

THE DANGEROUS EXPANSION OF LIABILITY UNDER THE PENNSYLVANIA UNFAIR TRADE PRACTICES & CONSUMER PROTECTION LAW

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Introduction

- Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. § 201-1 *et seq.*, prohibits "unfair methods of competition" and "unfair or deceptive acts or practices"
 - Allows for private and public enforcement
 - Contains onerous statutory remedies and penalties
 - Broadly applies to consumer transactions involving goods and services across many industries

Introduction

- Recent developments have expanded (or threaten to expand even further) the risk of UTPCPL liability, particularly for Pennsylvania businesses
 - Extra-territorial application for acts occurring outside the Commonwealth
 - “Catchall” provision interpreted to impose strict liability on businesses regardless of intent or culpability
 - Proposed new regulations by the Attorney General would substantially expand the UTPCPL’s scope and erode defenses

PRIVATE ACTIONS

Brief overview

UTPCPL Private Action Provision

“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 . . . this act, 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.” 73 P.S. § 201-9.2(a)

Elements of UTPCPL Private Action

- Plaintiff must allege and prove:
 - (1) that he or she ***purchased or leased*** a good or service that was “***primarily for personal, family or household purposes***”;
 - (2) that the seller or provider engaged in an ***unfair or deceptive act or practice*** prohibited by the statute;
 - (3) that he or she ***justifiably relied*** on the seller or provider’s representation or conduct; and
 - (4) that his or her justifiable reliance caused an ***ascertainable loss***.

Private Action Elements (cont.)

- First Element: Purchased or leased goods or services “primarily for personal, family or household purposes”
 - Private action provision casts a very broad net – goods or services, whether purchased or leased
 - Courts look to **purpose** of purchase, not the **type** of product or service purchased
 - Examples:
 - Title insurance for home purchase – Yes
 - Life insurance for business succession planning - No

Private Action Elements (cont.)

- Second Element: Section 201-2(4) lists 20 specific types of prohibited conduct. Categories include:
 - False, misleading, or disparaging advertising
 - Passing off goods or services (e.g., ownership, origin, standards, quality)
 - False promises to induce contract
 - Failing to comply with written guarantees, representations, or warranties
 - Repairs (e.g., misrepresentations about repairs, substandard repairs)
 - Certain telemarketing practices (e.g., obscuring the identity of the seller or the purpose of the call)
- Danger: A catchall provision banning “any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.” 73 P.S. § 201-2(4)(xxi).

Private Action Elements (cont.)

- Section 201-3 (73 P.S. § 201-3) makes it unlawful to engage in the acts or practices enumerated in Section 201-2(4) in the conduct of any “trade or commerce”
- “Trade or commerce” is defined broadly as “the advertising, offering for sale, sale or distribution of any property . . . or thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth.” 73 P.S. §201-2(3)

Private Action Elements (cont.)

Applies to consumer transactions
across many industries

- Automobile sales and leasing
- Banking
- Debt collection
- Food and restaurants
- Insurance
- Healthcare
- Mortgages
- Retail and department stores,
- Residential construction and contracting
- Residential real estate sales and leasing
- Utilities, cable, and telecommunications

Applies to many types of
services

- Accounting
- Construction
- Design
- Financial
- Legal
- Marketing
- Maintenance
- Media and entertainment
- Medical
- Realty
- Tax
- Transportation

Private Action Elements (cont.)

- Third Element: Justifiable reliance on the unfair or deceptive act or practice
 - Emanates from the private action provision, *i.e.*, ascertainable loss “as a result” of the use or employment of a prohibited act
 - Requirement applies in private action based on any of the enumerated prohibited acts, not just the catchall provision
 - Generally requires affirmative showing that plaintiff bought product/service or engaged in some other detrimental activity because of the prohibited conduct

Private Action Elements (cont.)

