

COMMENTS

THE PRICE OF COMPLIANCE: CONSUMER PROTECTION LAW AS A MEANS TO RECOVER RENT COLLECTED BY UNLICENSED PHILADELPHIA LANDLORDS*

I. INTRODUCTION

Renting an apartment can, in some ways, be like buying a gallon of milk. Imagine you are in a supermarket dairy aisle. Being a prudent consumer, you might check the expiration date on the container. Even the savviest shopper, however, would not think to chemically analyze the product to ensure that what they are purchasing is indeed milk. Instead, consumers place their faith in a regulatory scheme,¹ trusting that a system of laws, rules, and consequences are regulating the conduct of producers and merchants. Such rules recognize the obstacles that modern consumers face, including disparities in knowledge between transacting parties, the increasing complexity of products, and the need for a meaningful remedy where it is merited.

Residential tenants face similar challenges. Over time, courts took notice of the fact that issues like information disparity and the intricacy of the marketplace are at least as troublesome in the landlord-tenant context as they are elsewhere. Other entities acted as well. In Philadelphia, landlords must comply with certain licensing requirements to ensure minimum standards of tenant health and safety.² These measures create a regulatory regime in which tenants place their trust, much like the shopper in the dairy aisle.

Whether landlords or grocers, regulation is only effective if injured individuals have recourse when parties fail to comply with their respective regulatory schemes. While licensing is an important component of the regulatory framework, Philadelphia has not provided an enforcement method strong enough to ensure conformity. Under the existing ordinance, a landlord may not collect rent if they do not possess a rental license.³ However, there is no way to recover rent unwittingly paid to an unlicensed landlord under contract or equity principles.⁴ This conclusion presumes that tenants of unlicensed landlords receive the full benefit of their bargain and fails to consider that tenants suffer harm when placing their trust in a system that does not adequately ensure compliance.

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1. A regulatory scheme is a framework “composed of regulations promulgated by an authoritative body,” such as that which polices food safety. *Scheme*, BLACK’S LAW DICTIONARY (11th ed. 2019).

2. See PHILA., PA., CODE § 9-3902(1)(a) (2020).

3. *Id.*

4. Goldstein v. Weiner, No. 3964, 2011 Phila. Ct. Com. Pl. LEXIS 419, at *9–10 (Pa. Ct. Com. Pl. Phila. Cnty. Dec. 14, 2011).

One possible avenue for recourse is Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL).⁵ The UTPCPL permits individual consumers to bring a private action against entities engaged in business practices that tend to cause confusion or misapprehension.⁶ Given the broad proscription against misleading business activity under state law, applying the UTPCPL where there are violations of Philadelphia's rental licensing requirement is an example of how consumer protection law can more fully protect tenants. Specifically, when a tenant leases a property and subsequently determines that their landlord is unlicensed, the fact that they suffered as a result of misplaced faith in the statutory regime governing landlord licensing should constitute justifiable reliance and ascertainable loss for purposes of establishing a private action against the landlord under the UTPCPL.

This Comment proceeds in two Sections. Section II provides a historical overview of both consumer protection and landlord-tenant law, including the treatment of tenants as consumers under the law. Section III explains why the UTPCPL is a tool well suited for addressing the plight of Philadelphia tenants with unlicensed landlords and describes how such tenants can bring a claim under the law.

II. OVERVIEW

Tenants exist at an interesting legal intersection. On one hand, the landlord-tenant relationship is rooted in real property law tracing its origins to the sixteenth century.⁷ On the other, tenants are also consumers protected by modern consumer protection law.⁸ This juxtaposition results from the historical expansion of both tenant and consumer protections.

Part II.A summarizes the history of state consumer protection laws, including the UTPCPL. Part II.B then provides a historical overview of landlord-tenant law and an introduction to current housing regulations in Philadelphia. Part II.D describes how courts have come to see tenants as consumers transacting for goods and services.

A. A Brief History of State Consumer Protection Laws

Historically, the common law doctrine of *caveat emptor* meant that “the consumer . . . was unable to place liability on the supplier of goods.”⁹ In fact, a consumer's only remedy was to sue for fraud or deceit—a tall order given the strict pleading requirements and ample defenses available to suppliers.¹⁰ The predominance of

5. 73 PA. STAT. AND CONS. STAT. ANN. §§ 201-1 to -9.3 (West 2020).

6. *Id.* §§ 201-2(4)(xxi), -9.2.

7. See Barbara Jo Smith, *Tenants in Search of Parity with Consumers: Creating a Reasonable Expectations Warranty*, 72 WASH. U. L.Q. 475, 477 (1994).

8. See *infra* Part II.D for an overview of how tenants came to be viewed as consumers.

9. James H. Backman, *The Tenant as a Consumer? A Comparison of Developments in Consumer Law and in Landlord/Tenant Law*, 33 OKLA. L. REV. 1, 5 (1980). *Caveat emptor* is Latin for “let the buyer beware,” implying that a purchaser buys at their own risk. *Caveat*, BLACK'S LAW DICTIONARY (11th ed. 2019).

10. Backman, *supra* note 9.

this doctrine was consistent with the laissez-faire approach to business regulation that was prevalent through the nineteenth century.¹¹

Congress established the Federal Trade Commission (FTC) in 1914.¹² At first, the FTC was primarily concerned with protecting business interests by regulating unfair methods of competition.¹³ However, Congress expanded the FTC's mandate in 1938 to prohibit deceptive and unfair trade practices with the intention of affording consumers the same protections from unfair practices.¹⁴ Despite the FTC's wider mandate, the agency had limited resources, and courts repeatedly declined to construe the FTC's authorizing statute to provide a private right of action.¹⁵ Further, many instances of consumer abuse occurred at the state and local level, making it impossible for federal authorities to enforce federal protections in any meaningful way.¹⁶

In response, the National Conference of Commissioners on Uniform State Laws proposed a model statute for state adoption in 1964.¹⁷ This first attempt proved insufficient: plaintiffs were only entitled to attorneys' fees in some cases and were afforded only injunctive relief.¹⁸ The second attempt was a set of three model consumer protection statutes—developed by the Council of State Governments in partnership with the FTC—that allowed states to choose the best fit.¹⁹ The model statute proved successful; every state had its own consumer protection law by the mid-1970s.²⁰

This federal-state partnership was driven by three main policy goals.²¹ The first was leveling the imbalance of power and knowledge in the marketplace.²² As products and advertising became increasingly complex, it became less feasible for consumers to protect their own interests in the open marketplace.²³ The second was to render the litigation of small claims economical by allowing for the recovery of attorneys' fees in some instances and punitive damages in others.²⁴ The third was to deter other potentially unfair or deceptive acts by establishing a private right of action.²⁵ The FTC urged states to allow for a private right of action to achieve the goals of consumer protection without direct government intervention.²⁶

11. See J.R. Franke & D.A. Ballam, *New Applications of Consumer Protection Law: Judicial Activism or Legislative Directive?*, 32 SANTA CLARA L. REV. 347, 351 (1992).

12. Megan Bittakis, *Consumer Protection Laws: Not Just for Consumers*, 13 WYO. L. REV. 439, 442 (2013).

13. See *id.*

14. Franke & Ballam, *supra* note 11, at 355–56.

15. Note, *Toward Greater Equality in Business Transactions: A Proposal To Extend the Little FTC Acts to Small Businesses*, 96 HARV. L. REV. 1621, 1621–22 (1983) [hereinafter *Toward Greater Equality in Business Transactions*].

16. Franke & Ballam, *supra* note 11, at 357.

17. Bittakis, *supra* note 12, at 443.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Toward Greater Equality in Business Transactions*, *supra* note 15, at 1625.

