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In The Supreme Court Of Pennsylvania
Western District

29 WAP 2019

Gary L. Gregg and Mary Gregg,
Appellees

v.

Ameriprise Financial, Inc., Ameriprise Financial Services, Inc., Riversource Life Insurance Company and Robert A. Kovalchik,
Appellants

BRIEF OF *AMICI CURIAE*, NATIONAL CONSUMER LAW CENTER, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, COMMUNITY LEGAL SERVICES, AND OTHERS, IN SUPPORT OF APPELLEES GARY L. GREGG AND MARY GREGG

Appeal from the Order of the Superior Court entered September 12, 2018 at No. 1504 WDA 2017, affirming the Order of the Court of Common Pleas of Allegheny County entered September 20, 2017 at No. GD 01-006611

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PRELIMINARY STATEMENT

The Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-1 to 201-9.2 ("UTPCPL"), like other so-called Little FTC Acts, is remedial legislation enacted to provide consumers with broader and more effectual protections than those provided by traditional common law. *See, e.g.*, *Commonwealth v. Golden Gate National Senior Care, LLC,* 194 A.3d 1010, 1023 (Pa. 2018); *Meyer v. Community College of Beaver County*, 625 Pa. 563, 93 A.3d 806, 811 (2014). It is animated by the principle that honest markets and true competition cannot exist in the absence of honest disclosure and fair dealing. With the 1976 addition of a private consumer cause of action (Act of Nov. 24, 1976, P.L. 1166, No. 260, § 1), the UTPCPL created a dual enforcement scheme allowing both the Attorney General and private consumers to police the market against "unfair or deceptive acts or practices" through a robust array of potential remedies, including restitution, treble damages, and cease and desist orders.

Despite the intent to expand consumer protections, however, the UTPCPL was often interpreted narrowly by courts based on common law standards that do not adequately address the workings of the modern mass-market economy and consumer credit market. In response to 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 "creat[ing] a likelihood of

confusion or of 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) (collecting cases).

In light of the foregoing, the Superior Court correctly held below that the UTPCPL prohibits *any* deceptive act or practice towards a consumer, whether or not the merchant acted intentionally, carelessly or with the utmost care. *See Gregg v. Ameriprise Financial, Inc.*, 195 A.3d 930, 939 (Pa. Super. 2018), *alloc. granted*, No. 490 WAL 2018, 2019 WL 2635642 (Pa. Jun. 27, 2019). The language, structure and purposes of the statute all compel this conclusion, as this Court has already determined. *Golden Gate*, 194 A.3d at 1023. Appellate decisions interpreting consumer protection laws of sister states whose statutes, like ours, have no scienter requirement in the text, support this holding as well.

Where an innocent consumer is harmed by the deceptive acts or practices of a business, the consumer is not required to prove an intent to deceive in order to obtain relief. This rule fosters ethical business practices and discourages those acts that have the *capacity* or *tendency* to mislead, to the benefit of consumers and honest business competitors alike. This case presents the Court with an opportunity to

clarify the elements of a private consumer claim under the UTPCPL, to reaffirm the broad, remedial purposes of the statute and to remove any lingering effort to incorporate common law intent requirements into claims arising under the statute.

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici Curiae are non-profit consumer advocacy and legal services organizations dedicated to consumer protection and committed to advancing and protecting the interests of all consumers. They are identified and described in detail in Appendix A, attached hereto.

LEGAL ARGUMENT

I. THE LANGUAGE, STRUCTURE AND PURPOSES OF THE UTPCPL ESTABLISH THAT "INTENT" IS NOT AN ELEMENT.

A. The General Assembly Did Not Include "Intent" As An Element Under The "Catchall" Provision.

The UTPCPL lists twenty specified examples of "unfair or deceptive acts or practices," and then adds a "Catchall" provision that prohibits "any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding." 73 P.S. § 201-2(4)(xxi). Significantly, the Catchall encompasses "any other" deceptive conduct that has the capacity to confuse or mislead; the statutory text does not require a showing that any such "other" conduct be "knowingly" or "intentionally" deceptive.

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 express proof of "intent," §§ 201-2(4)(ix) & (x) (advertising goods or services "with intent" not to sell or supply them as advertised); 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); 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); and some that simply require a showing of "a likelihood of confusion or of misunderstanding," without any proof of intent, § 201-4(i)-(iv) ("passing off," "source, sponsorship or approval," "affiliation … or certification," "geographic origin").

The Catchall provision, § 201-2(4)(xxi), by using the words "any other," while omitting any scienter or intent requirement, indicates that each of the

preceding twenty enumerated practices—some of which include an element of ill-intent and some of which do not—is a specific example of a practice that would also fall within the Catchall. It therefore cannot be the case that only an intentional misrepresentation can violate the Catchall provision, or that there cannot be a violation in the absence of knowledge or intent. To put it another way, the text of § 201-2(4), in its entirety, outlaws more than just common law fraud, as can be seen from the enumerated examples themselves.

