IN THE SUPREME COURT OF PENNSYLVANIA

NO. 41 WAL 2005

GEORGIANA TOY

v.

METROPOLITAN LIFE INSURANCE COMPANY and BOB MARTINI

BRIEF OF *AMICI CURIAE,* NATIONAL CONSUMER LAW CENTER, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, AND COMMUNITY LEGAL SERVICES, INC. IN SUPPORT OF APPELLANT GIORGIANA TOY

On appeal of Memorandum Decision of Superior Court entered October 20, 2004 (No. 7 WDA 2004) affirming in part and reversing in part order of Wettick, J (No. GD 95-17627); and order of Superior Court (Per Curiam) denying reargument/reconsideration entered January 3, 2005

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES, RULES & REGULATIONS

LEGISLATIVE HISTORY

RESTATEMENTS OF THE LAW

TREATISES, BOOKS & LAW REVIEWS

PRELIMINARY STATEMENT

The Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-1 to 201-9.2 (2004) ("UTPCPL"), like other so-called Little FTC Acts, is remedial legislation enacted to provide consumers and honest businesses with broader and more effectual protections than those provided by traditional common law. It is animated by the principle that honest markets and true competition cannot exist in the absence of honest disclosures. With the 1976 addition of a private consumer cause of action (Act of Nov. 24, 1976, P.L. 1166, No. 260, § 1), the UTPCPL adopted a dual enforcement scheme allowing both the Attorney General and private consumers to police the market, thereby freeing honest businesses from undue governmental regulation while exposing dishonest competitors to payment of restitution and treble damages as well as cease and desist orders.[1]

In recent years, however, the UTPCPL has been interpreted narrowly based on formalistic common law standards that do not adequately consider the realities of the modern mass-market economy. The decision of the court below is an example of an unduly narrow application of the UTPCPL, which could disarm the Attorney General and

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[1] *See* 1 Pa. House Legis. Journal 2153 (1975); *see also* Jeff Sovern, *Private Actions under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 Ohio St. L.J. 437, 448 (1991) ("State and local consumer agencies lack sufficient resources to pursue every consumer fraud vigorously . . . ."); Comment, *The Attorney General as Consumer Advocate: City of York v. Pennsylvania Public Utility Commission*, 121 U. Pa. L.Rev. 1170, 1170 (1973) ("Special concern has arisen when the consumer has his interests theoretically represented by governmental agencies but those agencies seem less than energetic in fulfilling their duty of representation"); Seth William Goren, *A Pothole on the Road to Recovery: Reliance and Private Class Actions Under Pennsylvania's Unfair Trade Practices and Consumer Protection Law*, 107 Dick. L.Rev. 1, 8-9 & nn. 29-35 (2002) ("enforcement difficulties [pre-dating 1976] mirrored problems that existed nationally, and included a lack of public resources, information barriers, limited jurisdiction and the inaccessibility of public officials.").

consumers in the fight against deceptive practices. This restriction in the law affects both consumers and legitimate businesses, because it places honest sellers at a competitive disadvantage to those who can under-price or over-promise with little risk they will have to pay for their unfair or deceptive practices.

In response to these unduly restrictive interpretations of the Act, the General Assembly amended the UTPCPL in 1996 to emphasize that not only "fraudulent" but also "deceptive" acts or practices "creating a likelihood of confusion or misunderstanding" were forbidden. Act of Dec. 4, 1996, P.L. 906, No. 146, effective Feb. 2, 1997. This amended legislation directs the courts back to this Court's seminal interpretation of the UTPCPL in *Commonwealth v. Monumental Properties, Inc.*, 459 Pa. 450, 329 A.2d 812 (1974), that the Act extends beyond a mere codification of common law fraud principles. *See Commonwealth v. Percudani*, 825 A.2d 743, 747 (Pa. Commw. 2003) (overruling preliminary objections because 1996 amendment clarified that UTPCPL applies to more than common law fraud, and citing cases).

Amici Curiae submit this brief to set forth their view of the elements of a private UTPCPL cause of action, and to urge the Court to reiterate the broad and remedial purposes of the law. The elements of such a consumer claim are, in many instances, far less rigorous than the elements of a common law fraud claim. In fact, many of the unfair practices declared unlawful by the UTPCPL have no parallel in the common law of fraud. Amici demonstrate below that over one dozen specific subsections of the CPL, by design, expressly abandon outdated or overly restrictive common law fraud principles. Because the language of the UTPCPL, in numerous instances, purposely breaks with the strict

common law requirements, the traditional elements for fraud claims are not and should not be required by this Court.

There are three (3) essential elements for a private UTPCPL claim and one (1) or two (2) additional elements depending on which subsection of Section 201-2(4) gives rise to the claim. Every private claimant under Section 201-9.2(a) must plead and prove: (1) a consumer purchase or lease of goods or services (defined as "for personal, family or household purposes"); (2) an ascertainable loss of money or property; and (3) causation, meaning that the loss was "as a result of" a method, act or practice declared unlawful by the other sections of the statute. Section 201-9.2(a), in Amici's view, requires loss causation, not reliance, because the section uses causation language ("as a result of") requiring only a nexus between the loss and the unlawful practice, and because proof of transactional reliance would be impossible for many post-transaction claims arising under specific subsections of 201-2(4) and the regulations promulgated by the Attorney General pursuant to Section 201-3.1.

Amici are aware that this Court recently appeared to require a showing of justifiable reliance in *Yocca v. Pittsburgh Steelers Sports, Inc.,* 854 A.2d 425, 438-439 (Pa. 2004), citing *Weinberg v. Sun Co.*, 565 Pa. 612, 777 A.2d 442, 446 (2001); *Debbs v. Chrysler Corp.,* 810 A.2d 137, 156-57 (Pa. Super. 2002); *Sexton v. PNC Bank,* 792 A.2d 602, 607 (Pa. Super. 2002). But in certain transactions premised on representations made before the parties enter into the transaction, reliance and loss causation may converge. Amici respectfully urge the Court to clarify that justifiable reliance is not a required element for all private consumer causes of action under the UTPCPL.

Reliance concerns the nexus between a defendant's conduct and a plaintiff's purchase or sale, whereas causation concerns the nexus between defendant's conduct and a plaintiff's loss.[2] Where pre-transaction conduct is challenged, as in *Yocca*, loss causation and transaction causation may merge if the challenged representations allegedly induced the transaction. Where, however, the claims focus on prior representations about post-transaction characteristics, events, benefits or uses, or concern post-transaction compliance with written promises, loss causation and reliance differ dramatically. If, for example, a seller included a confession of judgment clause in a contract with a consumer, the UTPCPL would be violated regardless of any pre-transaction reliance by that consumer. *See* 73 P.S. § 201-2(4)(xviii). Similarly, if a seller advertised that a car came with a three (3) year warranty, the seller's failure to comply with that warranty would cause a loss to the consumer regardless of whether the specific advertisement or written warranty induced the consumer to purchase the car. *See, e.g.*, Comment 3 to 13 Pa. C.S.A. § 2-313 ("no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement"); *Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.,* 171 F.3d 818, 825 & n.7 (3d Cir. 1999)(reliance is only relevant if the warrantor first "has proven non-belief" by the consumer in the alleged promise or affirmation). For Section 201-9.2(a), "although it is clear that the loss must follow the purchase of goods or services, the language does not compel the conclusion that the unfair or deceptive conduct must have induced the

[2] *See Smoot v. Physicians Life Ins. Co.*, 87 P.3d 545, 550 (N.M. Ct. App. 2003), citing and quoting Goren, *A Pothole on the Road to Recovery, supra* note 1, at 11 & n.45.

consumer to make such a purchase." *Smith v. Commercial Banking Corp. (In re Smith)*, 866 F.2d 576, 583 (3d Cir. 1989).[3]

Sound public policy and legislative purpose mandate a careful delineation of those UTPCPL claims that do not require proof of common law fraud elements and those that may require such proof. Limiting all consumer claims under the Act to common law fraud elements would practically destroy the Act's self-policing function and, in the long run, seriously harm consumers and legitimate businesses alike. As described below, the General Assembly intended the UTPCPL to augment, rather than codify, traditional common law doctrines, and this Court should give effect to that legislative intent.

INTEREST OF AMICI CURIAE

The National Consumer Law Center, Inc. ("NCLC") is a non-profit corporation established in 1969 to carry out research, education, and litigation regarding significant consumer matters. One of NCLC's primary objectives is to assist attorneys in representing the interests of their low-income and elderly clients in the area of consumer law. A major focus of NCLC's work is to increase public awareness of, and to advocate protections against, deceptive sales and financing schemes. NCLC publishes *Unfair and Deceptive Acts and Practices* (6th ed. 2004), among its many other treatises, to assist attorneys whose

[3] To the extent there is any ambiguity in the language of Section 201-9.2(a), Amici submit that the remedial purpose of the law and the liberal construction mandated by this Court's decision in *Commonwealth v. Monumental Properties, Inc.*, 459 Pa. 450, 329 A.2d 812 (1974), suggest a construction that provides broader rights for consumers than existing common law. After all, the General Assembly was undoubtedly aware of this Court's seminal opinion in *Monumental Properties* when it added the private remedy language of Section 201-9.2(a) in 1976, and may be presumed to have intended a broad construction of the amendment. *See In re Silcox*, 543 Pa. 647, 674 A.2d 224 (1996) (legislature is presumed to be aware of judicial interpretations of statutes); *Lorillard v. Pons,* 434 U.S. 575, 580 (1978) (doctrine of legislative ratification provides that Congress is presumed to be aware of the judicial interpretation of a statute and to adopt that interpretation when it re-enacts the statute without questioning the interpretation).

clients have been victimized by unfair, fraudulent, or deceptive practices. In addition, NCLC has directly assisted attorneys in scores of cases brought under federal and state consumer protection statutes and regulations.

The National Association of Consumer Advocates ("NACA") is a non-profit group of attorneys and advocates committed to promoting consumer justice and curbing abusive business practices that bias the marketplace to the detriment of consumers. Its membership is comprised of over 1000 law professors, public sector lawyers, private lawyers, legal services lawyers, and other consumer advocates across the country. NACA has established itself as one of the most effective advocates for the interests of consumers in this country.

Community Legal Services ("CLS") provides civil legal assistance to the indigent in Philadelphia. CLS has committed substantial resources to consumer protection on behalf of its low-income clients. CLS advised or represented more than 1,700 clients with consumer protection problems in 2003. CLS, in some cases working with the Philadelphia office of the Pennsylvania Attorney General's Bureau of Consumer Protection, has successfully challenged deceptive practices of a rental referral agency, landlords using lease/purchase agreements and leases to evade the Landlord/Tenant Act and mislead tenants about their rights, for-profit trade schools offering false promises of quick training for high-paying jobs, and predatory mortgage lenders and brokers stripping hard-earned wealth from minority homeowners, among others. CLS believes that it is vital for the Consumer Protection Law to remain an effective tool to combat unfair and deceptive business practices that victimize its low-income clients.