- Fourth Element: “Ascertainable loss”
 - Actual, quantifiable, and non-speculative loss of money or property
 - Examples of potentially recoverable losses
 - Diminished value of property
 - Loss of bargain
 - Interest and fees
 - Examples of what does not qualify as ascertainable loss
 - Legal fees to bring suit
 - Reputation injury

Private Action: Remedies

- Robust remedial scheme aimed at punishing and deterring unfair and deceptive business practices
- “Actual damages or one hundred dollars (\$100), whichever is greater.” 73 P.S. § 201-9.2(a)
- Court has discretion to award:
 - Treble damages
 - Attorneys’ fees and costs
 - “Additional relief” that the court “deems necessary and proper.”

Private Action: Other Considerations

- No right to a jury trial
- Six-year statute of limitations

A Few Words on Class Actions

- Plaintiffs often bring UTPCPL claims as class actions
 - Increases damage exposure and the costs and burdens of defending the lawsuit
- The reliance requirement remains a substantial hurdle to class certification
 - Individualized and fact-intensive inquiry
 - Numerous cases denying class certification or decertifying classes based on the reliance requirement

A Few Words on Class Actions (cont.)

- Efforts to circumvent the reliance requirement have generally failed
 - Fraud on the market theory, *e.g.*, reliance should be presumed because deceptive conduct inflated price for everyone
 - Presumption of reliance for material omissions
 - Potential narrow exception where parties are in a fiduciary relationship
- Attorney General's proposed regulations contain several provisions that could alter the class action landscape

PUBLIC ACTIONS

Brief Overview

Public Actions, 73 P.S. § 201-4

- Brought by State Attorney General's Office
 - Often spurred by consumer complaints or AG interest in a particular industry
- AG is not subject to the same requirements as a private plaintiff
 - No reliance requirement
 - No ascertainable loss requirement

Public Actions, 73 P.S. § 201-4

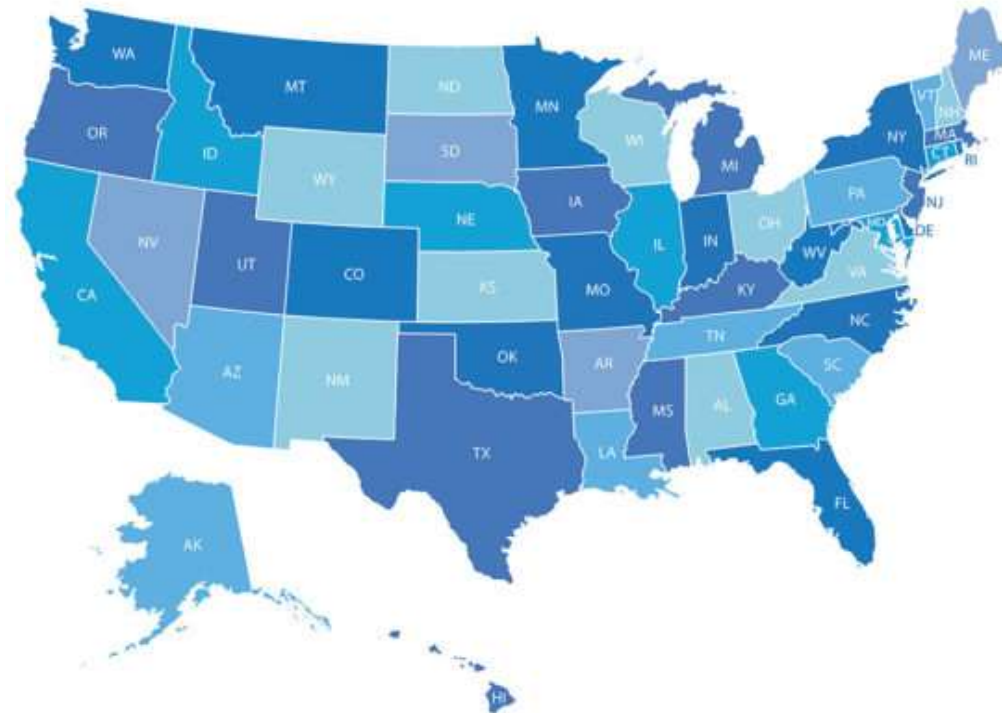
- Different remedies
 - Civil penalties
 - For willful violations, \$1,000 per violation for victims under 60 and \$3,000 per violation for victims 60+
 - What does “per violation” mean?
 - Injunctive relief
 - Court has discretion to award restitution
 - Permanent injunction constitutes *prima facie* evidence of a violation in any private action
 - Civil penalties of up to \$5,000 per violation for violating injunction as well as other possible penalties

RECENT EXPANSIONS OF PENNSYLVANIA'S UTPCPL

Extra-Territorial Application

Danganan v. Guardian Prot. Servs., 179 A.3d 9 (Pa. 2018)

Pennsylvania Supreme Court held that a non-Pennsylvania resident may file a UTPCPL claim against a Pennsylvania business based on transactions that occur out-of-state.



