

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

DAVID T. SHULICK,	:	January Term 2005
Plaintiff,	:	
v.	:	No. 1565
ANDREW J. DEGROAT, WHARTON	:	
EQUITY GROUP, AIG AMERICAN	:	COMMERCE PROGRAM
GENERAL, AMERICAN GENERAL	:	
LIFE, PENSION PROFESSIONALS OF	:	
AMERICA, LLC,	:	Control Numbers 032084/032191
Defendants.	:	

ORDER and OPINION

AND NOW, this 7th day of June, 2005, upon consideration of the Preliminary Objections of Defendant Andrew J. DeGroat and Wharton Equity Group to Plaintiff's Complaint (cn 032084) and the Preliminary Objections of Defendant American General Life Companies LLC to Plaintiff's Complaint (cn 032191), Plaintiff's response in opposition, the parties respective memoranda, all matters of record and in accord with the contemporaneous Memorandum Opinion to be filed of record, it hereby is **ORDERED** and **DECREED** that Defendants' Preliminary Objections are **Sustained** in part as follows:

1. Count I (UTPCPL) is **dismissed** against all Defendants.
2. Count III (punitive damages) is **stricken**.
3. Plaintiff is granted leave to amend Count VI (violation of the Pennsylvania Securities Act) solely as it pertains to Plaintiff's claim regarding the alleged misrepresentation by DeGroat. The claim for lack of registration is **dismissed** against all Defendants.

4. Plaintiff is granted leave to amend the agency allegations within the complaint as they pertain to Defendant American General Life Companies LLC within twenty (20) days from the date of this order.

All other Preliminary Objections are **Overruled**.¹

BY THE COURT,

HOWLAND W. ABRAMSON, J.

¹ This court makes no finding as to the future viability of any of the counts and this order is entered without prejudice so that Defendants may later file a motion challenging same if warranted.

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LIFE, PENSION PROFESSIONALS OF	:	
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Defendants.	:	

OPINION

Abramson, J.

Presently before the court are the respective preliminary objections filed by Defendants Andrew J. DeGroat and Wharton Equity Group and American General Life Companies LLC. For the reasons discussed below, Defendants' Preliminary Objections are sustained in part and overruled in part.

BACKGROUND

In or about November, 2003 through April 2004, Plaintiff David T. Shulick, Esquire was approached by Defendant Andrew DeGroat, a duly licensed salesman of Personal Retirement Products and related services, to sell him personal retirement products and related investments and securities which could allegedly yield him personal tax benefits and provide him with certain investment returns and related insurance policies and products. (Compliant ¶ 9). In particular, Plaintiff alleges that Defendants represented to him that if he purchased the products and the services being sold for the substantial sums, that it would enable Plaintiff to buy out "the Family Limited Partnership" AIG policy for the sum of \$74, 275.00 in year 6 of the program. (Id. ¶ 11).

Plaintiff alleges that at the same time that DeGroat and the other Defendants were attempting to sell these products to Plaintiff, Plaintiff learned that certain Internal Revenue Service Regulations were being proposed, circulated, drafted and otherwise discussed, that may impact the substance and representations of DeGroat and this retirement plan. (Id. ¶ 12). Plaintiff allegedly questioned DeGroat about this possibility and DeGroat affirmatively denied that any potential I.R.S. regulation could impact any aspect of the program represented in the Plan. Plaintiff then requested DeGroat to speak to the “experts” and to advise, in writing, if any of the potential I.R.S. regulations would affect the retirement program being sold to Plaintiff. In response, DeGroat allegedly advised that nothing being represented to Plaintiff in the retirement program would be affected by any of the proposed Internal Revenue Service Regulations pertaining to the 412i Plan. (Id. ¶¶ 13-15).