STATEMENT OF THE ISSUES[4]

(1) Does the Superior Court's decision conflict with Pennsylvania law, and the reasoned decisions of other appellate courts by limiting a claim under 42 Pa. C. S. § 8371 to the unreasonable refusal by an insurance company to pay a valid claim?

(2) Does the Superior Court's decision conflict with the Rules of Statutory Construction under Pennsylvania law by interpreting the Unfair Trade Practices and Consumer Protection Law to require that 'justifiable' reliance under common law fraud must be established to bring a claim under the Statute, as well as does the decision contradict the reasoned decisions of appellate courts in other jurisdictions that require a lesser standard of reliance to bring a claim under those States' consumer protection statutes?

Amici primarily address below Issue (2), as it most directly concerns the issues and claims Amici confront on a daily basis.

STATEMENT OF FACTS AND RULINGS BELOW[5]

On February 1, 1992, Appellant ("Consumer") agreed to participate in the "50/50 Savings Plan" offered by Appellee Met Life ("Insurer"). *Toy*, 863 A.2d 1, 5 (Pa. Super. 2004). Insurer represented the "50/50 Savings Plan" as a retirement plan that would allow Consumer to accumulate over $100,000 if she deposited $50 per month into the plan until age sixty-five. *Id.* at 4-5. During the sales presentation with Consumer on February 1,

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[4] The statement of the issues is copied from the Court's Order granting allocatur limited to these issues dated Aug. 10, 2005. *Toy v. Metro. Life Ins. Co.*, No. 41 WAL 2005, 2005 WL 1902846 (Pa. Aug. 10, 2005).

[5] Amici rely on the relevant facts, as stated by the Superior Court, without reference to the record to verify their accuracy. *Toy v. Metro. Life Ins. Co.*, 2004 Pa. Super. 404, 863 A.2d 1, 4-5 (2004).

1992, Consumer told Insurer that she was forty-two years of age and was interested in starting a retirement plan. *Id.* at 4. She also stated that she possessed $25,000 of life insurance through her employer and did not want any additional life insurance. *Id.* Insurer's agent suggested the "50/50 Savings Plan," which was represented to be a retirement plan that required monthly "deposits." *Id.* at 5. Insurer's agent did not explain that the "retirement plan" was, in fact, a "Whole Life Policy;" that the purported "retirement benefit" would only arise if equity was earned on the policy as a result of certain earnings assumptions by the Insurer; or that there would be no "retirement benefit" if Insurer did not realize its aggressive investment-earnings assumption for the "Whole Life Policy." *See, e.g., Dilworth v. Metro. Life Ins. Co.*, 418 F.3d 345 (3d Cir. 2005) (so-called guaranteed "self-funding" insurance policy failed to deliver the "vanishing premiums" promised by Insurer's agent).

After agreeing to participate in the plan, Consumer completed a form entitled "Application for Life Insurance." *Id.* The form required information about Consumer's lifestyle and medical history but made no mention of a retirement plan. Consumer signed the document, but never read its contents. *Id.* Before ending the meeting, Insurer's agent told Consumer that she would also receive life insurance from Insurer as an added benefit to her participation in the "50/50 Savings Plan." *Id.*

After Consumer made her first $50 monthly "deposit" into the plan, she received a copy of a "Whole Life Policy" from Insurer. She understood that the document was a life insurance policy, did not read it, and placed it in her files. Consumer affirmed that even though she only wanted a retirement plan, she believed the "Whole Life Policy" was part of the added benefit promised by Insurer's agent. *Id.* at 8. She also believed that the

retirement plan was separate, and that she would receive documentation about it at a later date. *Id.* Consumer did not suspect she had not been enrolled in a retirement plan until she received a notice of a class action against Insurer alleging that it had engaged in a scheme to promote life insurance policies as retirement plans. *Id.* at 5, 8.

The trial court dismissed Consumer's UTPCPL claims, and the Superior Court affirmed in part because the Court "[could not] find that the trial court erred when it concluded that Consumer must establish her justifiable reliance in order to establish a private cause of action under the UTPCPL." *Id.* at 10. The Superior Court determined, in light of this Court's decisions in *Weinberg* and *Yocca,*[6] that "every plaintiff asserting a private cause of action under the UTPCPL must demonstrate his/her justifiable reliance on the misrepresentation or wrongful conduct." *Id.* at 9. The Superior Court disagreed with the trial court as to whether Consumer's alleged reliance was unjustified as a matter of law. *Id.* at 9-10. The appellate court reasoned that Consumer was not required to read the documents she received to uncover omitted facts or inconsistencies in Insurer's representations. *See id.* According to the Superior Court, Consumer's understanding of the transaction was not "so unreasonable" as to preclude any showing of justifiable reliance as a matter of law. *Id.* at 10.

LEGAL ARGUMENT

This case presents the Court with an opportunity to clarify the elements of a private consumer claim under the UTPCPL and to reaffirm the broad and remedial purposes of the statute. In *Commonwealth v. Monumental Properties, Inc.*, 459 Pa. 450, 329 A.2d 812, the Court said the UTPCPL was intended "to benefit the public at large by eradicating 'unfair

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[6] *Weinberg v. Sun Co.*, 565 Pa. 612, 618, 777 A.2d 442, 446 (2001); *Yocca v. Pittsburgh Steelers Sports, Inc.,* 578 Pa. 479, 854 A.2d 425 (2004).

or deceptive' business practices [and] to ensure the fairness of market transactions." *Id.* at 457, 329 A.2d at 815. In this regard, the Court said the statute "attempts to place on more equal terms seller and consumer." *Id.* at 458, 329 A.2d at 816. To effectuate this purpose, the Court emphasized that the statute must be "liberally construed." *Id.* at 461, 329 A.2d at 817. Like the Federal Trade Commission Act ("FTCA"), 15 U.S.C. §§ 41-58, upon which the Pennsylvania law was modeled, the UTPCPL was meant to be an "adaptable tool for protection of the public interest." *See* 459 Pa. at 464, 329 A.2d at 819 (construing the UTPCPL in light of the principles and precedents pertaining to the FTCA).

In *Monumental Properties*, this Court warned against wooden, formalistic constructions of the UTPCPL, stating:

> We cannot presume that the Legislature when attempting to control unfair and deceptive practices in the conduct of trade or commerce intended to be strictly bound by common-law formalisms. Rather the more natural inference is that the Legislature intended the Consumer Protection Law to be given a pragmatic reading – a reading consistent with modern day economic reality.

Id. at 469-470, 329 A.2d at 822. Bound by this precedent, Pennsylvania courts have admonished that the UTPCPL is designed to augment, rather than codify, pre-existing common law and statutory remedies. *See Agliori v. Metropolitan Life Ins. Co.,* 2005 Pa. Super. LEXIS 2221 (Pa. Super. July 8, 2005); *Gabriel v. O'Hara*, 534 A.2d 488 (Pa. Super. 1987); *Hardy v. Pennock Ins. Agency*, 529 A.2d 471 (Pa. Super. 1987).

I. BACKGROUND OF THE UTPCPL

In *Monumental Properties*, this Court observed that the UTPCPL was based on the FTCA and the Federal Lanham Trademark Act. *See* 459 Pa. at 461-462, 329 A.2d at 817-819 (citations omitted) (agreeing that decisions under those Acts provide "guidance" in interpreting the law). As the mass-market economy began to grow, commentators and the

Federal Trade Commission ("FTC") recognized that the protection afforded consumers by common-law remedies was generally ineffective.[7] Only the most seriously injured or temerarious customer could shoulder the burdens of a common-law suit:

> The purchaser willing to seek recovery of the nominal sum usually involved was likely to be told by the court that *scienter* had not been adequately proved, that his reliance on the misrepresentation was unreasonable because he should have examined the goods or obtained the counsel of impartial and reliable persons, that the representations concerned matters of opinion and thus – as "puffing" – should have been treated with skepticism, or that in any case he had not sufficiently demonstrated that his purchase was induced by the advertisement.

Note, *Developments in the Law – Deceptive Advertising,* 80 Harv. L.Rev. 1016, 1017 (1967). In response, in 1967, the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), working in concert with the FTC, drafted an Unfair Trade Practices and Consumer Protection Act for adoption by the states. Pennsylvania was one of the first states to act on NCCUSL's recommendations by enacting the UTPCPL in 1968.[8]

In 1970, the Council of State Governments published a revised draft of the model Consumer Protection Act. The updated model differed from the 1967 suggested legislation in that it added what is described as the "Catchall Provision," which Pennsylvania had already adopted, as well as a provision allowing for a private right of action. In 1973, the Pennsylvania Commonwealth Court held that the UTPCPL "does not authorize restitution

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[7] *See State ex rel. Miller v. Hydro Mag. Ltd.,* 436 N.W.2d 617, 620 (Iowa 1989) ("The protection afforded consumers by common-law remedies was generally ineffective. The burdens of a common-law action were sufficient to dissuade all but the most persistent and most seriously injured customer." (internal quotation marks and citation omitted)); William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 Tul. L.Rev. 724, 729 n.10 (1972) (describing the background of modern consumer protection law); Note, *Developments in the Law – Deceptive Advertising,* 80 Harv. L.Rev. 1016, 1016-17 (1967) (describing consumer remedies before the FTCA); *see also* Goren, *A Pothole on the Road to Recovery, supra* note 1, at 4-5 & nn. 11-17.

[8] *See* Goren, *A Pothole on the Road to Recovery, supra* note 1, at 4-5 & nn. 15-17.

as a remedy," *Packel v. A.P.S.C.O.*, 309 A.2d 184, 186 (Pa. Commw. 1973). In response, the Legislature amended the UTPCPL in 1976 to authorize restitution, 73 P.S. § 201-4.1, and to provide for a private cause of action, 73 P.S. § 201-9.2.

Thus, the UTPCPL was enacted and amended because traditional common-law remedies were considered an inadequate check on widespread market deception and unfair commercial practices. While the law severely punished those who stole $100,000 from one person, it had failed to punish or even deter those who would steal $10 from 10,000 consumers. The UTPCPL, like the statutes upon which it was modeled, was necessary to protect consumer confidence, ensure a level playing field for honest businesses and promote fair competition in the mass market economy. Like the securities laws before it, for consumer transactions the law was designed "to achieve a high standard of business ethics." *See SEC v. Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 186 (1963). In this way, markets would tend towards self-regulation because consumers could effectively challenge sharp, deceptive or unfair sales practices that damaged both consumers and honest competitors alike.

