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## Unfair and Inactionable: The Case for a Private Cause of Action for Business and Investment Activity Under Pennsylvania's Unfair Trade Practices and Consumer Protection Law

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UNFAIR AND INACTIONABLE: THE CASE FOR A PRIVATE CAUSE OF  
ACTION FOR BUSINESS AND INVESTMENT ACTIVITY UNDER  
PENNSYLVANIA'S UNFAIR TRADE PRACTICES AND CONSUMER  
PROTECTION LAW

MARK T. WILHELM\*

I. INTRODUCTION

Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL)<sup>1</sup> was originally passed in 1968, with a focus on protecting Pennsylvania citizens from fraudulent and misleading commercial activity.<sup>2</sup> In 1996, the UTPCPL was amended to include a private cause of action for persons asserting a loss under the statute.<sup>3</sup> Since that time, and in an effort to protect consumers, Pennsylvania courts have applied the UTPCPL broadly to encompass many commercial transactions.<sup>4</sup> However, when examining the application of the UTPCPL, it is clear that business and investment activities are not within the scope of the UTPCPL's private cause of action provision, even when undertaken by relatively unsophisticated parties.<sup>5</sup>

This Essay will examine the current applicability of the UTPCPL to business and investment practices in the context of predatory lending actions related to business or investment properties.<sup>6</sup> Further, it will present an interpretation of the UTPCPL that may allow for a private cause of action for improper business and investment transactions under the statute's current construction.

II. BUSINESS PURPOSE AND PREDATORY LENDING

The UTPCPL provides a private cause of action to persons affected by

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1. 73 PA. STAT. ANN. § 201-1 to 201-9.3 (West 2014).

2. *See id.* § 201-3 (outlining unlawful acts under UTPCPL, which include “[u]nfair methods of competition” and “unfair or deceptive acts or practices”). Both “unfair methods of competition” and “unfair or deceptive acts or practices” are defined at length in § 201-2(4). *See id.* § 201-2(4); *see also* *Romeo v. Pittsburgh Assocs.*, 787 A.2d 1027, 1033 (Pa. Super. Ct. 2001); 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, 3–6 (2002) (providing history of UTPCPL).

3. *See* Unfair Trade Practices and Consumer Protection Law—Omnibus Amendments, No. 1996-146, 1996 Pa. Legis. Serv. (West).

4. *See* *Six v. Cole*, 8 Pa. D. & C.4th 625, 627 (Ct. Com. Pl. Adams Cnty. 1991) (“The purpose of the act has been stated as balancing bargaining positions of buyers with those of sellers.”).

5. *See* *Levine v. First Am. Title Ins. Co.*, 682 F. Supp. 2d 442, 466 (E.D. Pa. 2010) (noting that availability of cause of action under UTPCPL “depends on the purpose of the purchase, not the type of product purchased”).

6. Yet the interpretation advanced is equally applicable to any other business or investment practice.

various types of fraud or misrepresentation occurring as a part of a business transaction.<sup>7</sup> The parties able to assert this cause of action are limited to “[a]ny 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 . . . .”<sup>8</sup> Courts have routinely denied private causes of action under the UTPCPL where plaintiffs, even in their capacity as individuals,<sup>9</sup> have advanced a UTPCPL claim in relation to a business or investment interest.<sup>10</sup>

In the context of the recent housing collapse, Pennsylvania citizens have sought a private cause of action for acts that contributed to the collapse. Those acts notably include predatory lending.<sup>11</sup> While no Pennsylvania statute explicitly gives rise to a cause of action for predatory lending, Pennsylvania courts have recognized an action for predatory lending under the UTPCPL.<sup>12</sup> Yet, those decisions have made it clear that the application of the UTPCPL to predatory lending is limited *only* to acts that are associated with real estate used for *residential* purposes.<sup>13</sup>

7. See 73 PA. STAT. ANN. § 201-9.2.

8. *Id.*

9. For the purposes of this Essay, the term “individual” is synonymous with “natural person” unless otherwise stated.

10. See, e.g., *Balderston v. Medtronic Sofamor Danek, Inc.*, 285 F.3d 238, 242 (3d Cir. 2002) (holding doctor’s purchase of medical device on behalf of patients was not personal, but business related); *Waldo v. N. Am. Van Lines, Inc.*, 669 F. Supp. 722, 725 (W.D. Pa. 1987) (“The obvious intent of this language is to restrict claims brought under the CPL to those which are legitimately of a consumer nature.”). The *Waldo* court did admit, however, that its “research ha[d] uncovered *no Pennsylvania case squarely on point*,” and the court consequently based its decision on precedent from the U.S. District Court for the Eastern District of Pennsylvania. *Id.* at 726 (emphasis added). That is not to say that organizations have never been able to bring a claim under the UTPCPL. See, e.g., *Valley Forge Towers S. Condo. v. Ron-Ike Foam Insulators, Inc.*, 574 A.2d 641, 649 (Pa. Super. Ct. 1990) (allowing condominium association to assert private cause of action where transaction was for residential use by individual unit owners). But see, e.g., *Cumberland Valley Sch. Dist. v. Hall-Kimbrell Envtl. Servs., Inc.*, 639 A.2d 1199, 1201–02 (Pa. Super. Ct. 1994) (declining to recognize school district as representative of students for purposes of personal use analysis under UTPCPL).

