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Articles

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I. Introduction

The threat of treble damages and the relative ease of pleading a private cause of action under the Racketeer Influenced and Corrupt Organizations Act[1] ("RICO") prompted the federal judiciary to clamp down on private RICO actions by narrowing the elements of "pattern"[2] and "enterprise,"[3] thereby making a cause of action more difficult to plead and prove. Similarly, the abuses of federal class action securities cases prompted Congress to enact

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1. 18 U.S.C. §§ 1961-1968 (1994).

2. *See, e.g.*, H. J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989); Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1412-13 (3d Cir. 1991), *cert. denied*, 501 U.S. 1222 (1991).

3. *See, e.g.*, Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258 (3d Cir. 1995); Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A., 30 F.3d 339, 343 (2d Cir. 1994) (suggesting that the RICO enterprise must be distinct from the defendant).

the Private Securities Litigation Reform Act of 1995.[4] The same cannot be said, however, for the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"),[5] the scope of which extends beyond the RICO fraud requirement to impose strict liability[6] for any deceptive trade practice in Pennsylvania. The impact of the UTPCPL is compounded by its six- year statute of limitations,[7] the potential for treble damages,[8] and the award of attorneys fees.[9] This article addresses pockets of jurisprudence that may be raised on a motion to dismiss or in preliminary objections in defense of UTPCPL claims.

II. The History of the Private Action Under the UTPCPL

In response to the consumer protection movement in the 1960s, the Federal Trade Commission ("FTC") encouraged states to enact unfair trade practices legislation to supplement enforcement of the FTCA.[10] Uniform State Law commissioners and the FTC drafted a number of model state laws, including deceptive trade practices legislation and three versions of unfair trade practices and consumer protection legislation for consideration by the individual states enacting unfair trade legislation.[11]

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4. Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (1995). The Act, *inter alia*, strengthens pleading requirements, imposes a stay of discovery pending a determination of the sufficiency of the complaint, and authorizes sanctions for meritless litigation. *See id.*

5. PA. STAT. ANN. tit. 73, §§ 201-207 (West 1993 & West Supp. 1997).

6. *See, e.g.*, Commonwealth v. Foster, 57 Pa. D. & C.2d 203, 206 (Ct. of C.P. Allegheny County 1972) (holding that unfair and deceptive practices are illegal regardless of the intent or good faith of the seller); Gabriel v. O'Hara, 534 A.2d 488, 491 (Pa. Super. Ct. 1987) (stating that the UTPCPL supplements common law remedies "with *per se* liability for a variety of unfair trade practices"). *See also* Burke v. Yingling, 666 A.2d 288 (Pa. Super. Ct. 1995) (allowing a sophisticated buyer of audio-video system to rescind contract under section 201-7 without consideration of circumstances of purchase).

7. *See Gabriel*, 534 A.2d at 488.

8. *See* PA. STAT. ANN. tit 73, § 201-9.2(a).

9. *See, e.g.*, Neff v. G.M. Corp., 163 F.R.D. 478, 483 (E.D. Pa. 1995); *In re* Bryant, 111 B.R. 474, 480 (Bankr. E.D. Pa. 1990); Hammer v. Nikol, 659 A.2d 617, 620 (Pa. Commw. Ct. 1995). In November 1996, the Pennsylvania Legislature amended the UTPCPL to expressly authorize an award for attorney fees.

10. *See* J.R. Franke & D.A. Ballam, *New Applications of Consumer Protection Law: Judicial Activism or Legislative Directive*, 32 SANTA CLARA L. REV. 347, 357 (1992).

11. *See* Marshall A. Leaffer & Michael H. Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices; The Private Uses of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521, 522 (1980); Comment, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 TUL. L. REV. 427, 428 (1984) [hereinafter *Consumer Protection*].

The UTPCPL was enacted by the Pennsylvania Legislature in 1968. The Act was modeled on the "third version" of the model unfair trade practices and consumer protection law that contained an enumerated list of unfair and deceptive trade practices.[12] Although not as similar to the FTCA as the "first version" of the model law,[13] the UTPCPL nevertheless is modeled on the FTCA.[14]

As originally enacted, the UTPCPL provided no private right of action for consumers. In 1976, the Pennsylvania Legislature amended the UTPCPL to add a private cause of action to "[a]ny person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property . . . ."[15]

An important preliminary matter in the analysis of the UTPCPL is the difference between the breadth of the enforcement powers given to the Attorney General and district attorneys and the scope of a private cause of action. The UTPCPL gives the Attorney General and district attorneys the power to bring an action to restrain or enjoin certain enumerated "unfair methods of competition"[16] or "unfair or deceptive acts or practices"[17] whenever such proceedings "would be in the public interest."[18] The Attorney General and individual district attorneys also may seek civil penalties for both violations of injunctions[19] and for willful acts of unfair competition.[20] By contrast, standing in a private action under the UTPCPL is limited to "[a]ny person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property . . . ."[21]

There is a discrete difference between the scope of the private cause of action and the Attorney General's enforcement powers. Nothing in the UTPCPL limits the Attorney General's powers to

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12. *See Consumer Protection, supra* note 10, at 428.
13. *See id.*
14. *See* Commonwealth v. Monumental Properties, Inc., 329 A.2d 812, 817 (Pa. 1974); Gabriel v. O'Hara, 534 A.2d 488, 491. (Pa. Super. Ct. 1987).
15. PA. STAT. ANN. tit. 73, § 201-9.2 (West 1993 & West Supp. 1997).
16. *Id.* § 201-2(4).
17. *Id.*
18. *Id.* § 201-4.
19. *See id.* § 201-8(a).
20. *See* PA. STAT. ANN. tit. 73, § 201-8(b).
21. *Id.* at § 201-9.2(a).

consumer transactions.[22] Indeed, the preamble to the UTPCPL, as originally enacted, suggests no limitation for consumer transactions, citing the purpose of the Act as: "[P]rohibiting unfair methods of competition and unfair or deceptive acts in the conduct of any trade or commerce, giving the attorney general and district attorneys certain powers and duties and providing penalties."[23]

The private UTPCPL action, on the other hand, was intended to be limited to consumer transactions that might escape remedy because they do not affect the public interest and are not subject to public enforcement.[24] When the Pennsylvania Legislature amended the Act to create a private action, the preamble was changed suggesting that the purpose of the amendment was to "[prohibit] additional methods of unfair competition and unfair or deceptive acts or practices, *and [to give] additional powers and rights to consumers.*"[25] Thus, while the government is limited in its enforcement of unfair trade practices by "the public interest,"[26] private causes of action are limited to the purchase and sale of consumer goods or services.[27]

III. Pleading a Private Action

Plaintiffs bringing UTPCPL claims should be required to plead their complaints specifically by identifying the exact subsection under which they are proceeding.[28] This will focus the nature of the plaintiff's claims throughout the litigation and may prevent changes in theory.[29]

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22. *See* Granite State Ins. Co. v. Aamco Transmissions, Inc., 57 F.3d 316, 319-20 & n.3 (3d Cir. 1995) (stating that the UTPCPL combines remedies for unfair business competition and consumer fraud in the same statute).

23. 1968 Pa. Laws 387. *See also* PA. STAT. ANN. tit. 73, § 201-1 (quoting from Title of Act).

24. *See* Neff v. G.M. Corp., 163 F.R.D. 478, 482 (E.D. Pa. 1995).

25. 1976 Pa. Laws 260 (emphasis added).

26. *Neff*, 163 F.R.D. at 482 (stating that the private action section of the UTPCPL "provides a private remedy for all violations of section 3 of the UTPCPL that might otherwise escape remedy because they do not affect the public interest and therefore would not be subject to enforcement by the Attorney General").

27. *See* PA. STAT. ANN. tit. 73, § 201-9.2(a).

28. *See* Lindstrom v. Pennswood Village, 612 A.2d 1048, 1052-53 (Pa. Super. Ct. 1992) (concluding that plaintiffs failed to specify the facts under which claims pursuant to section 201-1 were brought); Nelson v. Old Guard Mut. Ins. Co., 13 Pa. D. & C.4th 173, 177 (Ct. of C.P. of Fulton County 1990) (noting that plaintiff did not identify particular subsections in her complaint).

29. *See* Kaplan v. Cablevision of Pa., Inc., 671 A.2d 716, 721 n.4 (Pa. Super. Ct. 1996), *appeal denied*, 683 A.2d 883 (Pa. 1996) (noting that plaintiffs did not include a claim under

An additional reason exists for seeking an identification of the specific subsections of section 201-2(4) under which a plaintiff is claiming recovery. Perhaps the most frequently used subsection is the catch-all fraud provision.[30] Since the catch-all fraud provision has been held to be co-extensive with common law fraud,[31] some courts have held that Federal Rule of Civil Procedure 9(b) or Pennsylvania Rule of Civil Procedure 1019(b) requires that a claim under the catch-all fraud provision be pleaded with specificity.[32] Thus, a defendant should insist that a plaintiff either confirm or deny the existence of a catch-all fraud claim. If such a claim is asserted, a defendant should further demand that the fraud be pleaded with specificity.

IV. Standing

Standing provides perhaps the best opportunity to defend claims under the UTPCPL through motion practice. Under section 201-9.2, the person[33] initiating the action must be: 1) a purchaser or lessee; 2) of "goods" or "services;" 3) primarily for personal, family, or household purposes; and 4) have suffered damages arising from the purchase or lease of goods or services.

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the catch-all fraud provision in the complaint).

30. The catch-all fraud provision had been codified at PA. STAT. ANN. tit 73, § 201-2(4)(xvii). In December 1996 the legislature amended this provision, effective February 1997, to include deceptive practices. It is now codified at PA. STAT. ANN. tit. 73, § 201-2(4)(xxi) (West Supp. 1997)

31. *See* Sewak v. Lockhart, 699 A.2d 755, 761 (Pa. Super. Ct. 1997); Prime Meats v. Yochim, 619 A.2d 769, 774 (Pa. Super. Ct. 1993), *appeal denied*, 646 A.2d 1180 (Pa. 1994); Hammer v. Nikol, 659 A.2d 617, 619-20 (Pa. Commw. Ct. 1995). *See also infra* notes 85-87 and accompanying text.

