

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

PEARL E. COHEN, on behalf of herself	:	
and all others similarly situated	:	CIVIL ACTION
	:	
v.	:	NO. 06-873
	:	
CHICAGO TITLE INSURANCE CO.	:	

MEMORANDUM AND ORDER

Juan R. Sánchez, J.

June 5, 2006

Chicago Title Insurance Company asks this Court to dismiss Pearl Cohen’s class action complaint, arguing the Pennsylvania Title Insurance Act¹ provides the exclusive remedy for those over-charged for title insurance. Because I agree with Cohen the remedy in the Act is not exclusive, I will deny Chicago Title’s Motion to Dismiss.

FACTS²

Title insurance in Pennsylvania is pervasively regulated by the Title Insurance Act. The only allowed rates for title insurance are approved by and filed with the Commonwealth’s Insurance Commissioner. 40 P.S. § 910-37(a). The approved rates are published in the Manual of the Title Insurance Rating Bureau of Pennsylvania (TIRBOP Manual). 40 P.S. § 910-37(a). If a property owner applies for title insurance within ten years of obtaining a policy issued on the same property, the reissue rate includes a ten percent discount. TIRBOP Manual 5.3, 5.50. If the application is

¹ Act of 1921 Pa. Laws 682 *as amended by* Act of 1963 Pa. Laws 922, 40 P.S. § 910-1 *et seq.*

²When considering a motion to dismiss under Rule 12(b)(6), this Court accepts the allegations of the complaint as true. *Ranke v. Sanofi-Synthelabo, Inc.*, 436 F.3d 197, 200 (3d Cir. 2006).

within three years of a previous policy, the refinance rate is eighty percent of the reissue rate. TIRBOP Manual 5.6.

Pearl Cohen obtained title insurance on February 24, 1999 for her home in Philadelphia. Within three years, on February 4, 2002, Cohen refinanced her home and claims Chicago Title charged the initial, basic rate for title insurance instead of the lower refinance rate. Cohen refinanced \$57,600 and paid \$606.75 for title insurance; the schedule rate was \$436.86.

Cohen filed suit in state court, alleging three state law causes of action: money had and received, unjust enrichment and a violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1 *et seq.*³ Cohen seeks class certification. Chicago Title removed the case to this court under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(2)⁴ and filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and (6), alleging lack of jurisdiction and failure to state a claim.

³ Act of December 17, 1968, P.L. 1224, *as amended*.

⁴In relevant part the statute provides:

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which--

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State;

or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

28 U.S.C. § 1332(d)(2). In its Notice of Removal, Chicago Title averred the putative damages aggregate more than \$5 million. Even if, after discovery, this turns out not to be true, this Court will retain jurisdiction on the basis of diversity under 28 U.S.C. §§ 1332. Chicago Title is an Illinois company and the proposed class designation would limit claims to Pennsylvania persons or entities.

DISCUSSION

Under a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), this Court “accepts the allegations of the complaint as true and draw[s] all reasonable inferences in the light most favorable to the plaintiff[]. . . . Dismissal is appropriate only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *Ranke v. Sanofi-Synthelabo, Inc.*, 436 F.3d 197, 200 (3d Cir. 2006) (citations omitted) (affirming the dismissal of an ERISA claim as time-barred).

Chicago Title argues this Court is without jurisdiction under Rule 12(b)(1) because section 910-44(b) of the Title Insurance Act provides a statutory remedy: in the case of an overcharge, the aggrieved person must ask for a refund and then appeal to the Insurance Commissioner for relief if the company denies it. 40 P.S. § 910-44(b).⁵ Chicago Title relies on *Jackson v. Centennial School District*, 501 A.2d 218, 220 (Pa. 1985), in which the Pennsylvania Supreme Court held “where a statutory remedy is provided, the procedure prescribed therein must be strictly pursued to the

⁵The section reads in relevant part:

