IN THE
SUPREME COURT OF PENNSYLVANIA

NO. 4 MAP 2014

CHRISTINA GRIMES,
Appellee

v.

ENTERPRISE LEASING COMPANY OF PHILADELPHIA, LLC,
Appellant

BRIEF OF AMICI CURIAE, NATIONAL CONSUMER LAW CENTER, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, AND COMMUNITY LEGAL SERVICES, INC. IN SUPPORT OF APPELLEE CHRISTINA GRIMES

Michael D. Donovan
DONOVAN AXLER, LLC
1845 Walnut Street, Suite 1100
Philadelphia, PA 19103
(215) 732-6067

Michael J. Quirk
Joseph Alan Venti
WILLIAMS CUKER BEREZOFSKY, LLC
1515 Market Street, Suite 1300
Philadelphia, PA 19102
(215) 557-0099

Carolyn L. Carter
NATIONAL CONSUMER LAW CENTER ®
7 Winthrop Square
Boston, MA 02110
(617) 542-8010

Cary L. Flitter
Andrew M. Milz
FLITTER LORENZ, P.C.
450 N. Narberth Ave., Suite 101
Narberth, PA 19072
(610) 822-0782

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES....................iii

PRELIMINARY STATEMENT....................1

INTEREST OF AMICI CURIAE....................5

STATEMENT OF THE ISSUES....................7

STATEMENT OF THE FACTS AND RULINGS BELOW....................7

LEGAL ARGUMENT....................11

I. The UTPCPL Does Not Require Justifiable Reliance for Claims Based on Unlawful Post-Transaction Collection Acts and Practices....................12

A. The UTPCPL's Private Right of Action for Unfair Debt Collection Practices....................12

1. Communicating With Persons Other Than the Consumer....................15

2. Manner of Communications With the Consumer....................17

3. Harassing, Oppressive, or Abusive Conduct....................18

4. False, Deceptive or Misleading Representation or Means......20

5. Unfair or Unconscionable Collection Means....................22

B. The Decision Below Follows Well-Established Pennsylvania Law....................25

1. State Court Decisions....................27

2. Federal Court Decisions....................30

II. The Superior Court Correctly Held the Consumer Incurred an "Ascertainable Loss" 35

A. Attorney Fees Incurred Resisting Unlawful Collection Conduct are Actual Damages and Clearly Distinct from Statutory Attorney Fees for a Successful UTPCPL Action 35

B. Courts Across the Country Hold Fees and Costs Incurred Fending Off Unlawful Practices Constitute Actual Damages Compensable Under their Consumer Protection Statutes 38

C. In the Collection Context, Ascertainable Loss Clearly Includes Fees and Costs Incurred Resisting Improper Collection Attempts 40

D. Consumers Need Not Sit Idly Where Deceptive Collection Tactics Threaten a Financial Quagmire 44

CONCLUSION 47

TABLE OF AUTHORITIES

CASES

Agliori v. Metropolitan Life Ins.,
2005 PA Super. 253, 879 A.2d 315 (2005)....................................37, 46

Alberton v. Com. Land Title Ins., 247 F.R.D. 469 (E.D. Pa. 2008)..................32

Alberton v. Com. Land Title Ins.,
2014 U.S. Dist. LEXIS 57733 (E.D. Pa. Apr. 24, 2014).......................32

Amsler v. Hollabaugh, 9 Pa. D. & C. 5th 486 (Armstrong 2009)....................28

Andrews v. Stiffler, 9 Pa. D. & C. 5th 334 (Armstrong 2009).........................28

Ash v. Cont'l Ins. Co., 593 Pa. 523, 932 A.2d 877 (2007)..............................26

Bartels v. Hudson Ins. Co.,
2008 U.S. Dist. LEXIS 95445 (D.N.J. Nov. 24, 2008)..........................39

Becker v. Chicago Title Ins.,
2004 U.S. Dist. LEXIS 1988 (E.D. Pa. Feb. 4, 2004)...........................33

Belmont v. MB Inv. Partners, 708 F.3d 470 (3d Cir. 2013)...........................30

Bennett v. A.T. Masterpiece Homes at Broadsprings, LLC,
2012 PA Super. 260, 40 A.3d 145 (2012)...27

Beyers v. Richmond, 594 Pa. 654, 937 A.2d 1082 (2007)..............................13

Birchall v. Countrywide Home Loans,
2009 U.S. Dist. LEXIS 106813 (E.D. Pa. Nov. 12, 2009).....................32

Brown v. Card Service Ctr., 464 F.3d 450 (3d Cir. 2006)..............................22

Brunwasser v. Transworld Airlines, 541 F. Supp. 1338 (W.D. Pa. 1982)...........46

C.A.R. Tow, Inc. v. Corwin, 708 P.2d 644 (Or. App. 1985)........................40

Chiles v. Ameriquest Mortg. Co., 551 F. Supp. 2d 393 (E.D. Pa. 2008)............32

Christopher v. First Mut. Corp.,
2006 U.S. Dist. LEXIS 2255 (E.D. Pa. Jan. 20, 2006)........................33

Clomon v. Jackson, 988 F.2d 1314 (2d Cir. 1993)....................................22

Columbia Chiropractic Group, Inc., v. Trust Ins.,
712 N.E. 2d 93 (Mass. 1999)..39

Com. v. Luther Ford Sales,
60 PA Commw. 123, 430 A.2d 1053 (1981).....................................13

Com. v. Manson, 903 A.2d 69 (Pa. Commw. 2006).................................28

Com. v. Monumental Props., 459 Pa. 450, 329 A.2d 812 (1974).............*passim*

Com. v. Parisi, 873 A.2d 3 (Pa. Commw. 2005)......................................28

Com. v. Peoples Benefit Servs.,
923 A.2d 1230 (Pa. Commw. 2007)..28

Com. v. Percudani, 825 A.2d 743 (Pa. Commw. 2003)............................2, 28

Com. v. Richard A. Cole, M.D.,
709 A.2d 994 (Pa. Commw. 1998)..36-37

Com. v. TAP Pharm. Prods., 36 A.3d 1197 (Pa. Commw. 2011)....................27

Davis v. Mony Life Ins.,
2008 U.S. Dist. LEXIS 69736 (W.D. Pa. Sept. 2, 2008)......................32

Duran v. Leslie Oldsmobile, 594 N.E. 2d 1355 (Ill. App. Ct. 1992)..................39

Evon v. Law Offices of Sidney Mickell, 688 F.3d 1015 (9th Cir. 2012).............17

Fazio v. The Guardian Life Ins.,
2012 PA Super. 273, 62 A.3d 396 (2012)......................................27

Fed. Trade Comm'n v. R.F. Keppel & Bro., 291 U.S. 304 (1934)................41-42

Figard v. PHH Mortg. Corp. (In re Figard),
382 B.R. 695 (Bankr. W.D. Pa. 2008)..33

Flores v. Shapiro & Kreisman, 246 F. Supp. 2d 427 (E.D. Pa. 2002)...............33

Foultz v. Erie Ins. Exch., Case No. 3053,
2002 Phila. Ct. Com. Pl. LEXIS 62 (Philadelphia 2002)......................29

Franklin v. Mellon Bank, Case No. 2850,
2002 Phila. Ct. Com. Pl. LEXIS 113 (Philadelphia 2002)......................29

Genter v. Allstate Prop. and Cas. Ins.,
2011 U.S. Dist. LEXIS 67840 (W.D. Pa. June 24, 2011).....................30

Gidley v. Allstate Ins.,
2009 U.S. Dist. LEXIS 118246 (E.D. Pa. Dec. 17, 2009).....................31

Gilroy v. Ameriquest Mortgage, 632 F. Supp. 2d 132 (D.N.H. 2009)...............18

Grimes v. Enterprise Leasing Co. of Philadelphia, LLC,
2013 PA Super. 57, 66 A.3d 330 (2013)....................................*passim*

Grimm v. Washington Mutual Bank,
2008 U.S. Dist. LEXIS 55628 (W.D. Pa. July 22, 2008)......................32

Haines v. State Auto Prop. and Cas. Ins.,
2009 U.S. Dist. LEXIS 52325 (E.D. Pa. June 22, 2009)......................31

Hansford v. Bank of Am.,
2008 U.S. Dist. LEXIS 65502 (E.D. Pa. Aug. 22, 2008)......................32

Harvey v. Great Seneca Fin. Corp., 453 F.3d 324 (6th Cir. 2006)...............19, 22

Hauk v. LVNV Funding, LLC, 749 F. Supp. 2d 358 (D. Md. 2010)..................39

Healey v. Wells Fargo, N.A., Case No. 11-3340,
2012 Pa. Dist. & Cnty. Dec. LEXIS 165 (Lackawanna 2012).................28

In re Fisher, 320 B.R. 52 (Bankr. E.D. Pa. 2005).....................................33

In re Patterson, 263 B.R. 82 (Bankr. E.D. Pa. 2001)..................................33

In re Smith, 866 F.2d 576 (3d Cir. 1989)...4

In re Wiggins, 273 B.R. 830 (Bankr. D. Idaho 2001)....................................39

Jarzyna v. Home Props., L.P., 763 F. Supp. 2d 742 (E.D. Pa. 2011)...........39, 42

Jeter v. Credit Bureau, 760 F.2d 1168 (11th Cir. 1985)........................42-43, 46

Jones v. Midland Funding, LLC,
755 F. Supp. 2d 393 (D. Conn. 2010)..40

Jungkurth v. E. Fin. Servs., 74 B.R. 323 (Bankr. E.D. Pa. 1987)......................13

Kapoor v. Rosenthal, 269 F. Supp. 2d 408 (S.D.N.Y. June 27, 2003)...............44

Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480 (M.D. Ala. 1987)......................37

Lakeside Care, Inc. v. Brighten Healthcare, LLP,
2006 Pa. Dist. & Cnty. Dec. LEXIS 509 (Bucks 2006)........................29

Lemire v. Wolpoff & Abramson, LLP, 256 F.R.D. 321 (D. Conn. 2009).........24-25

Lettenmaier v. Lube Connection, Inc., 741 A.2d 591 (N.J. 1999)......................40

Lorah v. SunTrust Mortg.,
2010 U.S. Dist. LEXIS 134325 (E.D. Pa. Dec. 17, 2010)...................31

Lowe v. Elite Recovery Solutions, L.P.,
2008 U.S. Dist. LEXIS 8353 (E.D. Cal. Feb. 5, 2008)........................43

Lowe v. Surpass Res. Corp., 253 F. Supp. 2d 1209 (D. Kan. 2003)..................39

Maple v. Colonial Orthopaedics, Inc. (In re Maple),
434 B.R. 363 (Bankr. E.D. Va. 2010)..39

McDowall v. Leschack & Grodensky, P.C.,
279 F. Supp. 2d 197 (S.D.N.Y. 2003)..24

McKnight v. Benitez, 176 F. Supp. 2d 1301 (M.D. Fla. 2001)........................44