Danganan v. Guardian Prot. Servs., 179 A.3d 9 (Pa. 2018)

- **Factual Background:**

- Homeowner contracted with Pennsylvania-based company for home security monitoring at his Washington, D.C. home. The contract contained a Pennsylvania choice of law provision.
- Plaintiff then moved to California. Despite Plaintiff's cancellation request, the Defendant continued billing him. Plaintiff sued alleging a violation of the UTPCPL.

- **Procedural History:**

- District court dismissed complaint finding an insufficient nexus between the Commonwealth and the improper conduct alleged in the complaint.
- Third Circuit certified two questions for the Pennsylvania Supreme Court to decide.

Danganan v. Guardian Prot. Servs., 179 A.3d 9 (Pa. 2018)

- **Issues Presented:**

- (1) Whether a non-Pennsylvania resident may bring suit under the UTPCPL against a business headquartered in and operating from Pennsylvania, based on transactions which occurred outside of Pennsylvania?
- (2) If the UTPCPL does not allow a non-Pennsylvania resident to invoke its protections, whether the parties can, through a choice-of-law provision, expand its protections to parties to the contract who are non-Pennsylvania resident consumers? (Court never reached this issue)

Danganan v. Guardian Prot. Servs., 179 A.3d 9 (Pa. 2018)

- **Plaintiff/Appellant's argument:**

- Definitions of “person,” “trade,” and “commerce” in the statute lack any geographic limitation or specification on residency.
- Statute should be construed broadly to effectuate its remedial purpose

- **Defendant/Appellee's argument:**

- UTPCPL applies only to non-residents when there exists a sufficient nexus between the transaction or injury and the forum state
- Strikes appropriate balance between each state's right to apply its own consumer protection laws to its own citizens and Pennsylvania's right to govern conduct that occurs within its borders

Danganan v. Guardian Prot. Servs., 179 A.3d 9 (Pa. 2018)

- **Court's Holding:**

- A non-Pennsylvania resident may bring a UTPCPL claim against a Pennsylvania business based on transactions that occur out-of-state
 - No textual basis to impose geographic limitation or residency requirement
 - Protection of non-residents consistent with statute's remedial purpose
 - While "sufficient nexus test" "may have merit in terms of a policy approach," it is inconsistent with plain language of the statute
- Does not reach second question or parties' arguments over whether choice of law provision was broad enough to cover UTPCPL claim or only contract claims

- **End Result:**

- On remand, the District Court dismissed Plaintiff's UTPCPL claims, finding that (1) the terms of the contract clearly advised Plaintiff of his payment obligations, and (2) Plaintiff failed to allege that Defendant somehow led him to believe otherwise.
Danganan v. Guardian Prot. Servs., 2019 WL 2464770 (W.D. Pa. June 13, 2019).

***Danganan v. Guardian Prot. Servs.*, 179 A.3d 9 (Pa. 2018)**

- **Implications:**

- Non-Pennsylvania residents may now file UTPCPL claims against a Pennsylvania business based on transactions that occur out-of-state
 - Other states, such as New York, have held that their consumer fraud statute applies only to deceptive conduct occurring in the state
 - Similar to *Danganan*, courts have applied the New Jersey Consumer Fraud Act to claims by nonresidents arising from out-of-state conduct
 - Proposed bill would limit application of the NJCFA only to New Jersey residents, or to transactions that take place in the State. A.B. 303 (2018)
 - Prior efforts to amend the NJCFA have failed
- Extra-territorial application not without limits:
 - Pennsylvania Supreme Court noted that choice-of-law rules and jurisdictional principles may serve to limit application of UTPCPL in particular cases