Thereafter, Plaintiff alleges that relying upon Defendants’ representations he paid approximately \$125,000.00 to Defendants in return for specific securities, insurance policies, annuities and investments as part of a “personal retirement program” as designed and solicited by Defendants DeGroat and Wharton. (Id. ¶ 10-15). Shortly thereafter in mid to late 2004, Plaintiff learned that certain Internal Revenue Service regulations were adopted that seemed to directly affect what was sold to Plaintiff by Defendants and allegedly contradicted the prior representations made to Plaintiff by DeGroat and Defendants, causing the “buy-out” of the Family Limited Partnership to increase from \$74, 275.00 to a sum far in excess of \$400,000.00 or at least more than \$74, 275.00 the represented amount. In the meantime, DeGroat and/or the Pension Professionals sent Plaintiff documents advising that his tax deduction for 2003 relating to

the personal retirement program would need to be reduced with no substantive explanation as to why. (Id. ¶ 17-18).

Plaintiff alleges he grew suspicious and investigated and learned that the representations concerning the proposed IRS regulations made by DeGroat were false. After Plaintiff's attempts to contact DeGroat were unsuccessful, on November 16, 2004, Plaintiff issued a letter to DeGroat which placed him on notice of Plaintiff's intent to file a consumer fraud action. (Id. ¶ 18).

In January 2005, Plaintiff instituted suit against Defendants alleging claims for violation of the Pennsylvania Consumer Fraud Act, 73 P.S. § 201 et. seq. ("UTPCPL") (Count I), negligent misrepresentation (Count II), punitive damages (Count III), fraudulent misrepresentation (Count IV), equitable and legal rescission (Count V) and violation of the Pennsylvania Securities Act and Insurance Regulations (Count VI). Defendants have respectively filed Preliminary Objections to Plaintiff's Complaint.

DISCUSSION

I. Plaintiff's complaint is not Preempted by ERISA.

Defendants respectively argue that Plaintiff's claims are preempted by ERISA. ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144 (a). In interpreting ERISA's preemption clause, a court "must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." N.Y. State Conf. Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656, 131 L.Ed. 2d 695, 115 S.Ct. 1671 (1995). The purpose of ERISA preemption is to avoid conflicting

federal and state regulation and to create a nationally uniform administration of employee benefit plans. Thus, ERISA preempts state laws that (1) “mandate employee benefit structures or their administration;” (2) provide alternative enforcement mechanisms;” or (3) “bind employers or plan administrators to particular choices or preclude uniform administration practice, thereby functioning as a regulation of an ERISA plan itself.” *Id.*

Applying these principals to the case *sub judice* the court concludes that Plaintiff’s state law claims against Defendants are not preempted by ERISA. Plaintiff alleges that that he was misled about the possible affect of proposed IRS regulations on the “buy out” of the life insurance component of the Plan. Plaintiff is not suing for benefits due under the Plan, his right to any benefits under the Plan, or the extent of existent coverage under the plan. Plaintiff does not seek benefits or rights under the Plan. Plaintiff does not allege improper administration or seek enforcement of the Plan. Rather, Plaintiff alleges misrepresentations relating to the advice received from Defendants prior to the investment in the Plan. As such Plaintiff’s claims do not conflict with ERISA’s purposes and is not preempted. See Milkis Enters., Inc. v. Ret. Plan Consultants, 2005 U.S. Dist. Lexis 6678 (E.D. Pa. 2005)(The bookkeeper's argument that the employee could have brought suit under ERISA for benefits due was misplaced because the employee was not suing for benefits due but rather for damages based on tax liability incurred as a result of its conduct. Resolution of the lawsuit involved interpretation of the IRS regulations and application of the state law of negligence.). The mere fact that the Plan is implicated in the dispute is not dispositive of whether Plaintiff’s claims are preempted. Accordingly, Defendants’ Preliminary Objections are overruled.