22. *Id.*

23. Franke & Ballam, *supra* note 11, at 356.

24. *Toward Greater Equality in Business Transactions*, *supra* note 15, at 1626.

25. *Id.*

26. Franke & Ballam, *supra* note 11, at 357.

This legislative revolution reached Pennsylvania in the form of the state's UTPCPL, which restricts deceptive or misleading practices in commerce.²⁷ The law lists a set of twenty-one prohibited practices or acts, including a catchall provision which prohibits "any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding."²⁸ Courts have construed the UTPCPL's "embracive mandate" as applying "liberally to effect its object of preventing unfair or deceptive practices."²⁹

There are two mechanisms by which the UTPCPL may be enforced. First, the Pennsylvania attorney general or a district attorney may bring an action in the name of the Commonwealth to address violations when doing so would be "in the public interest."³⁰ This approach was the only mode of enforcement authorized by the law as originally enacted in 1968 until the legislature amended it to include a private right of action for consumers in 1976.³¹ Even if the attorney general or district attorney were not limited by this statutory "public interest" requirement, the high volume of consumer complaints would mean that the attorney general's office could directly address only a fraction of potential violations.³²

In addition to empowering the attorney general to enforce the law,³³ the UTPCPL provides that a private individual "may bring a private action to recover actual damages or one hundred dollars (\$100), whichever is greater."³⁴ The Superior Court of Pennsylvania in *Keller v. Volkswagen of America, Inc.*³⁵ outlined the requirements for stating a valid private cause of action under the UTPCPL.³⁶ The court determined that to state a claim, a private plaintiff must show the following:

- 1) that he or she is a purchaser or lessee; 2) that the transaction is dealing with "goods or services"; 3) that the good or service was primarily for personal, family, or household purposes; and 4) that he or she suffered damages arising from the purchase or lease of goods or services.³⁷

To satisfy the fourth prong of this test, the plaintiff must demonstrate an "ascertainable loss,"³⁸ the nature of which must be established based on the specific facts

27. 73 PA. STAT. AND CONS. STAT. ANN. § 201-3 (West 2020).

28. *Id.* § 201-2(4)(i)-(xxi).

29. Commonwealth *ex rel.* Creamer v. Monumental Props., Inc., 329 A.2d 812, 815-17 (Pa. 1974).

30. 73 PA. STAT. AND CONS. STAT. ANN. § 201-4 (West 2020).

31. Charlotte E. Thomas, *The Quicksand of Private Actions Under the Pennsylvania Unfair Trade Practices Act: Strict Liability, Treble Damages, and Six Years To Sue*, 102 DICK. L. REV. 1, 3 (1997).

32. See Bureau of Consumer Protection, COMMONWEALTH OF PA. OFF. OF ATT'Y GEN., <http://www.attorneygeneral.gov/public-protection-division/bureau-consumer-protection/> [<http://perma.cc/4HL3-3YV6>] (last visited Apr. 1, 2022) (describing the development of a statewide mediation program due to the large number of consumer complaints filed each year); Barbara Mishkin, *Leader of PA AG's Consumer Financial Protection Unit Describes Active Agenda in Ballard Spahr Webinar*, JD SUPRA (Sept. 5, 2019), <http://www.jdsupra.com/legalnews/leader-of-pa-ag-s-consumer-financial-92213> [<http://perma.cc/BSN3-YMRX>].

33. 73 PA. STAT. AND CONS. STAT. ANN. § 201-4.

34. *Id.* § 201-9.2(a).

35. 733 A.2d 642 (Pa. Super. Ct. 1999).

36. See *Keller*, 733 A.2d at 646.

37. *Id.* (citing 73 PA. STAT. AND CONS. STAT. ANN. § 201-9.2).

38. 73 PA. STAT. AND CONS. STAT. ANN. § 201-9.2(a).

of each case.³⁹ A plaintiff is entitled to relief only where such a loss is “actual, non-speculative, [and] identifiable.”⁴⁰ Notably, the loss must be tied to the transaction at issue rather than to any ancillary expenses,⁴¹ and damages cannot be speculative.⁴²

Beyond establishing a prima facie case, to prevail in court, “a plaintiff must then prove the following: 1) the defendant was engaged in unfair methods of competition and unfair or deceptive acts or practices, and 2) the transaction between plaintiff and defendant constituted ‘trade or commerce’ within the meaning of the UTPCPL.”⁴³ If the plaintiff succeeds, the law empowers the court to award up to treble damages, attorneys’ fees, and, if appropriate, injunctive relief.⁴⁴ The remedies afforded under the UTPCPL are not exclusive but rather “are in addition to other causes of action and remedies.”⁴⁵

Under the UTPCPL, a plaintiff may recover the greater of either one hundred dollars or actual damages.⁴⁶ The law also provides the court with discretion to award up to treble damages, though the statute is silent as to when such awards should be granted.⁴⁷ The Superior Court of Pennsylvania addressed this issue in the context of deception in auto sales in *Johnson v. Hyundai Motor America*,⁴⁸ stressing that imposing treble damages served a punitive and deterrent role.⁴⁹ The superior court determined that trial courts should only award punitive damages—such as UTPCPL treble damages—where the defendant engaged in conduct that was “malicious, wanton, willful, oppressive, or exhibited a reckless indifference to the rights of others.”⁵⁰ The superior court addressed such damages in the landlord-tenant context in *Nexus Real Estate, L.L.C. v. Erickson*,⁵¹ finding that treble damages were appropriate where the defendant management company failed to repair serious damage to the plaintiff’s apartment despite months of repeated and false assurances that the issue would be addressed.⁵²

The UTPCPL is not clear on whether a plaintiff must prove the elements of common law fraud in order to bring an action under the catchall provision. Confusion on this issue arose because of a 1996 amendment to the UTPCPL, expanding section 201-2(4)(xxi) of the law to include not only fraudulent but also deceptive conduct.⁵³

39. *Agliori v. Metro. Life Ins. Co.*, 879 A.2d 315, 321 (Pa. Super. Ct. 2005).

40. *See Marshall v. Abdoun (In re Marshall)*, 613 B.R. 194, 214 (Bankr. E.D. Pa. 2020).

41. *See, e.g., Grimes v. Enter. Leasing Co. of Phila.*, 105 A.3d 1188, 1193 (Pa. 2014) (per curiam) (holding that plaintiff did not suffer “ascertainable loss” by hiring an attorney to bring the claim).

42. *See Marshall*, 613 B.R. at 214 (“Only an actual, non-speculative, identifiable loss constitutes an ascertainable loss for purposes of the UTPCPL.”).

43. *See Keller v. Volkswagen of Am., Inc.*, 733 A.2d 642, 646–47 (Pa. Super. Ct. 1999).

44. *See* 73 PA. STAT. AND CONS. STAT. ANN. § 201-9.2(a) (West 2020).

45. *Wallace v. Pastore*, 742 A.2d 1090, 1093 (Pa. Super. Ct. 1999) (citing *Gabriel v. O’Hara*, 534 A.2d 488, 495 & n.22 (Pa. Super. Ct. 1987)).

46. 73 PA. STAT. AND CONS. STAT. ANN. § 201-9.2(a).

47. *Id.*

48. 698 A.2d 631 (Pa. Super. Ct. 1997).

49. *Johnson*, 698 A.2d at 639.

50. *Id.* at 639.

51. 174 A.3d 1 (Pa. Super. Ct. 2017).

52. *Nexus*, 174 A.3d at 6 (“[Defendant] Nexus’s false promises and inaction was [sic] ‘cruel and callous behavior,’ and the type of intentional or reckless, wrongful conduct that warranted treble damages . . .”).