As this Court has previously explained, "it is not for the courts to add, by interpretation, to a statute, a requirement which the legislature did not see fit to include." *Pennsylvania Med. Soc. v. Dep't of Pub. Welfare of Com.*, 614 Pa. 574, 599–600, 39 A.3d 267, 282-284 (2012) (quotation and citations omitted). Rather, "as a matter of statutory construction, one must listen attentively both to what a statute says, and to what it does not say." *Id.* This Court's most recent decision under the UTPCPL, *Danganan v. Guardian Protection Services*, 179 A.3d 9 (Pa. 2018), emphasizes that "[w]ords that are clear and free from all ambiguity are presumed to be the best indicator of legislative intent," and that the "[o]bjective is to ascertain and effectuate the Legislature's intent." *Id.* at 16 (citations omitted). The precise language of § 201-2(4) states that "knowledge," "intent," or other state of mind are only required for certain claims, thus strongly demonstrating that the legislature did not intend a state-of-mind requirement where it was not expressly provided. Because

the UTPCPL uses "knowledge" and "intent" specifically for only certain subsections of the twenty enumerated practices, neither the statute generally nor the Catchall requires a plaintiff who has been harmed by deceptive commercial conduct to prove intent.[1]

B. The History of the UTPCPL Shows that Common Law Intent Is Not a Required Element of the Catchall Provision.

In *Monumental Properties*, this Court said the UTPCPL was intended "to benefit the public at large by eradicating 'unfair or deceptive' business practices [and] to ensure the fairness of market transactions." 459 Pa. at 457, 329 A.2d at 815. 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).

The UTPCPL arose out of a national recognition by commentators and the FTC that the protection afforded consumers in the modern, mass-market economy

[1] This interpretation is buttressed by the settled law of the Commonwealth that inclusion of a specific matter or term in a statute implies exclusion of others. *See, e.g., Atcovitz v. Gulph Mills Tennis Club*, 571 Pa. 580, 589, 812 A.2d 1218, 1223 (2002) (applying doctrine of *expressio unius est exclusio alterius*).

by common-law remedies was generally ineffective.[2] Only the most seriously injured 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 the NCCUSL's recommendations by enacting the UTPCPL in 1968.

In 1970, the Council of State Governments published a revised draft of the model Consumer Protection Act. The updated model differed from the 1967 version

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[2] *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. at 1016-17 (describing consumer remedies before the FTCA).

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 as a remedy," *Packel v. A.P.S.C.O.*, 309 A.2d 184, 186 (Pa. Commw. 1973). In response, the General Assembly amended the UTPCPL in 1976 to expressly authorize restitution, 73 P.S. § 201-4.1, and to provide for a private cause of action, 73 P.S. § 201-9.2. [3]

The General Assembly responded again, in 1996, adding the language "or deceptive" to the Catchall, Act of Dec. 4, 1996, P.L. 906, No. 146, § 1, after court decisions had held that claims brought under the earlier "other fraudulent conduct" language required proof of common law fraud. *See, e.g., Prime Meats, Inc. v. Yochim*, 619 A.2d 769 (Pa. Super. 1993), *appeal denied,* 646 A.2d 1180 (Pa. 1994).

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[3] *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 (Summer 2002) ("[E]nforcement difficulties mirrored problems that existed nationally, and included a lack of public resources, information barriers, limited jurisdiction and the inaccessibility of public officials.").

Following the 1996 amendment, that trend reversed, with the courts now recognizing that the elements of common law fraud were not incorporated into UTPCPL claims. *See Bennett v. A.T. Masterpiece Homes at Broadsprings, LLC*, 40 A.3d 145 (Pa. Super. 2012) (and cases cited therein).

Yet another event in the legislative history of the UTPCPL proves that the statute does not generally require proof of knowledge or intent. In 2000, the General Assembly codified the Attorney General's debt collection regulations promulgated under the UTPCPL by passing the Fair Credit Extension Uniformity Act ("FCEUA"), 73 P.S. § 2270.1, *et seq*. In doing so, the legislature made the FCEUA enforceable by an action under the UTPCPL. 73 P.S. § 2270.5(a); *Kaymark v. Bank of America, N.A.*, 783 F.3d 168, 182 (3d Cir. 2015). It also expressly adopted and referenced the federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, providing that a violation of the FDCPA would also constitute a violation of the FCEUA and, in turn, the UTPCPL. 73 P.S. §§ 2270.4 & 2270.5.

Like the FDCPA, the FCEUA includes a burden-shifting "bona fide error" defense, which is applicable where a debt collector or creditor proves "by a preponderance of evidence that the violation was both not intentional and (1) resulted from a bona fide error . . . or (2) resulted from good faith reliance upon incorrect information …." 73 P.S. § 2270.5(d). This express statutory defense places the burden of proof on the creditor to <u>show the absence of knowledge or intent</u>. *Id*. This

provision necessarily means the UTPCPL cannot generally mandate proof of intent by a consumer victim, as that would directly contradict the burden-shifting expressly and plainly set forth in the FCEUA's "bona fide error" defense provision.

By expressly incorporating the federal FDCPA and replicating a burden-shifting "bona fide error" defense, the General Assembly made clear that the FCEUA imposes liability without proof of any knowledge or intent. Of necessity, this intention must also be true for the UTPCPL, as the FCEUA is only enforceable through the UTPCPL's Catchall. Because it must be presumed that "the General Assembly intends an entire statute to be effective and certain and does not intend a result that is absurd, impossible of execution or unreasonable," the UTPCPL cannot, therefore, generally require proof of intent or knowledge. *See* 1 Pa. C.S. § 1922(1); *Pennsylvania Med. Soc.*, 614 Pa. at 599–600, 39 A.3d at 282-284.