Milliken v. Jacono, 2012 PA Super. 284, 60 A.3d 133 (2012)........................27

Mertz v. Donzi Marine, Inc.,
2007 U.S. Dist. LEXIS 15708 (W.D. Pa. 2007)..............................33

Morgan v. World Alliance Fin. Corp.,
2013 U.S. Dist. LEXIS 13870 (E.D. Pa. Jan. 31, 2013)......................30

Osbourne v. Capital City Mortgage Corp.,
667 A.2d 1321 (D.C. Ct. App. 1995)...39

Owens v. Howe, 365 F. Supp. 2d 942 (N.D. Ind. 2005)..................................44

Panag v. Farmers Ins. Co., 204 P.3d 885 (Wash. 2009)..................................39

Pennsylvania Dep't of Banking v. NCAS of Delaware, LLC,
995 A.2d 422 (Pa. Commw. 2010)...28

Pennsylvania Retailers Ass'n v. Lazin,
57 Pa. Commw. 232, 426 A.2d 712 (1981).....................................13

Pusey v. Sardo, Case No. 08-4856,
2009 Pa. Dist. & Cnty. Dec. LEXIS 296 (Chester 2009)......................29

Rodriguez v. Mellon Bank, N.A., 218 B.R. 764 (Bankr. E.D. Pa. 1998)............34

Schnell v. Bank of New York Mellon, 828 F. Supp. 2d 798 (E.D. Pa. 2011).........30

Seldon v. Home Loan Servs., 647 F. Supp. 2d 451 (E.D. Pa. 2009)..................31

Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC,
737 F. Supp. 2d 380 (E.D. Pa. 2010)...31

Shepherd v. Law Offices of Cohen & Slamowitz, L.L.P.,
668 F. Supp. 2d 579 (S.D. N.Y. 2009)..43

Siegel v. Berkshire Life Ins. Co., 835 N.E.2d 288 (Mass. App. Ct. 2005)..........39

Slemmer v. McGlaughlin Spray Foam Insulation,
955 F. Supp. 2d 452 (E.D. Pa. 2013)..........30

Tibbetts v. Sight 'n Sound Appliance Centers, 77 P.3d 1042 (Okla. 2003)..........40

Toth v. Northwest Sav. Bank, 31 Pa. D. & C. 5th 1 (Allegheny 2013)..........25-26

Toy v. Metropolitan Life Ins., 593 Pa. 20, 928 A.2d 186 (2007)..........15

Vassalotti v. Wells Fargo Bank, N.A.,
732 F. Supp. 2d 503 (E.D. Pa. 2010)..........30-31

Venes v. Professional Serv. Bureau,
353 N.W.2d 671 (Minn. Ct. App. 1984)..........44

Walton v. Pereira, --- F. Supp. 2d ----,
2014 U.S. Dist. LEXIS 15191 (W.D. Pa. Feb. 6, 2014)..........43

Weiler v. Smithkline Beecham Corp.,
53 Pa. D. & C. 4th 449 (Philadelphia 2001)..........29

Weinberg v. Sprint Corp., 801 A.2d 281 (N.J. 2002)..........40

Weinberg v. Sun Co., 565 Pa. 612, 777 A.2d 442 (2001)..........15

Wilson v. Parisi, 549 F. Supp. 2d 637 (M.D. Pa. 2008)..........32

Yocca v. Pittsburgh Steelers Sports, 578 Pa. 479, 854 A.2d 425 (2004)..........15

Zafarana v. Pfizer, 724 F. Supp. 2d 545 (E.D. Pa. 2010)..........31

Zwiercan v. GMC, 58 Pa. D. & C. 4th 251 (Philadelphia 2002)..........29

STATUTES AND REGULATIONS

15 U.S.C. § 1692....................13-14, 41

15 U.S.C. § 1692e(10)....................22

15 U.S.C. § 1692f....................24

15 U.S.C. § 1692k(a)(1)....................42

37 Pa. Code Chapter 303 (1999)....................13

37 Pa. Code § 303.1....................13

37 Pa. Code § 303.3(11)....................14

37 Pa. Code § 303.3(14)....................14

37 Pa. Code § 303.3(18)....................14

37 Pa. Code § 303.3(26)....................14

37 Pa. Code § 303.3(27)....................14

37 Pa. Code § 303.4(2)....................14

Act of Nov. 24, 1976, P.L. 1166, No. 260, § 1....................1

Act of Dec. 4, 1996, P.L. 906, No. 146....................2

1 Pa. House Legis. Journal 2153 (1975)....................1

73 P.S. § 201-1....................1

73 P.S. § 201-2(4)(xxi)....................*passim*

73 P.S. § 201-3.1....................12-13

73 P.S. § 201-9.2(a)....................*passim*

73 P.S. § 2270.1 12

73 P.S. § 2270.4(b)(1) 15-16

73 P.S. § 2270.4(b)(2) 17-18

73 P.S. § 2270.4(b)(3) 16

73 P.S. § 2270.4(b)(4) 3, 18-19

73 P.S. § 2270.4(b)(5) 20-21

73 P.S. § 2270.4(b)(5)(ii) 3, 38

73 P.S. § 2270.4(b)(6) 22-24

73 P.S. § 2270.5 .... *passim*

Md. Code Ann., Com. Law § 13-408(a) 38

N.J. Stat. Ann. 56-8-19 (West) 38

W. Va. Code § 46A-6-106(a) 38

ACADEMIC WORKS

Comment, *The Attorney General as Consumer Advocate: City of York v. Pennsylvania Public Utility Commission*, 121 U. Pa. L. Rev. 1170 (1973) 1

Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 Ohio St. L.J. 437 (1991) 1

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 (Summer 2002) 1

INTERNET SOURCES

FTC Announces Top National Consumer Complaints for 2013, available at http://www.ftc.gov/news-events/press-releases/2014/02/ftc-announces-top-national-consumer-complaints-2013 (last visited May 13, 2014)................40-41

FTC Consumer Sentinel Network Data Book 2013, available at http://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2013/sentinel-cy2013.pdf (last visited May 13, 2014)...41

TREATISES

National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (8th ed. 2012) 38

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 and honest businesses with broader and more effectual protections than those provided by the common law. It is animated by the principle that honest markets and true competition cannot exist in the absence of honest disclosures. 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, thereby freeing honest businesses from undue governmental regulation while exposing dishonest competitors to payment of restitution and treble damages as well as cease-and-desist orders.[1]

Despite the legislative intent to expand consumer protections, however, courts often construed the UTPCPL narrowly based on common law standards that do not adequately address the workings of the modern mass-market economy. In

[1] *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 and 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.").

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 "creating a likelihood of confusion or misunderstanding" were forbidden. Act of Dec. 4, 1996, P.L. 906, No. 146, effective Feb. 2, 1997; codified at 73 P.S. § 201-2(4)(xxi). 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 Com. v. Percudani*, 825 A.2d 743, 747 (Pa. Commw. 2003) (overruling preliminary objections because 1996 amendment clarified that UTPCPL applies to more than common law fraud; citing cases).

In light of the foregoing, the Superior Court correctly held below that the UTPCPL, as amended, prohibits *any* deceptive act or practice towards a consumer, whether or not the consumer relied on the deception. The decision below may also, however, be affirmed on narrower grounds, as Amici Curiae set forth in the remainder of this brief.

Plaintiff-Appellee Christina Grimes ("Grimes") does not allege deceptive or fraudulent conduct in the inducement or execution of a sale or lease. Rather, she alleges that Defendant-Appellant Enterprise Leasing Co. of Philadelphia, LLC ("Enterprise") committed unfair and deceptive conduct in attempting to collect an

alleged debt *after* she returned her rental car and the parties' lease transaction was completed. In this factual setting where the defendant's unlawful conduct occurs after a consumer transaction is completed, Amici Curiae respectfully submit that the UTPCPL should not be construed to require a consumer plaintiff to plead and prove reliance because there was no longer any purchase decision for the consumer to make in reliance upon the conduct in question.

It is well-established that the UTPCPL provides a cause of action for unfair and deceptive debt collection acts and practices. *See* 73 P.S. § 2270.5(a) ("If a debt collector or creditor engages in an unfair or deceptive debt collection act or practice under this act, it shall constitute a violation of the [UTPCPL]."). A creditor such as Enterprise may be liable to a consumer under the UTPCPL for, *inter alia*, making any "false representation of the character, amount or legal status of any debt," 73 P.S. § 2270.4(b)(5)(ii), or for engaging "in any conduct the natural consequence of which is to harass, oppress or abuse any person in connection with the collection of a debt." 73 P.S. § 2270.4(b)(4). This provision of a cause of action for consumers who are subject to post-sale collection practices that violate objective standards of conduct clearly demonstrates the Legislature's intent to provide redress for a broader range of conduct than is reached by the common law of fraud. A common law reliance requirement has no place in the collection setting because there is no action for a consumer to take in reliance after a transaction has

been completed. *See, e.g.*, *In re Smith*, 866 F.2d 576, 583 (3d Cir. 1989) (rejecting argument that, under the UTPCPL, a consumer cannot state a cause of action where "the alleged deceptive conduct occurred months after the purchase[;]" finding that a "contrary conclusion would insulate all kinds of practices from the [UTPCPL], such as debt collection, which occur after entering an agreement and which were not a basis for the original agreement."). In this respect, requiring justifiable reliance for claims based on a defendant's post-transaction collection conduct would be like trying to force a square peg into a round hole.

Instead of disputing the foregoing, Enterprise and its supporting Amici largely ignore the UTPCPL's structure and purpose, and urge the Court to impose a common law reliance standard as a gate-keeping device, allegedly to prevent courts from being flooded with consumer claims. This concern is misplaced, however, because the UTPCPL already delineates the universe of consumers who can bring a private action, and does so based not on their allegation or proof of common law reliance, but on whether they suffer "any ascertainable loss of money or property . . . as a result of the use or employment . . . of a method, act or practice declared unlawful" by the Act. 73 P.S. § 201-9.2(a). The absence of a reliance requirement in the statute is glaring. The Legislature required instead simple causation of any ascertainable loss of money or property, which is satisfied without reliance in the debt-collection setting where a consumer expends funds to fend off

a collector's harassing conduct, as Ms. Grimes did here. Since the Legislature answered the gate-keeping concern raised by Enterprise and its Amici by requiring general loss-causation, not common law reliance, the Superior Court below correctly decided both questions presented and its decision should be affirmed.

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 and 2013 Supp.), 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 corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice

for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices. NACA has an active Pennsylvania membership 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 advised or represented more than 500 clients with consumer protection problems in the years 2010 to 2014. 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.

STATEMENT OF THE ISSUES[2]

(1) Whether the Superior Court erred when it held that a private plaintiff who alleges deceptive conduct under the UTPCPL's "catch-all" provision, 73 P.S. § 201-2(4)(xxi), need not allege and prove justifiable reliance, contrary to the decisions of this Court, earlier decisions of the Superior Court, and federal decisions construing the UTPCPL.