II. FOR MANY CLAIMS THE UTPCPL DOES NOT REQUIRE PROOF OF COMMON LAW FRAUD FOR A PRIMA FACIE CASE.

There have been two sources for the courts' recent constructions appearing to limit private UTPCPL claims to proof of common law fraud elements. Some decisions have referred to the word "fraudulent" in the "Catchall" provision previously set forth in Section 201-2(4)(xvii), but now codified as amended in subsection (4)(xxi). *See Percudani*, 825 A.2d at 746-747 (discussing cases). As described below, this subsection was amended and renumbered to add the words "or deceptive" after "fraudulent," indicating a legislative

intent that the UTPCPL was more than a mere codification of common law fraud principles. *See id.*

Other decisions, as noted above, have referred to the causation – "as a result of" – language in Section 201-9.2(a) as requiring a form of common law reliance for all private UTPCPL claims. But, as described below, that section requires only loss causation, or a connection between the *loss* and the unfair practice, not common law reliance, which requires a connection between the *transaction* and the unfair practice.

Amici agree that claims under certain subsections of Section 201-2(4) may require proof of some common law fraud elements such as *scienter* or knowledge, or inducement causation (reliance). However, not all claims under the Section require such proof. Amici explain below the principal distinctions between each of the subsections and their elements. Amici also explain that the elements for a claim under the "Catchall" in Section 201-2(4)(xxi) will vary depending on whether the alleged unfair method, act or practice induced the consumer transaction or, by contrast, post-dated or caused an ascertainable loss separate from the inducement of a transaction. Amici further explain how the UTPCPL generally requires only a showing of objective materiality based on the "net impressions" test for those few instances in which transactional reliance may be a required for claims alleging material omissions prior to a consumer transaction.

A. The Structure and Language of the UTPCPL

The UTPCPL defines "unfair or deceptive acts or practices" by listing twenty specific examples and then including a "Catchall" definition barring "any other fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding." 73 P.S. § 201-2(4). The twenty enumerated deceptive practices include some that require a

"knowing" misrepresentation, §201-2(4)(xv) ("knowingly" misrepresenting that services, repairs or replacements are needed); some that require the making of a false or misleading statement but with no mental state specified, § 201-2(4)(xi) (misleading statements about "the reasons for . . . or the amount of price reductions"); some that require an affirmative representation, § 201-2(4)(vi)(representing used goods as new); some that involve an omission or failure to disclose information, § 201-2(4)(xvii)(mandatory disclosures for telemarketers); § 201-2(4)(xx)(mandatory disclosures regarding rustproofing of automobiles); and some that do not involve either a representation or an omission but are more akin to a breach of contract, § 201-2(4)(xiv)(breach of warranty), (xvi)(making repairs or improvements to property below the standard agreed to) or an unfair act, § 201-2(4)(xiii) (pyramid schemes), (xviii) (including a confession of judgment clause in a contract). The Catchall provision, § 201-2(4)(xxi), by using the words "any other," indicates that each of the preceding twenty enumerated practices is a specific example of a practice that would also fall within the Catchall, *i.e.* they are fraudulent or deceptive practices for purposes of the UTPCPL. It therefore cannot be the case that only an affirmative misrepresentation can violate the Catchall provision, or that there is no violation in the absence of knowledge or intent. To put it another way, the UTPCPL outlaws more than just common law fraud, as can be seen from the enumerated examples.

1. Passing Off Goods and Services as Those of Another

Section 201-2(4)(i) prohibits any person from "[p]assing off goods or services as those of another." The subsection does not require proof of any mental state by the seller, nor should it require one. Imposition of a knowledge or *scienter* requirement would encourage distributors, marketers and direct merchants to disregard indications that

merchandise was a knockoff, fake, counterfeit, pirated, imitation, reproduced or mislabeled. As compared with consumers, commercial sellers are in a far better position to detect and avoid the losses from knockoff goods and services. Legitimate originators of consumer brands as well as consumers are seriously harmed by knockoffs and copycats, as is the consumer marketplace in general. With a *scienter* requirement, few consumers would have the investigative wherewithal to pursue a knockoff claim, as sellers of such goods rarely admit to knowing the goods were knockoffs.[9]

A claim under this subsection would appear to merge both transaction and loss causation, but there may be instances in which proof of reliance should be unnecessary. For example, where pirated software has been sold as original to a consumer and the consumer suffers a loss only after the software fails to work completely or to allow for automatic upgrades from the originating company, loss causation would exist but reliance may not. In *Commonwealth by Zimmerman v. Society of the 28th Division, A.E.F., Corp.,* 538 A.2d 76 (Pa. Commw. 1987), the Court did not require proof of *scienter* on the part of the soliciting company. Therefore, Amici submit that neither *scienter* nor reliance is required to state a *prima facie* private claim under subsection 201-2(4)(i).

2. Causing Likelihood of Confusion . . . as to Source, Sponsorship, etc.

Subsection 201-2(4)(ii) is similar to subsection (i) but it addresses the trickier issue of goods or services that, though not counterfeit, appear to be produced, sponsored, approved or certified by a respected company or organization when they are not. The

[9] Amici request that the Court take judicial notice of the fact that the market for knockoff consumer goods is widespread and very damaging to the consumer market in general. A House Committee Hearing reports that "in 1998, losses from counterfeiting and piracy were estimated to be $60 billion dollars." House Committee Hearing, http://commdocs.house.gov/committees/intlrel/hfa88392.000/hfa883920.HTM#0, p.47 (last visited Sept. 29, 2004).

subsection does not require an explicit representation, but could include misleading consumers through juxtaposition, the form of packaging, presentation, statement or other communication that indicates or implies a particular source, sponsorship, approval or certification. Use of the word "[c]ausing" also seems to require transaction causation, or reliance. But the additional phrase, "likelihood of confusion or misunderstanding," mandates a lesser form of reliance than the common law requirement of justifiable reliance.

In an analogous FTC advertising case, the court ruled that "[t]he law is not made for the protection of experts, but for the public – that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions." *P. Lorillard Co. v. FTC*, 186 F.2d 52, 57 (4th Cir. 1950)(internal quotation marks and citations omitted); *see also Commonwealth v. Foster*, 57 D. & C. 2d 203, 207 (Allegheny C.P. 1972). The test "is the net impression which the advertisement is likely to make upon the general populace." 186 F.2d at 57; *Foster*, 57 D. & C. 2d at 207. Likewise, the good faith of the seller is not determinative of whether his statements are deceptive and misleading. *See Merck and Co. v. FTC,* 392 F.2d 921, 925 (6th Cir. 1968); *Foster*, 57 D. & C.2d at 206. Therefore, Amici suggest that neither justifiable reliance nor *scienter* is a required element for a private claim under subsection (ii).

3. Causing Likelihood of Confusion . . . as to Affiliation, Connection or Association

Subsection 201-2(4)(iii) is similar to subsection (ii) and "is not limited to intentional, actual, knowing, or bad faith deception." Carolyn L. Carter, PENNSYLVANIA CONSUMER LAW § 2.5.4.3 p. 60 (Bisel 2d ed. 2003). The language covers even totally

innocent misrepresentations. *Id.* In *Commonwealth by Packel v. Tolleson*, 321 A.2d 664 (Pa. Commw. 1974), for example, the court held that careless or reckless assertions violated this subsection. *Id.* at 693, *aff'd on other grounds*, 340 A.2d 428 (Pa. 1975). Similarly, the "likelihood of confusion or misunderstanding" language mandates a standard of reliance that is measured by the objective "net impressions" test. *See id.*; *see also P. Lorillard Co.*, 186 F.2d at 57; *Foster*, 57 D. & C. 2d at 207.

Nothing in the language or purpose of the 1976 amendment which added the private cause of action in Section 201-9.2(a) indicates the General Assembly intended to alter these elements for private claimants as opposed to public law enforcement officers under subsection 201-2(4)(iii). In fact, the 1976 amendment was intended to strengthen and broaden the remedies available under the statute after several lower court decisions had held that restitution and other remedies were unavailable under the Act. *See supra* text at 11-12. Moreover, the rule of legislative ratification presumes the General Assembly intended private UTPCPL causes of action to be far broader than the common law, as this Court had so held in *Monumental Properties.* *See Lorillard v. Pons,* 434 U.S. 575, 580 (1978) (legislature is presumed to adopt judicial interpretation of statute unless the amendment indicates otherwise); *In re Silcox*, 543 Pa. 647, 674 A.2d 224 (1996) (same). Accordingly, Amici respectfully suggest that neither *scienter* nor justifiable reliance is an element for a private claim arising under subsection 201-2(4)(iii).

4. Geographic Origin

Subsection 201-2(4)(iv) prohibits the use of "deceptive representations or designations of geographic origin," such as a "Made in USA" label when the product was not made in the United States. The subsection clearly requires an affirmative

representation of origin. However, like subsections (i)-(iii), it does not require proof of *scienter*, knowledge or bad faith on the part of the seller. As with those other subsections, sellers are in a far better position than consumers to investigate and avoid the possibility that the goods do not originate from the region or country on their label. Moreover, individual consumers do not have the wherewithal to determine a distributor's knowledge about the true origins of a consumer product. Inasmuch as legitimate competitors and consumers are both harmed by false labels of geographic origin – though only consumers may bring a claim for such harm under Section 201-9.2(a) – Amici submit that this subsection should not require proof of scienter or transactional reliance.

Where a consumer can show that the price she paid for a product with a "Made in USA" label was greater than the market price of a similar or identical product with the correct country of origin label, she should be able to state a *prima facie* claim under the UTPCPL. For all but the most unique or expensive products, a consumer is likely to have still purchased the product, but at a much lower, market price. The damage in such a case is similar to the damage measure for a breach of warranty, see 13 Pa. C.S.A. § 2714 (difference between price paid and actual value at time of delivery), as the origin label is in effect an express warranty. Therefore, only loss causation should be required.

5. Representing that Goods or Services have . . . Characteristics, Uses, Benefits or Quantities they do not have

Subsection 201-2(4)(v) is a type of catchall provision, *see* Carter, PENNSYLVANIA CONSUMER LAW, *supra* p. 16, at 61. In *Commonwealth v. Hush-Tone Industries, Inc.,* 4 Pa. Cmwlth. 1, 21 (1971), the court held that the following elements must be shown to state a claim under the subsection: "(1) that defendants' advertisement is a false representation of fact; (2) that it actually deceives or has a tendency to deceive a

substantial segment of its audience; and (3) that the false representation is likely to make a difference in the purchasing decision." The court further held that the defendants' sincere belief in their claims did not bar a claim under § 201-2(4)(v). *See id.* Subsequent cases have reiterated this standard for private causes of action. *See*, *e.g.*, *Fay v. Erie Insurance Group*, 723 A.2d 712 (Pa. Super. 1999). This is the same standard federal courts have applied in Lanham Act cases, upon which the UTPCPL was modeled. *See, e.g., Logan v. Burgers Ozark Country Cured Hams Inc.*, 263 F.3d 447, 462 (5th Cir. 2001).

