

## THE PENNSYLVANIA UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW

---

**Keystone Bar Association  
“LUNCH N LEARN”  
February 10, 2015**

**Renardo L. Hicks  
R. L. Hicks & Associates, LLC  
17 North Second Street, 16<sup>th</sup> Floor  
Harrisburg, PA 17101  
717-260-3070  
rlh@rlhickslaw.com**



### The Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL) 73 P.S. §§ 201-1 –201-9.2

---

- A powerful weapon;
- Used to protect consumers from “advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth” - 201-2(3)
- Enacted in 1968, but still vastly unknown to business;
- The Bureau of Consumer Protection (BCP) in the OAG, or DAs are charged with enforcement. BCP investigates, Mediates and litigates. 201-4.

73 P.S. § 201-2(4) is an extensive definition of conduct deemed to be "unfair methods of competition" and "unfair or deceptive acts or practices."

- A laundry list of separate unfair or deceptive acts or practices
- Five separate provisions targeted at preventing advertising and representations that confuse or mislead consumers as to the actual manufacturer or provider of goods or services, or as to the sources, sponsorship, affiliation or geographic origins of goods or services. (i-v)
- Other provisions are aimed at representations that goods or services have characteristics, ingredients or uses they do not have, and representing that goods are original or new if they are deteriorated or used, or that goods or services are of a particular standard when they are not. (vi-viii)
- "bait and switch", advertising goods or services with intent not to sell them as advertised, or advertising them with intent not to supply the reasonably expectable public demand, unless the advertisement discloses a quantity limitation. (ix-x)

## 73 P.S. § 201-2(4) continued

- representations that repairs or replacements are needed when they are not, and failure to comply with written warranties. (xiv – xvi)
- promise a buyer compensation for procuring another buyer or "referral" where that compensation is contingent upon some later event. (xii)
- promote or even engage in a "pyramid club," referring to the many commonplace sales schemes by which an individual buys goods or services upon the promise that he will receive compensation for selling similar goods and services to others, and for having those others sell goods and services, and so on. (xiii)
- 1996 amendment - to solicit telephone sales without *first* conspicuously stating the identity of the Seller, the purpose of the call (i.e., to make a sale), the nature of the goods or services in question and, in prize promotions, that no purchase or payment is necessary to win. How often is this legal requirement met in your own experience with telemarketers? (xvii)

## \$\$ PRIVATE ACTIONS \$\$



- So despite the Attorney General's significant resources and enforcement powers, it is private litigants who pose the more serious threat to business. 201-9.2
- 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 3 of this act [§ 201-3], 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.



## \*\* Class Actions \*\*

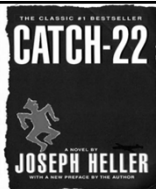
- A popular vehicle for class action litigation
- The Commonwealth's Attorney General has pursued actions under the statute for matters involving real estate transactions, lending transactions, the automobile industry, and franchise transactions.
- However, a broad "catch all" provision in the statute, coupled with an explicit or judicially created private right of action, creates a fertile ground for creative class litigation approach.
- A claim for fraud, when asserted as a claim under the UTPCPL, may entitle the plaintiff to treble damages and attorneys fees. 73 P.S. § 201-9.2. Further, the UTPCPL ensures that a successful plaintiff will recover more than nominal damages, mandating recovery of \$100 or actual damages, whichever is greater. 73 P.S. § 201-9.2. Finally, plaintiffs have successfully argued that UTPCPL actions are governed by the Commonwealth's six year statute of limitations, rather than the traditional two year statute for fraud claims.



## The "Catchall" Provision



- The Act's twenty-first unfair trade practice definition, its "catchall," is "any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding."
- Before the 1996 amendments, the catchall provision addressed only "fraudulent conduct," requiring a plaintiff to prove the elements of common law fraud, including proof that a misrepresentation was made intentionally or with reckless disregard of its truth. **Rodriguez v. Mellon Bank, N.A.**, 218 B.R. 764 (Bankr. E.D. Pa. 1998).
- However the 1996 amendments expanded the catchall provision to include a wider variety of unsavory conduct within the reach of the UTPCPL.
- Interestingly, the Pennsylvania Superior Court has since ruled that a plaintiff suing under the catchall provision still must prove all elements of common law fraud, despite the 1996 amendments. See **Booze v. Allstate Ins. Co.**, 750 A.2d 877 (Pa. Super. 2000).



The United States Bankruptcy Court for the Eastern District of Pennsylvania rejected the **Booze** decision, reasoning that the Pennsylvania legislature must have intended to expand plaintiffs' rights of recovery beyond fraudulent conduct when it amended the statute to address "deceptive" conduct. **Patterson v. Chrysler Financial Company**, 263 B.R. 82 (Bankr. E.D. Pa. 2001).