32. *See* Lazorka v. Pennsylvania Hosp., No. CIV.A.96-4858, 1997 WL 158144, at *4 (E.D. Pa. Mar. 31, 1997); Commonwealth v. National Apartment Leasing Co., 519 A.2d 1050, 1053 (Pa. Commw. Ct. 1986); *Nelson*, 13 D. & C.4th at 178. *See also* Dillon v. Ultrasound Diagnostic Sch., Nos. Civ.A.96-8342, 97-1268, 1997 WL 805216, at *3 (E.D. Pa. Dec. 18, 1997) (suggesting that all UTPCPL claims should be pleaded with specificity). The effect of the 1996 amendment, including a new catch-all deceptive claim upon the requirement that claims under this subsection be pleaded with specificity, remains unclear.

33. Although some defendants have argued that under section 201-9.2, a UTPCPL plaintiff must be a natural "person," this point has been dismissed by the Pennsylvania Superior Court. *See* Valley Forge Towers v. Ron-Ike Foam Insulators, Inc., 574 A.2d 641, 645 (Pa. Super. Ct. 1990), *aff'd*, 605 A.2d 798 (Pa. 1992). *See also* S. Kane & Son Profit Sharing Trust v. Marine Midland Bank, No. CIV.A.95-7058, 1996 WL 200603 (E.D. Pa. Apr. 25, 1996) (holding that a trust can sue on behalf of its beneficiaries under the UTPCPL).

A. *Purchaser or Lessee*

Under the express language of the UTPCPL, only a purchaser or lessee may bring a private action.[34] In *Valley Forge Towers v. Ron-Ike Insulators, Inc.*,[35] the Pennsylvania Superior Court softened this element by ruling that strict technical privity is not required to be a purchaser or lessee within the meaning of Section 201-9.2.[36] Despite the loosening of privity as a requirement in *Valley Forge Towers*, courts continue to require that plaintiffs be purchasers or lessees.

The rationale for limiting standing to purchasers and lessees is one of strict statutory construction. That position is set forth by Judge Wettick of Allegheny County in *Lauer v. McKean Corp.*[37] In *Lauer*, the court rejected the argument that the UTPCPL was intended to have a broader sweep that includes any person who *sought* to purchase or lease goods or services and was prevented from doing so because of deceptive trade practices.[38] The court explained:

> [I]t is apparent that section 201-9.2 was drafted for the purpose of excluding certain classes of consumers who were subjected to fraudulent or deceptive trade practices from bringing a private action. If the legislature had intended to permit any consumer who suffered an ascertainable loss of money or property as a result of fraudulent or deceptive trade practices to bring a

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34. *See* PA. STAT. ANN. tit. 73, § 201.92.

35. 574 A.2d 641 (Pa. Super. Ct. 1990), *aff'd*, 605 A.2d 798 (Pa. 1992).

36. *See id.* at 646-47. The court may have chosen to liberalize the privity requirement because of the nature of construction contracts. Although the manufacturer sold roofing materials to a contractor for installation and never directly contracted with the condominium association, the roof was directly warrantied by the manufacturer to the plaintiff condominium association. *See also* Klein v. Boyd, 949 F. Supp. 280, 283 (E.D. Pa. 1996) (finding that the lack of privity based upon seller not actually owning stock he sold to plaintiffs was irrelevant). *But see* Williams v. National Sch. of Health Tech., Inc., 836 F. Supp. 273, 283 (E.D. Pa. 1993), *aff'd*, 37 F.3d 1491 (3d Cir. 1994) (holding that a UTPCPL claim may not be brought against the subsequent holder of a loan because the holder was not the "seller" of the loan); Bracciale v. Nationwide Mut. Fire Ins. Co., No. 92-7190, 1994 WL 7707, at *1 (E.D. Pa. Jan. 12, 1994) (holding that since plaintiff was not purchaser of insurance policy, assignee of plaintiff had no standing to sue); Brownell v. State Farm Mut. Ins. Co., 2 Pa. D. & C.4th 394 (Ct. of C.P. of Allegheny County 1989) (dismissing plaintiff's UTPCPL claim against insurer's auditor which assessed plaintiff's insurance claim because there was no privity and no commercial relationship between plaintiff and auditor).

37. 2 Pa. D. & C.4th 394 (Ct. of C.P. of Allegheny County 1989).

38. *See id.* at 396.

private action, the act would have been worded in this fashion. The language that the legislature used is more restrictive. [39]

The *Lauer* court further justified its conclusion based on the premise that "a private action is not the primary remedy for enforcing" the UTPCPL.[40]

Similarly, in *Katz v. Aetna Casualty & Surety Co.*,[41] the Third Circuit held that a passenger injured in an automobile accident, who claimed that an insurance company improperly concealed the existence of insurance coverage, had no standing to make a claim under the UTPCPL.[42] After reasoning that the "statute unambiguously permits only persons who have purchased or leased goods or services to sue,"[43] the court concluded that if the "Pennsylvania legislature wanted to create a cause of action for those not involved in a sale or lease, it would have done so."[44] Although the Third Circuit conceded that the Pennsylvania Superior Court did not require strict privity of contract under *Valley Forge Towers*,[45] it concluded that "there is no indication that the court would have extended the private cause of action to a plaintiff lacking any commercial dealings with the defendant."[46]

Moreover, the Third Circuit has cast doubt on whether claims under the UTPCPL can be assigned to avoid the purchaser/lessee requirement.[47] In *Gemini Physical Therapy and Rehabilitation, Inc. v. State Farm Mutual Automobile Insurance Co.*,[48] a health

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39. *Id.*

40. *Id.* at 397. *See also* Bonacci v. Save Our Unborn Lives, Inc., 11 Pa. D. & C.3d 259, 262 (Ct. of C.P. of Phila. County 1979) (ruling that there is no private action under the UTPCPL for persons *attempting* to enter into a bargain).

41. 972 F.2d 53 (3d Cir. 1992).

42. *See id.* at 57.

43. *Id.* at 55.

44. *Id.*

45. *See* Valley Forge Towers v. Ron-Ike Foam Insulators, 574 A.2d 641 (Pa. Super. Ct. 1990).

46. *Katz*, 972 F.2d at 57. *See also* Mason v. National Cent. Bank, 19 Pa. D. & C.3d 229, 232-33 (Ct. of C.P. of Chester County 1990) (holding that surrender of financed car to financing bank is not a purchase sufficient to state a UTPCPL claim). *But see In re* Smith, 866 F.2d 576 (3d Cir. 1989) (relating back improper service of process to procuring of mortgage).

47. *See* Gemini Physical Therapy and Rehabilitation, Inc. v. State Farm Mut. Auto. Ins. Co., 40 F.3d 63 (3d Cir. 1994).

48. *Id. See also* Bracciale v. Nationwide Mut. Fire Ins. Co., No. 92-7190, 1994 WL 7707, at *1 (E.D. Pa. Jan. 12, 1994). *But see* Fran and John's Doylestown Auto Ctr., Inc. v. Allstate Ins. Co., 638 A.2d 1023 (Pa. Super. Ct. 1994) (holding that assignment of claims against insurance company, including a UTPCPL claim, was invalid without consent of the

care provider who provided health care to persons injured in automobile accidents sued an insurance company under the UTPCPL for failure to pay the insureds' bills in full. The provider's theory was that the injured insureds assigned their rights under the insurance policies to the health care provider.[49] Although stopping short of ruling that claims under the UTPCPL could not be assigned, the Third Circuit found that a commercial purchaser of general rights under an insurance contract did not have standing to sue under the UTPCPL.[50]

B. Goods or Services

There had not been much jurisprudence in Pennsylvania concerning the meaning of "goods" or "services" under section 201-9.2 until *Algrant v. Evergreen Valley Nurseries, Ltd.*[51] In *Algrant*, the district court ruled that securities were not "goods" within the meaning of section 201-9.2.[52] The Third Circuit has affirmed the district court, and embraced its reasoning.

Although not referenced in the district court's opinion, implicit in its reasoning was the availability of a cause of action under federal and state securities laws. Indeed, the plaintiff in *Algrant* had alleged, in addition to their UTPCPL claim, violations of the Securities Exchange Act[53] and the Pennsylvania Securities Act.[54] The court found that the applicable statute of limitations had expired for all claims except the UTPCPL claim.[55]

The court then held that a security was not a "good" for purposes of section 201-9.2.[56] Although the court in *Algrant* acknowledged that there was no definition in the UTPCPL for a "good" under section 201-9.2, it found that the Pennsylvania Uniform Commercial Code ("UCC") defined "consumer good" using virtually the same language as that employed by the Pennsylvania Legislature in section 201-9.2.[57] Section 201-9.2

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insurance company).

49. *See Gemini*, 40 F.3d at 66.

50. *See id.*

51. 941 F. Supp. 495 (E.D. Pa. 1996), *aff'd*, 126 F.3d 178 (3d Cir. 1997).

52. *See id.* at 499.

53. Securities Exchange Act of 1934, Pub. L. No. 73-404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-78mm (1994 & Supp. II 1996)).

54. *See id.* at 497-99.

55. *See id.*

56. *See id.* at 500.

57. *See Algrant*, 941 F. Supp. at 500.

authorizes a private cause of action to a purchaser or lessee of "goods or services primarily for personal, family or household purposes . . . ."[58] Article 9 of the UCC defines consumer goods as goods "used or bought for use primarily for personal, family or household purposes."[59] The *Algrant* court relied on the purview of the FTCA and the approach taken by other states on this issue and concluded that securities did not fit within the definition of a "good."[60]

The *Algrant* decision acknowledged the Pennsylvania Supreme Court's pronouncement in *Commonwealth v. Monumental Properties, Inc.*[61] that since the UTPCPL was "designed to thwart fraud in the statutory sense, it is to be construed liberally to effect its object of preventing unfair or deceptive practices."[62] Nonetheless, the court reasoned that *Monumental Properties* focused on the meaning of "trade and commerce" under section 201-3.[63] Section 201-3 was amended after *Monumental Properties* to read "trade or commerce as defined by subclauses (i) through (xvii) of clause (4) of section 2 of this act."[64] Additionally, *Monumental Properties* dealt with the power of public enforcement; it did not involve a private action under section 201-9.2.[65]

The court in *Algrant* realized that courts should not write out of existence the "goods" or "services" requirement of 201-9.2.[66] To do so would ignore the express language of the legislature.[67] Applying the definition of "goods" under article 2 or "consumer goods" under article 9 of the Uniform Commercial Code certainly makes sense. To apply such a definition, however, likely would

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58. PA. STAT. ANN. tit. 73, § 210-9.2 (West 1993 & West Supp. 1997).