(2) Whether the Superior Court erred when it held that a plaintiff may satisfy the UTPCPL's "ascertainable loss" requirement by voluntarily hiring an attorney and allegedly incurring litigation costs to challenge allegedly wrongful conduct, even where, as here, the plaintiff paid no money to the defendant as a result of that conduct.

STATEMENT OF FACTS AND RULINGS BELOW[3]

On December 29, 2010, Ms. Grimes rented an automobile from Enterprise by entering into a Rental Agreement. Ms. Grimes declined an optional damage waiver, which meant that under the Rental Agreement, she would be liable for the cost of repairs and other fees and costs if the vehicle were damaged during her

---

[2] The statement of the issues is copied from the Court's Order granting allocator limited to these issues and dated January 30, 2014. *Grimes v. Enterprise Leasing Co. of Philadelphia*, No. 488 MAL 2013, 2014 Pa. LEXIS 326 (Pa. Jan. 30, 2014).

[3] Amici primarily rely on the relevant facts as stated by the Superior Court, without reference to the record to verify their accuracy. *Grimes v. Enterprise Leasing Co. of Philadelphia, LLC*, 2013 PA Super. 57, 66 A.3d 330, 332-33 (2013).

rental period. *Grimes*, 66 A.3d at 332 (quoting trial court opinion). The Rental Agreement also contained a Power of Attorney clause that allowed Enterprise to request payment from a customer's insurance company for covered damage for which the customer refused to pay. *Id.*

Ms. Grimes returned the rental vehicle on December 31, 2010. An Enterprise employee told her that the vehicle had a ten to twelve-inch scratch on the outer body. *Id.* Four days later, on January 4, 2011, Ms. Grimes received a letter from the Damage Recovery Unit, an affiliate of Enterprise, again notifying her of the alleged damage to the vehicle. *Id.* On January 26, 2011, Ms. Grimes received a second letter providing an itemized damages amount for the alleged scratch totaling $840.42. *Id.* at 332-33. This amount included $590.00 for alleged damage to the vehicle, $100.00 for an administrative fee, $91.42 for a loss-of-use fee, and $59.00 for a diminution-in-value fee. *Id.* at 333. Six months later, Enterprise called Ms. Grimes and informed her that it intended to contact her insurer and/or credit card issuer to collect the amount allegedly owed. Reproduced Record at 12a (Complaint, ¶ 20).

Ms. Grimes thereafter filed suit against Enterprise alleging, *inter alia*, that it violated the UTPCPL by trying to collect inflated or excessive damages and fees. *Id.* at 336 (quoting Complaint, ¶¶ 51-61). Enterprise counterclaimed for the

$840.42 it alleged Ms. Grimes owed, *id.* at 333, but later withdrew its counterclaims and moved for judgment on the pleadings on her claims. *Id.*

On March 29, 2012, the trial court granted Enterprise's motion. Ms. Grimes timely filed a notice of appeal, and the trial court filed its Pa. R. App. P. 1925(b) opinion on July 3, 2012. *Id.* The trial court held in relevant part that Ms. Grimes could not prevail on her UTPCPL claim because she "[did] not allege a misrepresentation with respect to the disputed fees[,]" *id.* at 336 (quoting trial court opinion), she could not establish justifiable reliance in support of her claim, *id.* at 337 n.4, and because she did not plead any ascertainable loss. *Id.* at 337. The trial court also dismissed Ms. Grimes's claim for injunctive relief and her breach of contract and duty of good faith and fair dealing claims, *id.* at 341, which rulings are not at issue before this Court.

The Superior Court reversed the trial court's dismissal of Ms. Grimes's UTPCPL damages claims. In addressing whether she pleaded a violation of the act, the Superior Court held that Ms. Grimes "need not specifically allege a misrepresentation[,]" because "any deceptive conduct will suffice under [73 P.S. § 201-2(4)(xxi)]." 66 A.3d at 336-37. Since Ms. Grimes alleged that "Enterprise engaged in deceptive conduct '[b]y intentionally and artificially inflating the costs it incurred under the rental car contracts, and by concealing from [Grimes] the true costs it incurred[,]" *id.* at 337 (quoting Complaint, ¶ 57), the Superior Court held

that she plainly satisfied the catch-all provision's requirement of "'fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.'" *Id.* (quoting 73 P.S. § 201-2(4)(xxi)). The Superior Court further held with respect to Ms. Grimes's UTPCPL claim that, "to the extent that Grimes alleges Enterprise's conduct was deceptive, as opposed to fraudulent, she need not allege justifiable reliance." *Id.* at 337 n.4.

In addressing the UTPCPL's ascertainable loss requirement, the Superior Court held that Ms. Grimes's averment that she "incurred costs and fees associated with asserting her rights and protecting herself against Enterprise's alleged deceptive trade practices[,]" *id.* at 337, established the requisite loss-causation. *Id.* at 339. The Superior Court emphasized that this is a fact-specific inquiry, *id.* at 337, and that Ms. Grimes alleged an ascertainable loss where Enterprise sought to collect $840.42, she disputed that amount and refused to pay, Enterprise threatened to unilaterally collect the amount from her insurer and/or credit card issuer, and she filed suit to prevent Enterprise from collecting these unauthorized charges. *Id.* at 339. In so holding, the Superior Court noted Enterprise's eventual dismissal of its collection counterclaim, but recognized that "[p]resumably, if Grimes had not commenced and prosecuted this action, Enterprise would have long since collected the disputed charges." *Id.*

LEGAL ARGUMENT

The Superior Court correctly held that Ms. Grimes pleaded an actionable claim under the UTPCPL's catch-all provision based on Enterprise's attempts to collect unauthorized charges, and that she did not need to plead justifiable reliance in order to assert this claim. Since this claim is based entirely on Enterprise's post-transaction conduct occurring not only after Ms. Grimes rented the vehicle, but after she returned it, there is no plausible basis in the statute or anyplace else for requiring her to plead justifiable reliance. Indeed, there was no further action that Ms. Grimes could have taken in reliance upon a representation by Enterprise because the parties' lease transaction was already completed. In this setting involving post-transaction collection activity by an alleged creditor, the Superior Court correctly held, and this Court should affirm, that the UTPCPL does not and cannot require a consumer plaintiff to plead or prove justifiable reliance.

With respect to ascertainable loss, the Superior Court also correctly held that Ms. Grimes satisfied the UTPCPL's loss-causation requirement based on the facts she alleged. Specifically, her allegations that Enterprise both demanded payment of an unauthorized damage amount and asserted the right to collect this amount from her insurer and/or credit card company, so that she had to incur an expense to undertake legal action to prevent this unauthorized collection, satisfy the UTPCPL's requirement of "any ascertainable loss of money" incurred "as a result

of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act[.]" 73 P.S. § 201-9.2(a). The decision below with respect to Ms. Grimes's UTPCPL claim therefore should be affirmed.

I. The UTPCPL Does Not Require Justifiable Reliance for Claims Based on Unlawful Post-Transaction Collection Acts and Practices

A. The UTPCPL's Private Right of Action for Unfair Debt Collection Practices

The UTPCPL provides consumers with a private right of action where a debt collector or creditor engages in an unfair or deceptive debt collection act or practice. The UTPCPL's coverage of "[u]nfair methods of competition" and "unfair or deceptive acts or practices" includes a defendant's "[e]ngaging in any other fraudulent ***or deceptive conduct which creates a likelihood of confusion or of misunderstanding.***" 73 P.S. § 201-2(4)(xxi) (emphasis added). The UTPCPL's coverage of unfair or deceptive debt collection practices is codified in the Pennsylvania Fair Credit Extension Uniformity Act, 73 P.S. §§ 2270.1 to 2270.5 ("FCEUA"). Under the FCEUA, "[i]f a debt collector or creditor engages in an unfair or deceptive debt collection act or practice under this act, it shall constitute a violation of the act of December 17, 1968 (P.L. 1224, No. 387), known as the Unfair Trade Practices and Consumer Protection Law." 73 P.S. § 2270.5(a).

The FCEUA's provision of this cause of action through the UTPCPL codified a long-standing right of consumers under Pennsylvania law. The

UTPCPL also empowers the Attorney General to adopt regulations "necessary for the enforcement and administration of the act." 73 P.S. § 201-3.1. Pursuant to this authority, the Attorney General adopted a variety of industry trade practice regulations that expound upon and detail the types of industry-specific practices that would be considered unfair or deceptive under the UTPCPL. These regulations "have the force and effect of law." *Id.*

Prior to the FCEUA's enactment, one of the types of industry-specific regulations that the Attorney General adopted was the Debt Collection Regulations. *See* 37 Pa. Code Chapter 303 (1999). Debt collection practices are within the scope of the UTPCPL. 73 P.S. § 201-3.1; *Beyers v. Richmond*, 594 Pa. 654, 937 A.2d 1082, 1089 (2007) (describing cases); *Pennsylvania Retailers Ass'n v. Lazin*, 57 Pa. Commw. 232, 426 A.2d 712, 716 (1981); *Jungkurth v. Eastern Fin. Servs.*, 74 B.R. 323, 326 (Bankr. E.D. Pa. 1987). Moreover, a violation of a regulation promulgated under the UTPCPL is a *per se* violation of the statute. *Com. v. Luther Ford Sales*, 60 PA Commw. 123, 430 A.2d 1053, 1054 (1981); *Jungkurth, supra.*

The Debt Collection Regulations established what constitute unfair or deceptive acts or practices with regard to the collection of debts. *See* 37 Pa. Code § 303.1. Many of the substantive prohibitions of the Regulations were similar or identical to those of the federal Fair Debt Collection Practices Act ("FDCPA"), 15

U.S.C. § 1692. Like the federal statute, the Regulations prohibited an array of specific deceptive *and harassing* practices, and also included catchall provisions against both "using any false representation or deceptive means to collect or attempt to collect a debt," 37 Pa. Code § 303.3(18), and "abusing or harassing a person in connection with the collection of a debt," 37 Pa. Code § 303.3(27). Specific violations included: (1) representing that certain action will be taken if that action cannot legally be taken or is not intended to be taken, §§ 303.3(11), (14), (18), (27); (2) sending dunning letters that simulate the appearance of telegrams and misrepresent the nature, importance, cost, purpose and urgency of the communication, §§ 303.3(18), (27); (3) calling a debtor at her place of employment, §§ 303.3(26), (27), and 303.4(2); and (4) abusing or harassing a debtor by continuing to telephone during a seven-day period following a telephone discussion with the debtor, §§ 303.3(26), (27), and 303.4(2).