In *Weinberg v. Sun Oil Company*, 777 A.2d 442 (Pa. 2001), this Court held that private plaintiffs were required to prove transaction causation, or reliance, in order to recover under this subsection with respect to advertising claims. *Id.* at 618. The *Weinberg* Court did not address other UTPCPL claims, including claims resulting from violations of specific trade regulations adopted by the Attorney General as provided for in Section 201-3.1 of the Act. Although the Court distinguished *Hush-Tone Industries* as applying only to cases brought by government officials and not to private consumer actions (*see id.*), it did not consider or address the effect of the General Assembly's 1996 amendment to the Catchall in Section 201-2(4)(xxi), adding the phrase "or deceptive" to the subsection. Thus, in the absence of specific language confining the UTPCPL to common law standards, the liberal construction rules of *Monumental Properties* that applied when the private cause of action was added in 1976 should continue to govern the statute. *See* 1 P.S. § 1928 (statutes enacted after 1937 should be liberally construed even where they are in "derogation of the common law").

Pennsylvania decisions subsequent to *Weinberg* have explained the history of the Catchall provision and the impact of the amendment in 1996, Act of Dec. 4, 1996, P.L. 906,

No. 146, effective Feb. 2, 1997. *See Percudani*, 825 A.2d at 746-747, and cases cited therein. Where the legislature has modified the language of a statute, the amendment "ordinarily indicates a change in the legislative intent." *Commonwealth v. Pierce*, 579 A.2d 963, 965 (Pa. Super. 1990) (citing *Masland v. Bachman*, 473 Pa. 280, 289, 374 A.2d 517, 521 (1977)). The insertion of the phrase "or deceptive" in 1996 clarifies that either deceptive or fraudulent conduct constitutes a violation of the Catchall provision, and that deceptive conduct is not the same as fraudulent conduct. *See Commonwealth v. Pavia Co.*, 113 A.2d 224, 226 (Pa. 1955) (the amended statute is presumed to have a different construction). This is reinforced by the legislative history of the Catchall amendment, which reflects the General Assembly's intent to expand the scope of the UTPCPL in light of restrictive court interpretations. *See, e.g.*, Pa. Legis. Journal - Senate 1996, v. II, p. 2427-28 (discussing general motivations for UTPCPL amendments).

Since the term "deceptive"[10] has been added, many Pennsylvania and federal courts

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[10] The leading case on whether a practice is unfair or "deceptive" is the Supreme Court's decision in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972). In that case, the Court interpreted the phrase "unfair or deceptive acts or practices" in the FTCA as a "congressionally mandated standard of fairness [that] considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the . . . laws." *Id*. at 244. The Court listed a number of factors that the FTC considers in determining whether a practice is unfair, including "(1) whether the practice, without necessarily having been previously declared unlawful, offends public policy as it has been established by statutes, the common law, or otherwise – whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers." *Id*. at 244, n. 5.

Pennsylvania cases hold that an act or practice is deceptive or unfair if it has the capacity or tendency to deceive, whether or not actual deception is shown. *Commonwealth v. Nickel*, 26 D. & C. 3d 115, 120 (C.P. Mercer 1983). The test is the impression the act or practice is likely to make on a person of average intelligence. *Commonwealth v. Foster*, 57 D. & C. 2d 203 (C.P. Allegheny 1972). If particularly credulous persons are among the audience for an act or practice, the likely effect on them must be considered. *Commonwealth v. Hush-Tone Industries, Inc*., 4 Pa. Cmwlth 1 (1971).

have recognized that they must give it effect. *Percudani*, 825 A.2d at 746-47; *Becker v. Chicago Title Insurance Company*, 2004 WL 228672 (E.D. Pa. Feb. 4, 2004) (plaintiff not required to allege fraud to sustain UTPCPL claim); *Flores v. Shapiro & Kreisman*, 246 F. Supp. 2d 427, 431-32 n.2 (E.D. Pa. 2002) (plaintiff stated cause of action under UTPCPL for deceptive debt collection practices); *Zwiercan v. General Motors Corp.*, 2002 WL 31053838, *2 (C.P. Phila. Sept. 11, 2002); *Foultz v. Erie Insurance Exchange*, 2002 WL 452115 (C.P. Phila. Mar. 13, 2002) (holding UTPCPL claim suitable for class certification); *Weiler v. SmithKline Beecham Corporation*, 53 D. & C. 4th 449 (C.P. Phila. Oct. 9, 2001) (discussed and quoted extensively in *Foultz*); *In re Patterson*, 263 B.R. 82, 92 n.17 (Bankr. E.D. Pa. 2001) ("I must conclude that the addition of the word "deceptive" was intended to cover conduct other than fraud which was clearly embraced by the pre-amendment statute"), citing *In re Cohn*, 54 F.3d 1108, 1114 (3d Cir. 1995) (general principles of statutory construction dictate that courts are obligated to give effect, if possible, to every word used by a legislative body).

Prior to the amendment, some decisions had required consumers to prove some, or all, of the elements of common law fraud to establish actionable conduct under the Catchall provision. *See, e.g.*, *DiLucido v. Terminix International, Inc.,* 676 A.2d 1237 (Pa. Super. 1996); *Prime Meats, Inc. v. Yochim*, 619 A.2d at 774. But those cases examining pre-1997 claims are no longer authoritative. The 1996 amendments reflect a reaffirmation of the Legislature's intent to protect consumers from a broad range of deceptive and unfair practices, not just common law fraud. *Flores v. Shapiro & Kreisman*, 246 F. Supp. 2d at 431-32 (attorney's attempt to collect more fees than permitted by law supported claim for deceptive conduct under UTPCPL); *In re Patterson*, 263 B.R. at 91-93 (defendant's demand of more

than amount due was deceptive within meaning of UTPCPL); *Rodriguez v. Mellon Bank*, 218 B.R. 764, 784 (Bankr. E.D. Pa. 1998) (defendant's self-help eviction was deceptive under UTPCPL); *Ihnat v. Pover,* 2003 WL 22319459, *4-*5 (C.P. Allegheny Aug. 4, 2003)(plaintiff need not plead or prove elements of common law fraud in connection with UTPCPL claims arising from alleged violations of Automotive Industry Trade Practice Regulations, 37 Pa. Code § 301.1 *et seq*.).

Moreover, it is hard to conceive what other language the General Assembly could have used to express its intent – recognized by this Court in *Monumental Properties* and reinforced with the 1996 amendment – that the UTPCPL and its private right of action are more protective of consumers than the common law. Given the rule of legislative ratification, see *supra* note 3, and the 1996 amendment, private UTPCPL claims must have less rigorous elements than the common law absent specific language imposing a common law element, as is evident in a few (but not all) of the subsections of § 201-2(4). So, while transactional reliance may be required by *Weinberg* to state a claim under subsection (v), that element should be satisfied based on the objective, "net impressions" test utilized under the FTCA where the ascertainable loss has followed the deceptive representations of sponsorship, approval, characteristics or quantities.

6. Representing Used or Reconditioned Goods as New

Section 201-2(4)(vi) prohibits the representation of goods as new "if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand." Claims under this subsection commonly arise in the context of automobiles. The Superior Court has addressed such claims in at least two cases: *Young v. Dart*, 630 A.2d 22 (Pa. Super. 1993); and *Pirozzi v. Penske Oldsmobile Cadillac-GMC, Inc.,* 605 A.2d 373 (Pa. Super. 1992). In

both cases, the Superior Court held that the failure to disclose reconditioning to cars represented as "new" violated the UTPCPL. Likewise, the Board of Vehicles Act, 63 P.S. §§ 1, 2 & 10, also affirmatively requires dealers to disclose "material damage" to new vehicles to consumers that they were made aware of by the manufacturer. Subsection 2 of that Act defines "material damage" by an objective, reasonable person test to include: "Damage . . . which results in a vehicle being altered or reconditioned and the alteration or reconditioning is of a nature that a reasonable person would consider important in determining whether to make a retail purchase of a particular vehicle for a particular price." *Id.* at § 2. Subsection 10(d) of that Act expressly provides that nothing in the affirmative disclosure section shall be construed to diminish the obligation to provide notice to a purchaser of a new vehicle imposed by any other statute or judicial decision, including the UTPCPL. *See* 63 P.S. § 10(d). Read together, these sections make omissions of material fact actionable by consumers, meaning that direct reliance on an affirmative misstatement cannot be an essential element of this type of consumer claim.

7. Standard, Quality or Grade

Section 201-2(4)(vii) prohibits "representing that goods or services are of a particular standard, quality or grade . . . if they are of another." This subsection, Amici submit, should have similar elements as subsection (vi). That is, reliance should be an objective standard based on the "net impression" the seller's representations are likely to have had on a reasonable consumer and the materiality of the omitted truth about the lesser quality or grade of the product. Where the consumer can establish that the lesser quality product had, at the time of delivery, a lower price than the misrepresented product the consumer actually purchased, a *prima facie* case of both loss causation and materiality

should be established as a result. Likewise, the seller's bad intent or good faith should be irrelevant, as the seller is clearly in a better position to avoid the loss resulting from exaggerated or misleading claims of superior standard, quality or grade.

8. Disparaging Others' Goods or Services

Subsection 201-2(4)(viii) prohibits the use of false or misleading representations of fact to disparage the goods, services or business of another. This subsection may have limited application in the consumer context, but conceivably could apply where a business disparages the free or nominal charge services of a government agency or program in order to charge consumers more money for essentially the same service. *See*, *e.g.*, *Foster*, 57 D. & C. 2d at 204 (charging consumers $25 for a certified deed, when the Recorder of Deeds provided the same service for $5). In contrast to the other subsections discussed above, this subsection, from the consumer perspective, prohibits unfair practices that result from false or misleading statements about goods or services that the consumer has, in many instances, not purchased. Therefore, transactional reliance cannot be an element, as the consumer will have received precisely what was promised, though she will have paid more for it than she otherwise would have paid. The seller's bad intent or good faith should also be irrelevant, as even careless disparagement may cause consumer harm where a higher price has been paid, and the seller can more easily avoid that loss.

