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## **DO THE PENNSYLVANIA UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAWS APPLY TO REAL ESTATE TRANSACTIONS?**

By: Robert J. Foster, Esq.

In almost every lawsuit involving an undisclosed condition in real estate, in addition to the claims of breach of contract, violation of the Seller's Disclosure Act and fraud, the attorneys filing the suit will include a claim under Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL) 73 P.S. § 201 et seq. Historically, the impact was not very significant as a claim under the UTPCPL required a showing of common law fraud. Even without a UTPCPL claim, the Plaintiff would still be able to pursue a claim for punitive damages under a common law fraud theory. However, recently in *Bennett v. A.T. Masterpiece Homes, 2012 Pa.Super 60 (2012)* the Superior Court held that amendments to the UTPCPL eliminated the requirement of showing common law fraud thus making the UTPCPL a broader remedy than allowed under a common law fraud theory. Now, instead of having to show a real estate agent made a misrepresentation, the Plaintiff need only prove that the actions of the agent could have resulted in an erroneous conclusion by a real estate buyer. The expansion of the scope of conduct which would lead to a violation of the UTPCPL along with the provisions for treble damages and attorneys fees make an UTPCPL claim a significant weapon in claims against real estate agents.

A casual reading of Pennsylvania Superior Court decisions would lead one to conclude that the assertion of an UTPCPL claim is proper. In *Gabriel v. O'Hara, 368 Pa.Super. 383, 534 A.2d 488 (1987)* the Pennsylvania Superior Court permitted the Plaintiffs to amend their complaint to include a claim under the Unfair Trade Practices and Consumer Protection Laws based upon alleged fraudulent practices during a real estate transaction. This opinion has been often cited in cases discussing the application of the UTPCPL to real estate transactions. Based on this caselaw, it would appear that the issue had been settled.

The Pennsylvania Supreme Court, though, has indicated that it disagrees with the result in *Gabriel*. In *Schwartz v. Rockey, 593 Pa. 536, 556 (Pa. 2007)*, a case addressing the legal standard under which treble damages should be awarded, the Supreme Court volunteered the following observation in a footnote of the opinion:

n15 There is no issue presented in this limited appeal concerning Buyers' standing to invoke this statute, since they are complaining of loss in connection with their purchase of real property, as opposed to the purchase

or lease of "goods or services" to which the statute facially pertains. 73 P.S. §201-9.2. Parenthetically, the Superior Court has held, based on policy considerations, that the private-right-of-action provision of the UTPCPL extends to real estate transactions, see *Gabriel v. O'Hara*, 368 Pa. Super. 383, 388-92, 534 A.2d 488, 491-93 (1987), although such decision has been subject to critical commentary as being inconsistent with the plain terms of the statute. See, e.g., *James P. Nehf, Textualism in the Lower Courts: Lessons From Judges Interpreting Consumer Legislation*, 26 RUTGERS L.J. 1, 61 n.229(1994).

A careful analysis of the actual opinions in the underlying cases indicates that the question of whether the provisions providing for a private cause of action apply to real estate transactions should still be an open question under Pennsylvania law. First, the Superior Court in *Gabriel* did not rely upon the private right of action under the UTPCPL when issuing its opinion. It cited to the private right of action created by the Cash Consumer Protection Act, 73 P.S. § 204 et seq. The various other cases can also be distinguished on the basis that the parties either did not contest the issue or the court found that the UTPCPL did not apply for other reasons. In addition, since the last revisions to the UTPCPL were adopted by the same legislative body that adopted the Sellers Disclosure Laws, principles of statutory construction would also support the observation by the Supreme Court that the private cause of action under the UTPCPL does not apply to real estate transactions.

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