The Legislature's enactment of the FCEUA superseded the Attorney General's Debt Collection Regulations, but effectuated no substantive changes to the debt collection acts and practices that are prohibited. Instead, the FCEUA codified the Regulations' prohibitions and their creation of a cause of action under the UTPCPL for their violation. 73 P.S. § 2270.5(a). The FCEUA's enumeration of the unfair or deceptive debt collection acts and practices that are actionable under the UTPCPL makes clear that detrimental reliance is not a global

requirement for all UTPCPL claims by consumers, and that it is particularly ill-suited for claims arising in the post-transaction debt collection setting like Ms. Grimes's claim here.[4]

1. Communicating With Persons Other Than the Consumer

Section 2270.4(b)(1) of the FCEUA requires any alleged creditor, such as Enterprise here, that is "communicating with any person other than the consumer for the purpose of acquiring location information about the consumer" to:

> (i) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;
>
> (ii) not state that such consumer owes any debt;
>
> (iii) not communicate with any such person more than once unless requested to do so by such person or unless the creditor reasonably believes that the earlier response of such person is erroneous or incomplete and believes that such person now has correct or complete location information;
>
> (iv) not communicate by postcard;

---

[4] Neither the FCEUA's unfair or deceptive debt collection practices provisions nor the amendment to the UTPCPL's catch-all provision covering "other . . . deceptive conduct," 73 P.S. § 201-2(4)(xxi), was at issue or addressed in this Court's prior decisions holding that the pre-amendment UTPCPL required consumer plaintiffs to allege justifiable reliance. *See Toy v. Metropolitan Life Ins.*, 593 Pa. 20, 928 A.2d 186, 190-91 (2007) (addressing claim of fraudulent insurance sales practice); *id.* at 203 ("Toy's claims arose and are brought under the statute as it existed before it was amended in 1996. Therefore the 1996 amendment has no bearing in this appeal."); *Yocca v. Pittsburgh Steelers Sports*, 578 Pa. 479, 854 A.2d 425, 431-32 (2004) (addressing claim of allegedly fraudulent sales practice); *Weinberg v. Sun Co.*, 565 Pa. 612, 777 A.2d 442, 443-44 (2001) (addressing claim of fraudulent advertising practice); *id.* at 446 n.1 (addressing legislative history of UTPCPL's original enactment in 1976).

(v) not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the communication relates to the collection of a debt; and

(vi) after the creditor knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of or can readily ascertain such attorney's name and address, not communicate with any person other than that attorney unless the attorney fails to respond within a reasonable period of time to communication from the creditor.

73 P.S. § 2270.4(b)(1); *see also* 73 P.S. § 2270.4(b)(3) ("Except as provided in paragraph (1), without the prior express consent of the consumer given directly to the creditor or the express permission of a court of competent jurisdiction or as reasonably necessary to effectuate a postjudgment judicial remedy, a creditor may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, a debt collector, the attorney of the debt collector or the attorney of the creditor.").

These requirements and their converse prohibitions clearly are based on objective and precisely-defined standards of conduct, the violation of which is a UTPCPL violation. A common law requirement of justifiable reliance should not be held to apply to claims based on these provisions because the provisions address a creditor's communications made to persons *other than the consumer herself.* A consumer cannot be found to have relied, or acted in reliance, upon a creditor's

collection communications made to another person. The consumer could, however, be found to have incurred an ascertainable loss of money as a result of such a communication if it was made, for example, to an employer or business associate, and resulted in the recipient taking adverse action against the consumer. *Cf. Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1019 (9th Cir. 2012) ("Mickell's act of sending 'care of' letters [to a debtor's employer] constitutes a per se violation of the FDCPA.").

2. Manner of Communications With the Consumer

Section 2270.4(b)(2) prohibits creditors from engaging in certain manners of communication with a consumer in connection with an alleged debt unless the consumer expressly consents to or a court orders such forms of communication. Absent express consent or a court order, a creditor such as Enterprise here may not communicate with a consumer:

> (i) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a creditor shall assume that the convenient time for communicating with a consumer is after 8 a.m. and before 9 p.m. local time at the consumer's location;
>
> (ii) if the creditor knows the consumer is represented by an attorney with respect to such debt and has knowledge of or can readily ascertain such attorney's name and address unless the attorney fails to respond within a reasonable period of time to a communication from the creditor or unless the attorney consents to direct communication with the consumer; or

> (iii) at the consumer's place of employment if the creditor knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

73 P.S. § 2270.4(b)(2).

Here again, these prohibitions impose objectively defined and specific standards of conduct upon a creditor attempting to collect on a debt that give rise to a cause of action by an aggrieved consumer. *Cf. Gilroy v. Ameriquest Mortgage*, 632 F. Supp. 2d 132, 137 (D.N.H. 2009) (recognizing state-law debt collection practices act claim based on frequency, nature, and time of day of collection calls). A common law requirement of justifiable reliance should not be held to apply to claims based on these standards, as a consumer cannot, for example, be found to have relied or acted in reliance upon the fact that a creditor called her at 11 p.m. trying to collect on a debt. The consumer may again, however, be able to demonstrate that she incurred an ascertainable loss as a result of this harassing conduct by, for example, having to pay for a remediating or preventive measure such as a call-blocking service. Whatever form a resulting ascertainable loss might take, there is nothing in the UTPCPL or the FCEUA standards giving rise to this type of claim that requires a consumer to plead or demonstrate justifiable reliance.

3. Harassing, Oppressive, or Abusive Conduct

Section 2270.4(b)(4) prohibits creditors from engaging in "any conduct the natural consequence of which is to harass, oppress or abuse any person in

connection with the collection of a debt." 73 P.S. § 2270.4(b)(4). This prohibited conduct includes, but is not limited to:

> (i) The use or threat of violence or other criminal means to harm the physical person, reputation or property of any person.
>
> (ii) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.
>
> (iii) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the minimum requirements of section 1681a(f) or 1681b(a)(3) of the Fair Credit Reporting Act (Public Law 91-508, 15 U.S.C. § 1681 et seq.).
>
> (iv) The advertisement for sale of any debt to coerce payment of the debt.
>
> (v) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse or harass any person at the called number.
>
> (vi) Except as provided in paragraph (1), the placement of telephone calls without meaningful disclosure of the caller's identity.

73 P.S. § 2270.4(b)(4).

These prohibitions of specifically enumerated and other forms of conduct "the natural consequence of which is to harass, oppress or abuse any person," likewise impose an objective standard of conduct. *See*, *e.g.*, *Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324, 329 (6th Cir. 2006) (construing identical provision of FDCPA as using an "objective test based on the least sophisticated consumer"). Here again, a common law requirement of justifiable reliance should

not be held to apply to a consumer's claim that a creditor published her name or caused her telephone to ring repeatedly, because a consumer cannot plausibly be found to have acted in reliance upon the number of times her phone rang. Here too, though, the consumer may be able to demonstrate that she incurred an ascertainable loss as a result of this harassing conduct by, for example, having to pay for a remediating or preventive measure such as a call-blocking service, and this is all that the UTPCPL by its express terms requires for a consumer plaintiff to assert a cause of action for relief.

4. False, Deceptive or Misleading Representation or Means

Under section 2270.4(b)(5), "[a] creditor may not use any false, deceptive or misleading representation or means in connection with the collection of any debt." 73 P.S. § 2270.4(b)(5). This prohibited conduct includes, but is not limited to:

(i) The false representation or implication that the creditor is vouched for, bonded by or affiliated with the United States or any state, including the use of any badge, uniform or facsimile thereof.

(ii) The false representation of the character, amount or legal status of any debt.

(iii) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(iv) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, attachment or sale of any property of any person unless such action is lawful and the creditor intends to take such action.

(v) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(vi) The false representation or implication that a sale, referral or other transfer of any interest in a debt shall cause the consumer to lose any claim or defense to payment of the debt or become subject to any practice prohibited by this act.

(vii) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(viii) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a debt is disputed.

(ix) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued or approved by any court, official or agency of the United States or any state or which creates a false impression as to its source, authorization or approval.

(x) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(xi) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(xii) The false representation or implication that documents are legal process.

(xiii) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

73 P.S. § 2270.4(b)(5).

This prohibition of "any false, deceptive or misleading representation or means in connection with the collection of any debt" by a creditor likewise imposes an objective standard of conduct. *See, e.g.*, *Harvey*, *supra*, 453 F.3d at 329 (FDCPA's prohibition of "the use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer[,]" 15 U.S.C. § 1692e(10), uses "an objective test based on the least sophisticated consumer."); *see also Brown v. Card Service Ctr.*, 464 F.3d 450, 453 (3d Cir. 2006) (applying the "least sophisticated consumer" standard to FDCPA's prohibition of any "[f]alse or misleading representations"); *id.* ("'[T]he basic purpose of the least-sophisticated consumer standard is to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd.'") (quoting *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993)). By creating a cause of action for consumers subjected to a creditor's false or objectively deceptive or misleading representation or means concerning a debt, *regardless of the consumer's sophistication level*, the FCEUA as applied through the UTPCPL does not and should not be construed to require that any consumer plead justifiable reliance.

5. <u>Unfair or Unconscionable Collection Means</u>

Section 2270.4(b)(6) provides that a "creditor may not use unfair or unconscionable means to collect or attempt to collect any debt." 73 P.S. § 2270.4(b)(6). This prohibited conduct includes, but is not limited to:

(i) The collection of any amount, including any interest, fee, charge or expense incidental to the principal obligation, unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(ii) The acceptance by a creditor from any person of a check or other payment instrument postdated by more than five days unless such person will be notified in writing of the creditor's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(iii) The solicitation by a creditor of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(iv) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(v) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(vi) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if:

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intent to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

(vii) Communicating with a consumer regarding a debt by postcard.

(viii) Using any language or symbol, other than the creditor's address, on any envelope when communicating with a consumer by use of the mails or by telegram, provided that a creditor may use its business name.

73 P.S. § 2270.4(b)(6).

As with all of the other FCEUA unfair or deceptive collection act or practice provisions made actionable under the UTPCPL, this "unfair or unconscionable means" prohibition likewise employs an objective standard of unconscionability and unfairness. *See, e.g.*, *McDowall v. Leschack & Grodensky, P.C.*, 279 F. Supp. 2d 197, 199 (S.D.N.Y. 2003) (applying an "objective standard, based on how the 'least sophisticated consumer' would interpret the debt collector's notice" under the FDCPA's "unfair or unconscionable means" provision, 15 U.S.C. § 1692(f)). Here again, a common law justifiable reliance requirement should not be held to apply to a consumer's claim that a creditor used objectively unconscionable or unfair means by, for example, communicating about a debt by post card or collecting an unauthorized fee, because a consumer cannot plausibly be found to have acted in reliance on such conduct. Indeed, if the Legislature had intended to require justifiable reliance by a consumer, it would have prohibited "fraudulent" means of collection rather than "unfair or unconscionable" means. *See, e.g.*, *Lemire v. Wolpoff & Abramson, LLP*, 256 F.R.D. 321, 326 (D. Conn. 2009) ("[T]he claim that Lemire has raised need not be based on 'fraudulent or harassing'

behavior since the [FDCPA] also prohibits behavior which is merely 'deceptive' or 'unfair or unconscionable' . . . .").