59. 13 PA. CONS. STAT. ANN. § 9109(1) (West 1984).

60. *See Algrant*, 941 F. Supp. at 500.

61. 329 A.2d 812 (Pa. 1974).

62. *Id.* at 817.

63. "Trade and commerce" is defined as "the 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." PA. STAT. ANN. tit. 73, § 201-2(3).

64. *Id.* § 201-2.

65. *See Monumental Properties*, 329 A.2d at 814.

66. *See* Algrant v. Evergreen Valley Nurseries, Ltd., 941 F. Supp. 495, 500 (E.D. Pa. 1996).

67. *See id.*

exclude all intangible property from the purview of private actions under the UTPCPL.[68]

Other courts, without addressing the "goods" or "services" clause of section 201-9.2, have suggested that the operative issue is whether the allegedly deceptive acts are performed in the conduct of "trade or commerce."[69] The definition of "trade or commerce"[70] is sufficiently broad to encompass intangibles within the private action section of the UTPCPL, but this approach leaves vapid the legislature's choice to adopt the phrase "goods" or "services" in section 201-9.2.

C. Primarily for Personal, Family, or Household Purposes

Section 201-9.2 also limits private causes of action under the UTPCPL to unfair and deceptive practices for consumer-based transactions.[71] The actual language gives a private cause of action to purchasers or lessees of goods and services "primarily for personal, family or household purposes."[72] This requirement effectively has precluded business competitors[73] and other non-consumers[74] from bringing private causes of action under the

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68. The definition of "goods" under article 2 of the Uniform Commercial Code does not include tangible property. *See, e.g., In re* SSE Int'l Corp., 198 B.R. 667 (Bankr. W.D. Pa. 1996) (holding that intellectual property is not a "good" within the meaning of article 2); Field v. Golden Triangle Broad., Inc., 305 A.2d 689 (Pa. 1973) (holding that radio broadcasting license is not a "section 2105 good"), *cert. denied*, 414 U.S. 1158 (1974); Kaplan v. Cablevision of Pa., Inc., 671 A.2d 716, (Pa. Super. Ct. 1996), *appeal denied*, 683 A.2d 883 (Pa. 1996) (finding that transmission in cable television is not transaction in "goods"); Tomb v. Lavalle, 444 A.2d 666 (Pa. Super. Ct. 1981) (holding that a liquor license is a general intangible and, therefore, not within article 2 definition of "goods").

69. *See In re* Smith, 866 F.2d 576, 583 (3d Cir. 1989); Gabriel v. O'Hara, 534 A.2d 488, 492 (Pa. Super. Ct. 1987).

70. *See supra* note 63.

71. *See* PA. STAT. ANN. tit. 73, § 201-9.2 (West 1993 & West Supp. 1997).

72. *Id.* § 201-9.2.

73. *See, e.g.*, Ralph Kearney & Sons, Inc. v. Emerson Elec. Co., No. 96-3280, 1996 WL 502315, at *1 (E.D. Pa. Aug. 29, 1996); Media Arts Int'l, Ltd. v. Trillium Health Prods., No. CIV.A 92-2928, 1992 WL 136081, at *3 n.5 (E.D. Pa. June 2, 1992); American Standard Life and Accident Ins. Co. v. U.R.L., Inc., 701 F. Supp. 527, 538 (M.D. Pa. 1988); Waldo v. North Am. Van Lines, Inc., 669 F. Supp. 722, 725 (E.D. Pa. 1987); Klitzner Indus., Inc. v. H.K. James & Co., 535 F. Supp. 1249, 1258 (E.D. Pa. 1982).

74. *See, e.g.*, DiLucido v. Terminix Int'l Inc., 676 A.2d 1237 (Pa. Super. Ct. 1996), *appeal denied*, 684 A.2d 557 (Pa. 1996) (holding that owner of rental property cannot bring a UTPCPL claim); Cumberland Valley Sch. Dist. v. Hall-Kimbrell Envtl. Servs., Inc., 639 A.2d 1199, 1201 (Pa. Super. Ct. 1994) (holding that school district cannot maintain cause of action for asbestos abatement services under the UTPCPL); Trackers Raceway, Inc. v. Comstock Agency, Inc., 583 A.2d 1193 (Pa. Super. Ct. 1990) (holding that insured had no cause of action under the UTPCPL because the insurance policy was purchased for a business

UTPCPL. On the other hand, this provision likely is not a requirement that a plaintiff bringing a private cause of action must be a consumer in the traditional sense.

In *Valley Forge Towers*, the Pennsylvania Superior Court suggested that the focus is neither on the nature of the entity commencing the litigation nor on the type of product purchased or leased.[75] Rather, the issue relating to standing is the nature of the purchase or lease.[76] The *Valley Forge Towers* court concluded that a condominium association, suing as representative of the unit owners, did have a claim under the UTPCPL as the improper installation and manufacturing of the roofing materials used on the units constituted a household purpose.[77]

Despite the decision in *Valley Forge Towers*, whose unwritten rationale may have been to offset the interruption of contractual privity typical in construction cases, courts continue to and should enforce the requirement that transactions brought under section 201-9.2 be consumer-based in nature.

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purpose); Girton Mfg. Co. v. Pennsylvania Mfrs. Ass'n Ins. Co., 11 Pa. D. & C.4th 13 (Ct. of C.P. of Columbia County 1989) (precluding a claim under the UTPCPL for insurance purchased for business); David Jeffrey Ltd. v. Lucente, 7 Pa. D. & C.4th 558 (Ct. of C.P. of Montgomery County 1990) (holding that there was no claim under UTPCPL for insurance purchased for business); Springboro Volunteer Fire Dep't and Relief Ass'n. v. J.C. Moore Indus. Sales Corp., 50 Pa. D. & C.3d 479 (Ct. of C.P. of Crawford County 1988) (fire department cannot maintain UTPCPL claim because services performed to fire truck were not personal, household, or family services); McDermott v. Goodman, No. 1912, 1985 WL 15437, at *4 (Ct. of C.P. of Cumberland County Jan. 3, 1985) (landlord has no UTPCPL claim for wood burning furnace); Lebovic v. Nigro, No. 96-319, 1996 WL 179982 (E.D. Pa. Apr. 15, 1996) (sale of securities to start and maintain ownership in business was not actionable under the UTPCPL); Evansburg Water Co. v. Schlumberger Indus., Inc., No. 96-410, 1996 WL 144427 (E.D. Pa. Mar. 28, 1996) (water company alleging sale of defective water meter reading system could not bring UTPCPL claim); Britamco Underwriters, Inc. v. C.J.H., 845 F. Supp. 1090, 1096 (E.D. Pa. 1994), *aff'd*, 37 F.3d 1485 (3d Cir. 1994) (no UTPCPL law where insurance is purchased for a business purpose); Diversified Contracting Co. v. Braishfield Assoc., Inc., No. 92-4138, 1992 WL 365514 (E.D. Pa. Nov. 30, 1992) (purchase of workers compensation insurance not actionable under UTPCPL); Mylotte, David & Fitzpatrick v. Pullman, No. 92-2138j, 1992 WL 229886 (E.D. Pa. Sept. 8, 1992) (attorney's work related to business loans on commercial property not covered by UTPCPL); Advanta Leasing Corp. v. New England Wholesale Seafood, Inc., No. 88-7741, 1989 WL 60484 (E.D. Pa. June 7, 1989) (equipment lease entered into for business purpose not subject to UTPCPL). A troublesome opinion is *In re Jungkurth*, 74 B.R. 323 (Bankr. E.D. Pa. 1987), which applied the reasoning of a public enforcement decision to conclude that the UTPCPL applies to business loans.

75. *See* Valley Forge Towers v. Ron-Ike Foam Insulators, 574 A.2d 641, 647-48 (Pa. Super. Ct. 1990).

76. *See id.* at 648.

77. *See id.* at 649.

D. Reliance

Section 201-9.2 authorizes a private action for a purchaser or lessee of consumer goods and services who "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" under section 201-3.[78] The express language of the statute succinctly requires a causal nexus between a plaintiff's damages and the goods or services purchased or leased as well as a causal link between the unlawful act and the damages.[79] By way of example, a purchaser must show both that a misrepresentation induced the purchase or lease[80] and that the purchase or lease resulted in damages. Since this requirement is blended into the language that authorizes the commencement of a private action, there are standing overtones in addition to the required proof of a prima facie case. It could be argued that a plaintiff must be able to allege these two causal links.

Despite the express language of section 201-9.2(a), the Third Circuit refused to require the dual causal links in *In re Smith*[81] in which the plaintiff alleged, *inter alia*, that invalid service of process in the context of a mortgage foreclosure proceeding that resulted in a default judgment and sheriff's sale violated the UTPCPL.[82] *Smith* is an odd result and certainly a departure from the express language of the UTPCPL. Perhaps a more appropriate remedy for the failure to effectuate valid service and follow statutory foreclosure requirements would be to open, vacate, or strike the

78. PA. STAT. ANN. tit 73, § 201-9.2 (West 1993 & West Supp. 1997).

79. *See id.*

80. *See* Selvaggi v. Prudential Property and Cas. Ins. Co., 871 F. Supp. 815, 819 (E.D. Pa. 1995) (holding that no UTPCPL claim existed because lapse in coverage was not the cause of denial of insurance benefits); Centennial Sch. Dist. v. Independence Blue Cross, No. CIV.93-3456, 1994 WL 62016 (E.D. Pa. Feb. 28, 1994) (finding that school district must have purchased medical insurance based on the misrepresentation related to the 75% participation requirement); DiTeodoro v. J. G. Durand Int'l, 566 F. Supp. 273, 275 (E.D. Pa. 1983) (stating plaintiff must be able to prove that she purchased the dishes in reliance on the representation that the dishes were unbreakable); Mason v. National Cent. Bank, 19 Pa. D. & C.3d 229, 232-33 (Ct. of C.P. of Chester County 1980) (holding that allegation that deceptive act caused the surrender of an automobile after default in payments is insufficient to state UTPCPL claim). *But see* Laxon v. Lenger, 6 Pa. D. & C.4th 175, 177-78 (Ct. of C.P. of Lehigh County 1990) (lessee of mobile home could maintain claim against owner for unfairly withholding approval of new tenant).