53. *See* Act of Dec. 4, 1996, Pub. L. No. 906, No. 146, 1996 Pa. Legis. Serv. 146 (West).

Because the original language of the statute specifically prohibited fraudulent practices, courts had stated that “[i]n order to state a claim under the catchall provision of the [UTCPL], a plaintiff must prove the elements of common law fraud.”⁵⁴ The courts reasoned that a plaintiff should still have to plead and prove the elements of justifiable reliance and causation because the legislature “never intended [the] statutory language directed against consumer fraud to do away with the traditional common law elements” in passing the UTCPL.⁵⁵ These requirements necessitate a finding that an alleged fraudulent representation was “made falsely, with knowledge of its falsity or recklessness as to whether it is true or false.”⁵⁶ The Supreme Court of Pennsylvania has also determined that while “‘reliance’ can mean ‘reasonable reliance’ or ‘justifiable reliance’ or bare ‘reliance in fact,’ . . . a plaintiff alleging violations of the [UTCPL] must prove justifiable reliance.”⁵⁷

Even with the state legislature’s 1996 amendment to prohibit deceptive practices under the UTCPL, courts continued to cling to the common law fraud requirement “without discussing or even acknowledging the amended provision.”⁵⁸ However, in *Dixon v. Northwestern Mutual*,⁵⁹ the Superior Court of Pennsylvania determined that fraudulent misrepresentation was not the only type of misrepresentation that was prohibited by the UTCPL.⁶⁰ In that case, the court—in the process of analyzing a separate legal issue—faced the question of whether a claim of *negligent* misrepresentation could form the basis of a UTCPL claim.⁶¹ The court concluded that it could, reasoning that when the legislature expanded the catchall provision beyond fraud to include deceptive practices, it made negligent deception or misrepresentation actionable by that same amendment.⁶²

Four years later in *Gregg v. Ameriprise Financial, Inc.*⁶³ (*Gregg I*), the Superior Court of Pennsylvania definitively abrogated the requirement of proving common law fraud to assert a claim under the catchall provision.⁶⁴ The plaintiffs in *Gregg I* sued their financial advisor, alleging fraudulent misrepresentation, negligent misrepresentation, and violation of the UTCPL.⁶⁵ The defendant, relying on prior cases that found that

54. *Booze v. Allstate Ins. Co.*, 750 A.2d 877, 880 (Pa. Super. Ct. 2000), *abrogated by* *Gregg v. Ameriprise Fin., Inc.* (*Gregg II*), 245 A.3d 637 (Pa. 2021).

55. *DeArmitt v. New York Life Ins. Co.*, 73 A.3d 578, 592 (Pa. Super. Ct. 2013) (alteration in original) (quoting *Toy v. Metro. Life Ins. Co.*, 928 A.2d 186, 202 (Pa. 2007)).

56. *Milliken v. Jacono*, 60 A.3d 133, 140 (Pa. Super. Ct. 2012), *aff’d*, 103 A.3d 806 (Pa. 2014).

57. *Toy*, 928 A.2d at 201–02.

58. *Bennett v. A.T. Masterpiece Homes at BROADSPRINGS, L.L.C.*, 40 A.3d 145, 155 (Pa. Super. Ct. 2012); *see also* Stephen Buckingham, Comment, *Distinguishing Deception and Fraud: Expanding the Scope of Statutory Remedies Available in Pennsylvania for Violations of State Consumer Protection Law*, 78 TEMP. L. REV. 1025, 1038–41 (2005) (analyzing how the plain language of this change does not require proving the elements of fraud).

59. 146 A.3d 780 (Pa. Super. Ct. 2016).

60. *Dixon*, 146 A.3d at 790.

61. *Id.* at 789–90.

62. *Id.* at 790 (“The broadening of the UTCPL so as to not require fraud therefore *ipso facto* makes negligent deception, *e.g.*, negligent misrepresentations, actionable under the post–1996 catchall provision.”).

63. 195 A.3d 930 (Pa. Super. Ct. 2018), *aff’d*, 245 A.3d 637 (Pa. 2021).

64. *See Gregg I*, 195 A.3d at 939–40.

65. *Id.* at 934.

common law fraud was a necessary component of a UTPCPL claim, argued that a consumer must prove at least negligent misrepresentation in order to state a valid claim.⁶⁶ The proper result, the defendant asserted, is that the plaintiff's UTPCPL claim should fail because the jury at the trial level declined to find the defendant liable for negligent or fraudulent misrepresentation.⁶⁷

The superior court rejected the defendant's argument, finding instead that the statute imposed no requirement to prove common law fraud and that the appropriate standard is strict liability.⁶⁸ Drawing upon legislative history and existing precedent that liberally construed the UTPCPL, the court held that "any deceptive conduct, 'which creates a likelihood of confusion or of misunderstanding,' is actionable under 73 P.S. § 201-2(4)(xxi), whether committed intentionally (as in a fraudulent misrepresentation), carelessly (as in a negligent misrepresentation), or with the utmost care (as in strict liability)."⁶⁹

The *Gregg I* court further explained that because vendors have full control over how they comport themselves in business transactions, they are "in a much stronger position to fully comply with the UTPCPL before soliciting or interacting with customers," and, thus, "a UTPCPL violation . . . is not amendable to excuses."⁷⁰ Affirming the superior court's decision, the Supreme Court of Pennsylvania endorsed this reasoning, placing the burden of compliance on vendors.⁷¹ Specifically, the court reiterated the principle that consumers have no control over how vendors comport themselves in the marketplace.⁷² Strict liability, therefore, is the appropriate standard in order to conform to the legislature's goal of eradicating deceptive acts in the consumer context.⁷³

B. General Principles of Landlord-Tenant Law: From Conveyance to Contract

The origins of common law rules pertaining to the relationship between landlords and tenants reflected the nature of the commodity typically at issue: agricultural land.⁷⁴ Tenants were bound to those duties that customarily arose from the conveyance of a possessory estate, such as avoiding waste by maintaining the premises in the same condition as it was in when the lease term began.⁷⁵ The landlord's primary obligation was to turn over possession of the land and leave the tenant in quiet possession.⁷⁶ Put differently, "the landlord was not being paid to do anything."⁷⁷

66. *Id.* at 936.

67. *Id.* at 935–36.

68. *Id.* at 939.

69. *Id.*

70. *Id.* at 939–40.

71. *Gregg v. Ameriprise Fin., Inc.* (Gregg II), 245 A.3d 637, 650 (Pa. 2021).

72. *Id.* ("Representations made in the consumer context are within the exclusive control of the vendor.").

73. *Id.*

74. Hiram H. Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years*, 9 U. KAN. L. REV. 369, 371 (1961).

75. *Id.*

76. Thomas M. Quinn & Earl Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225, 227 (1969).

77. *Id.* at 228.