9. False Advertising

The Court directly considered subsection 201-2(4)(ix) in *Weinberg*, 777 A.2d at 446, requiring private claimants to show reliance on the challenged advertising to state a cause of action under the UTPCPL. Unlike other subsections of the statute, however, this subsection most directly addresses pre-transaction conduct and representations designed to induce a

transaction. While the Court in *Weinberg* appeared to reject attempts to show causation by pointing to expert evidence that demand and, in turn, price increased as a result of the deceptive advertising, the Court limited its holding to the facts in that particular case. *See* 777 A.2d at 446 (allegations of reliance required "in this particular case."). So, while intent and reliance may be required elements for transaction-inducing advertising, there may be instances in which these elements should not be required. If, for example, the challenged advertising would also violate another subsection of the UTPCPL – such as for pyramid schemes, failure to make prompt delivery of goods, or failure to comply with a written warranty – a particular consumer's specific reliance on the advertising would have little if anything to do with the loss resulting from the unfair or deceptive practice. *See* Carter, *supra* p. 16, at 156-157. Accordingly, the Court should make clear that proof of individual reliance is not a uniform or essential element for all UTPCPL claims.

10.-13. Bait and Switch, Deceptive Price Reductions, Referral Sales, and Pyramid Schemes

Subsections (x)–(xiii) of § 201-2(4) all address instances in which transaction causation or reliance cannot be an element for a private consumer action, as the consumer either did not consummate the transaction by purchasing the deceptively described product ("bait and switch"), or the consumer received precisely what she paid for ("deceptive price reduction"). Nevertheless, each of the sections outlaws well-known and all too common deceptive trade practices that influence consumer purchasing. For "bait and switch" or false "going out of business" sales, consumers should be able to plead and prove loss causation by showing that they would have paid a lower price for the goods or services in the absence of the deceptive practice. For these subsections, the seller's good faith or intent should be irrelevant, because the practices are avoidable, and they harm honest

competitors as much as consumers. The fact that the General Assembly included these claims in the list of specific practices defined as "unfair or deceptive" further demonstrates that transactional reliance and scienter cannot be uniform elements for all private causes of action under the UTPCPL.

Here, Consumer alleged and produced evidence of a classic "bait and switch" scheme. Insurer's agent represented that he was selling Consumer a "retirement plan" when in fact he delivered a "Whole Life Policy." The fact that Consumer received precisely what she paid for (as in all "bait and switch" scams) is irrelevant, because she did not receive what she bargained for. By definition, reliance cannot be an element of a "bait and switch" claim, because practically all such scams involve a substitution of the "bait" with a different, more expensive "switch," which consumers concededly pay for. But the General Assembly correctly recognized that such schemes are very damaging to the market, and undermine both consumer and competitor confidence in the overall fairness of the market and, in turn, impede commerce and efficiency in transactions.

14. Failure to Comply with a Written Warranty

Subsection 201-2(4)(xiv) prohibits sellers from failing to comply with any written warranty given to a buyer "at, prior to or after a contract for the purchase of goods and services is made." This precise language makes clear that transaction causation, or reliance, cannot be an element, since the warranty at issue can be one that was given even after the transaction was made. In addition, because such a failure would necessarily occur only after a particular consumer transaction took place, the common law requirements of transactional causation (reliance) and *scienter* typically would bar such a claim. Few if any consumers could affirm that they read or even saw all of the terms of a typical

warranty or insurance contract before entering the transaction, even though the written promises formed a basis of the bargain. *See, e.g.*, Comment 3 to 13 Pa. C.S.A. § 2-313 ("no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement"); *Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.,* 171 F.3d 818, 825 & n.7 (3d Cir. 1999) (reliance is only relevant if the warrantor first "has proven non-belief" by the consumer in the alleged promise or affirmation). As a result, a disreputable seller could gain a competitive market advantage because it could make the same or better warranty promise as an honest business but then ignore or unreasonably dispute a consumer claim with little fear of any added cost. To prevent this, the Court in the insurance and form-contract context has applied the "reasonable expectations doctrine … to protect non-commercial insured[s] from deception." *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 557 Pa. 595, 611, 735 A.2d 100, 109 (1999) (citing *Tonkovic v. State Farm Mut. Auto. Ins. Co.,* 513 Pa. 445, 521 A.2d 920 (1987)).

The reasonable expectations doctrine applies where the consumer did not receive what she reasonably bargained for. As this Court explained in *Tonkovic*,

> [A] crucial distinction [exists] between cases where one applies for a specific type of coverage and the insurer unilaterally limits that coverage, resulting in a policy quite different from what the insured requested, and cases where the insured received precisely the coverage that he requested but failed to read the policy to discover clauses that are the usual incident of the coverage applied for. When the insurer elects to issue a policy differing from what the insured requested and paid for, there is clearly a duty to advise the insured of the changes so made. The burden is not on the insured to read the policy to discover such changes, or not read it at his peril.

Tonkovic, 521 A.2d at 925. *See also Pressley v. Travelers Prop. Cas. Corp.*, 2003 Pa. Super. 58, 817 A.2d 1131 (2003). Under the "reasonable expectations" doctrine, only loss

causation measuring the difference between the price paid for the goods or services as promised and the value of the goods or services actually delivered, *see* 13 Pa. C.S.A. § 2714(b), need be shown. This, of course, is far different from the common law element of "justifiable reliance" because it reverses the burden of proof by requiring the seller to prove the consumer's "non-belief" in the promises or representations. Also, because a claim under this subsection is akin to a breach of contract claim, the seller's mental state should be irrelevant, as it is in all other breach of contract cases.

15. Knowingly Misrepresenting Necessity of Services

Subsection 201-2(4)(xv) outlaws the knowing misrepresentation of the need for services. For example, a landlord's refusal to return a tenant's security deposit based on the false representation that repairs were necessary would violate this section. *See Wallace v. Pastore*, 742 A.2d 1090 (Pa. Super. 1999). The fact that this subsection specifically refers to a specific mental state, "knowingly," is a strong indication that not all claims under the UTPCPL must plead or prove the common law element of scienter. Because claims under this subsection can relate to both pre-repair and post-repair misconduct, transaction causation cannot be an element for this claim. So, while knowing misconduct is required to be alleged and proved, consumer reliance is not a requirement.

16.-20. Inferior Repairs, Affirmative Telephone Disclosures, Prohibition on Confession of Judgment Clauses, Prompt Delivery, and Rustproofing

Subsections (xvi)–(xx) of § 201-2(4) are akin to mandatory contractual and disclosure requirements, and contractual prohibitions in all consumer agreements. Only the "prompt delivery" subsection (xix) has any reference to a potential mental state element, requiring that the seller have "a reasonable basis" to expect to be able to ship ordered merchandise within

the time stated in the solicitation. The other subsections do not refer to any scienter requirement, indicating that that common law element does not apply to private consumer claims. In addition, the phraseology of subsection (xix), regarding prompt delivery, indicates that the "reasonable basis" standard is a defense or "safe-harbor" available to a seller, in contrast to an affirmative element to be proved by the consumer. This makes sense because few, if any, consumers would have the ability to allege or prove that a seller knew he was unable to make prompt delivery of the goods. Finally, reliance cannot be an element for private claims under any of these subsections, because they either deal with mandatory disclosures that must be actionable *per se* where the seller has ignored the statute (*e.g.* including a confession of judgment clause, failing to disclose that rustproofing is optional), or concern post-transaction breaches (*e.g.* substandard repairs, delayed delivery).

21. Catchall; Any Other Fraudulent or Deceptive Conduct Creating A Likelihood of Confusion or of Misunderstanding.

The Catchall provision, § 201-2(4)(xxi), has received the most attention from the courts. Before 1996, there was a split in a number of decisions as to whether the Catchall provision required pleading and proof of all the elements of common law fraud. *See*, *e.g., DiLucido*, 676 A.2d at 1241; *Prime Meats*, 619 A.2d 769; *Gabriel*, 534 A.2d at 494 n.15. Some of the appellate cases after 1996 continued to cite these cases as indicating that proof of the common law elements was necessary, but the decisions all failed to consider the impact of the 1996 amendment that changed and renumbered the subsection from (xvii) to (xxi). *See Booze v. Allstate Ins. Co.,* 750 A.2d 877 (Pa. Super. 2000); *Debbs v. Chrysler Corp.*, 810 A.2d 137, 156-157 (Pa. Super. 2002). Later authorities have made it clear that the addition of "or deceptive" to the subsection was intended to overrule the restrictive interpretations of the UTPCPL and must be given effect. *See Percudani*, 825 A.2d at 746-747; *Weiler v.*

SmithKline Beecham Corp., 53 D. & C. 4th 449 (Phila. C.P. 2001); *McParland v. Keystone Health Plan Central, Inc.*, 113 York 135 (C.P. 1998).

In view of (i) this amendment; (ii) the fact that certain other subsections have a specific scienter requirement when others do not; (ii) the fact that certain other subsections have a reliance requirement when others do not; (iv) the broad and remedial purposes of the Catchall identified by this Court in *Monumental Properties*, 329 A.2d at 826-827; and (v) the rule of legislative ratification, Amici submit that the Catchall does not generally require pleading or proof of reliance or scienter for private consumer claims. Only where the consumer claim replicates a claim under another subsection that requires one or both of those common law elements should the Catchall claim then require proof of the element.

B. The Significance of UTPCPL Trade Regulations

As noted, Section 201-3.1 of the UTPCPL empowers the Attorney General to adopt regulations "necessary for the enforcement and administration of the act." 73 P.S. § 201-3.1 (2003). Among other things, the Attorney General has adopted a variety of industry trade practice regulations that expound upon and detail the types of industry-specific practices that would be considered unfair or deceptive under the law. These regulations "have the force and effect of law." *Id.*

Prior to June 2000, one of the types of industry-specific regulations the Attorney General had adopted was the Debt Collection Regulations, *see* 37 Pa. Code Chapter 303 (1999). Debt collection practices are within the scope of the UTPCPL. 73 P.S. § 201-3.1; *Pennsylvania Retailers Assn. v. Lazin*, 57 Pa. Cmwlth. 232, 426 A.2d 712, 716 (1981); *Jungkurth v. Eastern Financial Services, Inc.*, 74 B.R. 323, 336 (Bankr. E.D. Pa. 1987). A violation of a regulation promulgated under the UTPCPL is a *per se* violation of the

statute. *Commonwealth by Biester v. Luther Ford Sales, Inc.*, 60 Pa. Cmwlth. 123, 430 A. 2d 1053 (1981); *Jungkurth v. Eastern Financial Services, Inc., supra*.

The Regulations establish what are unfair or deceptive acts or practices with regard to the collection of debts. 37 Pa. Code 303.1. Many of the substantive prohibitions of the Regulations are similar or identical to those of the federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692a(6). Like the federal statute, the Regulations prohibit an array of specific deceptive tactics, and also include catchall provisions against "[o]therwise using any false representation or deceptive means to collect or attempt to collect a debt," 37 Pa. Code § 303.3(18), and "[o]therwise abusing or harassing a person in connection with the collection of a debt," 37 Pa. Code § 303.3(27). Specific violations include: (1) representing that certain action will be taken if that action cannot legally be taken or is not intended to be taken, §§ 303.3(11), (14), (18), (27); (2) sending dunning letters which simulate the appearance of telegrams which misrepresent the nature, importance, cost, purpose and urgency of the communication, §§ 303.3(18), (27); (3) calling a debtor at her place of employment, §§ 303.3(26), (27); 303.4(2); and, (4) abusing or harassing a debtor by continuing to telephone during a 7 day period following a telephone discussion with the debtor, §§ 303.3(26), (27); 303.4(2).