81. 866 F.2d 576 (3d Cir. 1989).

82. *See id.* at 578.

judgment and to set aside the sheriff's sale. Nevertheless, the *Smith* court found a violation and held that section 201-9.2 does not "compel the conclusion that the unfair or deceptive conduct must have induced the consumer to make such a purchase."[83] The court reasoned that section 201-9.2 "appears to provide a private remedy for all violations of section 3 which might otherwise escape remedy because they do not affect the public interest and would not therefore be subject to enforcement by the Attorney General . . . ."[84]

Smith does appear to be at odds with both the language of the UTPCPL as well as some subsequent Pennsylvania Superior Court decisions. In *Prime Meats, Inc. v. Yochim*,[85] the Pennsylvania Superior Court stated that the elements of a "catch-all fraud"[86] claim under the UTPCPL were co-extensive with the elements of common law fraud[87] including the element of reliance on the fraudulent representation. Thus, *Prime Meats* confirmed that reliance is a required element of a claim under at least the catch-all fraud provision.

There was some question, even against the express language of section 201-9.2 requiring reliance, whether reliance was a necessary element of some of the other subsections of section 201-2(4). For example, some of the Lanham Act subsections[88] make actionable conduct causing the likelihood of confusion or misunderstanding. Therefore, it could be argued that, for claims arising under these subsections, proof of actual reliance or causation is not required.

This question seems to have been answered by *DiLucido v. Terminix International, Inc.*[89] In *DiLucido*, the court suggested that the elements of common law fraud need not be shown for claims based on subsections 201-2(4)(ii), (v), or (xvi), as required under the "catch-all fraud" provision.[90] The court in *DiLucido*, however, did insist on a causal connection between the unlawful

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83. *Id.* at 583.

84. *Id.*

85. 619 A.2d 769 (Pa. Super. Ct. 1993), *appeal denied*, 646 A.2d 1180 (Pa. 1994).

86. *See supra* note 30 (describing the catch-all fraud provision and the recent amendment thereto).

87. *See Prime Meats*, 619 A.2d at 774.

88. *E.g.*, PA. STAT. ANN. tit. 73, § 201-2(4)(ii), (iii) (West Supp. 1997).

89. 676 A.2d 1237 (Pa. Super. Ct. 1996), *appeal denied*, 684 A.2d 557 (Pa. 1996).

90. *See id.* at 1241.

practice and the plaintiff's loss under the UTPCPL,[91] the second tier of reliance. Although the court stopped short of stating that the unlawful act must induce the purchase or lease, which also must cause the plaintiff's damages, this notion is imbedded in the court's rationale. Cited as insufficient was one class representative's testimony that he did not see any specific representation that defendant's termite removal process was safe but that he so assumed based on defendant's status as a national company.[92] That plaintiff also suggested that the defendant was retained by virtue of a renewal of the plan in place with the prior owners of the real property.[93] These passages suggest the need for the first tier of reliance—that the misrepresentation induced the purchase. The court explained:

> [Plaintiff's] primary contention appears to be that [defendant] failed to say enough in its advertising (i.e., warning or disclaimer information), rather than too much. Based on this testimony, we find that [plaintiff] failed to present sufficient evidence to establish that his alleged loss was a result of specific misrepresentations by [defendant] as required in a private action under the UTPCPL.[94]

Accordingly, after *DiLucido*, it appears that reliance is a necessary element for private actions brought under the UTPCPL.

V. Class Actions Under the UTPCPL

The UTPCPL is silent with respect to the propriety of class actions bringing UTPCPL claims. The significance of the silence is that the 1970 Revised Suggested Uniform Unfair Trade Practices and Consumer Protection Law,[95] which proposed authorizing private actions and upon which the private action section of the UTPCPL was modeled, expressly authorizes class actions. The section in the Uniform Act provides as follows:

> Persons entitled to bring an action . . . may, if the lawful method, act or practice has caused similar injury to numerous

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91. *See id.*

92. *See id.* at 1241.

93. *See id.*

94. *DiLucido*, 676 A.2d at 1241.

95. *See* Council of State Governments, 1970 Suggested State Legislation: Unfair Trade Practices and Consumer Protection Law-Revision (1972). This revised version of the legislation suggested in section 8 the authorization for both private actions and class actions.

> other persons similarly situated, bring an action on behalf of themselves and other similarly injured and situated persons to recover damages as provided for . . . . In any action brought, . . . , the court may in its discretion order, in addition to damages, injunctive or other equitable relief.[96]

Although the omission of this suggested language could mean that the Pennsylvania Legislature did not intend to authorize class actions for UTPCPL claims, no court has ever so suggested, and the existence of decisions allowing class actions counsels against such a rule.[97]

The leading superior court decision in this area is *Prime Meats, Inc. v. Yochim*,[98] in which the trial court denied class certification under the UTPCPL; the appeal involved the propriety of certification under the catch-all fraud provision.[99] The superior court first concluded that, under the catch-all fraud provision, "the elements of common law fraud must be proven."[100] That proof includes "a purchase . . . made in reliance upon a misrepresentation or other alleged deceptive practice, resulting in a detriment to the individual consumer."[101] The court then reasoned that "the existence and subsequent proof of common law fraud or of reliance, generally, would require an individual determination as to each potential class member."[102]

This language in *Prime Meats* has been interpreted as precluding class certification in UTPCPL claims brought under the catch-all fraud provision.[103] If, indeed, reliance is required to bring a private action for any subsection of section 201-2(4), as section 201-9.2 suggests,[104] individual proof of reliance may preclude class action treatment of all private actions.

The decision in *DiLucido*[105] foreshadows this possible rule. In *DiLucido*, the plaintiffs raised claims under subsections 201-

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96. *Id.*

97. *See* Moy v. Schreiber Deed Sec. Co., 535 A.2d 1168 (Pa. Super. Ct. 1988); Lake v. First Nationwide Bank, 156 F.R.D. 615 (E.D. Pa. 1994) (class certified for settlement).

98. 619 A.2d 769 (Pa. Super. Ct. 1993), *appeal denied*, 646 A.2d 1180 (Pa. 1994).

99. *See supra* note 30.

100. *Prime Meats*, 619 A.2d at 773.

101. *Id.* at 774.

102. *Id.*

103. *See, e.g.*, Kaplan v. Cablevision of Pa., Inc., 671 A.2d 716, 721 n.4, (Pa. Super. Ct. 1996), *appeal denied*, 683 A.2d 883 (Pa. 1996).

104. *See supra* notes 78-88.

105. DiLucido v. Terminex Int'l, Inc., 676 A.2d 1237 (Pa. Super. Ct. 1996).

2(4)(ii), (v), (vii), (xvi), and (xvii) of the UTPCPL.[106] The superior court ruled that although a plaintiff need not prove the elements of common law fraud, except under Section 201-2(4)(xvii), for the remaining sections, plaintiffs had "the burden of establishing a causal connection to or reliance on the alleged misrepresentations . . . ."[107] The trial court had ruled that common questions of law or fact did not predominate because proof would be required that every member of the class had seen the misrepresentation, relied on it, and suffered an ascertainable loss.[108] The trial court also held that plaintiffs' claims were not typical.[109] On appeal, although discussing the reliance requirements under the UTPCPL, the superior court held that plaintiffs' claims were not typical because neither class representative relied on misleading advertising to hire the defendant termite company.[110] Thus, the superior court stopped short of holding that the requirement of proving reliance precludes class treatment in UTPCPL claims.

A recent legislative development may modify the effect of *Prime Meats*. In November of 1996, the Pennsylvania Legislature amended the catch-all fraud provision to include not only any other "fraudulent" conduct but any other "deceptive conduct which creates a likelihood of confusion or of misunderstanding."[111] It could be argued, therefore, that the *Prime Meats* rationale of the common law elements of fraud, including individual reliance and precluding class action treatment, may have been legislatively overruled. On the other hand, since *DiLucido* requires proof of reliance as an element of all claims identified in section 201-2(4), it also could be argued that *DiLucido* continues to preclude class action treatment.[112]

The best approach, however, is to weigh the predominance of common questions of law on a case by case basis. In the context of most garden-variety, tort-based misrepresentation claims, individual proof of reliance is critical and likely should preclude class certification. On the other hand, it is conceivable that individualized proof of reliance might not be required in some

106. *See id.* at 1241.
107. *Id.*
108. *See id.* at 1239.
109. *See id.*
110. *See DiLucido*, 676 A.2d at 1242.
111. PA. STAT. ANN. tit. 73, § 201-2(4)(xxi) (West Supp. 1997).
112. *See DiLucido*, 676 A.2d at 1237.

deceptive trade practices cases such as unconscionable contract claims. In these cases, a class action could be an appropriate vehicle for resolution of UTPCPL claims.

In all instances, courts should be aware of the particular problems posed by class actions asserting UTPCPL laws. Not only do class actions offer the potential for trebling the damages of the entire class, a court[113] could treble the statutory minimum damages of $100[114] in lieu of the "actual damages" sustained by each class member. Thus, by way of example, an arguably non-deceptive practice that causes actual damages of $5 to each member of a class action comprised of 2000 participants that should result in a total award of $10,000 could result in a verdict of $200,000; with trebling, that figure would become $600,000, not including an additional award of attorneys fees.

VI. Malfeasance Versus Nonfeasance

A claim for nonfeasance alone,[115] as opposed to affirmative malfeasance,[116] is not actionable under the UTPCPL. This legal principle has been applied most frequently in UTPCPL claims brought by insureds against insurance companies for the failure to perform a contractual duty, such as the failure to pay insurance benefits or the failure to investigate an insurance claim.[117]

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113. The statute directs that it is the court's role to employ its discretion to treble damages. *See* PA. STAT. ANN. tit. 73, § 201-9.2(a).

114. *See id.*

115. *See* Gordon v. Pennsylvania Blue Shield, 548 A.2d 600, 604 (Pa. Super. Ct. 1988).