With respect to the conditions of the leased premises, courts relied on the common law rule of caveat emptor, requiring the tenant to assume the risk of substandard structures.⁷⁸ This doctrine developed at a time when structures upon the land were a secondary consideration.⁷⁹ For this reason, and for those above, the landlord had few obligations to warrant the fitness of the leased premises for habitability or to make repairs during the course of the tenancy.⁸⁰ Further, the covenants made by the tenant and landlord—namely, payment of rent in exchange for possession—were seen as independent from warranting habitability.⁸¹

The result was a “two level relationship.”⁸² Level one consisted of the tenant’s possessory interest.⁸³ Level two involved the landlord’s legal obligation to provide basic habitability in the form of heat, water, and the like.⁸⁴ The upshot was that the tenant was obligated to pay rent even if the landlord failed to deliver on a promise of habitability.⁸⁵ Withholding rent was not an option for tenants, and doing so was likely to result in a rapid eviction.⁸⁶

Over time, however, courts recognized that residential leases were less about the underlying land and more about the actual structures.⁸⁷ The trend away from caveat emptor and independent covenants gained significant momentum in 1970 with the United States Court of Appeals for the District of Columbia Circuit decision in *Javins v. First National Realty Corp.*⁸⁸ In *Javins*, the landlord filed to recover possession of the leased premises due to the tenants’ failure to pay rent.⁸⁹ The tenants responded by arguing that the property had over 1,500 violations of local housing regulations.⁹⁰

The court reasoned that the old rule was out of touch with principles of modern contract law, which “recognized that the buyer of goods and services in an industrialized society must rely upon the skill and honesty of the supplier to assure that goods and services purchased are of adequate quality.”⁹¹ The *Javins* court drew upon “principles derived from the consumer protection cases” it had surveyed to find that the District of Columbia Housing Code implied a warranty of habitability.⁹² The court further held that

78. 2 POWELL ON REAL PROPERTY § 16B.04 (2020).

79. *Id.*

80. *Id.*

81. *See* Quinn & Phillips, *supra* note 76, at 228–29, 233.

82. *Id.* at 233.

83. *Id.*

84. *Id.* at 233–34.

85. *Id.* at 234.

86. *Id.*; *see also id.* at 228–29 n.4 (“The net result of the process was to make the tenant’s right to possession and enjoyment of the premises so dependent on the payment of rent that summary procedures were readily available to assure that either the tenant paid the rent or was evicted.”).

87. 2 POWELL ON REAL PROPERTY § 16B.04 (2020).

88. 428 F.2d 1071 (D.C. Cir. 1970).

89. *Javins*, 428 F.2d at 1073.

90. *Id.*

91. *Id.* at 1075.

92. *Id.* at 1075, 1079. (“In interpreting most contracts, courts have sought to protect the legitimate expectations of the buyer and have steadily widened the seller’s responsibility for the quality of goods and services through implied warranties of fitness and merchantability.”).

a tenant's obligation to pay rent depended on a landlord's performance, "including his warranty to maintain the premises in habitable condition."⁹³

Following *Javins*, the majority of states have eschewed the doctrine of caveat emptor in residential leases in favor of an implied warranty of habitability either by appellate court rulings or statute.⁹⁴ In Pennsylvania, this occurred as a result of the Supreme Court of Pennsylvania's 1979 decision in *Pugh v. Holmes*.⁹⁵

In *Pugh*, the Supreme Court of Pennsylvania affirmed a superior court ruling that abolished caveat emptor for many of the reasons outlined in *Javins*, including a shift towards imposing contract principles upon residential leases and a greater disparity in bargaining power and knowledge between landlord and tenant.⁹⁶ As in *Javins*, the supreme court noted that housing code violations, though not necessarily dispositive, were considerations for the trier of fact to evaluate when determining whether a material breach of the warranty occurred.⁹⁷ If a material breach persisted after the tenant provided notice and opportunity for the landlord to make repairs, the tenant may vacate the premises and raise the issue of conformity to the implied warranty of habitability as a defense if the landlord sues for unpaid rent.⁹⁸

In *Fair v. Negley*,⁹⁹ the Superior Court of Pennsylvania further expanded the role of the implied warranty of habitability holding that, in addition to serving as a defense or counterclaim, "the warranty also may be used as the basis for a complaint."¹⁰⁰ If there is a material breach of the warranty, remedies include recovery of the difference between rent paid and the reasonable rental value of the premises, any amount spent to make the home habitable, and any utility bills determined by the fact finder to be excessive due to the condition of the premises.¹⁰¹

Critically, the *Fair* court found as a matter of public policy that the implied warranty of habitability cannot be waived despite *Pugh*'s treatment of residential leases as contracts.¹⁰² The court reasoned that several factors militate against a purely contractual understanding of residential leases, including concerns for public health and safety.¹⁰³ The court pointed to a notice of housing violations against the landlord as a concrete example of what can occur when tenants are allowed—or compelled—to waive the warranty of habitability.¹⁰⁴

93. *Id.* at 1082.

94. 2 POWELL ON REAL PROPERTY § 16B.04 (2020).

95. 405 A.2d 897 (Pa. 1979).

96. *Pugh*, 405 A.2d at 902–03.

97. *See id.* at 905–06. The court declined to explicitly connect breach of the warranty with housing code violations, noting the Commonwealth (and many municipalities) had not adopted housing regulations. *Id.*

98. *See id.* at 906–07.

99. 390 A.2d 240 (Pa. Super. Ct. 1978). The superior court decided *Fair* in the same term as *Pugh*, but the Supreme Court of Pennsylvania did not affirm *Pugh* until one year later. *See Pugh*, 405 A.2d at 903.

100. *Fair*, 390 A.2d at 242.

101. *Id.* at 242–43.

102. *Id.* at 243.

103. *Id.*

104. *Id.* at 243–44.

C. Housing Regulations and Rental Licensing in Philadelphia

The Philadelphia Code¹⁰⁵ (“the Code”) has several components that are the foundation of the city’s regulatory framework governing the landlord-tenant relationship.¹⁰⁶ The Code requires that most landlords obtain a license from the city.¹⁰⁷ The Code also dictates that landlords must obtain and provide all tenants “a Certificate of Rental Suitability that was issued by the Department no more than sixty days prior to the inception of the tenancy.”¹⁰⁸ While a single rental license may cover an entire building,¹⁰⁹ a Certificate of Rental Suitability must be provided to new residents “at the inception of each tenancy.”¹¹⁰ The ordinance further stipulates that “[n]o person shall collect rent with respect to any property that is required to be licensed . . . unless a valid rental license has been issued for the property.”¹¹¹

However, as the Philadelphia County Court of Common Pleas determined in *Goldstein v. Weiner*,¹¹² a tenant may not sue their landlord for reimbursement of payments made while the landlord lacked a valid license.¹¹³ Critically, the court found that in addition to providing city government critical information about rental properties in Philadelphia, the licensing regime was “enacted in the interest of protecting the health, safety and welfare of tenants and the general public.”¹¹⁴ For example, the city will not issue a license or certificate if it finds that there are outstanding violations under Title 4 of the Code, which contains the city’s building and occupancy regulations.¹¹⁵

Though important in their own right, building and maintenance codes may be of slight use to a tenant who can do little to compel compliance with those codes.¹¹⁶ Indeed,

105. PHILA., PA., CODE (2020).

106. The regulatory framework is “the sum of the ordinances, administrative systems, and operating practices” used to manage landlord behavior and to ensure a well-regulated rental housing market. ALAN MALLACH, CTR. FOR CMTY. PROGRESS, RAISING THE BAR: LINKING INCENTIVES AND RENTAL PROPERTY REGULATION 3 (2015), <http://www.metroplanning.org/uploads/cms/documents/raising-the-bar.pdf> [<http://perma.cc/Q994-WNDU>].

107. PHILA., PA., CODE § 9-3902(1). Owner-occupied units, units rented to family, and limited lodging rentals are excluded. *Id.* § 9-3902(1)(b); see also *Permits, Violations & Licenses*, CITY PHILA. (Oct. 19, 2021), <http://www.phila.gov/services/permits-violations-licenses/get-a-license/business-licenses-permits-and-approvals/real-estate/get-a-rental-license/> [<http://perma.cc/M98A-FU6M>].

108. PHILA., PA., CODE § 9-3903(1)(a) (2020).

109. *Id.* § 9-3902(1)(b)(1).

110. *Id.* § 9-3903(1)(a).

111. *Id.* § 9-3902(1)(a).