In 2000, the Regulations were replaced in favor of the Pennsylvania Fair Credit Extension Uniformity Act, 73 P.S. § 2270.1 *et seq*. ("FCEUA"). No material substantive changes in Pennsylvania debt collection law occurred, as the FCEUA merely codifies the prohibitions in the Regulations, and the Regulations remain applicable to acts which occurred before the effective date of the FCEUA. 73 P.S. § 2270.5(b).

The Regulations and the FCEUA are significant for two reasons. First, many of these provisions do not require an affirmative misrepresentation to establish a violation. Second, there can be a violation and damages to the consumer without pre-contract reliance, because the prohibited conduct, by definition, occurs well after the initial consumer transaction occurred. While violations of the Regulations and the FCEUA may, and often do, result in an ascertainable loss to the consumer, in virtually every case the consumer did not enter into the original transaction as a result of, or in reliance on, the unfair or deceptive acts that only occurred post-transaction. Therefore, the causation ("as a result of") language in § 201-9.2(a) cannot mean "justifiable reliance" or transaction causation. If that were the case, many unfair and deceptive practices which occur post-transaction would have no remedy under the UTPCPL, and the General Assembly's express cross-references for consumer claims to the UTPCPL would be nullified as a result.

Another set of pertinent regulations is the Automotive Industry Trade Practices Regulations, 37 Pa. Code § 301.1 *et seq.* ("AITPR"). These Regulations address both pre-transaction and post-transaction practices on the part of automotive industry participants. They impose affirmative disclosure obligations as well as prohibitions on certain practices by motor vehicle dealers, servicing operations and others.

These Regulations are significant because a dealer's failure to comply with an affirmative disclosure requirement such as describing a vehicle as "used" and "reconstructed," *see* 37 Pa. Code § 301.4(a)(2)(iii), would be an omission, but not an affirmative representation. Moreover, a consumer would confront an impossible burden of proof if she were required to prove reliance on an omission. *See infra* text at 36-38. Therefore, a private claim under § 201.9.2(a) for a car dealer's alleged violation of the AITPR cannot be limited to

instances of affirmative misrepresentation and justifiable reliance by the consumer. Rather, aggrieved consumers must be able to state a claim where the objective evidence establishes the dealer's material noncompliance with the AITPR, irrespective of speculation as to what the consumer might have done had she known the undisclosed information. A contrary rule would render the AITPR practically unenforceable.

C. Violations of Other Statutes Constituting Per Se UTPCPL Claims

It is well established in Pennsylvania that the violation of any consumer protection statute will also constitute a *per se* UTPCPL violation. *See, e.g., Gabriel v. O'Hara*, 534 A.2d 488 (violation of Unfair Insurance Practices Act, the Motor Vehicle Sales Finance Act and Pennsylvania's usury laws constitute violations of the UTPCPL); *King v. Rubin*, 35 Phila. 571 (Phila. C.P. 1998) (violation of Real Estate Licensing Act is a violation of the UTPCPL); *Deetz v. Nationwide Insurance Company*, 20 D. & C. 3d 499 (Mercer C.P. 1989) (violation of Unfair Insurance Practices Act a violation of UTPCPL); *see also In re Koresko*, 91 B.R. 689 (Bankr. E.D. Pa. 1998) (violation of Motor Vehicle Sales Finance Act found to be a violation of UTPCPL); *In re Russell*, 72 B.R. 855 (Bankr. E.D. Pa. 1987) (same).

This principle is especially true where the underlying consumer protection statute explicitly states that a violation is deemed to be an unfair trade practice. *See, e.g., McClelland v. Hyundai Motor Company America*, 851 F. Supp. 680 (E.D. Pa. 1994) (Pennsylvania's Lemon Law explicitly states that a violation of it is a UTPCPL violation). Violations of federal consumer credit protection statutes also constitute a UTPCPL violation. *See Commonwealth ex rel Zimmerman v. Nickel*, 26 D. & C. 3d 115 (Mercer

C.P. 1983) (violation of the Truth in Lending Act, a component of the Consumer Credit Protection Act, 15 U.S.C. § 1601, presents a violation of the UTPCPL).

The *per se* cases are significant because many, if not all, of the claims arising under the primary, substantive statutes do not contain common law elements such as reliance and scienter. Instead, many impose affirmative disclosure duties on sellers, the violation of which constitute a *per se* violation of the UTPCPL. Engrafting additional elements for a private claim onto these statutes would, for all practical purposes, obliterate the ability to enforce the substantive statutes and result in either increased regulation of the subject industries, wide-ranging regulatory oversight, or numerous and redundant private rights of action under each of the substantive statutes. Accordingly, the UTPCPL should not be interpreted to merely codify the elements of common law fraud.

D. The Structure and Language of the Private Cause of Action

As noted, the General Assembly amended the UTPCPL in 1976 to provide for a private cause of action for injured consumers. The added section, 73 P.S. § 201-9.2, provides, in pertinent part

> (a) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act, 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.

This section imposes three elements on a private claimant in addition to those set forth in sections 2 and 3 of the Act. First, the claimant must be a consumer, defined as a "person who purchases or leases goods or services primarily for personal, family or

household purposes." Second, the claimant must have suffered a loss, defined as an "ascertainable loss of money or property." Third, that loss must have been caused by an unfair or deceptive practice, where the loss was "as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act."

Section 9.2 sets forth a causation requirement but not a reliance requirement. "Causation differs from reliance, although both elements contemplate a nexus with defendant's misconduct. Causation requires a nexus between a defendant's conduct and a plaintiff's loss; reliance concerns the nexus between a defendant's conduct and a plaintiff's purchase or sale." *Smoot v. Physicians Life Ins. Co.,* 87 P.3d 545 (N.M. Ct. App. 2003) (quoting and citing, Goren, *A Pothole on the Road to Recovery, supra* note 1*,* at 11 n. 45).

The lower courts are erroneously construing the decisions in *Yocca v. Pittsburgh Steelers,* 854 A.2d 425, and *Weinberg v. Sun Co.*, 777 A2d 442, to mean that proof of "justifiable reliance" is *per se* applicable to *all* forms of deceptive conduct. However, courts throughout the country recognize that "justifiable reliance" does not apply to conduct based upon deceptive *omissions* or on post-transaction conduct, because it is virtually impossible to prove reliance upon information that remained a total secret at the time of the transaction.

Instead, it is recognized that "justifiable reliance" only applies to deceptive conduct involving *affirmative pre-contract verbal or written statements* (i.e. something heard or perceived by a consumer before agreeing to the transaction). Lower courts that construe *Yocca* and *Weinberg* to require proof of reliance in an omission or post-contract case are therefore placing an impossible burden on consumers and immunizing a wide swath of

deceptive conduct since many, if not most, deceptive practices take the form of non-disclosure, active concealment, contract omissions or statutory omissions.

Properly understood, the holdings of *Yocca* and *Weinberg* should be construed to mean that "causation" is an element of a UTPCPL private action *and* that if the action is based upon pre-contract affirmative misstatements or advertising (as they were in *Yocca* and *Weinberg*), then proof of reliance may be a required component of that causation element to ensure that the statement or advertisement is the "cause in fact" of the injury.

"Justifiable reliance," as a principle of common law, has only been recognized to apply as a requirement of the element of "causation-in-fact" in pre-transaction affirmative misrepresentation cases. Under general principles of tort law, the element of causation is defined as conduct that is the substantial factor in bringing about injury to another. *Restatement (Second) Of Torts,* § 431 (1965). In the context of the tort of misrepresentation, "reliance" is a component of the element of "causation." *Restatement (Second) Of Torts,* § 546 (1977) (causation-in-fact is established if one justifiably relies upon the truth of the matter represented). The purpose of requiring "reliance" is to ensure that the plaintiff was not foolish in relying on an affirmative verbal or written statement, but acted reasonably or justifiably when the statement was heard or seen. W. Prosser & W. Keeton, THE LAW OF TORTS, § 108 (5th Ed. 1984). This ensures that the statement was the cause in fact of the injury, not the plaintiff's unreasonable conduct. *See, e.g., Straub v. Vaisman,* 540 F.2d 591, 598 (3d Cir. 1976).

The causation-in-fact element therefore generally involves two components: 1) that the plaintiff's reasonable or justifiable reliance upon the statement or promise induced the transaction; and 2) that the loss incurred was in connection with the statement or promise.

These two components are referred to as "transaction causation" and "loss causation," respectively. [11]

However, the component of "justifiable reliance" or "transaction causation" does not apply in omission or nondisclosure cases because it is impossible for a person to react to mere silence. Therefore, in an omission case, the two components are compressed into a single loss causation element. As explained in *Wilson v. Comtech Communications,* 648 F.2d 88, 92 n.6 (2d Cir 1981), justifiable reliance makes no sense in an omission case:

> Although we will speak primarily in terms of reliance, a distinction should be noted between cases involving affirmative misrepresentations and those involving nondisclosure. The concept of reliance in a case of affirmative misrepresentations embodies two separate questions: (1) Did the plaintiff believe what the defendant said, and (2) was this belief the cause of the plaintiff's action? R. Jennings & H. Marsh, Securities Regulation 1063 (4th ed. 1977). In a case of nondisclosure, the task of positively proving reliance may become impossible to perform, and although the courts still refer to the element of causation in fact, the question really becomes one of materiality: "All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision," Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-54, 92 S.Ct. 1456, 1472, 31 L.Ed.2d 741 (1972).

See also Estate of Mahoney v. R.J. Reynolds, 204 F.R.D. 150, 158 (S.D. Iowa 2001) (reliance is not required in non-disclosure cases because it is generally impossible to prove reliance upon concealed information) (collecting cases).