For all of the foregoing reasons, the Court should affirm the Superior Court's holding that a consumer alleging that a creditor violated the UTPCPL by committing unfair or deceptive debt collection acts or practices does not have to plead justifiable reliance to state an actionable claim.

B. <u>The Decision Below Follows Well-Established Pennsylvania Law</u>

As explained above, the Superior Court's rejection of a global reliance requirement for claims under section 201-2(4)(xxi) of the UTPCPL, as amended in 1996, arises in the specific context of post-transaction debt collection. *See also Grimes*, 66 A.3d at 336 (noting Ms. Grimes's allegation that Enterprise engaged in deceptive conduct "[b]y threatening and planning to contact [Grimes]'s insurer and credit card issuer to collect the alleged fees at issue . . . ."). Examination of the FCEUA, *supra*, in particular demonstrates why a reliance requirement is inescapably alien to innumerable situations within that context.[5] The Superior

[5] Judge Wettick recently (and astutely) outlined several additional situations in which "a showing of actual reliance should not be required" because the causation requirement of § 201-9.2(a) is satisfied where a plaintiff's "ascertainable losses necessarily flow from the fraud or deceit." *Toth v. Northwest Sav. Bank*, 31 Pa. D. & C. 5th 1, 12 (Allegheny 2013). In his "EXAMPLE TWO," Judge Wettick describes a classic fraudulent overcharge case, and states that the unwitting consumer "should be entitled to recover the difference between the overcharged amount and the actual costs." *Id.* at 12-13. In his "EXAMPLE FOUR," Judge Wettick describes a situation in which "[t]he contractor of a housing development . . . us[es] roofing materials that do not comply with [known] code standards," resulting in a fire at one of the dwellings and later "every

Court's refusal to adopt a context-ignorant, consumer-adverse requirement carries more than logical force, though; it reflects proper adherence to the oft-quoted mandate that the UTPCPL "be construed liberally to effect its object of preventing unfair or deceptive practices." *Monumental Props.*, 329 A.2d at 817; *see also Ash v. Cont'l Ins.*, 593 Pa. 523, 932 A.2d 877, 881-82 (2007) ("This Court has directed that the UTPCPL is to be liberally construed to effectuate its objective of protecting the consumers of this Commonwealth from fraud and unfair or deceptive business practices. In accordance with this directive, Pennsylvania courts have held that even where the unlawful practice is directly addressed by another consumer-related statute, a plaintiff may nevertheless pursue his action under the UTPCPL since that statute is broad enough to encompass all claims of unfair and deceptive acts or practices in the conduct of any trade or commerce.") (internal citation omitted).

Enterprise and its Amici merely give lip service to this Court's mandate. And while their briefs attempt to portray the Superior Court's decision as one in a small cohort of outliers, this portrayal could not be more mistaken. Indeed, the

---

homeowner being required by the building inspector to replace his or her roof." *Id.* at 13-14. Judge Wettick opines that "each homeowner should be entitled to recover, at a minimum, the cost of replacing the roof and other relief provided by Section 9.2 of the Consumer Protection Law upon a showing that the contractor knowingly installed roofs that did not comply with code standards." *Id.* at *14. In either example, and similar to Ms. Grimes's case, proof of loss causation depends on *proof of the defendant's unlawful conduct*, not the plaintiff's speculative testimony about whether he or she relied on something along the way. *Id.* at 14-15.

Superior Court's post-transaction-context decision is consistent with a legion of cases that construe the amended "catch-all" provision in a way that generally eases the burden of consumer-claimants harmed by "deceptive conduct which creates a likelihood of confusion or of misunderstanding," 73 P.S. § 201-2(4)(xxi).

1. **State Court Decisions**

A number of decisions from the intermediate appellate courts and from trial courts across the Commonwealth reflect an understanding that the UTPCPL's private action loss-causation language does not require a consumer to plead and prove the elements of common law fraud in every case. *See, e.g.*:

- *Milliken v. Jacono*, 2012 PA Super. 284, 60 A.3d 133, 142 (2012) (en banc) (recognizing the "reduced burden" for the amended-UTPCPL-catchall claimant, but determining, in the end, that defendants "simply did not engage in any deceptive conduct.");

- *Fazio v. The Guardian Life Ins.*, 2012 PA Super. 273, 62 A.3d 396, 409-10 (2012) (noting that plaintiffs are only required to prove "deceptive conduct for purposes of stating a catchall UTPCPL claim under the 1996 amendments");

- *Bennett v. A.T. Masterpiece Homes at Broadsprings, LLC*, 2012 PA Super. 260, 40 A.3d 145, 154 (2012) ("A contrary reading that adheres to the common law fraud requirement for cases arising under the post-amendment catchall provision ignores the textual changes of the 1996 amendment as well as the rules of statutory construction.");

- *Com. v. TAP Pharm. Prods.*, 36 A.3d 1197, 1253 (Pa. Commw. 2011) ("The test for deceptive conduct under Section 2(4)(xxi) of the CPL is essentially whether the conduct has the tendency or capacity to deceive, which is a lesser, more relaxed standard than that for fraud or negligent misrepresentation.");

- *Pennsylvania Dept. of Banking v. NCAS of Delaware, LLC*, 995 A.2d 422, 433 n.28 (Pa. Commw. 2010) (applying "deceptive" standard for catchall provision);

- *Com. v. Peoples Benefit Servs.*, 923 A.2d 1230, 1236 (Pa. Commw. 2007) ("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");

- *Com. v. Manson*, 903 A.2d 69, 74 (Pa. Commw. 2006) (permitting catchall liability for deceptive conduct and rejecting interpretation of section 201-2(4)(xxi) that requires proof of common law fraud);

- *Com. v. Parisi*, 873 A.2d 3, 10-11 (Pa. Commw. 2005) (adhering to the conclusion in *Percudani* that "the General Assembly's use of the term 'other deceptive conduct' in addition to the term 'fraudulent conduct' no longer required a plaintiff to plead the elements of common law fraud.");

- *Percudani, supra*, 825 A.2d at 746-47 (holding 1996 amendment to section 201-2(4)(xxi) provides liability for deceptive conduct);

- *Healey v. Wells Fargo, N.A.*, Case No. 11-3340, 2012 Pa. Dist. & Cnty. Dec. LEXIS 165, at *51 (Lackawanna 2012) (stating that "[p]roof of common law fraud is not necessary to prove 'deceptive conduct which creates a likelihood of confusion or of misunderstanding' under 73 P.S. §201-2(4)(xxi)," and noting that "[m]any of the specific allegations of 'unfair or deceptive acts' by Wells Fargo regard conduct which occurred after the execution of the TPP contract.");

- *Amsler v. Hollabaugh*, 9 Pa. D. & C. 5th 486, 491 (Armstrong 2009) ("We agree with the Commonwealth Court's detailed analysis and find that Plaintiff need not plead the elements of common law fraud in order to state a claim under the CPL.");

- *Andrews v. Stiffler*, 9 Pa. D. & C. 5th 334, 337 (Armstrong 2009) (same);

- *Pusey v. Sardo*, Case No. 08-4856, 2009 Pa. Dist. & Cnty. Dec. LEXIS 296, at *6 (Chester 2009) (stating its belief that the 1996 amendments "relaxed" the common law fraud standard for catchall-provision claims);

- *Lakeside Care, Inc. v. Brighten Healthcare, LLP*, 2006 Pa. Dist. & Cnty. Dec. LEXIS 509, at *17 (Bucks 2006) ("Claims under UTPCPL, after the 1996 amendments, require no more than proof of the deceptive nature of the business activity as opposed to fraud.");

- *Foultz v. Erie Ins. Exch.*, Case No. 3053, 2002 Phila. Ct. Com. Pl. LEXIS 62, at *38 (Philadelphia 2002) (noting that "the current version of the Catchall Provision requires proof of a causal link between the specific misconduct and the harm suffered but does not require evidence of each element of common law fraud, including reliance");

- *Franklin v. Mellon Bank*, Case No. 2850, 2002 Phila. Ct. Com. Pl. LEXIS 113, at *44 (Philadelphia 2002) ("This Court agrees with Franklin's argument that one need not prove common law fraud to succeed in a cause of action for a violation of 73 P.S. § 201-2(4)(xxi).");

- *Zwiercan v. GMC*, 58 Pa. D. & C. 4th 251, 256 (Philadelphia 2002) (noting that "this court's holdings establish that 'reliance' is not a required element for a plaintiff to proceed under a 'deceptive' practice claim," but determining that reliance was established in any event);

- *Weiler v. Smithkline Beecham Corp.*, 53 Pa. D. & C. 4th 449, 454-55 (Philadelphia 2001) ("[T]he court must conclude that the purpose of the 1996 amendment was to eliminate the requirement that a plaintiff plead all the elements of fraud to sustain a claim under the catchall provision. To hold otherwise would be to find the word 'deceptive' redundant and would clash with the rules of statutory interpretation.").

2. **Federal Court Decisions**

The federal court system likewise is replete with decisions holding that consumers who are victimized by deceptive business practices need not plead reliance under the amended version of § 201-2(4)(xxi). *See, e.g.*:

- *Belmont v. MB Inv. Partners*, 708 F.3d 470, 498 (3d Cir. 2013) ("It appears that a UTPCPL claim based on deceptive conduct differs from a claim based on fraudulent conduct in that a plaintiff 'does not need to prove all of the elements of common-law fraud or meet the particularity requirement of Federal Rule of Civil Procedure 9(b).'") (quoting *Schnell v. Bank of New York Mellon*, 828 F. Supp. 2d 798, 807 n.5 (E.D. Pa. 2011));

- *Slemmer v. McGlaughlin Spray Foam Insulation*, 955 F. Supp. 2d 452, 463 (E.D. Pa. 2013) ("Because a plaintiff need not plead fraud under the UTPCPL, 'a plaintiff alleging deceptive conduct may proceed without satisfying the particularity requirement of Federal Rule of Civil Procedure 9(b).'") (citation omitted);

- *Morgan v. World Alliance Fin. Corp.*, 2013 U.S. Dist. LEXIS 13870, at *17 (E.D. Pa. Jan. 31, 2013) (observing that "[t]he standard for alleging deceptive practices under the UTPCPL is less strict than that for alleging fraud in that it does not require allegations of scienter");

- *Genter v. Allstate Property and Cas. Ins.*, 2011 U.S. Dist. LEXIS 67840, at *13-14 (W.D. Pa. June 24, 2011) (determining that amendment to catchall provision adding prohibition of deceptive conduct allows plaintiff to succeed under catchall section by pleading either common law fraud or deceptive conduct);