II. THE SUPERIOR COURT'S WELL-REASONED CONCLUSION THAT INTENT NEED NOT BE PROVEN UNDER THE CATCHALL PROVISION IS CONSISTENT WITH THIS COURT'S PRECEDENT.

Appellants characterize the Superior Court's ruling as being the result of a freewheeling legal analysis that failed to apply established rules of statutory construction. Br. App. at 1-2. The brief of their *Amici* (Pennsylvania Coalition, *et al*.) goes further, declaring that the panel's decision "makes little sense," is "wholly inconsistent with the statute's plain language and legislative history," and represents an act of "judicial free-lancing in the legislative policy arena." Br. Am. Cur. at 5-6.

What is most surprising about the argument they offer to support those formidable assertions is it is based almost entirely on dictionary definitions, statutory canons and legislative history, without reference to this Court's own, longstanding guidance regarding the statute.[4] Far from being an open question, this Court has already made clear that intent is not a required element of an "unfair or deceptive act or practice."

In 1974, this Court instructed that the UTPCPL's statutory prohibition against "unfair or deceptive acts or practices" is "predicated on a legislative recognition of unequal bargaining power . . . in the marketplace," and must be interpreted in light of the remedial goal of "prevention of deception and the exploitation of unfair advantage." *Monumental Properties, Inc*., 459 Pa. at 458, 329 A.2d at 816. The factual context of those words is important to remember. In *Monumental Properties*, the Court held that landlords were potentially liable under the statute for using printed form leases that, to quote the Attorney General's complaint, employed "archaic and technical language beyond the easy comprehension of the consumer of average intelligence" and misstated a tenant's rights under Pennsylvania law. *Id*. at

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[4] Besides, their use of the dictionary is itself suspect. For example, they focus on the definition of "deceit," when the statutory language is a "deceptive act or practice." While a "deceit" may imply ill intent, a "deceptive act or practice" does not, focusing instead on the character and tendency of the act or practice to mislead. Even more galling is their constant reference to "innocent" businesses that might be held accountable for misleading consumers. As two Nobel prize winning economists have observed, "The economic system is filled with trickery, and everyone needs to know that." G. Akerlof & R. Shiller, PHISHING FOR PHOOLS, THE ECONOMICS OF MANIPULATION AND DECEPTION, p. vii (Princeton Univ. Press 2015).

455, 329 A.2d at 814. There was no claim that the defendant landlords intended to deceive their tenants when they used these off-the-shelf leases. On the contrary, despite the absence of any such allegation, the Court determined that the defendants' use of "misleading and confusing" form leases could, indeed, constitute a prohibited "unfair or deceptive act or practice." *See id*. at 482, 329 A.2d at 828.[5]

If *Monumental Properties* left any doubt about the irrelevance of a defendant's intent when employing deceptive business practices, that doubt was eliminated by this Court's recent decision in *Golden Gate*, 194 A.3d 1010, which made explicit what had been implied for nearly a half-century:

> The UTPCPL was created to even the bargaining power between consumers and sellers in commercial transactions, and to promote that objective, it aims to protect the consumers of the Commonwealth against fraud and unfair or deceptive business practices. *See Commonwealth, by Creamer v. Monumental Props., Inc.*, 459 Pa. 450, 329 A.2d 812, 815-16 (1974). As a remedial statute, it is to be construed liberally to effectuate that goal. *Id.* at 816. ***"An act or a practice is deceptive or unfair if it has the capacity or tendency to deceive[,]" and "[n]either 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."*** *Commonwealth ex rel. Corbett v. Peoples Benefit Servs., Inc.*, 923 A.2d 1230, 1236 (Pa. Commw. 2007) (internal quotations omitted).

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[5] The Court contrasted this with the "mechanical" act of the printers and publishers, who were and are expressly excluded under the burden-shifting provision of § 201-3, where they acted "in good faith and without knowledge of the falsity or deceptive character" of the material they printed. *See id*. This express burden-shifting exclusion for printers and publishers is similar to the *bona fide* error defense and would, of course, make little sense if all UTPCPL liability first required pleading and proof of scienter, as urged by Appellants and their *Amici*.

194 A.3d at 1023 (emphasis added).

Remarkably, neither Appellants nor their *Amici* mention *Monumental Properties* or *Golden Gate*, deciding instead to emphasize the absence of any reference to "strict liability" in the statute or legislative history and dictionary or common law definitions of "fraud" and "deceit." While the Superior Court's use of the term "strict liability" may appear novel to Appellants, this Court has already recognized the strict-liability nature of the UTPCPL remedy. *See Tincher v. Omega Flex, Inc*., 104 A.3d 328, 381 n.18 (Pa. 2014). Indeed, the Superior Court's reasoning, which Appellants and their *Amici* paint as a radical departure from the proper understanding of the UTPCPL, effectively anticipated this Court's own language that followed two weeks later in *Golden Gate*. The Superior Court's conclusion that the legislature "outlawed **any . . . deceptive** conduct, regardless of a vendor's mental state," *Gregg v. Ameriprise Financial, Inc*. 195 A.3d at 938 (emphasis in original), says nothing more than what this Court itself held in *Golden Gate*.