In actual practice, even when the challenged business conduct does not fit any of the specific definitions of unfair trade practices, a plaintiff's lawyer preparing a complaint for breach of contract or transactional misrepresentations will often include a claim of unfair trade practices under the catchall provision.

**WHY:** First, the UTPCPL is not subject to the relatively short two-year statute of limitations applicable to common law fraud claims, thereby allowing a plaintiff to pursue a claim for fraud within six-years. The second and more significant reason for including a UTPCPL claim is, in a word, **money**.

## Catchall Bottom Line

The courts that have actually examined the issue closely have concluded, rightfully, that the legislative change is intended to broaden that catchall so that common law fraud is not required. Grimm v. Washington Mutual Bank, 2008 U.S. Dist. LEXIS 55628, 2008 WL 2858377 (W.D. Pa. July 22, 2008), Hansford v. Bank of America, 2008 WL 4078460, 2008 U.S. Dist. LEXIS 65502 (E.D. Pa. Aug. 22, 2008); Wilson v. Parisi, 549 F.Supp.2d 637 (M.D. Pa. 2008).

It is a good idea to avoid basing your case solely on the catchall if possible, to avoid this issue.



## Treble Damages and Other Remedies

- The UTPCPL offers a wide range of remedies-i.e., money damages-to those who succeed in proving an unfair trade practices claim.
- At Section 201-9.2, the Act provides that a person who has purchased or leased goods or services "primarily for personal, family or household purposes," and who thereby suffers any loss of money or property as a result of an unfair trade practice may bring a private action to recover actual damages or \$100.00, whichever is greater.
- Far more importantly, Section 201-9.2 also provides that "the court may in its discretion, award up to three times the actual damages sustained," plus reasonable attorney fees.
- In practice, an award of treble damages is quite rare. It is rather the threat of treble damages and counsel fees that makes the UTPCPL a powerful weapon. Many a case that might otherwise go to trial is settled quickly for a reasonable price upon the defendant's fear of potentially having to pay not just the plaintiff's attorney fees, but also three times whatever the actual damages might be.

## Real Estate



By its terms, the UTPCPL only provides private remedies to consumers of "goods or services." However in 1987 the Pennsylvania Superior Court ruled that sales of residential real estate are also within the purview of the UPTCPL. *See Gabriel v. O'Hara*, 368 Pa. Super. 383, 534 A.2d 488 (1987). As a result of the *Gabriel* ruling, unfair trade practices claims are now routinely included within fraud complaints against realtors and sellers of real estate.

With the *Gabriel* decision extending the reach of the UTPCPL, the Act provides consumers with significant leverage-excessive leverage, in the view of many business interests-to redress grievances in a wide variety of consumer transactions ranging from goods and services to telemarketing, motor vehicle sales and services, and now real estate. Further, with the 1996 amendments potentially gathering all manner of deceptive conduct within the "catchall" definition, there are surprisingly few hard limitations on what is and isn't an unfair trade practice. The benefit for plaintiffs, and the risk for business, is that, in an Act providing for remedies as strong as treble damages, the definition of "unfair trade practices" remains to some degree in the eye of the beholder.

## Notable violations of the catchall:

1. A landlord's egregious and continuous failure to maintain residential premises in a habitable condition. In re Clark, 96 B.R. 569 (Bankr. E.D. Pa. 1989)
2. Conversion of a tenant's personal property by a landlord. In re Clarkson, 105 B.R. 266 (Bankr. E.D. Pa. 1989)
3. Foreclosure rescue scams, i.e. misrepresentation by a "homesaver" that he would sell the debtor's home back to her, or sell it to a third party and return her a significant part of the proceeds. In re Bryant, 111 B.R. 474 (E.D. Pa. 1990)
4. An insurance company's promise of benefits it never intended to pay, premature termination of coverage, and miscalculation of benefits. *Schroeder v. Acceleration Life Ins. Co.*, 972 F.2d 41 (3d Cir. 1992)

## More Catchall Violations

---

5. Failure of a finance company to disclose that obtaining a new loan may be much less expensive than refinancing the existing loan. *In re Milbourne*, 108 B.R. 522 (Bankr. E.D. Pa. 1989)
6. Promising one rate index for an adjustable rate mortgage, but then using a different, higher one. *Le Bourgeois v. Firsttrust Savings Bank*, 25 Phila. 249 (C.P. 1993)
7. Misrepresenting the savings that consumers would receive through a prescription drug plan. *Commonwealth v. Peoples Benefit Services*, 895 A.2d 683 (Pa. Cmwlt. 2006)