116. Malfeasance has been defined as "the improper performance of a contractual obligation." Horowitz v. Federal Kemper Life Assurance Co., 57 F.3d 300, 307 (3d Cir. 1995).

117. *See Gordon*, 548 A.2d at 604 (failure to pay medical bills); Berro v. Erie Ins. Co., 20 Pa. D. & C.4th 9 (Ct. of C.P. of Lehigh County 1993); *Horowitz*, 57 F.3d at 307 (refusal to pay life insurance policy is not malfeasance required to state UTPCPL claim); Seidman v. Minnesota Mutl. Life Ins. Co., No. Civ.A.96-3191, 1997 WL 597608 (E.D. Pa. Sept. 9, 1997) (refusal to pay disability payments is nonfeasance); Thomas v. Massachusetts Cas. Ins. Co., No. Civ.A.96-1758, 1997 WL 338842 (E.D. Pa. June 18, 1997) (failure to pay disability benefits); Leo v. State Farm Mut. Auto. Ins. Co., 939 F. Supp. 1186, 1193 (E.D. Pa. 1996) (holding that refusal to evaluate file until obtaining statement under oath, failure to acknowledge correspondence, failure to adopt investigation standards, refusal to make offer, failure to effectuate settlement in good faith, and failure to provide explanation for failure to make settlement qualifies as malfeasance); Smith v. Nationwide Fire Ins. Co., 935 F. Supp. 616, 620-21 (W.D. Pa. 1996) (holding that failure to pay benefits and false accusation of arson is nonfeasance); Aetna Cas. & Sur. Co. v. Eriksen, 903 F. Supp. 836, 841 (M.D. Pa. 1995) (holding that failure to provide indemnification and defense is non-actionable nonfeasance); Klinger v. State Farm Mut. Auto. Ins. Co., 895 F. Supp. 709, 717-18 (M.D. Pa. 1995) (holding that allegations of reckless handling of UIM claim is, at essence, the failure

Although most courts take the view that allegations of malfeasance with respect to the processing of an insurance claim are merely creative pleadings, some courts suggest that the failure to perform an insurance investigation properly is malfeasance that can form the basis of a claim under the UTPCPL.[118] Yet, while most malfeasance claims have arisen in the insurance context, no court has limited the malfeasance rule to the insurance industry, and some courts have applied the principle in cases involving other industries.[119]

Despite the extensive jurisprudence following the malfeasance rule, there remains some authority that nonfeasance can be deceptive under the UTPCPL. Some public enforcement actions have been premised upon the failure to disclose a material fact.[120] Moreover, the UTPCPL expressly states that the failure to comply with the terms of a written guarantee or warranty is an illegal, unfair, or deceptive trade practice.[121]

The malfeasance rule makes considerable sense, particularly where the alleged wrongdoing is premised upon obligations created by contract.[122] Except under the most egregious of circumstances, Pennsylvania law has consistently ruled against the imposition of

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to pay benefits which amounts to nonfeasance); MacFarland v. United States Fidelity & Guar. Co., 818 F. Supp. 108, 110 (E.D. Pa. 1993); Lombardo v. State Farm Mut. Auto. Ins. Co., 800 F. Supp. 208, 212 (E.D. Pa. 1992) (holding that refusal to pay benefits is nonfeasance).

118. *See* Smith v. Nationwide Mut. Fire Ins. Co., 935 F. Supp. at 620-21 (holding that failure to conduct proper investigation is malfeasance); Parasco v. Pacific Indem. Co., 870 F. Supp. 644, 647-48 (E.D. Pa. 1994) (holding that conducting investigation in an unfair manner could be malfeasance that is actionable under the UTPCPL); Brownell v. State Farm Mut. Ins. Co., 757 F. Supp. 526, 532 (E.D. Pa. 1991) (holding that actions to defraud insured of benefits and misrepresentation that fraud was available is malfeasance).

119. *See* Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co., 953 F. Supp. 617, 668 (E.D. Pa. 1997) (rule applied in case brought against public electric utility); *In re* Milbourne, 108 B.R. 522, 541 (Bankr. E.D. Pa. 1989) (rule applied in banking case).

120. *See* Commonwealth v. Bell Tel. Co. of Pa., 551 A.2d 602 (Pa. Commw. Ct. 1988); Commonwealth v. Tolleson, 321 A.2d 664 (Pa. Commw. Ct. 1974), *aff'd*, 340 A.2d 428 (Pa. 1975).

121. *See* PA. STAT. ANN. tit. 73, § 201-2(4)(xiv) (West Supp. 1997).

122. Indeed, the definition of malfeasance set forth in *Horowitz v. Federal Kemper Life Assurance Co.*, 57 F.3d 300 (3d Cir. 1995), suggests that the very notion of what amounts to malfeasance is based on the improper performance of a contractual duty. Therefore, it is arguable that the failure to perform a duty created by statute or court order could indeed be an unfair or deceptive trade practice even though it constitutes nonfeasance. *See In re* Clark, 96 B.R. 569, 580-82 (Bankr. E.D. Pa. 1989).

punitive damages in breach of contract cases.[123] Consequently, it stands to reason that treble damages should not be allowed under the UTPCPL in instances in which the law would not otherwise impose a penalty.[124]

VII. Regulated Industry—Per Se Violations

The suggested state unfair trade practices and consumer protection law contained an exemption from public enforcement and private actions for highly regulated industries. The Pennsylvania Legislature elected not to include such an exemption in the UTPCPL. In spite of this omission, Pennsylvania courts have developed an area of jurisprudence which effectively creates an exemption from liability for claims asserting *per se* liability[125] based on a regulation or statute subject to exclusive administrative enforcement. This is a narrow exception, but nonetheless avoids

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123. *See* Baker v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 536 A.2d 1357, 1361 (Pa. Super. Ct. 1987), *aff'd*, 559 A.2d 914 (Pa. 1989); Daniel Adams Assoc., Inc. v. Rimbach Pub'g, Inc., 429 A.2d 726, 728 (Pa. Super. Ct. 1981).

124. *But see* Johnson v. Hyundai Motor Am., 698 A.2d 631, 639 (Pa. Super. Ct. 1997) (ruling that treble damages could be awarded in contract-based UTPCPL claims).

125. "Per se liability" in this context means basing the violation of the UTPCPL upon an alleged violation of another statute or regulation. A plaintiff may plead and prove a per se violation as long as the statute or regulation is not subject to administrative enforcement. *See* Moy v. Schreiber Deed Sec. Co., 572 A.2d 758, 760 (Pa. Super. Ct. 1990). Indeed, a number of Pennsylvania statutes provide that a violation of a given statute constitutes a per se violation of the UTPCPL. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 2524(c) (West Supp. 1997) (unauthorized practice of law is UTPCPL violation); 42 Pa. Cons. Stat. § 6909 (certain lessor liability is UTPCPL violation); PA. STAT. ANN. tit. 63, § 455.609 (West 1996) (UTPCPL violations for cancellations of timeshare or campground purchase agreements); 66 PA. CONS. STAT. ANN. § 2905 (West 1993) (failure to follow the Telephone Message Act is UTPCPL violation); 73 PA. CONS. STAT. ANN. § 1961 (West 1993) (Lemon Law violation constitutes UTPCPL violation); PA. STAT. ANN. tit. 73, § 2154 (West 1993) (violation of act relating to rental and leased vehicles is UTPCPL violation; § 2175 (violation of health club act is UTPCPL violation); § 2190 (violation of credit services act is UTPCPL violation); PA. STAT. ANN. tit. 73, § 2207(b) (West Supp. 1997) (violation of plain language consumer contract act is a violation of UTPCPL); 75 PA. CONS. STAT. ANN. § 7137 (West 1996) (tampering with odometers is UTPCPL violation). Other Pennsylvania statutes reference the UTPCPL as a standard of conduct. *See, e.g.*, PA. STAT. ANN. tit. 10, § 162.15(b) (West Supp. 1997) (deceptive charitable fund solicitation or promotion); 20 PA. CONS. STAT. ANN. § 8601 (West 1975 & West Supp. 1997) (anatomical gifts); PA. STAT. ANN. tit. 63, § 818.10(d) (West Supp. 1997) (state registration of vehicle manufacturers, dealers, and salespersons). *See also* 18 PA. CONS. STAT. ANN. § 7311(a)(3) (West Supp. 1997) (assignment of claims by collection agency); PA. STAT. ANN. tit. 35, §§ 6700-601, 6700-607 (West 1993) (authorizing denial, suspension, revocation, or imposition of conditions of hearing aid registration certificate for UTPCPL violation and authorizing penalties); 42 PA. CONS. STAT. ANN. § 6902 (West Supp. 1997) (cross-referencing definition of "home solicitation").

the undesirable predicament of a jury finding that an administrative agency incorrectly determined statutory or regulatory compliance.

As with the malfeasance rule, virtually all of the decisions involve claims against insurance companies, and involve allegations of *per se* violations of the UTPCPL based on violations of Pennsylvania's Unfair Insurance Practices Act ("UIPA"). The Pennsylvania Superior Court, in *Pekular v. Eich*,[126] ruled that the UIPA did not preclude common law remedies existing independent of the UIPA that arose against plaintiff's insurance agent or carrier.[127] Noting that "Pennsylvania courts have repeatedly held that violations of other statutes may also be violations" under the UTPCPL, the court added that the mere fact that the conduct complained of could also violate the UIPA did not necessarily bar a claim brought under the UTPCPL.[128] In *Pekular*, however, plaintiffs did not plead a *per se* violation of the UTPCPL based on violations of the UIPA.[129] Thus, its significance is limited to its holding that the mere fact the alleged acts and omissions happen to violate the UIPA does not preclude liability under the UTPCPL.

Shortly after *Pekular*, the superior court decided *Hardy v. Pennock Insurance Agency, Inc.*[130] In *Hardy*, the superior court acknowledged that "[a] cause of action initiated under the [UIPA] is not an action properly within our jurisdiction."[131] *Hardy* ultimately followed *Pekular* in concluding that the UIPA "does not represent the sole and exclusive source of statutory redress of alleged unfair or deceptive acts. . . ."[132] In *Hardy*, however, as in *Pekular*, the UTPCPL claim was not premised upon a *per se* violation of the UIPA. Rather, plaintiffs alleged that specific acts violated either the UIPA or the UTPCPL. The court dismissed the plaintiffs' independent UIPA claim.[133]

The superior court then decided *Gordon v. Pennsylvania Blue Shield*.[134] In *Gordon*, the plaintiff had not simply alleged UTPCPL claims based on conduct that also happened to violate the

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126. 513 A.2d 427 (Pa. Super. Ct. 1986), *appeal denied*, 533 A.2d 93 (Pa. 1987).