The distinction between affirmative misrepresentation and non-disclosure depends upon whether a plaintiff is presented with a choice to accept or reject a representation. If the success of the deception depends upon a reasonable exercise of choice by a consumer then justifiable reliance may apply. By contrast, where the consumer has no choice, as when information is concealed or withheld, then no reason exists to require justifiable

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[11] *See, e.g., Huddleston v. Herman & MacLean,* 640 F.2d 534, 549 (5th Cir. 1981), *aff'd in part, rev'd in part on other grounds,* 459 U.S. 375 (1983).

reliance. This principle is explained in *Crane Company v. Westinghouse Brake,* 419 F.2d 787, 797 (2d Cir. 1969):

> the test of reliance is whether the misrepresentation is a substantial factor in determining the course of conduct which results in (the plaintiff's) loss. . . . The reason for this requirement . . . is to certify that the conduct of the defendant actually caused the plaintiff's injury, since a basic . . . element of tort law is the principle of causation in fact. We have held that where the success of a fraud does not require an exercise of volition by the plaintiff, . . . there need be no showing that the plaintiff himself relied upon the deception. (Internal quotation marks and citations omitted).

This Court in *Weinberg* implicitly recognized that no *per se* rule of reliance is mandated under the UTPCPL by limiting its holding to the *facts before it.* 565 Pa. at 619, 777 A.2d at 446. ("*in this case*, a plaintiff must allege reliance, that he purchased Ultra® because he heard and believed Sunoco's false advertising that Ultra® would enhance engine performance.").

In contrast to *Weinberg*, the mode of proving causation in an omission, half-truth or post-contract case, can take on a variety of forms, but proof of transactional reliance is not required. *See Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) ("There is, however, more than one way to prove a causal connection. Indeed, we have previously dispensed with a requirement of positive proof of reliance where a positive duty of disclosure had been breached, concluding that the necessary nexus between the plaintiff's injury and the defendant's wrongful conduct had been established.").

For example, causation may be demonstrated by presuming *reliance upon the other party to disclose* the allegedly concealed facts. 37 Am. Jur.3d, Fraud and Deceit § 228 (1964). This mode of proof has long been judicially recognized under the common law, which provides an "assumption of reliance" where the omitted facts are material or are required to be disclosed by statute, regulation or the circumstances of the transaction. *See*

Adams v. Little Missouri Minerals, 143 N.W.2d 659, 683 (N.D. 1966) ("As the facts suppressed in the instant case were material, inducement and reliance are inferred from the circumstances."). In *La Course v. Kiesel*, 77 A.2d 877 (Pa. 1951), this Court stated directly that "[i]t is to be presumed from the very materiality of the misrepresentation that the person deceived relied upon it." *Id*. at 880. *See also Affiliated Ute Citizens of Utah v. United States,* 406 U.S. 128, 153-154 (1972) (same).

The legal right to rely upon a seller to comply with the contract or to disclose information material to that performance can also demonstrate proof of causation where the acceptance of the contract is based upon material omissions. *Varacallo v. Massachusetts Mutual Life,* 332 N.J. Super. 31, 752 A.2d 807 (2000) ("The distinction between proof of reliance and proof of causation can best be explained in the context of this case. If plaintiffs succeed in proving that Mass Mutual withheld material information with the intent that consumers rely on it in purchasing Mass Mutual's policy, the purchase of the policy by a person who was shown the literature would be sufficient to establish *prima facie* proof of causation."). The court in *Varacallo* noted that in such instances involving omissions, "[a]s a practical matter, the burden then shifts to the defendant to prove "that even if the information were disclosed[,] the [plaintiff] would not have acted differently." *Varacallo v. Mass. Mut. Life Ins. Co.*, 332 N.J. Super. 31, 50, 752 A.2d 807, 817 (2000) (citing *Zobrist v. Coal-X, Inc.*, 708 F.2d 1511, 1520 (10th Cir.1983) (alteration in original)). In other contexts, causation may be demonstrated by deception that occurs in the midst of contract performance. *See Smith v. Commercial Banking Corp.* 866 F.2d 576, 583 (3d Cir. 1989); *see also Smith v. MCI Telecommunications Corp.*, 124 F.R.D.

665, 679 (D. Kan. 1989) (reliance on written plan documents can be assumed based on continued employment).

The enactment of the UTPCPL did not mandate "reliance" as the *only* required method for establishing the element of causation in an omission case. Numerous distinct ways of proving causation may exist depending upon the nature of the deceptive conduct alleged and the circumstances of the transaction. Here, for example, Consumer may prove causation by showing that Insurer delivered an insurance policy, not a retirement plan.

E. States With Similar Statutes Do Not Require Proof of Common Law Fraud.

The vast majority of states that have enacted consumer protection statutes based on or inspired by the NCCUSL and FTC models have construed their similar statutes to not require for private actions proof of an affirmative misrepresentation, reliance, or *scienter*.[12]

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[12] *See, e.g., State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 534-35 (Alaska 1980) (actual injury and intent not required); *Cearley v. Wieser*, 727 P.2d 346, 348 (Ariz. Ct. App. 1986) (scienter not required); *Chern v. Bank of Amer.*, 544 P.2d 1310, 1316 (Cal. 1976) (intent not required); *Associated Inv. Co. v. Williams Assocs. IV*, 645 A.2d 505, 510 (Conn. 1994) (intent and reliance not required); *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983) (reliance and intent to misrepresent, to make a deceptive or untrue statement and to induce action not required); *Davis v. Powertel, Inc.*, 776 So. 2d 971, 973-74 (Fla. Dist. Ct. App. 2000) (individual reliance not required); *Regency Nissan, Inc. v. Taylor*, 391 S.E.2d 467, 470 (Ga. Ct. App. 1990) (intent not required); *State ex rel. Kidwell v. Master Distribs., Inc.,* 615 P.2d 116, 122-23 (Idaho 1980) (actual damage, reliance and intent not required); *Roche v. Fireside Chrysler-Plymouth, Mazda, Inc.*, 600 N.E.2d 1218, 1227 (Ill App. Ct. 1992) (intent not required); *Salkfeld v. V.R. Bus. Brokers*, 548 N.E.2d 1151, 1160 (Ill. App. Ct. 1989) (reliance not required); *State ex rel. Miller v. Hydro Mag, Ltd.*, 436 N.W.2d 617, 620 (Iowa 1989) (reliance, intent and damages not required); *Dale v. King Lincoln-Mercury, Inc.*, 676 P.2d 744, 748 (Kan. 1984) (intent and scienter not required); *Gehring v. Kansas Dep't. of Transp.*, 886 P.2d 370, 374 (Kan. Ct. App. 1994) (intent not required); *Sparks v. Re/Max Allstar Realty, Inc.*, 55 S.W.3d 343, 348 (Ky. Ct. App. 2000) (intent not required); *Telcom Directories, Inc. v. Commonwealth ex rel.* Cowan, 833 S.W.2d 848, 850 (Ky. Ct. App. 1991) (actual deception not required); *Thomas J. Sibley, P.C. v. Nat'l Union Fire Ins. Co.*, 921 F. Supp. 1526, 1531-32 (E.D. Tex. 1996) (construing Louisiana law) (intent not required); *Bartner v. Carter*, 405 A.2d 194, 200 (Me. 1979) (intent not required); *Golt v. Phillips,* 517 A.2d 328, 332-33 (Md. 1986)

These cases and their commentators explain that the statutes – although superimposed on the common law background – were designed to make it easier for consumers to assert claims.[13] Construing the UTPCPL generally to require proof of the common law elements

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(scienter not required); *Bond Leather Co. v. Q.T. Shoe Mfg. Co.*, 764 F.2d 928, 937 n.6 (1st Cir. 1985) (construing Massachusetts law) (intent not required); *Giannasca v. Everett Aluminum, Inc*., 431 N.E.2d 596, 599 (Mass. App. Ct. 1982) (intent not required); *Dix v. Am. Bankers Life Assurance Co.*, 415 N.W.2d 206, 209 (Mich. 1987) (reliance not required); *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 13 (Minn. 2001) (reliance not required); *Church of the Nativity of Our Lord v. WatPro, Inc*., 474 N.W.2d 605, 612 (Minn. Ct. App. 1991) (intent not required); *State ex rel. Nixon v. Beer Nuts, Ltd.*, 29 S.W.3d 828, 837 (Mo. Ct. App. 2000) (intent and reliance not required); *State ex rel. Webster v. Areaco Inv. Co*., 756 S.W.2d 633, 635 (Mo. Ct. App. 1988) (reliance not required); *Fenwick v. Kay Amer. Jeep, Inc*., 371 A.2d 13, 16 (N.J. 1977) (intent not required); *Byrne v. Weichert Realtors*, 675 A.2d 235, 240 (N.J. Super. App. Div. 1996) (reliance not required); *Gennari v. Weichert Co. Realtors*, 672 A.2d 1190, 1205 (N.J. Super. Ct. App. Div. 1996) (scienter not required); *Page & Wirtz Constr. Co. v. Solomon*, 794 P.2d 349, 354 (N.M. 1990) (intent not required); *Small v. Lorillard Tobacco Co*., 720 N.E.2d 892, 897 (N.Y. 1999) (reliance not required); *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 657 N.E.2d 741, 744 (N.Y. 1995) (intent not required); *Marshall v. Miller*, 276 S.E.2d 397, 403 (N.C. 1981) (intent not required); *Canady v. Mann*, 419 S.E.2d 597, 602 (N.C. Ct. App. 1992) (proof of fraud not required); *Hubbard v. Bob McDorman Chevrolet*, 662 N.E.2d 1102, 1105 (Ohio Ct. App. 1995) (intent not required); *Sanders v. Francis*, 561 P.2d 1003, 1006 (Or. 1971) (reliance not required for certain causes of action); *Inman v. Ken Hyatt Chrysler Plymouth, Inc.*, 363 S.E.2d 691, 692 (S.C. 1988) (intent and proof of common law fraud not required); *Smith v. Scott Lewis Chevrolet, Inc.,* 843 S.W.2d 9, 12 (Tenn. Ct. App. 1992) (intent and scienter not required); *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980) (intent not required); *Weitzel v. Barnes*, 691 S.W.2d 598, 600 (Tex. 1985) (reliance not required); *Poulin v. Ford Motor Co.*, 513 A.2d 1168, 1172-73 (Vt. 1986) (intent not required); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co*., 719 P.2d 531, 535 (Wash. 1986) (intent not required); *State v. Imperial Mktg*., 472 S.E.2d 792, 803 (W. Va. 1996) (reliance not required to establish statutory element of material misrepresentation); *State v. Clausen*, 313 N.W.2d 819, 827 (Wis. 1982) (intent not required).

[13] Richard F. Dole, *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act*, 76 Yale L.J. 485, 495 (1967); see also Goren, *A Pothole on the Road to Recovery*, supra note 1, at 12-16 & nn.50-51; Jonathan Sheldon & Carolyn L. Carter, UNFAIR & DECEPTIVE ACTS & PRACTICES, § 4.2.12 (5th ed. 2001) (discussing reliance under state consumer protection statutes); Samuel Issacharoff, *The Vexing Problem of Reliance in Consumer Class Actions*, 74 Tul. L.Rev. 1633, 1643 (2000) (same); Gary L. Wilson & Jason A. Gillmer, *Minnesota's Tobacco Case: Recovering Damages Without Individual Proof of Reliance Under Minnesota's Consumer Protection Statutes*, 25 Wm.

for all private claims would disregard the common roots of the state statutes and put the Commonwealth outside the mainstream of authority.