(b) Every rating organization and every title insurance company which makes its own rates shall provide, within this Commonwealth, reasonable means whereby any person aggrieved by the application of its rating system may be heard, in person or by his authorized representative, on his written request to review the manner in which such rating system has been applied in connection with the insurance afforded him. If the rating organization or title insurance company fails to grant or reject such request within thirty days after it is made, the applicant may proceed in the same manner as if his application had been rejected. Any party affected by the action of such rating organization or such title insurance company on such request may, within thirty days after written notice of such action, appeal to the commissioner, who, after a hearing held upon not less than ten days written notice to the appellant and to such rating organization or insurer, may affirm or reverse such action.

40 P.S. § 910-44 (footnote omitted).

exclusion of other methods of redress.” Section 3 of the Statutory Construction Act of 1972⁶ provides “one who fails to exhaust his statutory remedies may not thereafter raise an issue which could have and should have been raised in the proceeding afforded by his statutory remedy.” *Sith of Phila. v. Sam Bobman Dep’t Store Co.*, 149 A.2d 518, 521 (1959). Both *Jackson* and *Sam Bobman* involve questions which were raised in administrative procedures and then abandoned before the claimants resorted to the judicial process. The cases stand for the necessity of completing an administrative process, once begun, to preserve issues for judicial review.

Neither case addresses the question of the exclusivity of remedy in a statute. In this case, the remedy provided is not exclusive. The Legislature knows how to make a remedy exclusive. For instance, claims against the Banking Secretary acting as a receiver are limited to those provided for in the Department Code.⁷ 71 P.S. § 733-713; *Hargrove v. Ehinger*, 638 A.2d 282, 285 (Pa. Commw. Ct. 1994).

The remedy in the Title Insurance Act is not exclusive because the statute uses the word “may” three times in describing the administrative process. 40 P.S. § 910-44(b). The statutory word

⁶1 Pa.C.S. § 1504 Statutory remedy preferred over common law

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.

⁷That section provides:

All claims against the institution, suit upon which has not been commenced prior to the time the secretary took possession, *shall be presented in the regular manner provided by this act* for the presentation of claims. Neither a depositor or other creditor of the institution, nor any other claimant, may maintain any action at law or in equity upon such claim, except by regular method provided by this act for exceptions to the accounting of the secretary as receiver.

71 P.S. § 733-713 (emphasis added).

“may” as contrasted with “shall” signals a discretionary rather than a mandatory act. 1 Pa.C.S. § 1921(b), *Commonwealth v. Williams*, 828 A.2d 981, 988 (Pa. 2003), citing *Oberneder v. Link Computer Corp.*, 696 A.2d 148, 150 (Pa. 1997)); *see also Berks County v. Dep’t of Env’tl. Prot.*, 894 A.2d 183, 189 (Pa. Commw. Ct. 2006) (holding “may” is precatory rather than mandatory).⁸ Thus, the remedy of section 910-44 is not exclusive.

Were I to accept Chicago Title’s argument I would be forced to find “any other penalty provided by law” in section 910-48 surplusage in the statute. This I may not do. When construing statutory language, “[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage” 1 Pa. C.S. § 1903. The Statutory Construction Act also directs that a statute “be construed, if possible, to give effect to all its provisions,” so that no provision is rendered mere surplusage. 1 Pa. C.S. § 1921(a); *Pa. Sch. Bds. Ass’n, Inc. v. Com., Pub. Sch. Employees’ Ret. Bd.*, 863 A.2d 432, 436 (Pa. 2004).

The hearing procedure in the act is open to “[a]ny . . . person aggrieved by any action of the commissioner” 40 P.S. § 910-49(a). Cohen is not aggrieved by an action of the commissioner, but by an action of Chicago Title. Her quarrel is not with the rate structure, but with the rate she was charged.

Chicago Title also argues the doctrine of primary jurisdiction precludes this Court from

⁸In a constitutional case, “may” may mean shall:

Also, while the word ‘may’ is generally interpreted to be used in a permissive sense, it does have the same connotation as the word ‘shall’ in certain contexts and under certain circumstances.