11. See generally Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255 (2002) (detailing practices associated with predatory lending).

12. See *Growall v. Maietta*, 931 A.2d 667, 676 (Pa. Super. Ct. 2007) (“There is no question that the purchase or lease of a home, condominium, or apartment for *residential* purposes comes under the protections of the UTPCPL.”); see also *In re McConnell*, 390 B.R. 170, 182 (W.D. Pa. 2008) (“As an initial matter, the Court acknowledges that there is no common law cause of action for ‘predatory lending.’ Any claim for relief for predatory lending practices must be supported by some statutory basis . . . .”); *Sovereign Bank v. Gawron*, 13 Pa. D. & C.5th 71, 79–80 (Ct. Com. Pl. Lackawanna Cnty. 2010) (reviewing approaches to predatory lending causes of action inside and outside of Pennsylvania). Prior to the *Growall* decision, there was some question regarding whether the UTPCPL in fact applied to mortgages and associated loans. See generally John J. Jacko, III, *Are Mortgage Loan Transactions Really Subject to Private Actions Under Pennsylvania’s Unfair Trade Practices and Consumer Protection Law?*, 76 PA. BAR ASS’N Q. 171 (2005) (questioning whether, pre-*Growall*, UTPCPL applied to mortgage transactions and arguing that such transactions were not actionable under then current interpretation of UTPCPL).

13. See *Growall*, 931 A.2d at 676; *Lal v. Ameriquest Mortg. Co.*, 858 A.2d 119, 124–25 (Pa. Super. Ct. 2004) (dismissing UTPCPL claim where plaintiff purchased real estate for

By accepting the use of the UTPCPL for a private cause of action for predatory lending—that relates to residential properties, but not for business or investment properties—Pennsylvania courts have created a conflicting standard. The UTPCPL is designed to protect relatively unsophisticated individuals from unscrupulous business practices.<sup>14</sup> But the UTPCPL inherently assumes that these individuals will always be acting in their capacity as individuals.<sup>15</sup> In the non-individual context, Pennsylvania courts suggest that plaintiffs should rely on common law causes of action to support their claims based in fraud or breach of contract. But in the case of predatory lending, given the lack of a common law cause of action, relatively unsophisticated businesses—including individuals working in a business capacity or for investment purposes—are left unprotected.<sup>16</sup> Therefore, due to a lack of a common law remedy for predatory lending practices, lenders are free to engage in these practices against individuals and businesses alike that would be actionable under the UTPCPL but for the business or investment purpose behind the transaction.<sup>17</sup>

### III. STATUTORY CONSTRUCTION AND THE DEFINITION OF “PERSONAL”

Persons, broadly defined, may find some recourse under the UTPCPL by employing a critical reading of the statute’s text. The UTPCPL internally defines person as “natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entities.”<sup>18</sup> Yet, “personal” is not defined in the statute, despite being one of the main bases for a private cause of action under the UTPCPL.<sup>19</sup> The dictionary definition of

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investment purposes merely because of investment nature of transaction). However, while *Growall* applied the UTPCPL to residential property transactions with “no question,” the court did not state whether the purchase of residential property was a *personal* purchase or a *household* purchase for purposes of the private cause of action. See *Growall*, 931 A.2d at 676.

14. See *Six v. Cole*, 8 Pa. D. & C.4th 625, 627–28 (Ct. Com. Pl. Adams Cnty. 1991) (“If consumer protection is the goal, one consumer should be as important as the next. It would matter little to the individual customer whether he or she had been wronged by another individual or a giant corporation.”).

15. In this way, the UTPCPL implicitly assumes that a natural person acting in a business or investment related real estate transaction is in some way more sophisticated, better protected, or more informed than the same person, under the same lending circumstances, acting in the context of a residential real estate transaction.

16. In the context of predatory lending, this situation could arise in many mortgage transactions, with examples including a single member limited liability company purchasing a rental property or even a natural person purchasing an empty lot for the lot’s investment potential. Given the underlying reasoning for declining to apply the UTPCPL to business and investment activity—that these relatively sophisticated parties are already protected by their own knowledge and bargaining power—application of the UTPCPL to such activity would likely be limited to exclude parties that are seen as somehow more sophisticated and able to protect themselves through their routine market actions.

17. Indeed, nearly all mortgage loan applications have at least one question regarding whether the property will be used for residential or commercial purposes. While executing other loan documents, borrowers are also routinely required to sign statements acknowledging the same.

18. 73 PA. STAT. ANN. § 201-2(2) (West 2014).

19. Recall that a private cause of action is available for transactions entered into for “*personal*, family or household purposes . . . .” See *id.* § 201-9.2 (emphasis added); see also

“personal” is “[o]f or affecting a person.”<sup>20</sup> Facially, this definition seems to contemplate a natural person.