II. The Complaint Does Not Set Forth a Claim Under the UTPCPL.

Count I of Plaintiff's complaint purports to state a claim under the UTPCPL. An individual who purchases goods, including real estate, may bring a private action to recover damages caused by another's "act or practice declared unlawful" by the UTPCPL. 73 P.S. 201-9.2. In order to state a claim under the UTPCPL, a plaintiff must allege one of the "unfair or deceptive practices" set forth in 73 P.S. § 201-2(4)(i)-(xxi). 73 P.S. § 201-3. In considering these causes of action it is important to remember that "the general purpose of the UTPCPL is to protect the public from fraud and unfair or deceptive business practices." Lennon v. Wyeth-Ayerst Labs., Inc., 792 A.2d 1253 (Pa.Super. 2001) (citing Burke v. Yingling, 666 A.2d 288, 291 (Pa.Super. 1995)).

The court finds that the UTPCPL claim must be dismissed since the Plaintiff lacks standing to raise said claim. The limited circumstances under which a private person may bring a claim under the UTPCPL are specifically set forth in Section 9.2 (a), which provides in relevant part, that:

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 declare unlawful by section 3 of the UTPCPL, may bring a private action to recover actual damages or one hundred dollars (\$100.00), which ever is greater.

Bowers v. T-Netix, 837 A.2d 608, 613 (Pa. Cmwlth. 2003) (citing 73 P.C. S. A. § 201-9.2(a)).

Here, the primary purpose of Plaintiff's purchase of the Plan was not for personal, family or household use. The Plan, which is attached to the complaint, describes itself as a Defined Benefit Plan established for the exclusive benefit of all eligible employees and

their beneficiaries. Comp. Exhibit C art. 1. Similarly, the Plan contains a provision for “employer” funding of the Plan, employee vesting procedures and calculations for employee benefit accruals and calculations. *Id.* art. IV-VI, VIII. The court recognizes that Plaintiff is self employed with no other employees however the Plan was developed for the workplace and was not purchased primarily for the personal, family or household benefits. *See Cumberland Valley Sch. Dist. v. Hall-Kimbrell Env'tl. Serv., Inc.*, 639 A.2d 1199, 1201 (Pa. Super. 1994). Based on the foregoing, Defendants’ Preliminary Objection is sustained and Count I is dismissed.

III. Plaintiff’s Count for Punitive Damages is Stricken.

Count III of Plaintiff’s complaint purports to state a claim for punitive damages. Under Pennsylvania law, “a request for punitive damages does not constitute a cause of action in and of itself.” *Nix v. Temple Univ. of the Commw. Sys. Of Higher Educ.*, 596 A.2d 1132, 1138 (Pa. Super. 1991). Rather, such a request should be made in a clause requesting relief for a viable cause of action that permits recovery of punitive damages. Accordingly, Defendants’ Preliminary Objection to Count III is sustained and Count III is stricken.²

IV. Defendants’ Preliminary Objections to Count VI Alleging Violations of the Pennsylvania Securities Act and Insurance Regulations are Sustained.

² The court further finds that Plaintiff has failed to allege sufficient facts to warrant the imposition of punitive damages.

Count VI of Plaintiff's complaint purports to state a claim for violations of Pennsylvania Securities Act and Insurance Regulations. Specifically Plaintiff alleges that DeGroat violated and continues to violate the Pennsylvania Blue Sky laws and other applicable Pennsylvania Insurance Regulations (1) by failing to register with the Commonwealth of Pennsylvania to sell the investments referenced herein and (2) by making allegedly false representations to plaintiff at the time he was selling the personal retirement plan titled "David Shulick, Esq. 412 (i) Defined Benefit Plan. Complaint ¶ 46.

As it pertains to Plaintiff's claim that Defendant DeGroat failed to register with the Commonwealth of Pennsylvania to sell investments referenced herein, the court finds that said claim should be dismissed. Section 202 (g) of the Pennsylvania Securities Act specifically exempts from registration requirements "securities" "issued in connection with" Plaintiff's "pension, profit sharing, or similar benefit plan." 70 P.S. § 1-202 (g). In the Exhibits attached to the complaint, the Plan is identified as a Defined Benefit Plan pursuant to section 412 (i) of the Internal Revenue Code. (Complaint Exhibit "C"). Since the Pennsylvania Securities Act specifically exempts from registration requirements pension, profit sharing or similar benefit plans, and since Plaintiff's complaint as well as the exhibits attached to the complaint evidence that the Plan at issue is a defined benefit plan established for the purpose of providing retirement benefits, Plaintiff's Plan is exempt from the registration requirements and Defendants' Preliminary Objection on this basis is sustained.

