

June 9, 2003

Re: Collection of Attorney's Fees Pursuant to the Motor Vehicle Sales Finance Act

Dear _____ :

This letter responds to your request for a determination by the Pennsylvania Department of Banking (the "Department") of whether attorney's fees may be collected in certain situations related to the repossession and resale of motor vehicles¹ pursuant to the Motor Vehicle Sales Finance Act ("MVSFA"), 69 P.S. § 601 *et seq.*

Specifically, you inquire as to (1) whether an installment sales contract holder ("holder") may recover attorney's fees from a buyer in default under an installment sales contract ("buyer") where legal fees are incurred by the holder in retaking possession of a motor vehicle, but no actual legal process is instituted; (2.A) whether attorney's fees may be charged to a buyer against whom a lawsuit is instituted to recover a deficiency balance; and (2.B) whether attorney's fees incurred by the holder in the actual prosecution of a deficiency judgment action may be recovered from the buyer, presuming a judge would grant such an award.

Relevant Statutory Definitions

Section 3 of the MVSFA provides the following pertinent definitions:

3. "[i]ninstallment buyer" or "buyer" shall mean the person who buys, hires or leases a motor vehicle under any installment sale contract or any legal successor in interest to such person, and shall continue to designate such person notwithstanding he may have entered into one or more extensions, deferments, renewals or other revisions of the original contract, and includes any person who

¹ While the questions posed in your letter do not specify any distinction between the repossession of mobile homes as opposed to the repossession of standard motor vehicles, the sections of the MVSFA that you cite in your letter indicate that your queries are directed at the repossession of standard motor vehicles and not the repossession of mobile homes. The Department notes that in the case of mobile home repossessions, attorney's fees incurred by a holder prior to the commencement of legal action are recoverable from the buyer to a limited extent. *See* 69 P.S. § 623.G(6).

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as surety, endorser, guarantor, or otherwise, is liable on the obligation created by the buyer under an installment sale contract.

4. "Installment seller" or "seller" shall mean a person engaged in the business of selling, hiring or leasing motor vehicles under installment sale contracts or any legal successor in interest to such person.

5. "Holder" shall mean any person, including a seller, who is currently entitled to the rights of a seller under an installment sale contract.

69 P.S. § 603.

Discussion

(1) Whether a holder may recover attorney's fees from a buyer where legal fees are incurred by the holder in retaking possession of a motor vehicle, but no actual legal process is instituted.

As stated in Section 23.A of the MVSFA, "[u]nless the motor vehicle can be retaken without breach of the peace, it shall be retaken by legal process" 69 P.S. § 623.A. Thus, provided that there is no breach of the peace, a holder may repossess a motor vehicle from a buyer without legal process. *See* 69 P.S. § 623.B. Section 23.D of the MVSFA requires that when repossession of a motor vehicle is effectuated otherwise than by legal process, the holder must provide a written notice of repossession to the buyer setting forth the buyer's rights pursuant to the repossession. *See* 69 P.S. § 623.D.

Section 23.E of the MVSFA states that when repossession is effected other than by legal process, a buyer shall be liable for a holder's costs in retaking a motor vehicle "[w]hen such costs represent actual, necessary and reasonable expenses incurred by the holder in *retaking, storing and repairing the motor vehicle, excluding any costs incurred in retaking which are charges for services of persons who are regular full time employes of the holder.*" 69 P.S. § 623.E(2) (emphasis added). A holder may choose to hire an attorney, who is not an employee of the holder, to perform services such as drafting the written notice of repossession required by Section 23.D of the MVSFA. While the cost of hiring an attorney to perform services such as drafting the written notice of repossession may be considered by the holder to be a cost of retaking a motor vehicle, it is the Department's conclusion, as explained below, that attorney's fees are not costs incurred by the holder in retaking a motor vehicle within the meaning of Section 23.E of the MVSFA.