Indeed, the "strict liability" label is quite common in the consumer protection arena, as, for example, when consumers bring actions under the FDCPA, 15 U.S.C. § 1692 *et seq*., *Allen ex rel. Martin v. LaSalle Bank, N.A.*, 629 F.3d 364, 368 & n. 7 (3d Cir. 2011) ("The FDCPA is generally characterized as a 'strict liability' statute

because "it imposes liability without proof of an intentional violation."),[6] or the Truth in Lending Act, 15, U.S.C. § 1601, *et seq*., *see In re Porter*, 961 F.2d 1066, 1078 (3d Cir. 1992) ("TILA achieves its remedial goals by a system of strict liability in favor of the consumers when mandated disclosures have not been made. A creditor who fails to comply with TILA in any respect is liable to the consumer under the statute regardless of the nature of the violation or the creditor's intent.") (quotation omitted). Given that the UTPCPL was based on a federal statutory model, not Pennsylvania common law, *see Monumental Properties*, 459 Pa. at 460-66, 329 A.2d at 817-19,[7] it made complete sense for the Superior Court to describe the governing standard as a strict liability one, and it would similarly make sense for this Court to do the same in order to eliminate any lingering debate about the nature of the Catchall.

It is revealing that, rather than citing *Monumental Properties* and *Golden Gate*, the UTPCPL decision Appellants mainly rely on is *Toy v. Metro. Life Ins. Co*., 928 A.2d 186 (Pa. 2007). In holding that a private UTPCPL litigant must prove justifiable reliance to recover damages, *Toy* contained *dicta* that linked the source of

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[6] As noted, the FCEUA expressly incorporates the FDCPA, thereby making such claims actionable pursuant to the UTPCPL's Catchall provision.

[7] *Monumental Properties* made clear that when it described the "foundation [of the UTPCPL as] fraud prevention," *id*. at 459, 329 A.2d at 816, it was not talking about the common law tort of fraud but "fraud in the statutory sense." *Id*. at 460, 329 A.2d at 817.

the reliance requirement to the common law tort of fraud. *Id*. at 201. Later, in *Schwartz v. Rockey*, 593 Pa. 536, 932 A.2d 885, 898 (2007), when ruling there was no basis for incorporating common law punitive damage standards into a UTPCPL claim for treble damages, a majority of this Court expressly overruled the *dicta* in *Toy*, clarifying that the reliance requirement comes not from the common law but rather from the "as a result of" language of § 201-9.2. 932 A.2d at 897 n.16. Justice Cappy – the opinion author in *Toy* – filed a vigorous dissent that pressed for a statutory construction of the UTPCPL that was, where possible, consistent with common law principles. Effectively, Appellants and their *Amici* are asking this Court to change course again and return to that rejected, extra-textual construction.

III. THE CONSUMER PROTECTION LAWS OF MANY OTHER STATES ALSO DO NOT REQUIRE PROOF OF "INTENT."

Appellants argue that upholding the Superior Court's decision "would dramatically and improperly expand the reach of the UTPCPL to unintended, unknowable and unreasonable heights," App. Br. at 49, claiming that Pennsylvania will be an outlier in allowing liability for unfair and deceptive acts and practices without requiring proof of intent. *Id*. at 27-28. This assertion is false. According to a report published by the National Consumer Law Center in 2018, only three states – Colorado, Nevada, and Wyoming – require proof of a business's intent or

knowledge in all or most cases under their state UDAP statutes.[8] The majority do not, including all of Pennsylvania's neighboring states, as well as the nation's top three economic powerhouses: California, Texas and New York.

A. Pennsylvania's Neighboring States Do Not Require Proof of Intent

In two leading decisions from the 1990s, **New Jersey**'s Supreme Court held that no intent to deceive was required for violations of its Consumer Fraud Act ("CFA") [9] that are affirmative acts. In 1994, the court held that "intent is not an essential element and the plaintiff need not prove that the defendant intended to commit an unlawful act." *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 17–18, 647 A.2d 454, 462 (1994). In 1997, the New Jersey Supreme Court reaffirmed that "intent to

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[8] Carolyn Carter, "Consumer Protection in the States," National Consumer Law Center (2018), p. 28. The report, available at: https://www.nclc.org/images/pdf/-udap/udap-report.pdf, provides an overview of unfair and deceptive practices laws in all fifty states.

[9] Under the Consumer Fraud Act,

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice…

N.J. Stat. Ann. § 56:8-2 (West).

deceive is not a prerequisite to the imposition of liability" for misrepresentations under the CFA. *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 605, 691 A.2d 350, 365 (1997).[10]

Although the *Gennari* court noted that there was legislation pending at the time of its decision which would have added a requirement of proof of intent to deceive or knowledge that a statement was false, such legislation did not pass nor has such a requirement been added legislatively in the over twenty years since that decision. Meanwhile, the New Jersey Supreme Court has repeatedly reaffirmed its holding that intent is not an element of a claim for affirmative acts that violate the statute. *Dugan v. TGI Fridays, Inc.*, 231 N.J. 24, 51, 171 A.3d 620, 636 (2017); *Bosland v. Warnock Dodge, Inc.*, 197 N.J. 543, 556, 964 A.2d 741, 748 (2009); *Pollack v. Quick Quality Restaurants, Inc.*, 452 N.J. Super. 174, 196, 172 A.3d 568, 581 (N.J. Super. Ct. App. Div. 2017).