- *Vassalotti v. Wells Fargo Bank, N.A.*, 732 F.Supp.2d 503, 510 n.7 (E.D. Pa. 2010) (agreeing with the "courts in this district [that] have held that the 1996 amendment to the catch-all provision of the UTPCPL added a prohibition on deceptive conduct that permits

plaintiffs to proceed without satisfying all of the elements of common-law fraud");

- *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC*, 737 F. Supp. 2d 380, 421 (E.D. Pa. 2010) ("I agree . . . that the addition of the word 'deceptive,' along with the Pennsylvania Supreme Court's broad construction of the PUTPCPL as a remedial law designed to address both fraudulent and unfair business practices, renders previous interpretations requiring plaintiffs to allege common law fraud erroneous.");

- *Zafarana v. Pfizer*, 724 F. Supp. 2d 545, 557 n.3 (E.D. Pa. 2010) ("[W]e will not require Plaintiffs to establish conduct amounting to common law fraud in order to state a claim under the catchall provision of the UTPCPL, even though the Pennsylvania Supreme Court has not yet interpreted this provision as amended.");

- *Lorah v. SunTrust Mortg.*, 2010 U.S. Dist. LEXIS 134325, at *18 (E.D. Pa. Dec. 17, 2010) ("This Court joins many (although not all) courts in this District in predicting that the Pennsylvania Supreme Court would permit a plaintiff who alleges 'deceptive' conduct to proceed without proving all of the elements of common law fraud.");

- *Gidley v. Allstate Ins. Co.*, 2009 U.S. Dist. LEXIS 118246, at *9-10 (E.D. Pa. Dec. 17, 2009) ("I find that the catch-all provision only requires pleading all of the elements of common law fraud with particularity if plaintiffs allege fraudulent conduct, but not for any alleged deceptive conduct.");

- *Haines v. State Auto Property and Cas. Ins. Co.*, 2009 U.S. Dist. LEXIS 52325, at *25 (E.D. Pa. June 22, 2009) (assuming without deciding that plaintiff can establish catchall-provision violation without proving common law fraud);

- *Seldon v. Home Loan Servs.*, 647 F. Supp. 2d 451, 469 (E.D. Pa. 2009) ("[F]or a claim under the catchall provision of the UTPCPL, if a plaintiff alleges deceptive conduct, a plaintiff need not allege the elements of common law fraud");

- *Birchall v. Countrywide Home Loans*, 2009 U.S. Dist. LEXIS 106813, at *31 (E.D. Pa. Nov. 12, 2009) ("[T]he Court will join others in this district to permit a plaintiff who alleges deceptive conduct to proceed without alleging all of the individual elements of common law fraud.");

- *Alberton v. Com. Land Title Ins.*, 247 F.R.D. 469, 481 (E.D. Pa. 2008) ("proof of justifiable reliance is no longer required to succeed on a claim under the UTPCPL")[6];

- *Davis v. Mony Life Ins.*, 2008 U.S. Dist. LEXIS 69736, at *15-16 (W.D. Pa. Sept. 2, 2008) ("a plaintiff may allege deception, as opposed to common law fraud, to set forth an actionable claim under the UTPCPL.") (citing *Grimm v. Washington Mutual Bank*, 2008 U.S. Dist. LEXIS 55628 (W.D. Pa. July 22, 2008));

- *Hansford v. Bank of Am.*, 2008 U.S. Dist. LEXIS 65502, at *38 (E.D. Pa. Aug. 22, 2008) ("Because the UTPCPL must be construed liberally, the Court will join other courts in this district to permit a plaintiff who alleges deceptive conduct to proceed without proving all of the elements of common law fraud.") (internal citation omitted);

- *Wilson v. Parisi*, 549 F. Supp. 2d 637, 666 (M.D. Pa. 2008) (accepting view that plaintiff can state claim under post-1996 catchall provision by alleging deceptive activity);

- *Chiles v. Ameriquest Mortg. Co.*, 551 F. Supp. 2d 393, 399 (E.D. Pa. 2008) ("The UTPCPL must be construed liberally. This Court will therefore adopt the view that in order for the addition of the terms 'or deceptive' to be given effect, all elements of common law fraud need not be proven if Plaintiff alleges deceptive conduct.") (internal citation omitted);

[6] The class certification order in *Alberton* was later vacated on unrelated grounds. *See Alberton v. Com. Land Title Ins.*, 2014 U.S. Dist. LEXIS 57733, at *12 n.1 (E.D. Pa. Apr. 24, 2014) ("As set forth below, however, the outcome of [the Pennsylvania Supreme Court's ruling in] *Grimes* will not impact this case").

- *Figard v. PHH Mortg. Corp. (In re Figard)*, 382 B.R. 695, 715-16 (Bankr. W.D. Pa. 2008) ("This Court too agrees with the sound reasoning of the Commonwealth Court, and will not require a plaintiff to prove the elements of common law fraud to maintain a cause of action under the catchall provision of the Consumer Protection Law");

- *Mertz v. Donzi Marine*, 2007 U.S. Dist. LEXIS 15708, at *29 (W.D. Pa. 2007) ("We find the analysis of the Commonwealth Court in *Com. ex rel Corbett v. Manson* to be the correct interpretation of what must be proven in a § 201-2(4) (xxi) claim. Accordingly, contrary to the Defendants' argument, Plaintiff does not have to prove that he relied on statements or omissions by the Defendants that rise to the level of fraudulent activity");

- *Christopher v. First Mut. Corp.*, 2006 U.S. Dist. LEXIS 2255, at *9 (E.D. Pa. Jan. 20, 2006) ("It is no longer necessary for a plaintiff to plead all of the elements of common law fraud to recover under the UTPCPL catchall provision.");

- *In re Fisher*, 320 B.R. 52, 71 (Bankr. E.D. Pa. 2005) (determining that "word 'deceptive' within the catchall provision necessitates a less restrictive standard than proof of fraud");

- *Becker v. Chicago Title Ins.*, 2004 U.S. Dist. LEXIS 1988, at *43 (E.D. Pa. Feb. 4, 2004) ("[T]he 1996 Amendments, by amending the UTPCPL to prohibit both fraudulent conduct and deception instead of solely fraud, eliminated the need to plead all of the elements of common law fraud. This Court adopts this reasoning");

- *Flores v. Shapiro & Kreisman*, 246 F.Supp.2d 427, 432 (E.D. Pa. 2002) (concluding proof of fraud was unnecessary because plaintiff alleged defendants' conduct was deceptive);

- *In re Patterson*, 263 B.R. 82, 93 (Bankr. E.D. Pa. 2001) (court will not ignore 1996 amendment and its addition of "deceptive conduct" because doing so would ignore legislative intent and make revised language redundant);

- *Rodriguez v. Mellon Bank, N.A.*, 218 B.R. 764, 784 (Bankr. E.D. Pa. 1998) (rejecting pre-1996 pleadings requirements for catchall provision and noting that Pennsylvania Legislature's addition of the words "or deceptive conduct" signals approval of a less restrictive interpretation of the law).[7]

* * *

These dozens of cases provide ample support for a negative answer to the first question presented by Enterprise as phrased in the Court's allocatur order. That is particularly so given the nature of the facts presented here involving post-transaction collection conduct. *See, e.g.,* Reproduced Record at 12a (Complaint, ¶ 20) (alleging that Enterprise called Ms. Grimes and informed her that it intended to contact her insurer and/or credit card issuer to collect the amount allegedly owed). Amici therefore urge the Court to hold that the Superior Court was correct in holding that reliance pleading is not required for a section 201-2(4)(xxi) "deceptive conduct" claim based on unfair or deceptive debt collection conduct.

---

[7] The sheer endurance of the position reflected in these cases, no less than its proliferation, highlights the hyperbole-laden nature of the briefs lodged by the Amici supporting Enterprise. *Cf.* Br. of Pa. Bus. Council at 1 (suggesting that an affirmance would all of the sudden change the "economic climate" throughout the entire Commonwealth of Pennsylvania); Br. of Truck Renting & Leasing Assoc. at 2 (suggesting that affirmance would all of the sudden make "truck rentals" cost-prohibitive for the ordinary consumer).

II. The Superior Court Correctly Held That Ms. Grimes Incurred an "Ascertainable Loss"

A. Attorney Fees Incurred Resisting Unlawful Collection Conduct are Actual Damages and Clearly Distinct from Statutory Attorney Fees for a Successful UTPCPL Action

Of fundamental importance to this appeal, and to cases alleging debt collection misconduct throughout the Commonwealth, is the distinction between attorney fees incurred by a consumer to resist or defend against deceptive collection practices (defensive attorney fees) and those incurred prosecuting a successful action under the UTPCPL or another fee-shifting consumer protection statute (statutory attorney fees).

Defensive attorney fees are out-of-pocket expenses incurred (or owed) by a consumer who, like Ms. Grimes, sought counsel in response to a business's threatening collection tactics. Often, a consumer will pay or agree to pay these fees to a neighborhood lawyer for an opinion that the collector's threats are bogus, for a stern cease-and-desist letter to the offending creditor, or for the defense of a collection case filed against her in Magisterial District Court. And often, these out-of-pocket costs are laid out or agreed-to by the consumer before she files any affirmative consumer protection action or counterclaim against the party seeking to collect. As discussed in the pages that follow, these amounts are routinely recognized as "ascertainable losses" and compensable "actual damages" under consumer protection statutes.

By contrast, statutory attorney fees are incurred in litigating a later affirmative case or counterclaim against a non-compliant merchant or lender alleging a violation of a consumer protection law premised on the underlying unlawful collection conduct. The distinction between the two is clear: defensive attorney fees are actual damages, and statutory attorney fees are not.

Amici here do not suggest that fees and costs incurred in *affirmatively* prosecuting a UTPCPL case constitute an "ascertainable loss" under 73 Pa. C.S. § 201-9.2. The record reflects that Ms. Grimes's alleged "loss" was the amount of attorney fees and costs incurred *resisting* Enterprise's unlawful collection attempts, not her fees incurred in bringing her UTPCPL claims. The defensive fees and costs are her "ascertainable loss," while the fees and costs tied to the affirmative claims are only awardable in the trial court's discretion, if the consumer succeeds on her UTPCPL claim.

The "American Rule"—that litigants are generally responsible for their own legal fees—supports the common-sense notion that legal expense incurred to defend against improper collection attempts can create an "ascertainable loss" for consumers. *Cf.* Br. of Pa. Bus. Council at 26. Take, for example, the common case of a consumer sued for breach of contract past Pennsylvania's four-year statute of limitations. This is a recognized deceptive collection practice. *See Com. v. Richard A. Cole, M.D., Inc.*, 709 A.2d 994, 997 (Pa. Commw. 1998) (violates

UTPCPL); *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987) (violates FDCPA). The consumer resisting an improperly filed time-barred collection suit must hire, and pay for, her own lawyer to defend. She may succeed in getting the creditor's claims dismissed or obtaining judgment for defendant, but she is nonetheless responsible for paying her own attorney fees to achieve that result. These fees and costs would not have been incurred but for the creditor's unfair and deceptive practice of suing on a time-barred debt. In other words, the deceptive practice directly caused her out of pocket loss of attorney fees incurred in the resistance to the collection action.

