RECENT DEVELOPMENTS IN THE DEFENSE OF UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW CLAIMS

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Though they typically have no involvement in the construction of the property, realtors are often included as defendants in construction defect/failure to disclose cases. Most complaints include counts for fraud and/or fraudulent misrepresentation, negligent misrepresentation, negligence/breach of fiduciary duty, violation of the Pennsylvania Real Estate Sellers Disclosure Law, violation of the Real Estate Licensing and Registration Act and violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law. Breach of Contract claims are often included in these complaints as well.

Although there are several available defenses for realtors, mostly centering on their typical lack of knowledge and the language contained in the documents that control the transaction, there is a strong sentiment in the legislature, particularly in the present business and economic climate, to protect the rights of consumers. Consequently, the real "teeth" of Construction Defect Failure to Disclose cases are the claims for violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL). As the name suggests, the UTPCPL is Pennsylvania's Consumer Protection statute, and seeks to prevent, "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce..."[1] There is no dispute that it has been held to apply to real estate transactions.[2] The purpose of the statute has been held to be protection of the public "from unfair or deceptive business practices,"[3] and the Pennsylvania Supreme Court has held that the statute should be liberally construed in order to effectuate the legislative purpose of consumer protection.[4]

Section 201-2(4) lists twenty enumerated practices which constitute actionable practices that may be considered "unfair methods of competition" or "unfair or deceptive acts or practices."[5] However, the one that is most frequently employed and most controversial is the "catchall provision," codified at 73 P.S. Section 201-2(4)(xxi). In 1996, the General Assembly amended this portion of the statute. The pre-amendment language of the UTPCPL prohibited "fraudulent conduct" that created a likelihood of confusion or misunderstanding.[6] In 1996 the legislature added to its prohibitions deceptive conduct, such that the current "catchall provision" proscribes "fraudulent or deceptive conduct which creates a likelihood of confusion or of

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[1] 73 P.S. §201-3.

[2] See e.g., Growall v. Maietta, 931 A.2d 667, 676 (Pa.Super. 2007), appeal denied, 597 Pa. 717, 951 A.2d 1164 (2008)

[3] Agliori v. Metropolitan Life Ins. Co., 879 A.2d 315, 318 (Pa.Super. 2005)

[4] Com., by Creamer v. Monumental Properties., Inc., 459 Pa. 450, 459, 329 A.2d 812, 816 (1974).

[5] 73 P.S. Section 201-2(4)(i)-(xx)

[6] 73 P.S. Section 201-2(4)(xvii) (this was the citation before the amendments took effect).

misunderstanding."[7] Pre-amendment decisions relied on the plain language of the statute to hold that proof of fraud was required to succeed in a claim under the UTPCPL catchall provision.[8] However, even after the amendment, the courts of the Commonwealth continued to require such proof in order to sustain a claim.[9]

However, this past Spring, the Superior Court in Bennett v. A.T. Masterpiece Homes at Broadsprings, LLC, 2012 WL 698132 (Pa.Super.), an opinion authored by the Honorable Susan Gantman, revisited this issue. The Plaintiffs, Greg and Sandra Bennett and Kurt and Carol Hoefferle, contracted with A.T. Masterpiece Homes at Broadsprings for the construction of new homes in a new development called Overpond Court. Grant Colledge was the managing member of A.T. Masterpiece, and Plaintiffs' primary contact during the sale process[10]. During the construction, Plaintiffs noticed numerous building deficiencies, but Colledge assured them of the quality of the work. The record indicates that both sets of Plaintiffs made specific concerns about the construction directly to Colledge and he repeatedly assured him that the specific concerns would be addressed and the properties would be good quality and structurally sound. The court found these assurances to be "specific, direct, and often in the form of personal guarantees."[11] After settlement, Plaintiffs found their homes had significant defects and structural failures.

In the opinion, the court ruled that the 1996 amendment gave new meaning to the catchall provision, such that the pre-amendment standard of proof requiring fraud to sustain a cause of action under this provision no longer applied. Judge Gantman acknowledged that the same court had previously upheld the requirement to prove fraud even after the amendment, but found that logic to be contradictory to the legislative history and intent of the amendment. She noted that the Commonwealth Court and Pennsylvania federal courts had already concluded that the amendment lessened the degree of proof required under the UTPCPL catchall provision. Instead, she noted those courts found the appropriate standard, pursuant to the language of the 1996 amendment, permitted catchall liability for deceptive conduct, not fraud. Bennett, *supra* at *6.[12]

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[7] 73 P.S. Section 201-2(4)(xxi)

[8] See, Prime Meats, Inc. v. Yochim, 619 A.2d 769, 773 (Pa.Super. 1993), appeal denied, 538 Pa. 627, 646 A.2d 1180 (1994).

[9] See e.g., Ross v. Foremost Ins. Co., 998 A.2d 648 (Pa.Super. 2010); Colaizzi v. Beck, 895 A.2d 36 (Pa. Super. 2006); Booze v. Allstate Ins. Co., 750 A.2d 877 (Pa.Super. 2000), appeal denied, 564 Pa. 722, 766 A.2d 1242 (2000); Skurnowicz v. Lucci, 798 A.2d 788 (Pa.Super. 2002).

[10] Bennett, 2012 WL 698132 at *1

[11] Id.

[12] citing, Com. V. Percudani, 825 A.2d 743, 746-47 (Pa.Cmwlth. 2003); Com. ex rel. Corbett v. Manson, 903 A.2d 69, 74 (Pa.Cmwlth. 2006); Schnell v. Bank of New York Mellon, 2011 WL 5865966 (E.D.Pa. Nov. 22, 2011); Vassalotti v. Wells Fargo Bnak, N.A., 732 F.Supp.2d 503, 510 n. 7 (E.D.Pa. 2010); Wilson v. Parisi, 549 F.Supp.2d 637 (M.D.Pa. 2008).

Judge Gantman's opinion noted that both the Commonwealth Court and the federal courts were persuaded by the amendment and the directive from the Supreme Court that the statute was to be read liberally and pointed out that the post-amendment decisions that required proof of fraud relied on pre-amendment interpretations, without acknowledging the amendment. Bennett, *supra* at *6. Judge Gantman found that adhering to the common law fraud requirement in cases arising under the post-amendment catchall provision ignored the rules textual changes of the 1996 amendment and the rules of statutory construction. Id. at *7. Judge Gantman continued, "maintaining a standard that demands fraud even after the amendment would render the legislature's addition of 'deceptive' redundant and meaningless in a manner inconsistent with well-established principles of statutory interpretation." Id. Consequently, she ruled that deceptive conduct that could create the likelihood of confusion or misunderstanding constitutes a cognizable claim under the UTPCPL catchall provision. Id.

The effect of this decision on the defense of real estate professionals in Construction Defect Failure to Disclose cases is uncertain, as it is unclear what actions may be considered deceptive conduct. For instance, would a representation that the construction quality was sound constitute deceptive conduct pursuant to the new construction of the UTPCPL? The subsequent procedural history does not indicate any appeal to the Supreme Court, so the Bennett case would likely be seen as controlling on this issue, as it specifically disapproves of the prior rulings on the matter to the contrary. Although the aforementioned defenses (specifically those requiring actual knowledge) would certainly apply, the Bennett case certainly didn't make it easier to defend this type of case.