For the past forty-five years, **Delaware** also has not required proof of intent to deceive for claims under its Consumer Fraud Act ("CFA") based on misrepresentations. Prohibited practices under the CFA broadly include "[t]he act, use or employment by any person of any deception, fraud, false pretense, false

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[10] In both *Gennari* and *Cox*, the New Jersey Supreme Court distinguished between affirmative misrepresentations and omissions, holding that for liability to attach for failure to disclose or other omission, there must be proof that the defendant acted with knowledge. *Gennari*, 691 A.2d at 365; *Cox*, 647 A.2d at 462.

promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise." 6 Del. Code Ann. § 2513. In *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069 (Del. 1983), the Delaware Supreme Court distinguished between common law fraud and the Consumer Fraud Act, noting that for violations of the CFA, "[t]he defendant need not have intended to misrepresent or to make a deceptive or untrue statement." *Id.* at 1074. In so doing, it followed the reasoning of *In re Brandywine Volkswagen, Ltd.*, 306 A.2d 24, 29 (Del. Super. Ct. 1973), *aff'd*, 312 A.2d 632 (Del. 1973), where the court held that the "wording of 6 Del. C. § 2513 indicates that the legislature did not intend that the definition of unlawful practices would merely parallel common law fraud" because the only reference to intent applies to omissions and concealment.[11]

Nor does Pennsylvania's neighbor to the South, **Maryland**, generally require intent to deceive as an element of a violation of the Maryland Consumer Protection Act ("MCPA"), Md. Code Ann., Com. Law §§ 13-101 through 13-501. The MCPA defines unfair and deceptive trade practices to include "False, falsely disparaging, or misleading oral or written statement, visual description, or other representation of

[11] As in New Jersey, the only intent requirement of the Act is that in omitting or concealing a material fact, the defendant must have intended that others rely on the omission or concealment. *Stephenson*, 462 A.2d at 1074.

any kind which has the capacity, tendency, or effect of deceiving or misleading consumers." Md. Code Ann., Com. Law § 13-301(1). Maryland courts have refused to impose a requirement of intent where the statute is silent. Over thirty years ago, in a case where the landlord asserted in its defense that it was unaware of the falsity of its misrepresentations about a dwelling, the Maryland Court of Appeals held that §§ 13–301(1), (2), and (3) "do[] not require scienter…the subsections require only a false or deceptive statement that has the capacity to mislead the consumer." *Golt v. Phillips*, 308 Md. 1, 11, 517 A.2d 328, 333 (1986). This rule was reaffirmed more recently by Maryland's highest court in *Consumer Prot. Div. v. Morgan*, 387 Md. 125, 211, 874 A.2d 919, 970 (2005).

To the west of Pennsylvania, **Ohio** has a robust Consumer Sales Practice Act ("CSPA"), Ohio Rev. Code Ann. §§ 1345.01-1345.13, which, like ours, requires proof of intent only for selected subsections. The catch-all provision of the CSPA simply states that "No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction." Ohio Rev. Code Ann. § 1345.02(A). An Ohio court of appeals considering this provision in 1978 explained that

> the very reason for the enactment of the Consumer Sales Practices Act was to give the consumer protection from a supplier's deceptions which he lacked under the common law requirement of proof of an intent to

> deceive in order to establish fraud. To require proof of intent would effectively emasculate the act and contradict its fundamental purpose.

Thomas v. Sun Furniture & Appliance Co., 61 Ohio App. 2d 78, 81–82, 399 N.E.2d 567, 570 (Ohio Ct. App. 1978). Subsequent decisions have repeatedly reaffirmed that proof of intent is not required for a claim under § 1345.02. *See*, *e.g.*, *Fletcher v. Don Foss of Cleveland, Inc.*, 90 Ohio App. 3d 82, 86, 628 N.E.2d 60, 62 (Ohio Ct. App. 1993) (intent or knowledge is not an element of CSPA claim because "the Ohio legislature knew how to include an intent or knowledge requirement when it desired to do so"); *Frey v. Vin Devers, Inc.,* 80 Ohio App. 3d 1, 6, 608 N.E.2d 796, 800 (Ohio Ct. App. 1992)("a consumer is not required to demonstrate that a supplier intended to be unfair or deceptive"); *Karst v. Goldberg*, 88 Ohio App. 3d 413, 417, 623 N.E.2d 1348, 1351 (Ohio Ct. App. 1993)("A consumer does not need to prove intent or scienter to prove a violation of R.C. 1345.02").[12]

Finally, **West Virginia**'s Consumer Credit and Protection Act ("CCPA") also carries no requirement that there be proof of intent. Like Ohio, West Virginia broadly prohibits "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." W. Va. Code Ann. § 46A-6-104. The private right of action under the CCPA allows a person who "suffers an ascertainable

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[12] For a plaintiff to recover attorneys' fees for a private suit under the CSPA, however, he or she must prove that "The supplier has knowingly committed an act or practice that violates this chapter." Ohio Rev. Code Ann. § 1345.09(F)(2).

loss of money or property, real or personal" as a result of a prohibited practice under it to recover damages. *Id*. at § 46A-6-106. Nothing in the statute requires proof of intent, and there appears to be no case law reading such a requirement into the definition of "unfair or deceptive acts or practices."