127. *See id.* at 430.

128. *Id.* at 432.

129. *See id.* at 428.

130. 529 A.2d 471 (Pa. Super. Ct. 1986).

131. *Id.* at 478.

132. *Id.* at 479. *See also* Wright v. North Am. Life Assurance Co., 539 A.2d 434 (Pa. Super. Ct. 1988).

133. *See Hardy*, 529 A.2d at 478.

134. 548 A.2d at 600 (Pa. Super. Ct. 1988).

UIPA. Rather, she alleged that violations of the UIPA amounted to per se violations of the UTPCPL. The court explained:

> In the instant case, appellants [sic] have *indirectly* claimed a violation of the Unfair Insurance Practices Act by presenting the [UIPA] violation as the foundation for appellant's direct claim, a violation of the Unfair Trade Practices and Consumer Protection Law . . . . Logically, in order to determine whether appellee violated the [UTPCPL] by violating the [UIPA], it must first be determined whether appellee, in fact, violated the [UIPA]. As we have stated, that initial step is not within the authority of this Court to decide.[135]

Thus, *Gordon* makes clear that a finder of fact lacks the authority to determine the existence of statutory or regulatory violations for which enforcement authority lies with an administrative agency when proffered to prove *per se* liability under the UTPCPL.

The holding in *Gordon* was extended in *Moy v. Schreiber Deed Security Co.*[136] beyond the UIPA to the Title Insurance Act ("TIA") which, similar to the UIPA, vests exclusive administrative authority to adjudicate violations in the Insurance Commissioner.[137] Just as in *Gordon*, plaintiffs in *Moy* alleged that the violation of the TIA was the basis for their *per se* liability claim under the UTPCPL.[138] Although *Moy* reiterated the general proposition "that violation of other statutes may also be violations of the [UTPCPL],"[139] it ultimately followed *Gordon* in concluding that no UTPCPL claim based on a violation of TIA would be entertained "prior to the appellant's presenting their grievance before the [insurance] commissioner."[140]

Some doubt was cast upon the rationale of *Gordon* in *Romano v. Nationwide Mutual Fire Insurance Co.*[141] Although *Romano* did not address per se liability under the UTPCPL, it did suggest

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135. *Id.* at 603.

136. 572 A.2d 758 (Pa. Super. Ct. 1990), *appeal denied*, 581 A.2d 573 (Pa. 1990).

137. *See id.* at 760. Supporting the notion that the *Gordon* rule applies to statutes other than the UIPA is *Winterberg v. CNA Ins. Co.*, 868 F. Supp. 713, 724-25 (E.D. Pa. 1994), *aff'd*, 72 F.3d 318 (3d Cir. 1995) in which the court held that the exclusivity provision of Pennsylvania's Workers Compensation Act precluded a UTPCPL claim based on the refusal to pay an injured worker's medical bills. *See id.*

138. *See Moy*, 572 A.2d at 760.

139. *Id.*

140. *Id.* at 761. *See also* Fair v. State Farm Mut. Ins. Co., 18 Pa. D. & C.4th 78 (Ct. of C.P. of Lancaster County 1992).

141. 646 A.2d 1228 (Pa. Super. Ct. 1994).

that, as a matter of statutory construction, the provisions of the UIPA and its regulations may be used to determine whether an insurer acted in bad faith for purposes of a statutory bad faith claim.[142] The fact that the *Romano* court specifically referred to the purpose of statutory construction, and because *Romano* arose on a motion for counsel fees, suggests the continuing viability of *Gordon*. *Romano* does not suggest that the jurisdiction be extended beyond the resolution of statutory ambiguities on a motion for counsel fees or costs. It did not authorize admission of evidence of UIPA standards to be given to a jury to determine a bad faith claim. Indeed, since *Romano*, a number of decisions have interpreted its holding as limited to the resolution of statutory ambiguities.[143]

The narrow rule has been established that a violation of a statute or regulation for which authority is vested in an administrative tribunal to determine violations cannot be used to establish *per se* liability[144] or, indeed, a standard of conduct.[145] That does not mean, however, that conduct which violates a statute or regulation cannot, independent of the statute or regulation, be determined to be deceptive under the UTPCPL.[146] The effect of the admittedly narrow rule could be to limit evidence of regulatory violations in highly regulated industries such as the financial institutions, insurance, or securities industries.

VIII. Preemption

Specific federal and state laws can preempt claims brought under the UTPCPL. Federal preemption occurs when Congress has included an express preemption clause in a statutory scheme,

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142. *See id.* at 1233.

143. *See*, e.g., Smith v. Nationwide Mut. Fire Ins. Co., 935 F. Supp. 616, 622 (W.D. Pa. 1996); Leo v. State Farm Mut. Auto. Ins. Co., 908 F. Supp. 254, 256-57 (E.D. Pa. 1995); Parasco v. Pac. Indem. Co., 870 F. Supp. 644, 647 (E.D. Pa. 1994).

144. *See, e.g.*, Lombardo v. State Farm Mut. Auto Ins. Co., 800 F. Supp. 208, 212 (E.D. Pa. 1992); Margalies v. State Farm Fire and Cas. Co., 810 F. Supp. 637, 642 (E.D. Pa. 1992); *Fair*, 18 Pa. D. & C.4th at 78; McLaughlin v. Nationwide Ins. Co., 33 Pa. D. & C.3d 504, 514-15 (Ct. of C.P. of Huntingdon County 1984). *But see* DeZaiffe v. State Farm Fire & Cas. Co., 42 Pa. D. & C.3d 133, 139 (Ct. of C.P. of Clearfield County 1984).

145. The court in *Lombardo* ruled that violation of the UIPA could neither be used to establish per se liability nor a standard of conduct expected of the defendant. *See Lombardo*, 800 F. Supp. at 212.

146. *See* Falbo v. State Farm Life Ins. Co., No. 96-5540, 1997 WL 116988, at *8-9 (E.D. Pa. Mar. 13, 1997); Wood v. Allstate Ins. Co., No. 96-4574, 1996 WL 637832, at *2-3 (E.D. Pa. Nov. 4, 1996).

Congress has indicated its intent to occupy an entire regulatory field, or when state law (such as the UTPCPL or claim brought thereunder) conflicts with federal law.[147] Removal to federal court under chapter 28, section 1331 of the United States Code becomes an option for a defendant, but only if there is complete federal preemption.[148]

A number of federal statutes have been held to preempt private actions brought under the UTPCPL. Most recently, after the Supreme Court's decision in *Smiley v. Citibank (South Dakota), N.A.*,[149] the Pennsylvania Supreme Court reversed its prior decision and held that the National Bank Act and a federal regulation defining late fees as interest, which permits banks to charge interest rates allowed by the bank's home state, even if prohibited by the customer's state, preempted, *inter alia*, the UTPCPL.[150] Moreover, the broad preemption clause in ERISA has been held to preempt UTPCPL claims for employee disability, health, and life insurance benefits.[151] Additionally, the Carmack Amendment to the Interstate Commerce Act, which occupies the entire field of liability for common carriers, has been held to preempt UTPCPL claims.[152] Finally, a state court has found preemption of UTPCPL claims based on the Cable Television Consumer Protection and Competition Act of 1992.[153]

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147. *See* Barnett Bank of Marion Co. v. Nelson, 116 S. Ct. 1103, 1107-08 (1996); Trojan Techs., Inc. v. Pennsylvania, 916 F.2d 903, 905 (3d Cir. 1990), *cert. denied*, 501 U.S. 1212 (1991).

148. *See In re* Comcast Cellular Telecomms. Litig., 949 F. Supp. 1193, 1204-05 (E.D. Pa. 1996); Institute of Pa. Hosp. v. Blue Cross and Blue Shield of Del., Inc., No. 96-3041, 1996 WL 729847, at *2 (E.D. Pa. Dec. 10, 1996).

149. 517 U.S. 735 (1996).

150. *See* Bank One, Columbus, N.A. v. Mazaika, 680 A.2d 824 (Pa. 1996) (applying the *Smiley* decision).

151. *See* Lazorka v. Pennsylvania Hosp., No. CIV.A.96-4858, 1997 WL 158144 (E.D. Pa. Mar. 31, 1997); Clancy v. Insurance Co. of Am., No. 96-1053, WL 543929 (E.D. Pa. Sept. 24, 1996); Schultz v. Thomas & Betts Corp., No. 94-2088, 1994 WL 410826 (E.D. Pa. Aug. 4, 1994); Wallace v. H.L. Yoh Co., No. 91-CV-3519, 1992 WL 10448 (E.D. Pa. Jan. 15, 1992); Ellis Fleisher Produce Co. v. Paul A. Tanker & Assoc., No. 85-3495, 1986 WL 4334 (E.D. Pa. Apr. 9, 1986). *But see Institute of Pa. Hosp.*, 1996 WL 729847 (holding that ERISA does not preempt claims by health care providers).

152. *See* Faust v. Clark and Reid Co., No. 94-4580, 1994 WL 675132 (E.D. Pa. Nov. 23, 1994).

153. *See* Laarkampt v. Comcast Corp., No. CIV.A.9408-0098, 1997 WL 469323 (Ct. of C.P. of Phila. County June 11, 1997).

IX. Application to Certain Industries

In *Commonwealth v. Monumental Properties, Inc.*[154] the Pennsylvania Supreme Court suggested that "[t]here is no indication of an intent to exclude a class or classes of transactions from the ambit of the Consumer Protection Law."[155] It is true that the only specific statutory exemption under the UTPCPL is for owners or agents of radio or television stations and owners or publishers of newspapers.[156] Nevertheless, some courts interpreting the UTPCPL have taken a common sense approach in excluding some industries from private actions under the UTPCPL.