The consumer can only be made whole by seeking that loss as damages in a counterclaim or a later affirmative action under the UTPCPL. *See Agliori v. Metropolitan Life Ins.*, 2005 PA Super. 253, 879 A.2d 315, 320 (2005) (actual damages should place the aggrieved party in the position he would have occupied in the absence of the violation, prior to any trebling). It would be anathema to the UTPCPL's purposes to leave that loss unrecompensed. *Id.* To woodenly apply the "ascertainable loss" requirement to exclude defensive costs and fees would defeat the UTPCPL's remedial objectives and be contrary to its spirit and purpose. Consumers would not be placed on an equal footing with the wrongdoer, but rather forced to incur fees through no fault of their own while the wrongdoer is insulated from any repercussions from its deceptive collection practices.

Similarly, suit on a time-barred debt would plainly be prohibited by the provisions of the FCEUA, 73 P.S. §2270.4(b)(5)(ii-x). As discussed above, the UTPCPL is the means of consumer enforcement of the FCEUA against improper collection efforts of creditors and debt collectors. 73 P.S. § 2270.5(a), (b). It would be an odd construct indeed if legal expenses incurred to defend or prevent continuation of a prohibited collection tactic could not be reimbursed. The UTPCPL does not exclude defensive attorney fees, and doing so would be at odds with the intent of this remedial legislation and the liberal interpretation to which the UTPCPL is to be given. *See Monumental Props.*, 329 A.2d at 817 (liberal construction furthers the Act's remedial purpose).

B. Courts Across the Country Hold Fees and Costs Incurred Fending Off Unlawful Practices Constitute Actual Damages Compensable Under their Consumer Protection Statutes

Like Pennsylvania's UTPCPL, many other states' Little FTC Acts call for an "ascertainable loss" or require persons to be "injured by" the unfair or deceptive practice.[8] The courts interpreting those very similar acts routinely hold that attorney fees incurred resisting unlawful collection attempts can constitute the

[8] *See, e.g.*, Md. Code Ann., Com. Law § 13-408(a) (suffered "injury or loss"); N.J. Stat. Ann. 56-8-19 (West) ("suffers any ascertainable loss of money or property"); W. Va. Code § 46A-6-106(a) ("suffers ascertainable loss of money or property"); *see generally* National Consumer Law Center, *Unfair and Deceptive Acts and Practices* at 11.4.2.2 (8th ed. 2012) (collecting statutes).

requisite loss sufficient to trigger the act's protections.[9] These courts recognize that demanding a debt that is not owed often causes a consumer to incur expenses, and therefore the consumer meets a UDAP's "ascertainable loss" requirement even if he or she has not paid the debt but rather incurred costs in the form of moneys paid to third parties in the effort to defend against it.

Contrary to the suggestion of Enterprise's Amici, Pennsylvania would be an outlier jurisdiction if it *refused* to recognize defensive attorney fees as an

---

[9] *See, e.g.*, *Jarzyna v. Home Props., L.P.*, 763 F. Supp. 2d 742 (E.D. Pa. 2011) (citing costs of defending against previous lawsuit as ascertainable loss); *Hauk v. LVNV Funding, LLC,* 749 F. Supp. 2d 358, 369-70 (D. Md. 2010) (interpreting Maryland Consumer Protection Act and holding "where the wrongful acts of the defendant have involved the plaintiff in litigation with others, or placed him in such relation with others as make it necessary to incur expense to protect his interest," those expenses, including his attorney fees, are compensable damages); *Bartels v. Hudson Ins.,* 2008 U.S. Dist. LEXIS 95445 (D.N.J. Nov. 24, 2008) (loss need not be a direct payment to the defendant; fees paid to attorney because defendant insurer refused to provide defense satisfy injury requirement); *Maple v. Colonial Orthopaedics, Inc. (In re Maple)*, 434 B.R. 363, 373 (Bankr. E.D. Va. 2010) (attorney fee that consumers paid to obtain order sealing pleading in which defendant wrongfully published their Social Security numbers satisfies UDAP loss requirement); *Lowe v. Surpass Res. Corp.*, 253 F. Supp. 2d 1209, 1227-29 (D. Kan. 2003) (consumer was "aggrieved" under Kansas UDAP statute by having to obtain assistance of third parties to respond to collection calls, even though she did not hear the calls herself); *In re Wiggins*, 273 B.R. 830, 857 (Bankr. D. Idaho 2001) (attorney fees incurred in connection with earlier bankruptcy and conservatorship proceedings were "ascertainable loss," as distinguished from attorney fees separately recoverable under Idaho act); *Osbourne v. Capital City Mortgage Corp.*, 667 A.2d 1321 (D.C. Ct. App. 1995) (attorney fees paid to defend foreclosure case may be damages sufficient to sustain UDAP claim); *Duran v. Leslie Oldsmobile*, 594 N.E. 2d 1355 (Ill. App. Ct. 1992) (attorney fee that consumer had to pay for defense of collection suit constitutes damages); *Columbia Chiropractic Group, Inc., v. Trust Ins.*, 712 N.E. 2d 93 (Mass. 1999) (where UDAP violation involves filing a lawsuit, attorney's fees incurred in defending it are a loss of money or property); *Siegel v. Berkshire Life Ins.*, 835 N.E.2d 288 (Mass. App. Ct. 2005) (where UDAP "violation forces someone to incur legal fees and expenses that are not simply those incurred in vindicating that person's rights under the statute, those fees may be treated as actual damages in the same way as other losses of money or property."); *Panag v. Farmers Ins.*, 204 P.3d 885 (Wash. 2009) (costs to consult attorney about disputed debt and to determine effect on credit rating meet injury requirement).

ascertainable harm under the UTPCPL. *See* Br. of Pa. Bus. Council at 26-27.[10]

Enterprise acknowledges, as it must, that actual damages constitute "ascertainable losses." App't. Br. at 37. The fees and costs incurred resisting Enterprise's allegedly unlawful collection attempts constitute an "ascertainable loss" under the UTPCPL, whether incurred before or after the creditor sues the consumer.

C. <u>In the Collection Context, Ascertainable Loss Clearly Includes Fees and Costs Incurred Resisting Improper Collection Attempts</u>

Debt collection regularly ranks at the top of the list of most common consumer complaints lodged with the Federal Trade Commission. *See FTC Announces Top National Consumer Complaints for 2013*, available at

---

[10] Enterprise's Amici's cited case *C.A.R. Tow, Inc. v. Corwin*, 708 P.2d 644, 646 (Or. App. 1985) is unpersuasive. There the court failed to distinguish between defensive costs incurred through no fault of the consumer, and fees recoverable in an affirmative action, in a case where the claimant's "own misconduct precipitated the legal dispute." The decision in *Weinberg v. Sprint Corp.*, 801 A.2d 281 (N.J. 2002), also cited by Enterprise's Amici, is inapposite; there the complainant never argued he incurred fees and costs resisting an unfair practice, the "filed rate doctrine" precluded any award of damages, and he was not entitled to statutory attorney fees in his affirmative action because his NJCFA claim was dismissed. *Accord Tibbetts v. Sight 'n Sound Appliance Centers*, 77 P.3d 1042 (Okla. 2003) (plaintiff who was awarded no damage at trial was not entitled to attorney fees in his affirmative UDAP case). Similar to *C.A.R.*, the decision in *Jones v. Midland Funding*, LLC, 755 F. Supp. 2d 393 (D. Conn. 2010) fails to distinguish between affirmative and defensive fees incurred in a case where there was no allegation that the consumer was forced to defend against an improper collection counterclaim, as was Ms. Grimes here.

Lettenmaier v. Lube Connection, Inc., 741 A.2d 591 (N.J. 1999), too, is inapposite, as it holds that attorney fees in prosecuting an affirmative NJCFA case cannot be included as damages for purposes of establishing a jurisdictional amount in controversy. That said, it offers telling language applicable to the distinction between defensive and statutory fees: "[amount in controversy] can refer only to the monetary damages that a plaintiff claims were sustained as a result of the defendant's actions, plus trebling. The reason is obvious. The amount of claimed monetary damages is the only amount that a litigant can calculate at the beginning of the litigation when determining whether or not to file in the [small claims court]." *Id.* at 596. Defensive attorney fees easily fit within that rubric.

http://www.ftc.gov/news-events/press-releases/2014/02/ftc-announces-top-national-consumer-complaints-2013 (last visited May 13, 2014). In 2013 alone, there were 204,644 collection-specific complaints to the Federal Trade Commission. *Id.* Pennsylvanians accounted for over 6,000 of these complaints, and debt collection was the number one complaint category for the Commonwealth. *See FTC Consumer Sentinel Network Data Book 2013* at p. 60, http://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2013/sentinel-cy2013.pdf (last visited May 13, 2014). Complaints related to collection included "falsely represents the amount or status of debt," "falsely threatens suit," and "violates other provisions of the Fair Debt Collection Practices Act." *Id.* at p. 77.

The FDCPA provides consumers with certain protections against unfair and deceptive conduct by debt collectors. However, the FDPCA narrowly defines who is a "debt collector" to the exclusion of creditors collecting their own debts. Enterprise, as a rental company collecting an amount alleged to be owed to it, would not be subject to the FDCPA. Thus, it falls to state law—the FCEUA, as actionable through the UTPCPL—to fill the gap in federal consumer protection law in the collection context. If attorney fees incurred resisting unlawful collection conduct are not considered "ascertainable loss," these consumer protections would be severely undermined. *See Fed. Trade Comm'n v. R.F. Keppel & Bro.*, 291 U.S.

304, 308 (1934) (applying FTC Act, courts should be willing to include/exclude liberally, considering its gap-filling purpose).

The prohibitions in the FCEUA (actionable through the UTPCPL) are, but for a few exceptions, identical to those in the FDCPA. Accordingly, the wealth of decisions under the federal statute are persuasive authority on interpretation of the FCEUA. By its very terms, *see* 73 P.S. § 2270.5(a), the FCEUA states that a violation triggers a private right of action for statutory damages under the UTPCPL. *Jarzyna v. Home Props., L.P.,* 763 F. Supp. 2d 742, 749 (E.D. Pa. 2011). Attorney fees for resisting unlawful collection that are actual damages under the FDCPA should be actual damages (and thus, "ascertainable loss") under the FCEUA and UTPCPL as well. *See id.* at 749 (finding allegation consumer was "forced to retain counsel to resist [] collection efforts" sufficient to state a claim for "ascertainable loss" under the UTPCPL).