B. The States with the Largest Economies Do Not Require Proof of Intent

Appellants' and their Amici's claims that allowing the Superior Court's decision below to stand will have catastrophic effects on Pennsylvania's economy are not borne out by the experiences of other states.

California, which has the largest gross domestic product (GDP) of any state in the country,[13] does not require proof of intent for a *prima facie* claim under either of its UDAP statutes, the Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200-17594, or the Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750-1785.

A consumer may seek injunctive relief and restitution under the UCL's catch-all provision, which defines unfair competition to include "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500)

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[13] According to the United States Bureau of Economic Analysis report, "Gross Domestic Product by State, First Quarter 2019," available at https://www.bea.gov/-system/files/2019-07/qgdpstate0719.pdf. The report lists California, Texas and New York as the first, second and third largest state GDPs, respectively.

of Part 3 of Division 7 of the Business and Professions Code." *Id*. at § 17200. California appellate courts have consistently held that no showing that the defendant intended to deceive or injure anyone is required to state a claim. *See People ex rel. Lockyer v. Fremont Life Ins. Co.*, 128 Cal. Rptr. 2d 463 (Cal. Ct. App. 2002) ("section 17200 imposes strict liability"); *Prata v. Superior Court*, 91 Cal. App. 4th 1128, 1136, 111 Cal. Rptr. 2d 296, 302 (2001) ("to state a claim under the act one need not plead and prove the elements of a tort. Instead, one need only show that 'members of the public are likely to be deceived.'"); *In re Tobacco II Cases*, 46 Cal. 4th 298, 312, 207 P.3d 20, 29 (2009) ("A [common law] fraudulent deception must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages. None of these elements are required to state a claim for injunctive relief under the UCL.")

Under the CLRA, a consumer may recover actual damages, injunctive relief, restitution and punitive damages for "unfair methods of competition and unfair or deceptive acts or practices" without a requirement of proving the defendant's intent to deceive. Cal. Civ. Code §§ 1770, 1780. The plaintiff is only required to prove that the statement was likely to deceive a reasonable customer. *Anderson v. The Hain Celestial Grp., Inc.*, 87 F. Supp. 3d 1226, 1236 (N.D. Cal. 2015). Instead, as with the express language of the FCEUA and the exclusions for printers and publishers in § 201-3 of the UTPCPL, if a defendant wishes to avoid the imposition of damages

for violations of the CLRA, the burden is on the defendant to prove "that such violation was not intentional and resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid any such error" and that it appropriately remedied the violation. Cal. Civ. Code § 1784.

Texas, the state with the second largest GDP in our nation, similarly does not require an intent to deceive or knowledge of falsity in bringing most claims under its Deceptive Trade Practices-Consumer Protection Act (DTP-CPA). Like Pennsylvania's UTPCPL, the DTP-CPA includes a list of enumerated acts that are defined as "false, misleading, or deceptive acts or practices." V.T.C.A., Bus. & C. § 17.46(b). Only four of these "acts or practices" expressly require intent or knowledge. *See* § 17.46(9), (10), (13), and (17). If the statutory language does not specifically require intent or knowledge, the Supreme Court of Texas has declined to read an intent requirement into it. As that Court held:

> The legislature obviously was aware of the "intent" question since it did require intent or knowledge under these four subdivisions. Certainly, if it meant for intent to be a requirement for all violations it would not have written it into four specific items without requiring it under the other subdivisions of § 17.46(b).

Pennington v. Singleton, 606 S.W.2d 682, 689 (Tex. 1980).

New York, with the third-largest GDP in the country, broadly prohibits "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." N.Y. Gen. Bus. Law § 349(a). Neither

the statute nor New York courts impose a requirement of intent to deceive. In 1995, the New York Court of Appeals (the state's highest court) stated that "it is not necessary under the statute that a plaintiff establish the defendant's intent to defraud or mislead." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26, 647 N.E.2d 741, 745 (1995). The *Oswego* court explained that it was "mindful of the potential for a tidal wave of litigation against businesses that was not intended by the Legislature," but that this scenario would be avoided by its adoption of "an objective definition of deceptive acts and practices, whether representations or omissions, limited to those likely to mislead a reasonable consumer acting reasonably under the circumstances." 85 N.Y.2d at 26, 647 N.E.2d at 745. The statute, and the objective test that does not require proof of intent, still stand today.

The experience of the majority of states, including Pennsylvania's neighboring states and those with the largest economies, belies Appellants' dire predictions about what would happen if this Court does not reverse the Superior Court's decision in this case. For decades, these states have allowed private suits under their consumer protection laws without requiring the harmed plaintiff to prove intent to deceive. The courts in these states have refused to read an intent requirement into the consumer protection law where one was not explicitly included by the legislature. By affirming the Superior Court, this Court would be doing no more than

confirming that Pennsylvania jurisprudence is in line with its neighboring states and many others.