As it pertains to Plaintiff's claim that Defendant DeGroat allegedly made false representations to Plaintiff at the time he was selling the personal retirement plan titled "David Shulick, Esq. 412 (i) Defined Benefit Plan, Plaintiff fails to identify the specific

section (s) of the Securities Act and Insurance Regulations which were allegedly violated by the Defendants. Moreover, Plaintiff also fails to allege whether the life insurance contract and the annuity which comprise the Plan constitute a “security” under the Pennsylvania Securities Act. A pleading should fully summarize the material facts, and at a minimum, set forth concisely the facts upon which a cause of action is based. Here the allegations within the complaint are insufficient to allow Defendants to prepare a defense. Accordingly, Defendants’ Preliminary Objections to Plaintiff’s claim for allegedly making false representations to Plaintiff at the time he was selling the personal retirement plan are sustained. In the event Plaintiff is capable of alleging sufficient facts to state a claim for violations of the Pennsylvania Securities Act and Insurance Regulations, Plaintiff is granted leave to amend the complaint within twenty (20) days from the date of this order to amend only said claim.

IV. Plaintiff’s Allegations of Agency are Insufficiently Specific.

Plaintiff purports to allege claims against American General Life Companies, LLC based on a theory of vicarious liability. The court finds that Plaintiff’s allegations of agency are insufficiently specific as a matter of law. While it is unnecessary to plead all the various details of an alleged agency relationship, a complainant must allege, as a minimum, facts which: (1) identify the agent by name or appropriate description; and (2) set forth the agent's authority, and how the tortious acts of the agent either fall within the scope of that authority, or, if unauthorized, were ratified by the principal. Alumni Asso., Delta Zeta Zeta of Lambda Chi Alpha Fraternity v. Sullivan, 535 A.2d. 1095 (Pa. Super. 1987). More importantly, an agent who is not a servant is not subject to any right of control by his principal over the details of his conduct, and the principal is not liable for

harm caused by the agent's unauthorized negligent physical conduct. Smalich v. Westfall, 269 A.2d 476, 481 (Pa. Super. 1970); Restatement (Second), Agency § 250.

In the matter *sub judice*, Plaintiff has only alleged that DeGroat was acting individually, and/or as an agent of Defendant American General Life Companies LLC. Exhibit “A” ¶ 19.³ Absent from the complaint are allegations that American General Life Companies LLC either authorized, or ratified by acquiescence, DeGroat’s alleged conduct. Hence, the factual allegations of the complaint are insufficient as a matter of law to place the issue of agency before this Court. Accordingly, Defendant’s Preliminary Objection is sustained. In the event Plaintiff is capable of alleging the facts necessary to bring the issue of agency before the court, Plaintiff is granted leave to amend the complaint within twenty (20) days from the date of this order.

CONCLUSION

Based on the foregoing, Defendants’ Preliminary Objections are sustained in part as follows: Count I (UTPCPL), Count VI (Securities Act violations) as it pertains to the registration requirements and Count III (Punitive Damages) of Plaintiff’s complaint are dismissed. Plaintiff is granted leave to amend Count VI to allege the specific sections of the Pennsylvania Securities Act and Insurance Regulations that were allegedly implicated by Defendants’ conduct and Plaintiff is granted leave to amend the agency allegations within twenty (20) days from the date of this order. All other Preliminary Objections are overruled. An order contemporaneous with this opinion will follow.

BY THE COURT,

³ Plaintiff also alleges that DeGroat was acting as an agent for Defendants Wharton Equity Group and Pension Professionals of America. Defendant American General Life Companies LLC solely objects to the specificity of the agency allegations.

HOWLAND W. ABRAMSON, J.