In this context, it is important to underscore the distinction between a private right of action under the UTPCPL and a public enforcement action. It is equally important to exercise caution in applying the reasoning of public enforcement actions to private actions. If only because a private action is limited to goods or services purchased primarily for personal, family, or household purposes, the purview of the public enforcement action is broader than that of a private action. Therefore, the UTPCPL does not necessarily apply to all of "trade or commerce" in private actions, as it arguably would in public enforcement actions.[157] Thus, in restricting the application of the UTPCPL, courts either look to the standing provisions of section 201-9.2 or merely conclude that the legislature did not intend such a broad application of the statute.

A. Health Care Professionals

Although not expressly excluded from the UTPCPL, Pennsylvania courts have held that the UTPCPL does not afford a private cause of action against doctors, nurses, or hospitals. In *Gatten v. Merzi*,[158] the Pennsylvania Superior Court explained this principle in a case alleging misrepresentations relating to a surgical procedure designed to facilitate weight loss:

> [E]ven though the Act does not exclude services performed by physicians, it is clear that the Act is intended to prohibit

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154. 329 A.2d 812 (Pa. 1974).

155. *Id.* at 815 n.5.

156. *See* PA. STAT. ANN. tit. 73, § 201-3 (West Supp. 1997).

157. *But see In re* Smith, 866 F.2d 576, 583 (3d Cir. 1989) (adopting an expanded view of the scope of a private cause of action under the UTPCPL).

158. 579 A.2d 974 (Pa. Super. Ct. 1990), *appeal denied*, 596 A.2d 157 (Pa. 1990).

> unlawful practices relating to trade or commerce and of the type associated with business enterprises. It is equally clear that the legislature did not intend the Act to apply to physicians rendering medical services.[159]

The court reasoned that to premise the liability of doctors based on statements about the course of treatment "would have the effect of making a physician the absolute guarantor of both his treatment and the anticipated results even in the absence of a specific contract warranting those results,"[160] thereby rendering physicians "the guarantors of their fault free work."[161] The court in *Foflygen v. R. Zemel, M.D. (P.C.)*[162] followed the reasoning of *Gatten* to conclude that the UTPCPL is "inapplicable to providers of medical services"[163] which, in that case, included doctors, a nurse, and a hospital.

Both *Foflygen* and *Gatten* at first blush seem to clash with the district court's conclusion in *Chalfin v. Beverly Enterprises, Inc.*[164] in which the court stated that health care providers are not excluded from the UTPCPL.[165] However, the result in *Chalfin* may have been correct, independent of *Gatten* and *Foflygen*, because the alleged unfair or deceptive acts related to a nursing home's failure to help a patient procure Medicaid payments and the later discharge of the patient. These acts relate more to administration than to providing health care (although a discharge might be more akin to health care) and, for that reason, may not be at odds with *Gatten* and *Foflygen*.

B. Other Professionals

Since *Gatten* and *Foflygen* hold that the UTPCPL does not apply to providers of medical services, it would follow that the UTPCPL would not apply to other professionals. There are, however, no decisions suggesting that such a rule exists. For example, in the case of lawyers, certainly the standing rules of Section 201-9.2 should curtail some application of the Act. There should be some level of privity between the client and lawyer that

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159. *Id.* at 976.
160. *Id.*
161. *Id.*
162. 615 A.2d 1345 (Pa. Super. Ct. 1992), *appeal denied*, 629 A.2d 1380 (Pa. 1993).
163. *Id.* at 1355.
164. 741 F. Supp. 1162 (E.D. Pa. 1989).
165. *See id.* at 1177.

creates a "buyer-seller" relationship.[166] At a minimum, a UTPCPL claim should be limited to consumer-type legal representations.[167] On the other hand, a number of cases asserting UTPCPL claims based upon violations of the Fair Debt Collections Practices Act have been brought against lawyers without any apparent contractual privity.[168]

C. *Securities*

There was a split in federal authority as to whether the UTPCPL applies to the sale of securities. The same instinctive reasoning that was employed in *Gatten* suggests that courts should not open the UTPCPL floodgates to securities fraud claims. First, federal and state securities laws amply cover the regulation of securities and private actions for securities fraud. Indeed, recent federal legislation is aimed at curtailing, not expanding, such private actions. Second, given the Supreme Court's restrictive view of the statute of limitations for claims brought under section 10b-5 of the Securities Exchange Act of 1934,[169] the six year statute of limitations accruing upon discovery applicable to the UTPCPL could create a deluge of private UTPCPL claims that otherwise would have been styled as securities fraud.

Recent federal decisions support the argument that securities should not be governed by the UTPCPL. In *Algrant v. Evergreen Valley Nurseries, Ltd.*,[170] the court held that a security is not a "good" under section 201-9.2 of the UTPCPL.[171] In so doing, the

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166. *See* Klein v. Boyd, 949 F. Supp. 280, 285 (E.D. Pa. 1996) (concluding that a law firm that prepared and executed disclosure documents for securities cannot be liable under UTPCPL because it was not the seller of the securities).

167. *See* Mylotte, David & Fitzpatrick v. Pullman, No. 92-2138, 1992 WL 229886 (E.D. Pa. Sept. 8, 1992) (holding that legal services related to business loans on commercial property not actionable under UTPCPL).

168. *See* Zhang v. Haven-Scott Assoc., Inc., No. 95-2126, 1996 WL 355344 (E.D. Pa. June 21, 1996); Adams v. Law Offices of Stuckert & Yates, 926 F. Supp. 521 (E.D. Pa. 1996); Teel v. Panarella, 16 Pa. D. & C.4th 271 (Ct. of C.P. of Phila. County 1993); Martin v. Berke & Spielfogel, No. CIV.A.95-0005, 1995 WL 214453 (E.D. Pa. Apr. 4, 1995). *See also* PA. STAT. ANN. tit. 42, § 2524(c) (West 1981) (declaring that the unauthorized practice of law is a violation of the UTPCPL).

169. 15 U.S.C. § 78j(b) (1994); *see* also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991).

170. 941 F. Supp. 495 (E.D. Pa. 1996), *aff'd*, 126 F.3d 178 (3d Cir. 1997).

171. The court in *Klein v. Opp*, 944 F. Supp. 396,398 (E.D. Pa. 1996) reached a similar conclusion, *albeit* without reasoning, that the UTPCPL "is inapplicable to purchases of securities."

Algrant court distinguished between misrepresentation in the sale of a security and malfeasance in the servicing of a security. *Algrant* also suggested that cases of "churning" and failing to trade might properly come within the ambit of the UTPCPL as a service.[172]

The Third Circuit's affirmance of *Algrant* casts doubt on *S. Kane & Son Profit Sharing Trust v. Marine Midland Bank*.[173] In *S. Kane* the court ruled that securities were covered by the UTPCPL based upon the "churning" cases that the district court in *Algrant* distinguished from the purchase of securities.[174] The Third Circuit's *Algrant* decision also calls into question *Lebovic v. Nigro*.[175] In *Lebovic*, the court stated that "the UTPCPL can apply to the purchase of securities"[176] although the court held that the purchase of stock in a new business venture was not for personal, family, or household purposes and, therefore, not covered by the UTPCPL.[177]

D. Financial Institutions

Just as there are persuasive policy reasons that the UTPCPL should not create a private cause of action for fraud and deception in the sale of securities, policy reasons also suggest that the Act should not cover the highly regulated banking and financial institutions industry. The UTPCPL was modeled on the FTCA.[178] Indeed, courts look to interpretations of the FTCA in interpreting the UTPCPL.[179] Yet, at the time the UTPCPL was enacted, the FTCA exempted banks from the FTC's enforcement powers under the FTCA.[180] While in 1974, the FTCA was amended to cover unfair and deceptive acts by banks or savings institutions, the amendment delegated both rulemaking and

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172. *See Algrant*, 941 F. Supp. at 501 (citing Denison v. Kelly, 759 F. Supp. 199 (M.D. Pa. 1991)). *See also* Advest, Inc. v. Kirschner, No. 926656, 1994 WL 18592, at *2 (E.D. Pa. Jan. 21, 1994); McCullough v. Shearson Lehman Bros., Inc., Nos. 82-2752-58, 87-1431-35, 1988 WL 23008 (W.D. Pa. Feb. 18, 1988).

173. No. 95-7058, 1996 WL 200603 (E.D. Pa. Apr. 25, 1996).

174. *See id.* at *4.

175. No. 96-319, 1996 WL 179982 (E.D. Pa. Apr. 15, 1996).

176. *Id.* at *2.

177. *See id.* at *3. The court in *Klein v. Boyd*, 949 F. Supp. 280 (E.D. Pa. 1996), apparently assumed, without expressly making that conclusion, that the UTPCPL applied to the sale of securities. *See id.*

178. *See* Commonwealth v. Monumental Properties, 329 A.2d 812, 817 (Pa. 1974); Gabriel v. O'Hara, 534 A.2d 488, 491 (Pa. Super. Ct. 1987).

179. *See Monumental Properties*, 329 A.2d at 817.

180. *See* 15 U.S.C. § 45(a)(6) (1994).

enforcement authority to the various federal banking supervisory agencies.[181]

The FTCA's delegation of authority to federal banking agencies to create and enforce rules pertaining to unfair or deceptive practices by banks and thrifts suggests two points: 1) that Congress intended that rules relating to unfair and deceptive practices by banks and thrifts be promulgated by a trained federal administrative agency familiar with the industry and its practices; and 2) that Congress intended that enforcement be through a trained supervisory administrative agency that was authorized, *inter alia*, to perform examinations of the financial institution and enter cease and desist orders.

Allowing a private cause of action under the UTPCPL against banks and thrifts permits the undesired result of a jury finding that a particular practice of a bank or thrift is unfair or deceptive while the institution's regulators have found that no unfair or deceptive practice has taken place. This circumstance is particularly likely if the plaintiff has alleged a violation of the UTPCPL based on a *per se* violation of a banking regulation which, absent the UTPCPL, would not create a private cause of action. For this very reason, many states have adopted statutory exemptions for regulated industries in their unfair trade practices statute.[182]

Although the Pennsylvania Supreme Court has not yet addressed this issue, many trial courts, particularly bankruptcy courts, have suggested that banks may be subject to UTPCPL claims.[183] In most cases, however, the denial of a UTPCPL claim would not deprive the plaintiffs of their day in court because they

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181. *See id.* § 57a(f).