IV. WHERE A TRANSACTION IS "DECEPTIVE," A BUSINESS HAS NO RIGHT TO KEEP THE CONSUMER'S MONEY.

Well-established law in Pennsylvania requires the return of moneys obtained through deceptive means. *See, e.g., Golden Gate*, 194 A.3d at 1035 (reinstating UTPCPL deception claim, permitting Attorney General to assert claim against parent companies if defendants cannot satisfy judgment); *Commonwealth v. BASF Corp.*, 2001 Phila. Ct. Com. Pl. LEXIS 95, at *44 (March 15, 2001) (permitting unjust enrichment claim based on allegation that "Defendants' acceptance and retention of the benefits (e.g., the millions of dollars of 'ill-gotten' profits) from their unfair and deceptive acts would be inequitable, unconscionable, and unjust.").

The law in other states is substantially the same. *See, e.g., Vastano v. Killington Valley Real Estate*, 996 A.2d 170, 172 (Vt. 2010) ("[R]egardless of whether the plaintiff was otherwise damaged, a violator must return any ill-gotten gains in order to effectuate the [Consumer Fraud Act's] goals of protecting consumers from deceptive practices and deterring future misconduct"); *Bank of the West v. Superior Ct.*, 833 P.2d 545, 553 (Cal. 1992) (purpose of Unfair Competition Law remedial orders is to "deter future violations . . . and to foreclose retention by the violator of its ill-gotten gains.") (internal quotation marks and citation omitted); *State ex rel. Guste v. Orkin Exterminating Co., Inc.*, 528 So. 2d 198, 203 (La. Ct.

App. 1988) ("Failure to award interest would allow Orkin to profit from its wrong-doing, which offends the public policy against unfair and deceptive trade practices.").

For this reason, too, the Court should hold that the UTPCPL prohibits all manner of deceptive conduct.

V. IT IS DIFFICULT FOR A COMPANY TO CONFORM VOLUNTARILY TO HIGH STANDARDS AND PRACTICES IF IT HAS COMPETITORS WHO CONTINUE TO REAP GREATER PROFITS BY PURSUING LESS HONORABLE TACTICS.

Robust enforcement of deceptive practices laws also benefits law-abiding businesses by fostering a fair and honest marketplace. The UTPCPL itself recognizes this by prohibiting specific types of deception aimed at exploiting the good will generated by honest businesses. *See* 73 P.S. §§ 201-2(4)(i)-(iii), (v)-(viii). This Court also recently reiterated this point in *Danganan*, *supra*, explaining that if it narrowed the UTPCPL's application, "'honest businesses could be placed at a competitive *disadvantage* competing against a business that generates revenue from unlawful acts that violate the statute.'" 179 A.3d at 13 (quoting *Thornell v. Seattle Service Bureau, Inc.*, 363 P.3d 587, 591 (Wash. 2015)) (emphasis in original).

Here, too, courts in other states long have recognized the same. *See, e.g.*, *Karlin v. IVF America, Inc.*, 712 N.E.2d 662, 663 (N.Y. 1999) ("In order to ensure an honest marketplace, the General Business Law prohibits all deceptive practices, including false advertising . . . ."); *Ai v. Frank Huff Agency, Ltd.*, 607 P.2d 1304,

1311 (Haw. 1980) ("HRS § 480-2, as its federal counterpart in the FTC Act, was constructed in broad language in order to constitute a flexible tool to stop and prevent fraudulent, unfair or deceptive business practices for the protection of both consumers and honest businessmen."); *see also Gov't of Guam v. Kim*, 2015 Guam 15, 62 (Guam 2015) ("Honest companies would be more willing to enter contracts in a jurisdiction where fraud and deceptive practices are discouraged . . . .").

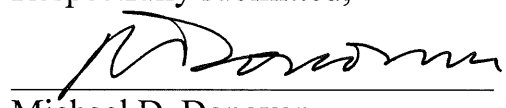
The Court's construction of the UTPCPL to prohibit all manner of deceptive conduct thus would benefit Pennsylvania consumers and law-abiding businesses alike by fostering a fair and honest marketplace.

CONCLUSION

The judgment of the Superior Court should be affirmed.

Dated: November 5, 2019

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Michael D. Donovan, do hereby certify that I caused two copies of the foregoing Brief of *Amici Curiae* to be served upon the persons below by express mail service which satisfies the requirements of Pa. R. A. P. 121:

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CERTIFICATE OF COMPLIANCE WITH PA. R.A.P. 2135(a)(1)

I hereby certify, pursuant to Pa. R.A.P. 2135(a)(1) and 2135(d), that the foregoing brief contains 6,907 words according to the count of Microsoft Word, not exceeding the 7,000 word limit.

Date: November 5, 2019

Michael D. Donovan

APPENDIX A

IDENTITY AND INTEREST OF *AMICI CURIAE*

The **National Consumer Law Center** ("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* (8th ed. 2012) (Supp. 2013), among its many other treatises, to assist attorneys whose 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 1,000 private, public sector, and legal services lawyers, law professors, and other consumer advocates from across the country. NACA has established itself as one of the most effective advocates for the interests of consumers in this country. For its member attorneys, state "unfair

and deceptive acts or practices" statutes are some of the most important tools for protecting consumers. NACA has an active Pennsylvania chapter.