RECENT EXPANSIONS OF PENNSYLVANIA'S UTPCPL

**Strict Liability “Catchall”
Provision**

Gregg v. Ameriprise Fin., Inc., 195 A.3d 930 (Pa. Super. Ct. 2018)

- Superior Court construed UTPCPL catchall provision – prohibiting “any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding” – as a strict liability provision
- **Procedural History:**
 - Plaintiff husband and wife claimed that financial advisor and insurance company Defendants misled them in connection with the purchase of an insurance policy
 - Jury found in Defendants’ favor on fraud and negligent misrepresentation claims, but the judge ruled for Plaintiffs on the UTPCPL catchall claim
 - Found that even if advisor did not misrepresent the cost of the life insurance policy, his conduct created a likelihood of confusion and misunderstanding
 - Awarded actual damages of \$52,431.29 plus attorneys’ fees and costs
 - Defendants appealed to the Superior Court

***Gregg v. Ameriprise Fin., Inc.*, 195 A.3d 930 (Pa. Super. Ct. 2018)**

- **Defendants/Appellants' argument:**

- Res judicata or collateral estoppel required dismissal of the UTPCPL claim
 - To establish “deceptive” conduct under the catchall provision, Plaintiffs must at a minimum prove negligent misrepresentation
 - Because jury rejected fraud and negligent misrepresentation claims, Plaintiffs were bound by that ruling and their UTPCPL catchall claim should have been dismissed

- **Court's Holding:**

- Rejected Defendants/Appellants' arguments and affirmed the judgment
- Standard for proving “deceptive” conduct under the UTPCPL is different (and lower) than standard for proving common law fraud or negligent misrepresentation

Gregg v. Ameriprise Fin., Inc., 195 A.3d 930 (Pa. Super. Ct. 2018)

- “[W]e hold that the General Assembly, by eliminating the common law state of mind element (either negligence or intent to deceive) . . . imposed strict liability on vendors who deceive consumers by creating a likelihood of confusion or misunderstanding in private, as well as public, causes of actions. **Carelessness or intent, required for negligent or fraudulent misrepresentations, may be absent when perpetrating ‘deceptive conduct’ under [the catchall].**” (emphasis added)
- “[A]ny deceptive conduct, ‘which creates a likelihood of confusion or of misunderstanding,’ is actionable under [the catchall], whether committed intentionally (as in a fraudulent misrepresentation), carelessly (as in a negligent misrepresentation), or with the utmost care (as in strict liability).”
- Superior Court’s holding was based on (1) its reading of the 1996 amendments to the catchall provision, which added “or deceptive” to the catchall’s prohibited conduct, as well as (2) the remedial nature of the statute

***Gregg v. Ameriprise Fin., Inc.*, 195 A.3d 930 (Pa. Super. Ct. 2018)**

- **Issue currently before the Pennsylvania Supreme:**
 - Whether the Superior Court improperly held that a strict liability standard applies to a claim under the “catch-all” provision of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-1 *et seq* as amended in 1996, even though the provision expressly requires proof of “fraudulent or deceptive conduct.”
- **Appellants’ Arguments: Superior Court’s decision:**
 - Conflicts with the statute’s plain language
 - Fails to construe “deceptive” in accordance with its plain and well-settled meaning
 - Fails to give any meaning to the limiting language “fraudulent or deceptive”
 - Conflicts with the relevant legislative history
 - Runs afoul of constitutional requirements that statutes afford adequate notice of the conduct being prohibited

***Gregg v. Ameriprise Fin., Inc.*, 195 A.3d 930 (Pa. Super. Ct. 2018)**

- Multiple Amici Joined Appellants in Challenging Superior Court's Decision
 - Pennsylvania Coalition for Civil Justice Reform; Pennsylvania Bankers Association; Pennsylvania Health Care Association; Pennsylvania Manufacturers' Association; University of Pittsburgh Medical Center; American Property Casualty Insurance Association; American Tort Reform Association; Chamber of Commerce of the United States of America; National Federation of Independent Business.
 - Pennsylvania Association of Realtors.
 - Pennsylvania Builders' Association.
- Timetable
 - Appellees' Brief is due November 5, 2019
 - Anticipate argument in first half of 2020