112. No. 3964, 2011 Phila. Ct. Com. Pl. LEXIS 419 (Pa. Ct. Com. Pl. Phila. Cnty. Dec. 14, 2011).

113. *Goldstein*, 2011 Phila. Ct. Com. Pl. LEXIS 419, at *9–10. Citing an unpublished (and apparently unlocatable) case, the court reasoned that because the tenant made voluntary payments and the landlord gave the tenant the full benefit of their bargain, “there was no basis under either contract or equity principles to order the landlord to disgorge the payments.” *Id.*

114. *Id.* at *15. The case cites the Philadelphia Property Maintenance Code (PMC) at PM-101.3. The original PMC was repealed and replaced in 2015 in order to enact the International Property Maintenance Code. The licensing provisions that were originally part of the PMC are still in effect but are now located under Title 9, Chapter 9-3900 of the Philadelphia Code. See PHILA., PA., CODE § 4, Subcode PM-101.3 (2020).

115. PHILA., PA., CODE § 9-3901(2)(b)(3) (2020). Title 4 of the Philadelphia Code includes, inter alia, the city’s fire, maintenance, environmental, and residential codes. See *id.* § 4-101.0.

116. Mary B. Spector, *Tenants’ Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 170 (2000).

Philadelphia landlords were in the habit of simply evicting tenants who reported code violations, which was one reason the city adopted its Fair Housing Ordinance.¹¹⁷ This law established a dedicated Fair Housing Commission with subpoena power to investigate unfair rental practices, such as landlords raising rent in retaliation for a tenant reporting a housing code violation.¹¹⁸ However, the commission's power is limited to enforcing the prohibition on the practices enumerated by the ordinance.¹¹⁹ Failure to maintain a rental license or collecting rent while unlicensed is not included in the list of prohibited acts.¹²⁰

Aside from the limitations of the ordinance itself, practical considerations limit the effectiveness of Philadelphia's rental licensing. One issue is the scale of noncompliance: in 2018, the city estimated that 52,000 rental units were unlicensed.¹²¹ The Department of Licenses and Inspections, charged with citing properties for building and maintenance code violations, is also stretched exceedingly thin because of a housing boom in the city.¹²² Further, the rental licensing ordinance does not require that an inspection take place for a license or Certificate of Rental Suitability to be issued.¹²³ Rather, the approval or denial of any license or certificate depends on whether there are any *existing*, open violations at the time of application.¹²⁴

Other practical concerns include Philadelphia's relatively old housing stock, which creates issues of affordability and code enforcement.¹²⁵ A tenant might attempt to avoid these complications by conducting research through public records.¹²⁶ However, access to these resources is subject to change based on the city's priorities.¹²⁷

117. PHILA., PA., CODE § 9-801 (2020).

118. *See id.* § 9-804(2)(b).

119. *See File a Complaint About Unfair Rental Practices*, PHILA. FAIR HOUS. COMM'N (Oct. 14, 2021), <http://www.phila.gov/services/crime-law-justice/file-a-complaint-about-unfair-rental-practices/> [<http://perma.cc/9ZLA-HB7E>] (“Not all complaints can be accepted by the commission. Some actions by your landlord may be unfair and possibly illegal, but they may not be considered unfair rental practices under the Fair Housing Ordinance.”).

120. *See* PHILA., PA., CODE § 9-804.

121. *See* Julia Terruso, *Rentals Lacking Licenses Test City*, PHILA. INQUIRER, Dec. 9, 2018, at B.1 (“In all, the city estimates 20 percent of the 260,000 rental units are unlicensed.”).

122. Michaelle Bond, *Amid Building Boom, L&I Can't Fill Slots*, PHILA. INQUIRER, Mar. 11, 2020, at B.1. In addition to performing inspections of rental units (such as when a tenant calls to report a code violation), the department also inspects construction projects and vacant properties, among other duties. *See Department of Licenses and Inspections: Divisions and Boards*, CITY PHILA. (Sept. 16, 2021), <http://www.phila.gov/departments/department-of-licenses-and-inspections/about/divisions/> [<http://perma.cc/N5A6-8C4G>].

123. *See* PHILA., PA., CODE § 9-3903(2)(b).

124. *See id.* § 9-3903(2)(b)(.2).

125. *See* Anna Kramer, *Old Homes, High Poverty Make Philadelphia Housing Less Than Affordable for Some*, WHY (July 25, 2018), <http://why.org/articles/old-homes-high-poverty-make-philadelphia-housing-less-than-affordable-for-some/> [<http://perma.cc/FKU6-8AGM>] (discussing how Philadelphia's aging homes often need extensive repairs that drive up costs, including for landlords who must either raise rents or allow their property to decline).

126. *See Property*, CITY PHILA., <http://property.phila.gov> [<http://perma.cc/KJ5D-WEZX>] (last accessed Apr. 1, 2022).

127. *See, e.g.*, Jacob Adelman, *You Can't Look Up Philly Property Owners by Name Anymore. City Cites 'Security Matters.'*, PHILA. INQUIRER (Sept. 22, 2020), <http://www.inquirer.com/business/philadelphia-lookup-property-name-searches-security-real-estate-kenney-m>

A growing population of renters is also straining the city's ability to manage rental licensing while raising issues for tenants seeking safe and affordable housing.¹²⁸ With an increasing number of tenants cost burdened—i.e., they spend more than thirty percent of their income on housing¹²⁹—the role of the rental licensing ordinance and the associated housing codes in promoting the health and safety of tenants has become increasingly important.¹³⁰

D. Tenants as Consumers

The overall trend of expanding tenant protections under a consumer law theory tracks the historical development of consumer protection laws more broadly in that courts have chipped away at older common law doctrines in favor of principles that expand consumer rights.¹³¹ In this way, the application of contract principles, such as dependent covenants and implied warranties in lease agreements, is part of a trend in the law recognizing residential tenants as a type of consumer.¹³²

The challenges faced by the modern consumer—namely, an inability to meaningfully inspect complex products and unequal bargaining power between purchaser and vendor—apply equally to tenants.¹³³ In some states, courts have extended consumer protection statutes to include lease agreements by using maneuvers such as analogizing the tenant to the prototypical consumer, determining that the relevant statute applied to residential leases, or finding that the landlords were engaging in sufficiently similar types of unfair or deceptive practices as vendors outside of the landlord-tenant context.¹³⁴

ayor-20200922.html [http://perma.cc/XA6W-EVED] (reporting on Philadelphia's sudden decision to prevent users from searching property records by owner name due to unspecified security concerns).

128. See Julia Terruso, *City for Rent*, PHILA. INQUIRER, Aug. 9, 2018, at A.11 (describing an increase in the proportion of Philadelphians renting their homes); see also SETH CHIZECK, FED. RSRV. BANK OF PHILA., GENTRIFICATION AND CHANGES IN THE STOCK OF LOW-COST RENTAL HOUSING IN PHILADELPHIA, 2000 TO 2014, at 2 (2017), <https://www.philadelphiafed.org/-/media/frbp/assets/community-development/reports/0117-cascade-focus-gentrification-and-changes.pdf> [http://perma.cc/J3GX-7TKP] (finding that Philadelphia lost twenty percent of its low-cost rental units between 2000 and 2014).

129. OCTAVIA HOWELL, PEW CHARITABLE TRS., THE STATE OF HOUSING AFFORDABILITY IN PHILADELPHIA 3, 6 (Larry Eichel, Erika Compart, Cindy Murphy-Tofig & Bernard Ohanian eds., 2020). The situation is worse for renters earning less than \$30,000 per year: sixty-eight percent of such households were cost burdened in 2018. *Id.* at 7.