This conclusion is supported by the plain language of the MVSFA, which consistently lists attorney's fees as a charge to the buyer separate and apart from the costs of retaking a motor vehicle.² Specifically, the plain language of Section 23.C of the MVSFA, dealing with repossession by legal process, states that a buyer ". . . shall be liable for such costs of suit *and*

² *See* 69 P.S. §§ 623, 624, 628, 631.

reasonable attorney's fees as provided by the laws governing such legal proceedings.” 69 P.S. § 623.C (emphasis added). Applying the statutory construction principle of *expressio unius est exclusio alterius*,³ the fact that attorney’s fees are specifically stated as being recoverable from a buyer in a legal-process repossession in Section 23.C of the MVSFA, and are not specifically mentioned in Section 23.E of the MVSFA as recoverable from a buyer in a non-legal-process repossession, indicates that the Pennsylvania General Assembly, in enacting and periodically amending the MVSFA, did not intend for attorney’s fees incurred by the holder in a non-legal-process repossession to be chargeable to the buyer.⁴

Based upon the foregoing, it is the Department’s position that attorney’s fees incurred by a holder in a non-legal-process repossession are not chargeable to the buyer pursuant to Section 23.E, or any other section, of the MVSFA. Thus, a holder in a non-legal-process repossession cannot recoup an attorney’s fee for performing services such as drafting the written notice of repossession required by Section 23.D of the MVSFA. Any holder that charges a buyer for the holder’s attorney’s fees in a non-legal process repossession would be making a prohibited charge within the meaning of Section 31.A of the MVSFA, 69 P.S. § 631.A. As a general matter, the Department is authorized to reduce the amount of or prohibit entirely any expense of retaking which appears to be fictitious or unnecessary, pursuant to Section 23.F of the MVSFA, 69 P.S. § 623.F.

(2.A) Whether attorney’s fees may be charged to a buyer against whom a lawsuit is instituted to recover a deficiency balance.

Section 27 of the MVSFA states in pertinent part that:

[i]f the proceeds of the resale mentioned in section twenty-six above are not sufficient to defray the expenses thereof, the expenses of retaking and storing the motor vehicle to which the seller or holder may be entitled and the net balance due upon the contract, plus the amount of any accrued default charges authorized

³ The proposition that the mention of one thing in a statute implies the exclusion of others not expressed. *See, e.g., Vitac Corp. v. Workers’ Comp. Appeal Bd. (Rozanc)*, 817 A.2d 1205, 1212-13 (Pa. Commw. Ct. 2003).

⁴ The plain language of Sections 24 and 25 of the MVSFA also evidence a similar distinction and support this conclusion. *Compare* 69 P.S. § 624.A (an installment sales contract may be reinstated provided that the buyer pays all past due installments including costs of suit authorized by the MVSFA in repossession by legal process) *with* 69 P.S. § 625.B (does not provide for the recovery of attorney’s fees by holder as part of conditions of buyer’s right of redemption after repossession of a motor vehicle other than by legal process). Additionally, Section 23.G of the MVSFA, added in 1978 to address mobile home repossessions, supports this conclusion. Section 23.G(6) provides for attorney’s fees upon commencement of legal action in mobile home repossessions, but caps the amount of attorney’s fees that are incurred prior to commencement of legal action that a holder may charge to a buyer at \$50. *See* 69 P.S. § 623.G(6). The provision for a holder to recover attorney’s fees from a buyer prior to legal action contained in Section 23.G(6)(b) could be used to support an argument that attorney’s fees are intended by the General Assembly to be generally recoverable from buyers in non-legal-process repossessions. However, the fact that the General Assembly did not amend the rest of the MVSFA, and particularly Section 23, in 1978 to permit attorney’s fees to be recoverable from buyers in non-legal-process repossessions evidences the opposite legislative intent and supports the Department’s conclusion that attorney’s fees incurred by the holder in a non-legal-process repossession of a vehicle other than a mobile home are not chargeable to the buyer.

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by this act, the seller or holder may recover the deficiency from the buyer or from any one who has succeeded to the obligations of the buyer

69 P.S. § 627. Section 27 of the MVSFA does not specifically address the permissibility of a holder recovering from a buyer the cost of attorney's fees incurred by the initiation and prosecution of a deficiency judgment action.

