur. Co. v. Hayden, 64 F.3d 833, 837 (3d Cir. 1995), and so we may construe the lease agreement insofar as it lays out the existence of a "charge" in paragraph 18.

¹⁸NMAC goes on to note that the text of paragraph 18 does clearly state the conditions under which a lease may be terminated early, including that the lease is terminated on the due date of the monthly lease payment after thirty days' written notice. Consequently, NMAC avers, paragraph 18 complies with 15 U.S.C. § 1667a(11), which mandates that both the conditions under

(continued...)

The plaintiffs proffer a number of arguments in an effort to avoid this common-sense result. First, they argue that the Consumer Leasing Act, and the Truth in Lending Act of which it is a part, are meant to be given liberal construction in favor of the consumer, and consequently the reasonableness provision of § 1667b(b) ought to be applied broadly to all the costs a consumer faces from an early termination. It is certainly proper to construe a remedial statute such as the Consumer Leasing Act in favor of the lessees, see Smith v. Fidelity Consumer Discount Co., 898 F.2d 896, 898 (3d Cir. 1990); however, such a principle of interpretation cannot lead us to read the statutory language contrary to the text's clear meaning. When § 1667b(b) refers to a "charge" for "early termination", we must take this to mean the additional charge to the consumer imposed as a result of the decision to terminate early. We cannot expand this to include the various other costs implicit in such a decision, including that some portion of an already-paid lease fee may be somehow said to be forfeited depending on the date on which the vehicle is turned in. Thus, notwithstanding the need to be liberal in

¹⁸(...continued)

which a lease may be terminated early and the method used for calculating the early termination charge must be set out "accurately" and "clearly and conspicuously". We need not reach the merits of this disclosure question, however, as the question at issue here is whether the application of the charge from the monthly anniversary date is "reasonable", not whether the conditions of early termination are properly disclosed. To the extent that NMAC makes this point as part of a larger statutory interpretation argument, we address this further below.

our interpretation, we cannot apply the § 1667b(b) reasonableness standard to the alleged "overcharge".¹⁹

Plaintiffs also argue that in order to avoid application of the reasonableness requirement to the alleged overcharge we must redefine their claims and read provisions into the lease that are not in fact there. In particular, plaintiffs seem to argue that NMAC's motion to dismiss improperly recasts the Complaint by using semantics to exclude the alleged overcharge from the early termination charge. They further contend that because NMAC in practice accepts the return of vehicles on dates other than the due date of the monthly lease payments, we cannot interpret the language of paragraph 18 to mean that consumers are entitled to early termination of their leases only on the monthly anniversary. True though this may be, it does not alter our conclusion here.

¹⁹NMAC also proffers an argument based on the canon of expressio unius est exclusio alterius - that the explicit mention of one thing in a statute means that Congress intended to exclude others. In particular, NMAC points to § 1667a(11), which requires disclosure both of the conditions under which a lease may be terminated early and of the amount or method of calculating the amount of the early termination charge. Comparing § 1667b(b), NMAC notes that § 1667b(b) only mentions the early termination charges, and not the conditions, and that consequently Congress must have deliberately intended to exclude the conditions from the reasonableness requirement of § 1667b(b). As we find we can resolve the interpretation of § 1667b(b) without reference to this canon, we need not discuss the argument further, see Beach v. Ocwen Fed. Bank, 118 S. Ct. 1408, 1412 (1998).

First, we do not think the distinction between the early termination "charge" for which the consumer is separately billed, and the other costs implicit in terminating the lease early, is semantic. To the contrary, and particularly to the extent that the interpretation of statutes is the interpretation of words, it is crucial. The question presented under paragraph 18 is whether the implicit cost associated with early lease termination because of the pre-paid monthly rental fee is included in the "charge" for "early termination" regulated by § 1667b(b), and this inquiry does not require us to engage in the interpretation exercise that plaintiffs describe.

Moreover, plaintiffs argue, our holding here would effectively "eviscerate" the limitations on early termination liability that the Consumer Leasing Act and supporting regulations are intended to provide, and they offer a thought experiment to prove their point. What if, plaintiffs ask, the early termination clause allowed termination only on the annual anniversary of the lease? Under our conclusion, plaintiffs aver, a lessee terminating the lease early (that is, prior to the annual anniversary) would be liable for all payments leading up to the yearly anniversary and these would be excluded from any "reasonableness" analysis. According to plaintiffs, our logic would sanction a de facto forfeiture of, say, 200 days' worth of lease payment under such a scenario.

Plaintiffs' hypothetical does not convince. For one thing, it appears to assume that the lease payments themselves

would be made on an annual basis²⁰, and, also, we note that any such requirement would have to be clearly disclosed to the consumers per § 1667a(11). The question this extreme example presents is therefore not before us. On the other hand, to the extent that our decision here would exclude the "annual anniversary" requirement from reasonableness analysis, we do not find this troubling. Just because a consumer, after accurate, clear and conspicuous disclosure of such a requirement, nonetheless entered into the lease, such a decision would not, by itself, put the implicit costs associated with an early termination within the ambit of § 1667b(b), a section that on its bare language clearly addresses the only additional charge levied for early termination.

B. Reasonableness and the
Amount of the Alleged Overcharge

We have found above that the alleged overcharge resulting from early termination of the lease before the monthly due date of the lease payment does not fall under the reasonableness requirement of § 1667b(b). We therefore need not reach the question of whether the amount of the alleged overcharge is in any case reasonable. In view of the parties' extensive discussion of this issue in their briefs, however, a few words here may narrow this area of dispute.