130. As more affordable housing is lost to development and gentrification, a greater proportion of renters may find that they are no longer able to afford quality housing. CHIZECK, *supra* note 128, at 2. They may be forced into substandard living conditions as “the city’s lowest-cost properties are more likely to suffer from under-maintenance and neglect.” *Id.* at 5. This places increasing pressure on the city to ensure sufficient code enforcement because such enforcement is intended to protect the health and safety of tenants living in such situations. See *supra* notes 112–114.

131. See Backman, *supra* note 9, at 6–7 (discussing several areas in tort, consumer, and landlord-tenant law where courts have imposed greater liability on vendors and merchants).

132. See *id.* at 7.

133. See Smith, *supra* note 7, at 491.

134. See, e.g., *Carter v. Mueller*, 457 N.E.2d 1335, 1341–42 (Ill. App. Ct. 1983); *McGrath v. Mishara*, 434 N.E.2d 1215, 1222 (Mass. 1982); *Love v. Amsler*, 441 N.W.2d 555, 559 (Minn. Ct. App. 1989); 49 Prospect St. Tenants Ass’n v. Sheva Gardens, Inc., 547 A.2d 1134, 1141–42 (N.J. Super. Ct. App. Div. 1988); *Yochim v.*

In *Commonwealth ex rel. Creamer v. Monumental Properties, Inc.*,¹³⁵ the Supreme Court of Pennsylvania concluded that the UTPCPL applies to transactions between landlords and tenants.¹³⁶ Focusing on the deterrent effect of the law, the supreme court held that the UTPCPL “is to be construed liberally to effect its object of preventing unfair or deceptive practices.”¹³⁷ The court characterized the landlord-tenant arrangement as analogous to any lessor-lessee relationship, writing that “[t]he contemporary leasing of residences envisions one person (landlord) exchanging for periodic payments of money (rent) a bundle of goods and services, rights and obligations.”¹³⁸ The court rejected the argument that leases do not technically convey passing of title, writing that “[h]inging the remedies of the [UTPCPL] on the passing of title simply fails to reflect fairly both modern economic conditions and, more importantly, the [l]egislature’s intent.”¹³⁹ Thus, the court held, “the leasing of residences falls within the ambit of the [UTPCPL].”¹⁴⁰

III. DISCUSSION

Because the Philadelphia rental licensing ordinance does not present an avenue by which tenants may recover rent paid to an unlicensed landlord, the UTPCPL should be used as a viable alternative. When a tenant enters into a lease, discovers habitability or maintenance issues at the property, and subsequently determines that their landlord is not complying with the rental licensing law, an ascertainable and legally cognizable loss for the purpose of establishing a private action under the UTPCPL is present.

Part A of this Section will set forth the policy rationale for bringing such tenants under the aegis of consumer protection law. Part B argues that a tenant whose landlord has collected rent despite being unlicensed has a legally cognizable claim for UTPCPL damages.

A. The Expansion of Private Actions Under the UTPCPL Will Meaningfully Address the Shortcomings of Existing Protections for Tenants as Consumers

Enforcement of the UTPCPL by the state is not a realistic or expedient way to address concerns of individual tenants. For one, the statute itself restricts enforcement by the state to those cases that relate to the public interest.¹⁴¹ The office charged with investigating consumer fraud and deception states that, based on the statutory public interest limitation, the scope of the office’s investigation typically includes patterns of fraudulent activity, practices that affect a large number of consumers, or situations involving large sums of money, among other things.¹⁴² This focused enforcement is necessary as a practical matter given the number of consumer complaints the attorney

McGrath, 626 N.Y.S.2d 685, 689 (Yonkers City Ct. 1995); *Love v. Pressley*, 239 S.E.2d 574, 583 (N.C. Ct. App. 1977); *L’Esperance v. Benware*, 830 A.2d 675, 681 (Vt. 2003).

135. 329 A.2d 812 (Pa. 1974).

136. *Monumental*, 329 A.2d at 820.

137. *Id.* at 817.

138. *Id.* at 820.

139. *Id.* at 823.

140. *Id.* at 820.

141. 73 PA. STAT. AND CONS. STAT. ANN. § 201-4 (West 2020).

142. COMMONWEALTH OF PA. OFF. OF ATT’Y GEN., *supra* note 32.

general's office receives each year.¹⁴³ While the attorney general enjoys far broader enforcement powers under the UTPCPL than private citizens, there is simply no way for the state to address every deceptive act or practice.

Permitting tenants to sue for back rent under the UTPCPL not only reduces the state's burden but also furthers three objectives of the statute and consumer protection law more broadly. First, a more liberal interpretation of the law addresses the issue of significantly mismatched bargaining power between landlords and tenants.¹⁴⁴ Prospective tenants realistically have two choices when presented with a lease agreement: accept or reject the terms as written.¹⁴⁵ The ability of a tenant to influence a landlord's compliance with the rental licensing laws (and, by extension, the municipal property code) is similarly constrained.¹⁴⁶ If tenants were able to recover money paid to an unlicensed landlord, there would be a greater incentive for landlords to comply with the licensing ordinance in the first place in order to avoid exposure to liability for deception or misleading conduct under the UTPCPL.¹⁴⁷

Second, broader tenant access to private actions under the UTPCPL will help mitigate the asymmetry of information between landlord and tenant. In Philadelphia, this asymmetry is worsened by the age and condition of the city's housing stock—the median age of a Philadelphia house is ninety-three years old, nearly thirty years older than the national median.¹⁴⁸ Further, as owner of the property, the landlord has much more information about the property for lease than the prospective tenant. In contrast, the tenant must rely on the City to provide the means to perform a meaningful inquiry into the status of the property, such as by publishing property records online.

While Philadelphia does publish code violations and rental licensing information,¹⁴⁹ there are at least two reasons why this alone is insufficient to address information asymmetry¹⁵⁰: the public records database only reflects code violations the city knows about,¹⁵¹ and the City can (and has) changed the form and manner by which

143. The attorney general fields between 23,000 and 25,000 consumer complaints annually. Mishkin, *supra* note 32.

144. See Backman, *supra* note 9, at 3 (“Almost always the residential landlord and the producer, supplier, or serviceman in a consumer transaction is the party who drafts the contract and the consumer/tenant is usually in a take-it-or-leave-it position with regard to the lease or consumer contract.”).

145. See Pugh v. Holmes, 405 A.2d 897, 902 (Pa. 1979) (“No longer does the average prospective tenant occupy a free bargaining status and no longer do the average landlord-to-be and tenant-to-be negotiate a lease on an ‘arm’s length’ basis.” (quoting Reitmeyer v. Sprecher, 243 A.2d 395, 398 (Pa. 1968))).

146. See Goldstein v. Weiner, No. 3964, 2011 Phila. Ct. Com. Pl. LEXIS 419, at *9–10 (Pa. Ct. Com. Pl. Phila. Cnty. Dec. 14, 2011). A tenant may sue to force their landlord to comply with the licensing ordinance, but there is no mechanism under the law to force a *prospective* landlord to do so; they would likely just walk away from the transaction. See PHILA., PA., CODE § 9-3901(4)(f) (2020).

147. See *infra* Part III.B.1 for a discussion of how unlicensed landlords are engaging in a deceptive or misleading practice.

148. Kramer, *supra* note 125.

149. See CITY PHILA., *supra* note 126.

150. These two specific shortcomings are discussed because they are systemic and bear on the mismatch between the stated policy goals of protecting tenants and the tools available to tenants to protect themselves. While other factors exist, such as unequal access to information based on language or ability, they are beyond the scope of this Comment, but I would be remiss not to mention them.

