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## Forum Choice a Key Issue in Pa. Consumer Protection Law Cases



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In 1968, the Pennsylvania Legislature passed the Unfair Trade Practices and Consumer Protection Law in order to protect the public from businesses engaging in fraud and unfair or deceptive practices. Specifically, Section 201-2 of the act provides 20 different prohibited activities that fall under what the act labels "unfair methods of competition" and "unfair or deceptive acts or practices." (See 73 P.S. § 201-2(4).)

Examples of these activities include making false representations about the characteristics or origin of products, using false advertising, misrepresenting price and incentives, failing to comply with written warranties and performing substandard repairs. In addition to the 20 specifically enumerated activities, Section 201-2 of the act includes a catchall provision for a party engaging "in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding." Although the catchall provision appears broad on its face, courts in Pennsylvania have narrowed its application by requiring a party to prove all the elements of common law fraud. (See the Superior Court's 2000 opinion in *Booze v. Allstate Ins. Co.* )

While enforcement of the Unfair Trade Practices and Consumer Protection Law can be by the attorney general and district attorney bringing an action on behalf of the commonwealth, the more likely method of enforcement — and the true teeth of the act — is litigation brought by individual consumers. Under the act, individual consumers of goods or services used for "personal, family or household purposes" can bring a private cause of action and potentially recover treble damages, attorney fees and costs. The potential for treble damages and recovery of attorney fees serves as an incentive for businesses to comply with the act and for consumers to commence litigation when businesses do not. This incentive, however, has significantly diminished in Pennsylvania's federal courts since the 3rd U.S. Circuit Court of Appeals' decision in *Werwinski v. Ford Motor Co.* in 2002.

In *Werwinski* , the 3rd Circuit considered whether the economic loss doctrine barred claims under the act. Because the state Supreme Court had not addressed this question, the 3rd Circuit predicted how it thought the Supreme Court would rule. In formulating its prediction, the 3rd Circuit relied solely on a case from the Western District of Wisconsin and a case from the Supreme Court of Connecticut — neither of which involved the act, but instead their respective state consumer fraud statutes — and predicted that the Pennsylvania Supreme Court would hold that the economic loss doctrine would bar claims under the act in the same way as common law fraud claims.

The 3rd Circuit in *Werwinski* , quoting the Western District of Wisconsin, explained that exempting statutory fraud claims — such as the act — from the effects of the economic loss doctrine would virtually nullify the doctrine. Since

the holding in *Werwinski*, the Eastern District has held on numerous occasions, after extensive and arguably contradictory analysis in dicta, that its hands are bound and that it has no latitude to deviate from the 3rd Circuit's prediction and application of the economic loss doctrine to the act. (See, e.g., the 2009 case *DeFebo v. Andersen Windows Inc.*.)

After the 3rd Circuit established the precedent in *Werwinski* requiring federal courts to dismiss claims under the act because of the economic loss doctrine, the lower Pennsylvania state courts began addressing the same issue and were reaching the opposite conclusion.

In September 2002, only months after the decision in *Werwinski*, the Pennsylvania Court of Common Pleas in *Zwiercan v. General Motors Corp.* held that a consumer's claim under the act against a car manufacturer for breach of implied warranty was not barred by the economic loss doctrine even though the consumer was only seeking economic damages. A month later, the Pennsylvania Court of Common Pleas addressed the issue again in *Oppenheimer v. York Int'l* and held that a consumer's recovery under the act against an HVAC manufacturer for fraud and intentional tort was not barred by the economic loss doctrine. Again, the Court of Common Pleas addressed this issue in *Smith v. Reinhart Ford* and held that a consumer's claim under the act against a car dealer for misrepresentations was not barred by the economic loss doctrine.

Interestingly, in *Zwiercan*, the Court of Common Pleas agreed with the 3rd Circuit's opinion in *Werwinski* that there are certain cases where the economic loss doctrine should apply to bar statutory claims. However, it also found that a blanket application of the economic loss doctrine to the act fails to address the purpose for which the act was created and, therefore, does not bar claims under the act. Specifically, the court in *Zwiercan* held: "To apply the economic loss doctrine to all claims under the [act] has the potential to eviscerate the [act] itself." The court in *Oppenheimer* added, "It defeats the statute's purposes, particularly its provisions for private consumer actions, to apply the economic loss doctrine to bar the claims it created." Finally, the court in *Smith* held that allowing "the economic loss doctrine to bar plaintiff's UTPCPL claim would eviscerate the purpose of the statute, which the legislature enacted with full knowledge of the existence of common-law contract remedies. [citation omitted] Knowing, then, of such remedies, and still providing relief under the UTPCPL, the legislature did not intend the economic loss doctrine to bar such relief."

In each of the above state court cases addressing this issue, the courts allowed consumers to maintain claims under the act for purely economic damages that would have been barred by the economic loss doctrine had they been brought in federal court. This split between the courts highlights a fundamental difference in how the 3rd Circuit and Pennsylvania's state courts approached this issue. While the 3rd Circuit's primary concern was that the act would nullify the economic loss doctrine, Pennsylvania's lower state courts' primary concern was that the 3rd Circuit's blanket application of the economic loss doctrine would nullify the act.

Notably, Pennsylvania state courts, unlike Pennsylvania federal courts, have the freedom to take this position because they are not bound by opinions issued by Pennsylvania's federal courts or the 3rd Circuit and, therefore, have no obligation to follow the prediction in *Werwinski* . Conversely, Pennsylvania's trial-level federal courts are required to follow predictions by the 3rd Circuit, but are not bound by lower-level state courts. For this reason, although many recent federal court opinions addressing this issue recognize the decisions in *Zwiercan* , *Oppenheimer* and *Smith* , they are bound to follow the prediction in *Werwinski* and bar any claims under the act.

The conflict between Pennsylvania's state and federal courts regarding the economic loss doctrine's applicability to the Unfair Trade Practices and Consumer Protection Law creates an interesting dilemma for plaintiffs. The law of Pennsylvania, in its present state, allows for the recovery of treble damages, attorney fees and costs for claims brought under the act in state court, even if the claim is for only economic damages, but precludes those very same claims if brought in federal court. Thus, in order for a plaintiff to benefit from the damages established by Pennsylvania's Legislature under the act, that plaintiff's counsel needs to ensure that his or her claims are filed in state court and that the defendant cannot remove the matter to federal court.

The significance of choosing the correct forum to bring claims under the act can be easily overlooked. While counsel filing claims under the act are generally aware of the differences between state and federal court procedural law, they are not necessarily aware of the differences between the two courts in applying state substantive common law, such as the economic loss doctrine. This is primarily because the choice of forum is not supposed to affect substantive rights.

While the current state of the law in Pennsylvania's courts is not ideal, it is not going to change until either the 3rd Circuit reconsiders the issue and overturns its opinion in *Werwinski* , the Supreme Court of Pennsylvania considers the issue and resolves the conflict between the state and federal courts, or Pennsylvania's Legislature amends the act to address the applicability of the economic loss doctrine. Until one of these three events occurs, claimants under the act have no choice but to bring claims in state court and hope that they can defeat diversity and removal to federal court. •

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