F. Summary of the Elements

In summary, Amici respectfully urge the Court to clarify that the UTPCPL does not mandate proof of all of the common law elements of fraud for all private causes of action. Instead, the statute has three (3) universal elements: (1) a purchase or lease of consumer goods or services; (2) an ascertainable loss; and (3) loss causation, meaning that the loss resulted from the unfair or deceptive act or practice. Where the claim alleges affirmative misrepresentations prior to the consumer transaction, then proof of the fourth (4th) element of transactional causation, or reliance, may also be required. Where, however, the claim alleges half-truths, material omissions (including "bait and switch"), post-contractual breaches or deception, an unfair act, or a violation of an affirmative disclosure obligation (*e.g.* telemarketing sales and debt collection activities), causation may be established without proof of reliance based on the circumstances giving rise to the alleged loss (*e.g.* materiality, continued performance by the consumer, or the nature of the affirmative disclosure duty).

For certain claims under the specific subsections 201-2(4)(ix)(false advertising with intent not to sell as advertised), 201-2(4)(xv)(knowingly misrepresenting need for

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Mitchell L. Rev. 567, 595-608 (1999) (summarizing case law and arguments that reliance is not necessary for consumer protection claims); Elizabeth A. Dalberth, *Unfair and Deceptive Acts and Practices in Real Estate Transactions: The Duty To Disclose Off-Site Environmental Hazards*, 97 Dick. L. Rev. 153, 158 (1992) ("[T]he elements of UDAP statutes are easier to prove than the elements of common law fraud because many do not require proof of intent to defraud, reliance, actual damage, or even actual sale."); 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, 536 (1980) ("[R]eliance need not be pleaded or proven to establish a UDAP violation for deceptive practices.").

services), and 201-2(4)(xx)(requiring prompt delivery of goods ordered by mail or phone), proof of the seller's knowledge or intent may also be an element. For claims under the Catchall, § 201-2(4)(xxi), neither reliance nor intent are *per se* elements, but may be required if the alleged deceptive practice induced the transaction and is similar to a practice that would otherwise require proof of intent. For all such cases, the seller's scienter or recklessness should be subject to proof based on circumstantial evidence of either the opportunity to know that the representations were likely to be misleading, or the careless disregard of obvious facts indicating that such an opportunity was ignored by the seller.

III. THE LOWER COURTS ERRED WHEN THEY REQUIRED JUSTIFIABLE RELIANCE FOR CONSUMER'S UTPCPL CLAIM.

Despite the breadth and remedial purpose of the UTPCPL, the Superior Court here has confined the statute improperly to inflexible common law fraud elements. The trial court "dismissed the UTPCPL claims because Consumer failed to demonstrate that she justifiably relied upon any of [Insurer's] alleged misrepresentations." 863 A.2d at 9. The Superior Court correctly reversed the trial court's grant of summary judgment for Insurer, reasoning that it was not unreasonable as a matter of law for Consumer to rely on Insurer's representations. *Id.* at 13 (citing *Rempel v. Nationwide Life Ins. Co*, 471 Pa. 404, 409, 370 A.2d 366, 368 (1977); *Pressley v. Travelers Prop. Cas. Corp.*, 817 A.2d 1131 (Pa. Super. 2003)). However, in this "bait and switch" and "reasonable expectations" context, the UTPCPL should not require proof of the common law fraud element of justifiable reliance.

A. Insurer's Half-Truths and Omissions

Even common law fraud standards have recognized that a "half-truth is a whole lie." *See Foster*, 57 D. & C. 2d at 208. The United States Supreme Court has held that "a statement of a half truth is as much a misrepresentation as if the facts stated were untrue."

Equitable Lift Ins. Co. of Iowa v. Halsey, Stuart & Co., 312 U.S. 410, 424-426 (1941) (applying Iowa law). A poet has described the concept crisply:

> That a lie which is half a truth is ever the blackest of lies;
> That a lie which is all a lie may be met and fought with outright,
> But a lie which is part a truth is a harder matter to fight. [14]

In a famous FTC case, the court observed: "To tell less than the whole truth is a well known method of deception; and he who deceives by resorting to such method cannot excuse the deception by relying upon the truthfulness per se of the partial truth by which it has been accomplished." *P. Lorillard Co. v. FTC*, 186 F.2d at 58. The *Restatement (Second) of Torts* restates these common law truisms. *See Restatement (Second) of Torts* §§ 550 & 551.

Given these principles, the Superior Court below appeared to end its analysis too soon. Although a seller who remains silent may not have a duty to disclose defects or deficiencies in a product or service, a seller who chooses to speak about the quality or characteristics of the product or service is required to disclose all facts necessary to make the statements made, in light of the circumstances, not misleading. *See Restatement (Second) of Torts* § 551(2)(b).

A reasonable fact-finder could find that Insurer's representations about the life insurance policy ("50/50 Savings Plan"; "retirement plan"; "added benefit" to "also receive life insurance") and the characteristics of the monthly premium payments ("deposits"), in light of the circumstances, were misleading. 861 A.2d at 4. These statements and the presentation of the policy itself were half-truths. The policy, while appearing to be consistent with a "retirement plan," was in fact life insurance. Given the half-truth that

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[14] A. Tennyson, The Grandmother, Stanza 8 (quoted in *Commonwealth v. Foster,* 57 D. & C. 2d at 208).

participation in the retirement plan included the added benefit of life insurance, the receipt of a "Whole Life Policy" would not have alerted even the sensitive antennae of an investment analyst to investigate further. The verbal representations of Insurer and, most important, the complex nature of insurance policies and retirement plans all contributed to the deception. Under these circumstances, a jury could reasonably find that Insurer's incomplete representations and omissions were misleading.

Whether Insurer knowingly or recklessly failed to disclose the omitted facts, *i.e.*, that Insurer provided a life insurance policy instead of the retirement plan that Consumer agreed to purchase, also presented a jury question. As the Supreme Court has recognized, circumstantial evidence is often the principal, if not the only, means of proving bad faith. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n.30 (1983) (noting that circumstantial evidence can be "more than sufficient" to prove *scienter* in fraud cases).

Besides having the opportunity to mislead, Insurer also had one of the oldest known motives for deceit: a disproportionate profit and a much higher commission from the sale of the life insurance policy as opposed to a simple retirement plan. A reasonable jury thus could conclude from these and other undisputed facts that Insurer intentionally uttered half-truths and otherwise concealed material facts from Consumer to induce her to buy the life insurance policy.

In view of this Court's statement of the issue under review, Amici submit that even if common law standards control the elements of Consumer's particular UTPCPL claim here, those elements do not require proof of justifiable reliance on the omissions embraced by Insurer's half-truths. In fact, Consumer's summary judgment evidence satisfied the key elements: (1) she made monthly payments into a so-called "retirement plan" for personal,

family or household purposes; (2) she sustained an ascertainable loss of money or property, because she lost both the benefit of the retirement savings plan that she bargained for, and the cost of the life insurance policy that she expressly did not seek, *see Neuman,* 51 A.2d at 766; *Restatement (Second) Torts* § 551 (specifying that benefit of the bargain damages may also be recovered); (3) her loss was "as a result of" Insurer's deceptive practice, as both the transaction and Consumer's loss of the benefit of a real retirement plan were the result of Insurer's half-truths; (4) Consumer relied on Insurer's representations about the nature of the service provided, as Insurer had superior knowledge and expertise with regard to retirement plans and the actual life insurance policy provided; and (5) Insurer knowingly or recklessly uttered half-truths concerning the so-called "retirement plan," as the circumstantial evidence shows that it had the opportunity to know of and reveal the true facts and a motive to conceal them from Consumer.

B. The UTPCPL is More Protective than the Common Law.

Wholly apart from the common law of half-truths and the doctrines of equitable fraud and rescission, several specific subsections of the UTPCPL imposed an affirmative duty on Insurer, in light of its incomplete representations about the nature ("retirement plan") and characteristics ("savings plan"; "deposits" versus premiums) of the policy, to disclose material facts to Consumer. As explained above, Consumer paid for a life insurance policy that she did not want and would not have purchased otherwise had the undisclosed truth about the agreement (so-called "retirement plan" versus life insurance policy) been disclosed by Insurer. Consumer's evidence established, at a minimum, that Insurer was aware that the entire plan to which she agreed contained only a life insurance policy and no additional retirement plan. Having chosen to speak about the nature,

characteristics, uses and benefits of the policy, it was deceptive and unfair for Insurer to fail to disclose the other facts a reasonable buyer would consider important.[15]

A requirement that Consumer's reliance on the misrepresentations of Insurer be justifiable for a UTPCPL claim conflicts with the broad and remedial purposes of the statute. Interpretations of the Act that imposed common law fraud elements were unduly restrictive and led the General Assembly to amend the UTPCPL in 1996. Act of Dec. 4, 1996, P.L. 906, No. 146, effective Feb. 2, 1997. The amended Act reinforces this Court's interpretation of the UTPCPL in *Commonwealth v. Monumental Properties, Inc.*, 459 Pa. 450, 329 A.2d 812 (1974), holding that the Act extends beyond a mere codification of common law fraud principles. *See Commonwealth v. Percudani*, 825 A.2d 743, 747 (Pa. Commw. 2003) (overruling preliminary objections because 1996 amendment clarified that UTPCPL applies to more than common law fraud, and citing cases). Thus, this Court should clarify that "justifiable reliance" is not a required element for all UTPCPL claims, particularly where, as here, the "reasonable expectations" of the consumer indicate that the burden of proof should be reversed on the issue.

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[15] Courts in jurisdictions with similar consumer protection laws have interpreted the statutes to enable consumers to recover for deceptive sales practices such as those involved here. For example, in New Jersey, the Appellate Division held "that common law fraud requires proof of reliance while consumer fraud requires only proof of a causal nexus between the concealment of the material fact and the loss." *Varacallo v. Massachusetts Mut. Life Ins. Co*, 332 N.J.Super. 31, 752 A.2d 807 (2000). *See also Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 607-608, 691 A.2d 350 (1997) (holding that reliance is not required in suits under the Consumer Fraud Act because liability results from "misrepresentations whether 'any person has in fact been misled, deceived or damaged thereby'").

CONCLUSION

For the foregoing reasons, Amici urge the Court to clarify that not all private claims under the UTPCPL require proof of the common law fraud elements, and that the burden of proof with respect to reliance is reversed where the good or service delivered does not conform to the consumer's "reasonable expectations" in light of the seller's affirmations or promises.

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