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 has advised or represented hundreds of clients with consumer protection problems. 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/sellers using lease/purchase agreements and leases to evade the Landlord/Tenant Act and mislead tenants/purchasers about their rights, for-profit trade schools offering false promises of quick training for high-paying jobs, and predatory mortgage lenders and brokers that stripped hard-earned wealth from minority homeowners, among others. CLS believes that it is vital for the UTPCPL to remain an effective tool to combat unfair and deceptive practices that victimize its low-income clients.

Americans for Financial Reform Education Fund ("AFREF") is an independent, nonprofit coalition of more than 200 consumer, investor, labor, civil rights, business, faith-based, and community groups working to lay the foundation for a strong, stable, and ethical financial system. Through policy analysis, education, and outreach, AFREF actively engages in advocacy for stronger consumer financial

protections, including stronger protections against unfair and deceptive acts and practices.

The **Center for Responsible Lending ("CRL")** is a non-profit, non-partisan research and policy organization that works to protect homeownership and family wealth by helping to eliminate abusive financial practices. CRL is affiliated with the Center for Community Self-Help, a non-profit community development financial institution focused on creating asset building opportunities for low-income, rural, women-headed, and minority families, primarily through safe, affordable home loans and small business loans. CRL conducts ground-breaking research focused on consumer lending: primarily mortgages, payday loans, student debt, bank overdrafts, and auto loans. Through its research and policy work, CRL seeks to ensure a fair, inclusive financial marketplace that creates opportunities for all responsible borrowers, regardless of their income.

The **Community Justice Project ("CJP")** is a statewide project of the Pennsylvania Legal Aid Network. CJP engages in impact advocacy—such as class action litigation and administrative advocacy—on behalf of low-income families and individuals in civil matters. Much of CJP's work is done directly on behalf of consumers or for the benefit of consumers.

Established in 1968, **Consumer Federation of America ("CFA")** is an association of more than 250 non-profit consumer organizations across the United States. CFA also has as associate members dozens of city, county and state consumer

agencies, many of which are empowered to enforce consumer protection statutes. CFA's mission is to advance the consumer interest through research, advocacy, and education. Core to that mission is supporting state laws that protect consumers from unfair and deceptive act and practices in the marketplace. Today, more than 250 of these groups participate in the federation and govern it through their representatives on the organization's Board of Directors.

Legal Aid of Southeastern Pennsylvania ("LASP") is the largest non-profit organization providing free civil legal services to low-income residents in Bucks, Chester, Delaware and Montgomery counties, the suburban counties outside of Philadelphia. These counties contain pockets of poverty in locations such as Pottstown, Norristown, and Chester City, where the poverty population ranges from 20-35%. In the consumer law area, LASP represents clients in a variety of matters, including bankruptcy, debt relief, foreclosure, and other consumer litigation. Our client population consists of individuals who may have limited English speaking ability, limited literacy skills, particularly with respect to financial matters, the elderly and disabled, all of whom are particularly vulnerable to abusive practices with respect to consumer transactions. In 2018, LASP assisted over 800 clients in consumer law cases. LASP has successfully fought for clients facing predatory contracts, deceptive sales tactics, and in enforcing consumer protection laws such as the UTPCPL. LASP recognizes the UTPCPL as an important tool in protecting low-income clients.

For more than 50 years, **Neighborhood Legal Services ("NLS")** has provided free civil legal representation, advice, and education to low-income individuals and families. Over the past 5 years, NLS has been involved in than 38,500 cases on behalf of indigent persons, senior citizens, veterans, and victims of domestic violence in Allegheny, Beaver, Butler and Lawrence Counties involving a wide range of civil legal issues of which more 10% were consumer-related.

The **Pennsylvania Legal Aid Network, Inc. ("PLAN")** provides leadership, funding, and support for the availability and quality of civil legal aid. PLAN is the state's coordinated system of civil legal aid for those with nowhere else to tum; providing funding to legal aid providers statewide. It conducts trainings for public interest lawyers and leadership for legal aid providers. PLAN-funded programs offer critical legal information, advice, and services through direct representation of low-income individuals and families facing urgent civil legal problems in every Pennsylvania county.

Founded in 1996, **Philadelphia Legal Assistance Center ("PLA")** provides free legal representation to low-income Philadelphians in civil matters. PLA is primarily funded by the federal Legal Services Corporation. PLA attorneys represent consumers in a wide range of matters to preserve their homes and maintain economic security, including defending against tax and mortgage foreclosures, bringing affirmative litigation against perpetrators of predatory loan schemes; against third-

party purchasers at tax sales who prematurely attempt to evict homeowners in violation of their right of redemption, and who attempt to enforce their claim for the redemption debt in a unfair and deceptive manner; and representing clients against sellers who use Land Installment Sales Contracts in a predatory manner. PLA has extensive experience in the areas of consumer bankruptcy, residential mortgage and foreclosure law and consumer protection. PLA attorneys have represented hundreds of low-income homeowners and helped them stave of the loss of their homes. The Pennsylvania CPL has proven to be a potent weapon in PLA's arsenal for challenging unfair and deceptive practices in connection with the provision of home financing services, with so called "lease-purchase" agreements and in challenging attempts to collect bogus debts in bankruptcy cases.

Amici are interested in this case because of the significant impact it could have on consumers, especially low-income consumers, in Pennsylvania. No one other than *amici* has authored or paid for the preparation of this brief.