Under the FDCPA, a plaintiff may recover as damages out-of-pocket expenses directly resulting from the deceptive collection conduct. 15 U.S.C. § 1692k(a)(1). Thus, a plaintiff may recover the cost of hiring an attorney if she did so as a result of a collection notice that misleadingly threatens action harmful to the consumer. For example, in *Jeter v. Credit Bureau*, 760 F.2d 1168 (11th Cir. 1985), the debtor hired an attorney upon receiving a deceptive demand letter threatening legal action. The court held the debtor could prevail if she hired the

lawyer as a direct result of the deceptive collection letter. That the debtor did not submit payment in reliance on the letter did not preclude her claim:

> It is true that Jeter might have been injured worse. Upon receiving one or both of the letters, she could have immediately paid the debt, thinking she was about to be sued. This case, therefore, may well illustrate one of the purposes of the [FDCPA]. Congress apparently was aware that a false threat to sue in the near future might well be used to induce premature payment of an alleged debt with respect to which the consumer has a legitimate defense.

Id. at 1178 n. 11.

Under the FDCPA, attorney fees incurred resisting or defending improper collection suits are clearly recognized as "actual damages" compensable in a later filed, affirmative FDCPA case. Recently, the Pennsylvania district court in *Walton v. Pereira,* --- F. Supp. 2d ----, 2014 U.S. Dist. LEXIS 15191, at *10 (W.D. Pa. Feb. 6, 2014), held in an FDCPA case that a consumer's "averments regarding the attorney's fees she incurred in defending the [state court] Collection Complaint... sufficiently and plausibly pled that she has suffered actual damages." *See also*:

- *Shepherd v. Law Offices of Cohen & Slamowitz, L.L.P.*, 668 F. Supp. 2d 579 (S.D.N.Y. 2009) (attorney fees incurred by consumer to vacate an improperly obtained default judgment in underlying state collection action were among consumer's recited actual damages);

- *Lowe v. Elite Recovery Solutions, L.P.*, 2008 U.S. Dist. LEXIS 8353 (E.D. Cal. Feb. 5, 2008) (awarding as actual damages the amount of attorney fees incurred by the consumer in defending the underlying state collection action where, *inter alia,* the claim included an incorrect principal balance, an unauthorized amount of interest, and unauthorized attorney fees);

- *Owens v. Howe*, 365 F. Supp. 2d 942, 948 (N.D. Ind. 2005) (attorney fees defending state court action compensable as "actual damages" under FDCPA);

- *Kapoor v. Rosenthal*, 269 F. Supp. 2d 408 (S.D.N.Y. June 27, 2003) (time spent defending against unlawful post-judgment execution in state collection suit was compensable attorney fee in subsequent federal FDCPA suit successfully challenging that practice);

- *McKnight v. Benitez*, 176 F. Supp. 2d 1301 (M.D. Fla. 2001) (additional attorney fees incurred by consumer to change venue in case filed in judicial district unlawful under § 1692i, were actual damages);

- *Venes v. Professional Serv. Bureau*, 353 N.W.2d 671 (Minn. Ct. App. 1984) (attorney fees incurred by debtors for prior collection action were properly submitted to jury as element of actual damages under FDCPA).

These cases clearly hold that the defensive attorney fees are compensable "actual damages," separate and apart from statutory attorney fees available for a successful affirmative consumer protection action.

D. Consumers Need Not Sit Idly Where Deceptive Collection Tactics Threaten a Financial Quagmire

Ms. Grimes alleges that Enterprise sent her a letter from its "Damage Recovery Unit" stating she was responsible for payment of repairs related to a claimed "scratch," and enclosing an invoice larded with unauthorized fees. She states Enterprise then placed collection calls during which it threatened to contact her automobile insurer and/or credit card issuer in order to collect the disputed

fees. The deceptive threats caused Ms. Grimes to hire a lawyer to protect herself from Enterprise's unfair collection conduct. At this moment, she incurred an "ascertainable loss" in the form of her defensive attorney fees. Some point after she retained her lawyer, Ms. Grimes (through counsel) decided an affirmative lawsuit under the UTPCPL was the best way to fend off Enterprise's wrongful conduct, so she sued. Ms. Grimes's fears materialized when Enterprise filed a collection counterclaim against her, forcing her to further incur costs associated with defending against Enterprise's improper collection attempts.

If Enterprise and its Amici had their way, Ms. Grimes should have waited for Enterprise to act on its deceptive threats and she should have sat idly by until after Enterprise submitted a claim to her insurance company, billed her credit card for $840.42, or sued her in court seeking the bogus fees. Only *then* should Ms. Grimes have hired a lawyer to defend a collection case. Even then, according to Enterprise and its Amici, whatever Ms. Grimes paid or owed her defense attorney for services helping to undo the damage would not be an "ascertainable loss," even though it would be a debt she incurred directly caused by its deceptive conduct, simply because it is attorney fees.

The Superior Court correctly held that this perverse logic turns the preventive, remedial, and deterrent purposes of the UTPCPL on its head. *See Grimes,* 66 A.3d at 339 ("Grimes was not required under the UTPCPL to sit idly

by and wait for Enterprise to collect $840.42 from her in order to assert her rights and attempt to stop Enterprise's alleged deceptive trade practices."). "Only by exalting form over substance could such a course be pursued." *Monumental Props.,* 329 A.2d at 826. Like all provisions of the UTPCPL, the "ascertainable loss" requirement must be construed liberally to achieve the Act's remedial purposes to prevent and deter fraud. *Agliori*, 879 A.2d at 320 (citing *Monumental Properties*); *Brunwasser v. TWA*, 541 F. Supp. 1338, 1347 (W.D. Pa. 1982).

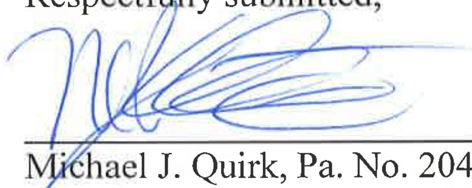
It is true, Ms. Grimes could have been injured worse, *e.g.*, by having paid the disputed $840.42 thinking her credit card was going to be billed. *See Jeter*, 760 F.2d at 1178. Such is not an unreasonable reaction to Enterprise's threats. Nor is obtaining counsel. Nonetheless, Enterprise cynically claims that Ms. Grimes's defensive fees were "voluntarily incurred." App't. Br. at 42. One facing collections, potentially negative credit ramifications, referral to her insurance carrier, and/or suit over a disputed amount cannot be said to have incurred defensive costs on her own volition, but rather under pressure from the wrongdoer's deceptive practices. Ms. Grimes was threatened to such extent that she reasonably felt it necessary to hire a lawyer, an action that carried with it a readily ascertainable financial loss.

CONCLUSION

For all of the reasons set forth herein, Amici Curiae respectfully urge the Court to affirm the decision of the Superior Court below and hold that Plaintiff-Appellee states an actionable claim under the UTPCPL.

Dated: May 23, 2014

Respectfully submitted,



Michael J. Quirk, Pa. No. 204677
Joseph Alan Venti, Pa. No. 209799
Williams Cuker Berezofsky, LLC
1515 Market Street, Suite 1300
Philadelphia, PA 19102
Tel: (215) 557-0099
Fax: (215) 557-0673

Michael D. Donovan, Pa. No. 51895
Donovan Axler, LLC
1845 Walnut Street, Suite 1100
Philadelphia, PA 19103
Tel: (215) 732-6067
Fax: (215) 732-8060

Cary L. Flitter, Pa. No. 35047
Andrew M. Milz, Pa. No. 207715
Flitter Lorenz, P.C.
450 N. Narberth Avenue, Suite 101
Narberth, PA 19072
Tel: (610) 822-0782
Fax: (610) 667-0552

Carolyn L. Carter, Pa. No. 49368
National Consumer Law Center®
7 Winthrop Square

Boston, MA 02110
Tel: (617) 542-8010
Fax: (617) 542-8028

Attorneys for Amici Curiae, National Consumer Law Center, National Association of Consumer Advocates, and Community Legal Services, Inc.

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 13,804 words according to the count of Microsoft Word, not exceeding the 14,000 word limit.

Date: May 23, 2014

Michael J. Quirk, Esq. (204677)
Williams Cuker Berezofsky, LLC
1515 Market Street, Suite 1300
Philadelphia, PA 19102
Tel: (215) 557-0099
Fax: (215) 557-0673

CERTIFICATE OF SERVICE

I, Joseph Alan Venti, do hereby certify that I caused copies of the foregoing Brief of Amici Curiae to be served upon the persons indicated below, by First Class U.S. Mail, which service satisfies the requirements of Pa. R. A. P. 121:

Theodore H. Jobes, Esq.
FOX ROTHSCHILD LLP
2000 Market Street, 20th Floor
Philadelphia, PA 19103
(215) 299-2000
Counsel for Appellant Enterprise Leasing Co. of Philadelphia, LLC

G. Franklin McKnight, IV, Esq./ Claudia Drennan McCarron, Esq.
NELSON, LEVINE, DELUCA & HORST, L.L.C.
518 Twp. Line Rd. Ste. 300
Blue Bell, PA 19422
(215) 358-5100

&

James C. Haggerty, Esq./ James M. Alexander, Esq.
HAGGERTY, GOLDBERG, SCHLEIFER & KUPERSMITH, P.C.
1835 Market Street, Suite 2700
Philadelphia, PA 19103
(267) 350-6600
Counsel for Appellee Christina Grimes

Michael L. Kichline, Esq./ Will W. Sachse, Esq./ Joseph McFarlane, Esq.
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104-2808
(215) 994-4000
Counsel for PA Business Council, PA Chamber of Business & Industry, and PA Food Merchants Association, Appellant Amici Curiae

D. Alicia Hickok, Esq./ Todd N. Hutchison, Esq.
DRINKER BIDDLE & REATH LLP
One Logan Square, Suite 2000
Philadelphia, PA 19103
(215) 988-3364
Counsel for Truck Renting and Leasing Association and the Industry Council for Vehicle Renting and Leasing, Appellant Amici Curiae

William R. Caroselli, Esq./ David Samuel Senoff, Esq.
CAROSELLI, BEACHLER, MCTIERNAN & CONBOY, L.L.C.
1845 Walnut St., Floor 15
Philadelphia, PA 19103
(215) 609-1350
Counsel for Pennsylvania Association for Justice, Appellee Amicus Curiae

Adrian Nathaniel Roe, Esq./ Charles B. Watkins, Esq.
LAW OFFICE OF ADRIAN N. ROE, P.C.
The Gulf Tower, Suite 1331
707 Grant Street
Pittsburgh, PA 15219
(412) 434-8187
Counsel for Class Action Overcharge Plaintiffs, Appellee Amicus Curiae

Date: May 23, 2014

Joseph Alan Venti, Esq. (209799)
Williams Cuker Berezofsky LLC
1515 Market Street, Suite 1300
Philadelphia, PA 19102
Tel: (215) 557-0099
Fax: (215) 557-0673

Co-counsel for Amici Curiae, National Consumer Law Center, National Association of Consumer Advocates, and Community Legal Services, Inc.