



# UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW

CHRISTOPHER D. CARUSONE  
APRIL 25, 2019

# IN A NUTSHELL

- The Pennsylvania UTPCPL, 73 P.S. § 201-1 *et seq.*, prohibits “unfair methods of competition” and “unfair or deceptive acts or practices”
- Enforceable by the PA Office of Attorney General, District Attorneys, and members of the public through a private right of action
- PA OAG has an entire bureau – Bureau of Consumer Protection – dedicated to enforcement of the UTPCPL consisting of special agents and attorneys
- Affects any industry engaged in “trade” or “commerce”
- State law version of a larger set of federal laws enforced by FTC
- Penalties may include dissolution of company and/or forfeiture of right to do business in Pennsylvania

# AGENDA

- To whom does the UTPCPL apply?
- What does the UTPCPL prohibit?
- How does the PA OAG conduct UTPCPL investigations?
- Enforcement/penalties for violating the UTPCPL?
- How to settle with the OAG?
- Private rights of action under the UTPCPL?
- Other relevant laws?
- Tips for corporate counsel?

# APPLICABILITY

- UTPCPL applies to any “person” engaged in “trade” or “commerce”
- Both terms defined as “the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate . . . .” 73 P.S. § 201-2(3)
- Includes “[a]ny trade or commerce directly or indirectly affecting the people of this Commonwealth.” 73 P.S. § 201-2(3)
- Recently expanded to apply to complaints from non-residents against businesses located in PA even if transaction occurred outside of this Commonwealth. *Danganan v. Guardian Protection Services*, 179 A.3d 9 (Pa. 2018)

# PROHIBITIONS

- UTPCPL prohibits “unfair methods of competition” and/or “unfair or deceptive acts or practices.” 73 P.S. § 201-2(4)
- Specifies 20 specific acts “unfair methods of competition” and/or “unfair or deceptive acts or practices” and one catch-all
- “Passing off goods or services as those of another” § 201-2(4)(i)
- “Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services” § 201-2(4)(ii)
- “Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another” § 201-2(4)(ii)

# PROHIBITIONS

- “Using deceptive representations or designations of geographic origin in connection with goods or services.” § 201-2(4)(iv)
- “Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have.” § 201-2(4)(v)
- “Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand.” 201-2(4)(vi)
- “Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another.” § 201-2(4)(vii)

# PROHIBITIONS

- “Disparaging the goods, services or business of another by false or misleading representation of fact.” § 201-2(4)(viii)
- “Advertising goods or services with intent not to sell them as advertised.” § 201-2(4)(ix)
- “Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity.” § 201-2(4)(x)
- “Making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions.” § 201-2(4)(xi)

# PROHIBITIONS

“Promising or offering prior to time of sale to pay, credit or allow to any buyer, any compensation or reward for the procurement of a contract for purchase of goods or services with another or others, or for the referral of the name or names of another or others for the purpose of attempting to procure or procuring such a contract of purchase with such other person or persons when such payment, credit, compensation or reward is contingent upon the occurrence of an event subsequent to the time of the signing of a contract to purchase.” § 201-2(4)(xii)



# PROHIBITIONS

- “Promoting or engaging in any plan by which goods or services are sold to a person for a consideration and upon the further consideration that the purchaser secure or attempt to secure one or more persons likewise to join the said plan; each purchaser to be given the right to secure money, goods or services depending upon the number of persons joining the plan. . . .” § 201-2(4)(xiii) (also prohibits “chain letter plans” and “pyramid clubs”)
- “Failing to comply with the terms of any written guarantee or warranty given to the buyer at, prior to or after a contract for the purchase of goods or services is made.” § 201-2(4)(xiv)
- “Knowingly misrepresenting that services, replacements or repairs are needed if they are not needed.” § 201-2(4)(xv)

# PROHIBITIONS

- “Making repairs, improvements or replacements on tangible, real or personal property, of a nature or quality inferior to or below the standard of that agreed to in writing.” § 201-2(4)(xvi)
- “Making solicitations for sales of goods or services over the telephone without first clearly, affirmatively and expressly stating: (A) the identity of the seller; (B) that the purpose of the call is to sell goods or services; (C) the nature of the goods or services; and (D) that no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion.” § 201-2(4)(xvii)

# PROHIBITIONS

- Using contract, form or other document in consumer transaction which contains a confessed judgment clause waiving consumer's right to assert a legal defense to an action § 201-2(4)(xviii)
- Soliciting any order for sale of goods to be ordered by buyer through the mails or by telephone unless, at time of solicitation, seller has a reasonable basis to expect that it will be able to ship any ordered merchandise to buyer: (A) within that time clearly and conspicuously stated in any such solicitation; or (B) if no time stated, within thirty days after receipt of a properly completed order from the buyer. § 201-2(4)(xix) (if buyer applies for credit, 50 days)

# PROHIBITIONS

- “Failing to inform the purchaser of a new motor vehicle offered for sale at retail by a motor vehicle dealer of the following: (A) that any rustproofing of the new motor vehicle offered by the motor vehicle dealer is optional; (B) that the new motor vehicle has been rustproofed by the manufacturer and the nature and extent, if any, of the manufacturer's warranty which is applicable to that rustproofing.”  
§ 201-2(4)(xx) (contains additional language related to rustproofing)
- Additional specific prohibitions in PA OAG regulations for automotive industry, loan brokers, dog sellers. 37 Pa.Code Pt. V