Given the broad definition of “person” in the UTPCPL, an argument may be advanced that business activity falls within the scope of the private cause of action, because the definition of “personal”—admittedly taken from the dictionary, as opposed to the statute or case law—is something affecting the person. Logically, any activity that affects the statutorily defined person falls within the private cause of action. As such, a business entity—included within the scope of person in the UTPCPL—acting in its regular course of business, is necessarily engaged in activity that affects itself, the business. Because the business is a person for purposes of the statute, that action of the business is personal to the business since the action is of or affecting the business. That business, therefore, should logically have a right to bring a claim under the private cause of action provision under the “personal” clause.<sup>21</sup>

Understandably, Pennsylvania courts may be hesitant to adopt this interpretation of the UTPCPL given its relative creativity.<sup>22</sup> In fact, in a substantively different context, this interpretation was litigated unsuccessfully in a Pennsylvania trial court.<sup>23</sup> However, courts admit that the scope of the UTPCPL is intended to be interpreted broadly.<sup>24</sup> Further, Pennsylvania courts have explicitly stated that protecting consumers in real estate transactions, albeit to date only in residential transactions, is an important interest contemplated by the UTPCPL.<sup>25</sup> This combination of intent to protect relatively unsophisticated

*supra* notes 7–8 and accompanying text.

20. BLACK’S LAW DICTIONARY (9th ed. 2009).

21. In thirty states, statutes similar to the UTPCPL would allow a cause of action for a business against another business relating to fraudulent or deceptive trade practices. *See* Michael Flynn & Karen Slater, *All We Are Saying Is Give Business a Chance: The Application of State UDAP Statutes to Business-to-Business Transactions*, 57 CONSUMER FIN. L.Q. REP. 60, 66–67 (2003).

22. Here, “creativity” refers to the novelty of the interpretation, especially in light of many decisions—mostly in federal courts—that simply refuse to apply the UTPCPL to business and investment activity, regardless of the identity or nature of the affected actor.

23. *See* Springboro Volunteer Fire Dep’t & Relief Ass’n v. J.C. Moore Indus. Sales Corp., 50 Pa. D & C.3d 479, 482 (Ct. Com. Pl. Crawford Cnty. 1988) (declining to apply UTPCPL under statutory construction argument to repair of fire truck). The *Springboro* court reasoned that it did “not believe that repairs to a fire company’s fire truck [were] within purview of the type of consumer purchases the legislature intended to protect.” *Id.* Notably, the court did not address the logic of the underlying argument, but simply defaulted to its interpretation of the legislature’s intent to exclude business purposes from the scope of the UTPCPL. *See id.* at 482–83.

24. *See* Commonwealth *ex rel.* Creamer v. Monumental Props., Inc., 329 A.2d 812, 815 n.5 (Pa. 1974) (“There is no indication of an intent to exclude a class or classes of transactions from the ambit of the Consumer Protection Law. When the Legislature deemed it necessary to make an exception from the Law’s scope, it did so in clear language.”); Commonwealth *ex rel.* Corbett v. Snyder, 977 A.2d 28, 44 (Pa. Commw. Ct. 2009) (“The CPL is to be liberally construed to effectuate the legislative goal of consumer protection.”); Commonwealth v. Parisi, 873 A.2d 3, 9 (Pa. Commw. Ct. 2005) (“[T]he Law is to be liberally construed to effectuate the legislative goal of consumer protection.”); *supra* note 4 and accompanying text. *But see* Meyer v. Cmty. Coll. of Beaver Cnty., 93 A.3d 806, 815 (Pa. 2014) (holding “person” as defined in UTPCPL does not include political subdivision agencies).

25. *See* Gabriel v. O’Hara, 534 A.2d 488, 493 (Pa. Super. Ct. 1987) (“Residential real

consumers, as well as a viable interpretation of the UTPCPL, may provide a limited exception to the prohibition against a private cause of action for business or investment transactions.

#### IV. CONCLUSION

The above logic regarding the interpretation of “personal” may extend the UTPCPL to all real estate transactions in which individuals are put at risk, irrespective of the subjective motivations of the individuals.<sup>26</sup> Especially in the context of predatory lending, given the lack of an alternative cause of action, individuals may be left without recourse if they are the victims of predatory lending in a business or investment transaction. If the goal of the UTPCPL is indeed to place buyers and sellers on equal ground—particularly in the context of large real estate purchases—Pennsylvania courts must adopt a new, broad reading of the UTPCPL to protect all consumers, without reviewing consumers’ subjective motives through a transaction-by-transaction analysis.

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estate is almost always a consumer’s largest single purchase. Consequently, the impact of unfair or deceptive practices is greatest in this type of transaction.”).

26. Of course, this interpretation applies to any application of the UTPCPL, including applications for business or investment activity. However, given precedent, it is unlikely that the UTPCPL would be applied to any business or investment transaction where a common law or statutory cause of action has been recognized already.