Attorney's fees which are incurred by a holder in a legal-process repossession and charged to the buyer pursuant to Section 23.C of the MVSFA may be recovered in a deficiency judgment action if the proceeds of the resale of the repossessed motor vehicle pursuant to Section 26 of the MVSFA do not cover such lawfully-incurred costs. *See* 69 P.S. § 627. Otherwise, if a holder was unable to recoup such costs outside of the sale of a repossessed motor vehicle, a holder's ability to charge a buyer for attorney's fees in a legal-process repossession as set forth in Section 23.C of the MVSFA would be rendered meaningless. *See, e.g., Associates Financial Services Co., Inc. v. Delich*, 414 A.2d 1091, 1095 (Pa. Super. Ct. 1979); *Somerset Mack Sales & Service, Inc. v. Bracken*, 23 Pa. D. & C. 3d 394, 408-09 (1981). Again turning to statutory construction, the Pennsylvania General Assembly is presumed to “. . . not intend a result that is absurd, impossible of execution or unreasonable.” 1 Pa.C.S.A. § 1922(1). *See, e.g., Associates* at 414 A.2d 1094-95. Therefore, it is the Department's position that Section 27 of the MVSFA permits a holder to recover from the buyer attorney's fees that are lawfully incurred by the holder in the repossession of a motor vehicle by legal process pursuant to Section 23.C of the MVSFA as part of a deficiency judgment action.

However, Section 27 of the MVSFA does not permit a holder to recover attorney's fees from a buyer that are incurred by a holder's initiation and prosecution of a deficiency judgment action against a buyer. Applying the statutory construction principle of *expressio unius est exclusio alterius* again, the fact that attorney's fees are listed as a charge separate and apart from the costs of retaking a motor vehicle throughout the MVSFA, and that holders' attorney's fees are not listed as recoverable from buyers in Section 27 of the MVSFA, leads the Department to the conclusion that attorney's fees incurred by the holder in obtaining and prosecuting a deficiency judgment action against a buyer are not recoverable from the buyer pursuant to Section 27, or any other section, of the MVSFA, regardless of whether the underlying repossession was accomplished by legal process or otherwise than by legal process.

(2.B) Whether attorney's fees incurred by the holder in the actual prosecution of a deficiency judgment action may be recovered from the buyer, presuming a judge would grant such an award.

As addressed above, attorney's fees incurred by the holder in obtaining and prosecuting a deficiency judgment action against a buyer are not recoverable from the buyer pursuant to Section 27, or any other section, of the MVSFA. In addition, there is no authority in Section 27, or any other section, of the MVSFA for a Pennsylvania court to award attorney's fees to a holder that has prosecuted a deficiency judgment action against a buyer.

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Whether and the extent to which a Pennsylvania court may award attorney's fees in a deficiency judgment action is an issue that falls outside the scope of the Department's jurisdiction. Thus, while the Department is unable to provide an authoritative interpretation regarding this issue, it appears that a court of competent jurisdiction in Pennsylvania would be able to award attorney's fees to a plaintiff in a deficiency judgment action if such fees are warranted, pursuant to Pennsylvania's Judicial Code. *See* 42 Pa.C.S.A. § 2503; *see also Action Management, Inc. v. Gross*, 51 Pa. D. & C. 4th 414, 419-20 (2001).

Please be advised that the opinions expressed herein regarding the ability of Pennsylvania courts to award attorney's fees to litigants are those of the Department and such opinions are not binding upon any Pennsylvania court.

The Department's analysis is based upon the facts as stated in this letter. Any change in the facts could result in an amendment or reversal of the Department's position. This letter has been authorized by the appropriate Department personnel and constitutes a duly authorized statement of the Department's position regarding the issues discussed herein. This letter may not be relied upon or construed as constituting legal advice.

Please do not hesitate to contact me if you have any further questions regarding this matter.

Sincerely,

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cc: Lydia E. Hernandez-Velez
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