***Gregg v. Ameriprise Fin., Inc.*, 195 A.3d 930 (Pa. Super. Ct. 2018)**

- **Implications:**

- Remains to be seen whether the Pennsylvania Supreme Court will adopt or overturn the Superior Court's strict liability standard
- In the meantime, strict liability standard is ripe for abuse by plaintiffs' attorneys
 - Focus is entirely on consumer's state of mind
 - "Confusion" and "misunderstanding" are vague concepts
 - Risk that UTPCPL catchall claims will displace traditional causes of action
- Companies should step up efforts to police marketing and sales practices

RECENT EXPANSIONS OF PENNSYLVANIA'S UTPCPL

**Pennsylvania AG's Proposed
Regulations**

Pennsylvania AG's Proposed Regulations

- UTPCPL grants the Pennsylvania AG certain authority to adopt regulations “as may be necessary for the enforcement and administration of [the] act.” 73 P.S. § 201-3.1
- Recent proposed regulations from the Pennsylvania AG seek to expand dramatically the scope of the UTPCPL and the AG's role in private litigation
 - Substantial questions regarding whether the regulations exceed the AG's limited authority and usurp the legislative function
 - In some instances, regulations seek to abrogate existing law, as construed by the Pennsylvania Supreme Court

Pennsylvania AG's Proposed Regulations

- Significant proposed changes include:
 - Expanding the list of prohibited “unfair methods of competition and unfair or deceptive acts or practices”
 - New definition of “Unfair market trade practices”
 - Essentially a new state antitrust law
 - New definition of “Unfair conduct”
 - “A method, act or practice, without necessarily having been previously considered unlawful, which violates public policy as established by any statute, the common law, or otherwise within the penumbra of any common law, statutory, or other established concept of unfairness; which is unscrupulous, oppressive or unconscionable; or which causes substantial injury to a victim.”

Pennsylvania AG's Proposed Regulations

- New definition of “Deceptive conduct”
 - “A method, act or practice which has the capacity or tendency to deceive”
- New definition of “Fraudulent conduct”
 - “[U]nfair conduct or any other conduct which has a tendency or capacity to deceive”
 - AG’s rulemaking summary explains: “Neither the intention to defraud nor actual fraud must be proved; rather it need only be shown that the acts and practices are capable of harming another person in an immoral, unethical, oppressive, unscrupulous or unconscionable way.”

Pennsylvania AG's Proposed Regulations

- Justifiable reliance on the part of the plaintiff is not required for liability in a private action
 - New definition of “As a result of”: “Cause-in-fact or but-for theory of causation, excluding any requirement under any reliance theory under common law fraud.”
 - Elimination of reliance requirement would make it more difficult to defeat class actions
- Prohibiting settlement and release of private claims as part of any class action without first providing notice to and receiving written consent from the AG
- Providing that any waiver of a person's rights under the regulations prior to or at the time of a commission of a violation is contrary to public policy and is void, and that any attempt to have another waive his right shall be deemed a violation of the UTPCPL

Pennsylvania AG's Proposed Regulations

- Regulations are currently making their way through Pennsylvania's regulatory review process
- Comments have been submitted in opposition to these regulations, many from the business community
- Business community has expressed serious concerns:
 - AG has overstepped his authority
 - Regulations are vague, overly broad, and subject to abuse
 - To the extent the AG's regulations seek to establish a state antitrust law, those proposals should be rejected because the General Assembly has consistently declined to enact state antitrust laws

CONCLUSION

Takeaways

- Businesses should continue to monitor the *Gregg* appeal, the status of the proposed AG regulations, and other developments in this area
- In the meantime, businesses should focus on potential ways to mitigate risk
 - Training of sales and marketing staff
 - Review contracts and sales and marketing materials
 - Contract provisions to consider:
 - Integration clauses
 - Anti-reliance provisions
 - Choice-of-law provisions
 - Arbitration provisions

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