Commonwealth ex rel. Fox v. Swing, 186 A.2d 24, 25 (Pa. 1962) (holding when the constitution provides the legislature may declare what offices are incompatible, the courts are without power to also so declare.)

hearing the case. The primary jurisdiction of the Insurance Act applies only when the issue is so complex, complicated or technical it requires the agency's special competence. *In re Ins. Stacking Litig.*, 754 A.2d 702, 706 (Pa. Super. Ct. 2000). This is a straight-forward, non-technical question involving only a reading of the rate manual.

Chicago Title's argument to dismiss count three of the Complaint is also without merit. Pennsylvania case law has consistently construed the Unfair Insurance Practices Act⁹ to allow private rights of action in addition to administrative investigations. *Pekular v. Eich*, 513 A.2d 427, 430 (Pa. Super. Ct. 1986) (allowing a private action for deceptive trade practices). As the Third Circuit noted in 2001, the state legislature has not changed the act in the fifteen years since *Pekular* to address the question of exclusivity. *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 168 (3d Cir. 2001) (allowing a Lanham Act claim to proceed despite the existence of the Unfair Insurance Practices Act).

Because the Title Insurance Act and the Unfair Insurance Practices Act do not confer exclusive jurisdiction on the Commissioner, this Court has jurisdiction and Chicago Title's Motion to Dismiss under Rule 12(b)(1) will be denied.

Chicago Title also asks this Court to dismiss Cohen's claim of unjust enrichment, arguing Cohen is the beneficiary of a lender's policy and, therefore, this is a contract action. A contract holder may not assert unjust enrichment. *Wilson Area Sch. Dist. v. Skepton*, 895 A.2d 1250, 1254 (Pa. 2006) (plurality holding "unjust enrichment is inapplicable when the relationship between parties is founded upon a written agreement or express contract, regardless of how harsh the provisions of such contracts may seem in the light of subsequent happenings"). Chicago Title has

⁹40 Pa.C.S. 1171.1 *et seq.*

produced no contract between itself and Cohen. The TIRBOP Manual distinguishes between owner's and lender's policies. *Compare e.g.* TIRBOP Section 5.1.A and 5.5.A. Chicago Title has failed, at this stage of the litigation at least, to persuade me to dismiss Cohen's unjust enrichment claim.

Similarly, I will not dismiss Cohen's claim under Pennsylvania's Unfair Trade Practices and Consumer Protection Law. The legislature specifically amended the UTPCPL in 1996 to add deception to its prohibitions against fraud. *Commonwealth v. Percudani*, 825 A.2d 743, 747 (Pa. Commw. Ct. 2003) (holding adherence to the pre-1996 pleading requirements would render the words "or deceptive conduct" redundant and superfluous, which is contrary to the rules of statutory construction); *Commonwealth ex. rel. Pandolfo v. Pavia Co.*, 113 A.2d 224, 226 (Pa. 1955) (reasoning when "words of a later statute differ from those of a previous one on the same subject they presumably are intended to have a different construction") (citations omitted). Because Cohen adequately pled deception and she does not have to plead fraud in a UTPCPL case, I will deny Chicago Title's Motion to dismiss. An appropriate order follows.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PEARL E. COHEN, on behalf of herself	:	
and all others similarly situated	:	CIVIL ACTION
	:	
v.	:	NO. 06-873
	:	
CHICAGO TITLE INSURANCE CO.	:	

ORDER

And now this 5th day of June, 2006, Defendant's Motion to Dismiss (Document 12) is DENIED. Defendant is ORDERED to file an answer no later than June 26, 2006. A status/scheduling conference will be held July 11, 2006 at 9:30 a.m. in Courtroom TBA (parties to call chambers the day prior).

BY THE COURT:

\s\ Juan R.Sánchez

Juan R. Sánchez, J.