# PROHIBITIONS

- “Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.” § 201-2(4)(xxi) (referred to as “catch-all”)
- Courts construe UTPCPL liberally. *Commonwealth by Shapiro v. Golden Gate National Senior Care LLC*, 194 A.3d 1010 (Pa. 2018)
- “An act or a practice is deceptive or unfair if it has the capacity or tendency to deceive. Neither the intention to deceive nor actual deception must be proved; rather, it need only be shown that the acts and practices are capable of being interpreted in a misleading way. The test for the court is to determine the overall impression arising from the totality of what is said, as well as what is reasonably implied, in the advertisement or solicitation.” *Corbett v. Peoples Ben. Servs., Inc.*, 923 A.2d 1230, 1236 (Pa.Cmwlt. 2007)

# PA OAG INVESTIGATIONS

- Typically begins with a letter from Deputy AG demanding records
- Prompted by consumer complaints or interest in specific industry
- After records production, OAG typically asks company to appear for an informal meeting to discuss the allegations. Typically at OAG office and includes Deputy AG and Special Agent
- Meetings are not recorded, but Special Agent takes notes
- May then move into negotiation stage – AVC or lawsuit?
- Allow for informal “appeal” up chain of command

# ENFORCEMENT/PENALTIES

- OAG has power to issue administrative subpoenas for records and testimony before the Bureau of Consumer Protection. Enforceable by Commonwealth Court. Disclosure limited to OAG personnel unless good cause shown. Privileges apply. 71 P.S. § 307-3
- PA OAG can team up with other AG's for multi-jurisdiction investigation
- Penalties under the UTPCPL -- enforceable through the filing of a civil action in state court -- may include civil penalties of \$1,000 per violation for victims under 60 years of age, and \$3,000 per violation for victims 60 years of age or older. 73 P.S. § 201-8

# ENFORCEMENT/PENALTIES

- OAG may also seek injunctive relief, which may include an award of restitution and, in the case of a permanent injunction, constitute *prima facie* evidence of a violation in any private action brought by consumers under the UTPCPL. 73 P.S. § 201-4, 4.1, 9.2(b)
- Violations of any injunction ordered may be subject to civil penalties of up to \$5,000 per violation and, in extreme cases, dissolution, suspension or forfeiture of the company or its right to do business in Pennsylvania § 201-8(a), 9
- In cases of involuntary dissolution, the UTPCPL allows for the appointment of a receiver of the assets of the company § 201-9.1



# SETTLEMENTS WITH OAG

- Parties may agree to enter into an Assurance of Voluntary Compliance (AVC), 73 P.S. § 201-5
- Filed with the court, Public document
- Not considered to be an admission of liability for any purpose
- Typically identifies and contains factual description of alleged violations, restraints on future actions, and monetary relief
- Monetary relief may consist of civil penalties, costs of investigation, restitution, and miscellaneous terms including monitoring

# ADVANTAGES AND DISADVANTAGES OF AN AVC

## ■ Advantages

- Does not require admission of liability
- Pretty negotiable
- sharp reduction in civil penalties

## ■ Disadvantages

- Public document accompanied by press release
- May require search for and notification of affected consumers
- May contain unreasonable conditions on future operation of the company;
- May contain an expansion of the OAG's jurisdiction and allow for OAG monitoring
- Costs of investigation tacked on

# PRIVATE RIGHTS OF ACTION

- UTPCPL provides for private right of action
- May come in the form of a class action
- Limited to purchases or leases of goods or services primarily for personal, family, or household purposes
- May recover up to three times the amount of actual damages, costs, attorneys fees, and additional relief deemed just and proper
- Permanent injunction ordered by court constitutes prima facie evidence in private right of action § 201-9.2(b)

# EXPANSION BY REGULATION

- OAG has authority to promulgate regulations to expand the UTPCPL § 201-3.1
- Have already promulgated regulations for automotive industry, loan brokers, dog sellers 37 Pa.Code Pt. V.
- Currently in process of promulgating a new chapter entitled Unfair Market Trade Practices targeting anti-competitive conduct such as monopolies, price-fixing, and other anti-trust style provisions
- Controversial initiative that dramatically expands the UTPCPL by regulation after unsuccessful attempts at legislation See 48 Pa.B. 4834

# OTHER LAWS

- Plain Language Consumer Contract Act, 73 P.S. § 2201 *et seq.*  
Also see 37 Pa.Code Ch. 307
- Unfair Insurance Practices Act, 40 P.S. § 1171.1 *et seq.*, 31 Pa.Code Ch. 146
- Other Acts that incorporate by reference the UTPCPL
  - Fair Credit Extension Uniformity Act, 73 P.S. § 2270.4
  - Health Club Act, 73 P.S. § 2175
  - Price Gouging Act, 73 P.S. § 232.5
- Federal laws enforced by Federal Trade Commission

# TIPS FOR CORPORATE COUNSEL

- Pay attention to the signs of trouble
- Take the initiative to investigate and correct
- Hire experienced counsel with connections inside OAG
- Communicate with the OAG early and often
- Lend some perspective
- Use caution when settling
- Beware of press release

# QUESTIONS?



# CONTACT INFORMATION

**Christopher D. Carusone** |  
**Partner**

**Harrisburg**

240 North Third Street  
7th Floor  
Harrisburg, PA 17101

p. 717.234.5530  
c. 717.433.3716  
f. 717.213.0731

[ccarusone@cohenseglias.com](mailto:ccarusone@cohenseglias.com)

[www.cohenseglias.com](http://www.cohenseglias.com)