151. See *supra* notes 121–124 for reasons why this information gap is unlikely to be resolved by the city.

the public may access violation and licensing information.¹⁵² The upshot is that the landlord is the party with the most complete and accurate information about the “good” and the “bad” in a rental transaction. A private right of action serves as both an incentive to disclose such information and a form of recourse where a landlord’s failure to disclose results in harm to the tenant.¹⁵³

Third, more expansive access to a private right of action under these circumstances reflects the high stakes that exist when fraud or deception are involved in a transaction for a critical resource like housing. The risk to tenants is exacerbated by the rising proportion of renters in the city.¹⁵⁴ This changing demographic is, in turn, contributing to a dearth of affordable housing.¹⁵⁵ The result is that a significant proportion of tenants are cost burdened, spending an outsized portion of their income on housing costs.¹⁵⁶

The rental licensing ordinance is intended to enforce compliance with housing codes, which are themselves intended to ensure safe and healthy housing.¹⁵⁷ The financial reality for many tenants leaves little room for recourse when that licensing system fails, meaning that tenants can afford nothing less than the full benefit of their initial bargain. A UTPCPL action does not merely provide a way for tenants to recover damages; it also creates even more incentive for landlords to comply with the licensing law, thereby furthering the underlying policy goal of ensuring safe housing.

B. A Tenant Renting from an Unlicensed Landlord Can Bring a Claim Under the UTPCPL for Rent Paid

When a tenant pays rent to an unlicensed landlord, they are not receiving the full benefit of their transaction because of deceptive conduct that is actionable under the UTPCPL.¹⁵⁸ Returning to the four-part test for a prima facie case under the UTPCPL,¹⁵⁹ residential tenants can satisfy the first and second prongs by the very nature of the lease arrangements.¹⁶⁰ For the first prong, Pennsylvania courts have established that tenants are consumers bargaining and transacting for what is essentially a bundle of goods and services.¹⁶¹ As such, a plaintiff suing under the UTPCPL will satisfy the first and second requirements by proving the existence of a written or oral lease agreement.¹⁶²

152. See, e.g., Adelman, *supra* note 127.

153. See *infra* Part III.B.1 for a discussion of the ascertainable loss suffered by tenants.

154. See Terruso, *supra* note 128.

155. See CHIZECK, *supra* note 128, at 2.

156. Fifty-four percent of renters in Philadelphia were cost burdened in 2018. HOWELL, *supra* note 129, at 6. The situation is worse for renters earning less than \$30,000 per year: sixty-eight percent of such households were severely cost burdened in 2018. See *id.* at 7.

157. See *infra* notes 167–172 and accompanying text for an overview of how the landlord licensing requirement and the property maintenance code interact.

158. See *infra* Part III.B.1.

159. See *supra* notes 35–42 and accompanying text for an overview of the prima facie test.

160. See *Keller v. Volkswagen of Am., Inc.*, 733 A.2d 642, 646 (Pa. Super. Ct. 1999). The first and second prongs are that a plaintiff must show “that he or she is a purchaser or lessee” and “that the transaction is dealing with ‘goods or services.’” *Id.*

161. *Commonwealth ex rel. Creamer v. Monumental Props., Inc.*, 329 A.2d 812, 820 (Pa. 1974).

162. Pennsylvania law recognizes oral leases for terms of not more than three years. 68 PA. STAT. AND CONS. STAT. ANN. § 250.201 (West 2020).

A tenant will generally satisfy the third prong as well¹⁶³ (so long as they are residing in the leased premises) because the relevant lease agreement would necessarily constitute a transaction for “goods or services primarily for personal, family, or household purposes.”¹⁶⁴ The personal use requirement is ostensibly aimed at ensuring that the private action provisions remain a tool wielded by individual consumers given its effect of excluding “business competitors and other non-consumers” from bringing actions under the UTPCPL.¹⁶⁵ Thus, permitting a private tenant to sue comports with the plain meaning and the apparent purpose of that provision.

The remaining questions are whether a tenant who has paid money to an unlicensed landlord can be said to have suffered an ascertainable loss and whether the landlord’s failure to possess a license and Certificate of Rental Suitability constitutes an unfair or deceptive practice under the UTPCPL.¹⁶⁶ The act of collecting rent while unlicensed is inherently deceptive because it creates a likelihood of misunderstanding and confusion. As a result of that misunderstanding, the tenant suffers harm by losing the full protection of the landlord-tenant regulatory framework. Under these circumstances, the UTPCPL is a viable avenue by which tenants can sue. Further, such an action should not require plaintiffs to prove the elements of common law fraud in order to recover.

1. Collecting Rent Without a License Is a Deceptive Act that Results in an Ascertainable Loss for the Tenant

If a residential lease is a transaction for a bundle of goods and services, one component of that bundle is a safe and salubrious living arrangement. This principle undergirds the concept of the implied warranty of habitability, which establishes the bare minimum standards of living a landlord must maintain and is the stated goal of the Philadelphia Property Maintenance Code.¹⁶⁷ However, the mere existence of housing codes does not ensure that tenants are protected.¹⁶⁸

The city’s rental licensing ordinance attempts to complete the regulatory framework and give effect to the maintenance code.¹⁶⁹ Unlike other municipalities, Philadelphia does not impose a fine for failure to maintain a rental license or Certificate of Rental Suitability.¹⁷⁰ Therefore, recognizing the landlord’s right to evict or to collect rent is the

163. The third prong of the test requires that a plaintiff establish “that the good or service was primarily for personal, family, or household purposes.” *Keller*, 733 A.2d at 646.

164. 73 PA. STAT. AND CONS. STAT. ANN. § 201-9.2 (West 2020). This will be true for the majority of residential tenants who, by definition, are contracting for use of a property as their primary dwelling.

165. See Thomas, *supra* note 31, at 10–11 (collecting numerous examples in case law illustrating this effect).

166. See 73 PA. STAT. AND CONS. STAT. ANN. § 201-9.2 (West 2020); see also *Keller*, 733 A.2d at 646–47 (“[A] plaintiff must then prove . . . the defendant was engaged in unfair methods of competition and unfair or deceptive acts or practices . . .”).

167. PHILA., PA., CODE tit. 4, Subcode PM-101.3.

168. See *supra* notes 115–128 and accompanying text.

169. See MALLACH, *supra* note 106, at 3.

170. For example, Pittsburgh imposes a fine of up to \$500 for each month that a rental unit is not registered. PITTSBURGH, PA., CODE OF ORDINANCES art. X, § 781.09 (2020). Harrisburg imposes a penalty up to \$1,000, plus costs, and/or up to ninety days imprisonment for each violation of that city’s Residential Rental Unit Registration Program. HARRISBURG, PA., CODE § 8-511.99.D (2019).

only carrot the City offers to entice landlords to comply.¹⁷¹ To allow a landlord to remain in possession of money that they had no right to collect under municipal law would defeat the purpose of the rental licensing scheme and, by extension, the primary mechanism by which Philadelphia monitors and enforces safety standards in rental properties.

In *Goldstein*, the Pennsylvania Court of Common Pleas pointed out that in prior cases dealing with the licensing law, tenants could not recover rent paid to unlicensed landlords because, while the landlord might not be entitled to the rent, the tenant was still receiving the benefit of their bargain.¹⁷² That conclusion, however, fails to consider the important role of rental licensing in ensuring the health and safety of tenants in Philadelphia.¹⁷³ In fact, the licensing ordinance itself recognizes the “value” of compliance, as is evident from the fact that the law strips the right of landlords to receive *any* rent if they do not possess a license.¹⁷⁴ Therefore, it is more accurate to say that, by neglecting to maintain their license, a landlord is depriving tenants of at least some of the value of their bargain. Namely, they have not been provided a dwelling that complies with the Code and, failing that, there is some meaningful recourse under the law.