182. *See, e.g.*, Fleet Bank, N.A. v. Barlas, No. CV-92-0518205s, 1994 WL 324473 (Conn. Super. Ct. June 28, 1994); First Fin. Bank FSB v. Butler, 492 So. 2d 503 (La. Ct. App. 1986); Hydroflo Corp. v. First Nat'l Bank of Omaha, 349 N.W.2d 615 (Neb. 1984); Miller v. United States Bank of Wash., N.A., 865 P.2d 536 (Wash. Ct. App. 1994).

183. *See, e.g.*, Christmas v. Mellon Mortgage Co., No. 96-4779, 1997 WL 197298 (E.D. Pa. Apr. 18, 1997); *In re* Fricker, 115 B.R. 809 (Bankr. E.D. Pa. 1990); *In re* Milbourne, 108 B.R. 522 (Bankr. E.D. Pa. 1989); *In re* Stewart, 93 B.R. 878 (Bankr. E.D. Pa. 1988); *In re* Saler, 84 B.R. 45 (Bankr. E.D. Pa. 1988); *In re* Andrews, 78 B.R. 78 (Bankr. E.D. Pa. 1987); *In re* Jungkurth, 74 B.R. 323 (Bankr. E.D. Pa. 1987); Culbreth v. Lawrence J. Miller, Inc., 477 A.2d 491 (Pa. Super. Ct. 1984) (discussing the power of the commonwealth to promulgate regulations); Safeguard Invest. Corp. v. Commonwealth, 404 A.2d 720 (Pa. Commw. Ct. 1979) (allowing public enforcement). *But see* Epstein v. Goldome, FSB, 49 Pa. D. & C.3d 551 (Ct. of C.P. of Del. County 1987).

also had statutory claims that created an express private right of action against financial institutions.[184]

Perhaps most troubling is *In re Smith*[185] in which the Third Circuit held that invalid service of process and the failure to follow statutory foreclosure procedures that resulted in a default judgment was a violation of the UTPCPL.[186] The court maneuvered around the issue of whether the plaintiff, a mortgagee in default, had purchased a "good" or "service" in reliance on an unfair or deceptive trade practice, reasoning that a mortgage transaction is "trade or commerce" under the UTPCPL and that a UTPCPL claim "is not limited to the initial mortgage agreement only, but includes transactions and dealings between the parties during the life of the mortgage."[187] The court basically wrote out of existence the standing prerequisites of the private action section by concluding that the section "appears merely to provide a private remedy for all violations of section 3 which might otherwise escape remedy because they do not affect the public interest and would not therefore be subject to enforcement by the Attorney General under section 4 of the UDAP."[188] Theoretically, *In re Smith* could sanction a private cause of action for damages against anyone who fails to provide proper service of process.

Nevertheless, Pennsylvania appellate courts have not confronted the issue of the application of the UTPCPL to the financial institutions field in private actions, and the issue remains open. Certainly, the application of the UTPCPL to banks creates tension between state law and the role of federal and state banking regulators. Should such a claim be found to exist, it should be enforced with deference to regulators and regulations which were never intended to be enforced through private litigation.

E. Actions Against the Government

Although the UTPCPL does not provide an express exemption for actions against the government, the doctrine of the commonwealth's sovereign immunity provides the functional equivalent of such an exemption. Presumably, a private action

184. *See Safeguard Invest. Corp.*, 404 A.2d at 720.
185. 866 F.2d 576 (3d Cir. 1989).
186. *See id.* at 584-85.
187. *Id.* at 582.
188. *Id.* at 583.

otherwise could be leveled against a government unit, at least to the extent that the government unit, in a non-sovereign capacity, sold or leased consumer goods. Yet, since presumably ferreting out fraud and misrepresentation by government units was not high on the agenda of Pennsylvania law makers at the time the UTPCPL was amended to include a private cause of action, courts may be understandably reluctant to authorize such actions.

Nevertheless, such a claim was advanced in *Smolow v. Department of Revenue*.[189] *Smolow* involved a claim that the Department of Revenue misrepresented the effective tax rate on the sale of new cars subject to manufacturers' rebates by computing sales tax on such cars without deducting the amount of the rebate. The court held that the Commonwealth was immune from UTPCPL claims since there was no express waiver of sovereign immunity for UTPCPL claims.

The nature of sovereign immunity varies depending upon the type of government unit at issue. For example, for some governmental units, there is sovereign immunity for damages but not for equitable relief.[190] Although each type of government unit should be evaluated to determine the nature of immunity, it could be predicted that a court addressing this issue would adopt the common sense approach and conclude that the UTPCPL does not apply to government units.

F. Damages

Section 201-9.2 authorizes a purchaser or lessee "to recover actual damages or one hundred dollars ($100), whichever is greater."[191] The issue remains, however, exactly what constitutes "actual damages" under that section.[192]

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189. 547 A.2d 478 (Pa. Commw. Ct. 1988), *aff'd*, 557 A.2d 1063 (Pa. 1989). *See also* Teel v. Panarella, 16 Pa. D.& C.4th 271 (Ct. of C.P. of Phila. County 1993) (suggesting that UTPCPL does not apply to municipality's efforts to collect taxes); Ruman v. Department of Revenue, 462 F. Supp. 1355 (E.D. Pa. 1979), *aff'd*, 612 F.2d 574 (3d Cir. 1979), *cert. denied*, 446 U.S. 964 (1980) (ruling that the UTPCPL does not give rise to a claim under 42 U.S.C. § 1983 and declining to exercise pendent jurisdiction).

190. *See* E-Z Parks, Inc. v. Larson, 498 A.2d 1364, 1369 (Pa. Commw. Ct. 1985), *aff'd*, 503 A.2d 931 (Pa. 1986) (suggesting that local agencies have limited sovereign immunity for damages, but not for injunctive relief).

191. PA. STAT. ANN. tit. 73, § 201-9.2(a) (West 1993 & West Supp. 1997).

192. *See* Gray v. Green Lincoln Mercury Mazda, Inc., 16 Phila. 411 (1987) (suggesting that "actual loss" and not benefit of bargain was "actual damages" in UTPCPL claim).

Although early decisions held that actual damages included the remedy of "reimbursement for [the] original outlay" or the purchase price,[193] actual damages have not been limited to rescission. In *Young v. Dart*,[194] the Pennsylvania Superior Court sanctioned a jury award of damages that included incidental and consequential damages in addition to return of the purchase price less depreciation from use.[195] Some bankruptcy court decisions have held that emotional distress is not included in the definition of "actual damages" in section 201-9.2.[196]

Section 201-9.2 also authorizes a court to treble the award of actual damages.[197] Trebling is a matter for the discretion of the court;[198] yet, the UTPCPL gives courts no standards by which to determine whether trebling of an award is appropriate. In earlier decisions, courts considered the trebling of actual damages similar to punitive damages, requiring evidence of outrageous or unconscionable conduct.[199] Recently, however, in *Johnson v. Hyundai Motor America*,[200] the Pennsylvania Superior Court, while concurring that trebling damages was a form of punitive damages, concluded that a trial court did not abuse its discretion in trebling damages based upon "reckless" conduct. It found that a finding of outrageous or unconscionable conduct was not a prerequisite to trebling damages.[201]

Courts addressing the entitlement of a successful UTPCPL claimant to attorneys fees have cited the language in section 201-9.2 authorizing "such additional relief as necessary or proper."[202] However, the 1996 amendment to the UTPCPL added an express authorization for attorneys' fees making official what courts had

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193. DiTeodoro v. J. G. Durand Int'l, 566 F. Supp. 273, 275 (E.D. Pa. 1983).

194. 630 A.2d 22 (Pa. Super. Ct. 1993). *See also In re* Milbourne, 108 B.R. 522, 544 (Bankr. E.D. Pa. 1989); *In re* Jungkurth, 74 B.R. 323, 336 (Bankr. E.D. Pa. 1987).

195. *See Young*, 630 A.2d at 26.

196. *See In re* Bryant, 111 B.R. 474, 479-80 (Bankr. E.D. Pa. 1990); *In re* Russell, 72 B.R. 855, 863 (Bankr. E.D. Pa. 1987); *In re* Clark, 96 B.R. 569, 583 (Bankr. E.D. Pa. 1989).

197. *See* PA. STAT. ANN. tit. 73, § 201-9.2(a) (West 1993 & West Supp. 1997).

198. *See* Hammer v. Nikol, 659 A.2d 617, 620 (Pa. Commw. Ct. 1995); Gambrill v. Alfa Romeo, Inc., 696 F. Supp. 1047, 1050 (E.D. Pa. 1988), *aff'd*, 877 F.2d 54 (3d Cir. 1989).

199. *See* McClelland v. Hyundai Motor Am., 851 F. Supp. 680, 681 (E.D. Pa. 1994) (citing Smith v. Chrysler Credit Corp., No. 89-2898, 1990 WL 65700 (E.D. Pa. May 15, 1990)). *See also In re Bryant*, 111 B.R. 474 (Bankr. E.D. Pa. 1990).

200. 698 A.2d 631, 638-40 (Pa. Super. Ct. 1997).

201. *See id.*

202. *Hammer*, 659 A.2d at 620; Neff v. G.M. Corp., 163 F.R.D. 478, 483 (E.D. Pa. 1995); *In re Bryant*, 111 B.R. at 480.

consistently found in their analyses. An award of attorneys' fees, however, remains a matter of discretion for the trial court, and a court need not award the entire amount claimed due by a claimant.[203]

X. Conclusion

The lack of definition in the UTPCPL, together with the jurisprudence encouraging a broad reading of the Act, have opened the door to a broad range of consumer claims. The combination of class action treatment, treble damages, and award of attorneys' fees provides lucrative incentives for the commencement of UTPCPL actions. While Congress and the federal judiciary are tightening the restrictions on RICO and federal securities claims, Pennsylvania courts continue to interpret the UTPCPL liberally. If Pennsylvania courts continue to employ a liberal construction to UTPCPL claims, they must be cautious not to interpret away the legislature's written word or to open the floodgates to state litigation when the trough has run dry in federal courts.

203. Sewak v. Lockhart, 699 A.2d 755, 762 (Pa. Super. Ct. 1997).