²⁰Again, our holding here is that pre-paid lease payments are excluded from the early termination charge.

NMAC argues that the alleged overcharge is reasonable for several reasons, one of which is that the implicit cost of the "forfeiture" of some days' payment on the lease is a very small amount. By way of illustration, it chooses the Roses' lease. The monthly due date on that lease was the twenty-fifth, and the Roses turned in their vehicle on the twenty-second. With a monthly lease payment of \$237.87, the implicit cost for the three days between the date of turn-in and the monthly due date of the payment was \$25.49. NMAC notes that this is 0.27% of the total lease payments that were due over the life of the lease²¹, and we note that the three days' lease is about 3.9% of the \$654.69 early termination charge that apparently was assessed to the Roses. Plaintiffs counter that scale ought not influence our decision, because class actions, such as this case, are designed to offer redress for classes of individuals each of whom have but a small loss.

Although we need not reach the merits of these arguments, we wish to point out that the alleged overcharge may not be even so large as NMAC has posited. Plaintiffs argue that in a situation where a car is turned in before the due date of the monthly lease payment, NMAC gains a windfall in the sense that the lease payment for the days between the turn-in and the monthly due date have already been made, but the consumer does

²¹Thus, claims NMAC, to the extent that this is indeed an extra charge, its small scale as compared to the contract price prevents it from being considered "unreasonable".

not have the use of the car for those days. Thus, say the plaintiffs, the "forfeited" lease payment for those days is a "classic contract penalty", and because it is penal, it cannot be reasonable. However, it appears to us that these analyses of the "forfeited" lease payments miss a connection with the early termination charge.

Under the language of paragraph 18, the first step in the calculation of the early termination charge is: "First, all monthly lease payments, which under the terms of this lease, are not yet due . . . are discounted to present value." Thus, the early termination charge itself is a function of lease payments for the period of the lease when the consumer does not have the use of the car. Assuming that the vehicle is turned in on the monthly anniversary date, then, the early termination charge involves a discounted payment for each and every day from that point until the contracted end of the lease, despite the reality that the consumer will not have the vehicle for those days.

Stated this way, it is less clear exactly what the "overcharge" is here, since the consumer must pay for all the days from the date of vehicle turn-in to the end of the lease.²² The only money difference to the consumer is that the payment for the days between vehicle turn-in and the monthly due date are not

²²To be specific, even if the lessor were to refund the prepaid lease payments for the days between vehicle turn-in and the monthly due date, the lessor would then immediately turn around and take that money back under the logic of the early termination agreement.

discounted, and thus the "overcharge" to the consumer, if any, would seem to be restricted to the amount of the discount, an amount necessarily a small fraction of the actual lease payments for those days, since the discounting period would at the most be one month. As an illustration, to return to the example of the Roses' termination discussed above, the amount that they "forfeited" was not \$25.84, but rather the value of the discount from the 25th to the 22nd on that \$25.84.

As noted above, we do not pass on the reasonableness of such a charge, nor, for that matter, on the reasonableness of the very formula of the early termination charge expressed in paragraph 18. We hasten to add that the conceptual similarity we have described between the "forfeited" lease payments and the early termination charge does not affect our holding that the "charge" for "early termination" referred to in § 1667b(b) comprises only the separate and distinct sum owed to the lessor as a result of the decision to terminate the lease early, and does not include any of the implicit costs, including the "forfeited" lease payments.

C. Plaintiff's Claims Regarding
the Use of an Unauthorized Formula

As mentioned at the outset, after the parties' stipulation to dismiss certain of the allegations without prejudice, two paragraphs of the sole count of the Complaint were still before us: paragraph 38D, claiming that the early termination charge is unreasonable because it is assessed to the

next monthly anniversary of the lease, and therefore charges consumers for the use of the vehicle that the consumer does not enjoy, and paragraph 38E, claiming that NMAC uses a non-disclosed or unauthorized formula to compute early termination charges.

Plaintiffs note that NMAC's motion to dismiss explicitly addressed only the allegations of paragraph 38D, and fails to respond to those made in paragraph 38E. NMAC responds that it understood that paragraph 38E "must be referring to the issue addressed in NMAC's motion", namely the implicit charge for the days between the vehicle turn-in and the monthly payment due date. Reply Br. of Def. in Supp. of Def.'s Mot. to Dismiss at 1 n.1. If this allegation refers to something else, NMAC contends that "it is impossible for defendant to respond to a two-line conclusory averment." Id.

We do not agree that the allegations in paragraph 38E must necessarily be associated with the other claims that we have addressed heretofore. Indeed, the use of a different formula than that disclosed is a violation of the Consumer Leasing Act even if the different formula acts to the advantage of the consumer, see, e.g., Channell v. Citicorp Nat'l Servs., Inc., 89 F.3d 379, 383 (7th Cir. 1996). The question of what formula was in fact used to calculate the early termination charges is distinct from the question of reasonableness, and thus the claim that NMAC used a different formula is separate from the other allegations addressed in the motion to dismiss. On the basis of

the instant motion, then, we cannot dismiss the claims plaintiffs made in paragraph 38E of the Complaint.

III. Conclusion

We find that the 15 U.S.C. § 1667b(b) and its reasonableness requirement do not apply to the implicit cost to the consumer in "forfeited" lease payments created when a vehicle is turned in prior to the monthly payment due date, and we therefore will dismiss the claims in paragraph 38D of the Complaint. Defendant's motion to dismiss did not, however, reach the claims in paragraph 38E of the Complaint, and so these will for now remain. An appropriate Order follows.