There are several factual scenarios in which a landlord’s failure to comply with the licensing ordinance creates confusion or misunderstanding. The relevant ordinances impose a dual obligation on landlords. The first is to obtain a valid, year-long rental license for the property.¹⁷⁵ The second is to provide a Certificate of Rental Suitability to each new tenant, which must have been issued by the City no more than sixty days prior to the tenancy.¹⁷⁶ Prospective tenants who are unfamiliar with the statutory distinction between the two documents may incorrectly assume that a landlord in compliance with one obligation, but not the other, is entitled to receive rent.¹⁷⁷

Though expansion of the right of private action might draw concerns about overburdensome liability, the provisions governing damages under the UTPCPL provide grounds for courts to tailor awards to the circumstances at hand.¹⁷⁸ For one, the law provides that only “actual damages” may be recovered.¹⁷⁹ Any such damages must be clearly demonstrated and cannot be speculative.¹⁸⁰ Where a tenant sues an unlicensed landlord, damages are readily identifiable—the amount paid to the landlord while they were not entitled to receive rent under the law. In this scenario, potential plaintiffs are

171. The property license ordinance does provide for a private action whereby a tenant may sue to compel their landlord to comply with the ordinance. PHILA., PA., CODE § 9-3901(4)(f) (2020). That would not, however, require the landlord to disgorge rent collected while unlicensed. *Id.*

172. *Goldstein v. Weiner*, No. 3964, 2011 Phila. Ct. Com. Pl. LEXIS 419, at *9–10 (Pa. Ct. Com. Pl. Dec. 14, 2011).

173. *See supra* notes 113–114.

174. *See* PHILA., PA., CODE § 9-3901(4)(e) (2020).

175. CITY PHILA., *supra* note 107.

176. PHILA., PA., CODE § 9-3903(1)(a) (2020).

177. *See* PHILA., PA., CODE § 9-3901(4)(e) (2020). This is much more likely to be the case where a landlord is licensed by the city but does not possess (or did not provide) a Certificate of Rental Suitability because the city’s online property records reflect only the status of the rental license.

178. *See* 73 PA. STAT. AND CONS. STAT. ANN. § 201-9.2 (West 2020).

179. *Id.*

180. *In re Marshall*, 613 B.R. 194, 214 (Bankr. E.D. Pa. 2020) (“Only an actual, non-speculative, identifiable loss constitutes an ascertainable loss for purposes of the UTPCPL.”).

also constrained to that amount because any damages sought must arise as a consequence of the transaction and deceptive conduct.¹⁸¹

A court's ability to award relief to plaintiffs under the UTPCPL, while expansive,¹⁸² is not unduly so. Punitive damages are limited to those circumstances where the fact finder determines that the defendant's actions were at least reckless if not deliberate or systematic.¹⁸³ However, the possibility of treble damages is an important discretionary power that allows courts to effectuate the UTPCPL's deterrence function.¹⁸⁴ In this way, the damages provisions for a private right of action under the UTPCPL complement the public interest enforcement by the attorney general. Courts have the flexibility to set damages proportional to the gravity of the defendant's conduct, even in a private action where damages might otherwise be limited to actual harm.

2. The UTPCPL Does Not Require Tenants To Prove Common Law Fraud

Strict liability is the standard for claims brought under the catchall provision of the UTPCPL based on the plain language of the statute and legislative history of the law.¹⁸⁵ The Pennsylvania Supreme Court, Superior Court, and Commonwealth Court have all pointed to the language of the 1996 amendment to the UTPCPL to support the conclusion that the legislature did not intend to require plaintiffs to prove common law fraud.¹⁸⁶ Courts in Pennsylvania have also consistently stated that the UTPCPL should, as a general matter, be interpreted broadly in order to achieve its purpose of addressing unfair and deceptive practices.¹⁸⁷ Thus, the language, purpose, and judicial interpretation of the

181. The UTPCPL permits private actions only where the plaintiff purchases or leases goods and "thereby suffers any ascertainable loss" that results from an act made unlawful by the statute. 73 PA. STAT. AND CONS. STAT. ANN. § 201-9.2 (West 2020) (emphasis added).

182. The UTPCPL permits an award of up to treble damages, court costs, reasonable attorneys' fees, and "such additional relief as it deems necessary or proper." *Id.*

183. See *Johnson v. Hyundai Motor Am.*, 698 A.2d 631, 639 (Pa. Super. Ct. 1997).

184. See *id.* (reasoning that punitive damages serve "a deterrence as well as a punishment function").

185. *Gregg v. Ameriprise Fin., Inc.* (Gregg II), 245 A.3d 637, 650 (Pa. 2021); see also *Buckingham*, *supra* note 58, at 1038–41. *Buckingham* rather presciently laid out the statutory arguments for abrogating the fraud requirement, the gist of which were adopted in *Gregg I* and affirmed in *Gregg II*.

186. See, e.g., *Gregg II*, 245 A.3d at 651 ("It is not for the courts to add a state of mind requirement to the statute where the legislature did not choose to do so."); *Bennett v. A.T. Masterpiece Homes at Broadspings, LLC*, 40 A.3d 145, 154 (Pa. Super. Ct. 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."); *Gregg v. Ameriprise Fin., Inc.* (Gregg I), 195 A.3d 930, 938 (Pa. Super. Ct. 2018), *aff'd*, 245 A.3d 637 (Pa. 2021) ("Had the General Assembly intended to limit the catchall provision to cover only common law misrepresentation claims, it would have done so in more direct language than 'deceptive conduct.'"); *Commonwealth v. Percudani*, 825 A.2d 743, 746 (Pa. Commw. Ct. 2003).

187. See, e.g., *Commonwealth ex rel. Creamer v. Monumental Props., Inc.*, 329 A.2d 812, 817 (Pa. 1974) ("These expansive provisions reflect the legislative judgment that unfairness and deception in all consumer transactions must be halted. These sections of the Consumer Protection Law, in accordance with the legislative intent, are to be liberally construed to effectuate that intent."); *Percudani*, 825 A.2d at 746 ("[T]he Law is to be liberally construed to effectuate the legislative goal of consumer protection."); *DeArmitt v. N.Y. Life Ins. Co.*, 73 A.3d 578, 591 (Pa. Super. Ct. 2013) ("Our Supreme Court has stated courts should liberally construe the UTPCPL in order to effect the legislative goal of consumer protection.").

UTPCPL align such that acts with the tendency to deceive should be actionable under the law.¹⁸⁸

The logic and importance of a more liberal interpretation of the meaning of unfair or deceptive conduct is especially clear in the context of residential leasing. Tenants are consumers.¹⁸⁹ Continuing to allow landlords to engage in an act which has the capacity to deceive tenants does not further the legislature's objective of "eradicat[ing] the use of unfair and deceptive conduct in consumer transactions."¹⁹⁰

Whether or not a landlord has a particular state of mind when failing to maintain any required licenses, the tenant suffers a legally cognizable harm.¹⁹¹ The landlord still comes to possess money to which they are not entitled under the Code.¹⁹² Further, the tenant has no adequate recourse under the licensing ordinance itself.¹⁹³ Any requirement which would preclude an action brought by tenants under the UTPCPL as well would not be in line with its broad scope and policy goals.¹⁹⁴

IV. CONCLUSION

Tenants are consumers and should benefit from the panoply of protections afforded by consumer protection law. Where a jurisdiction provides minimum standards for business practices to protect consumers, there must be an adequate method of enforcement. The City of Philadelphia has imposed upon landlords certain licensing requirements to ensure compliance with the Property Maintenance Code and protect the health and safety of tenants. Though the city technically prohibits the collection of rent by unlicensed landlords, under the city ordinance, tenants have no way to recover payments that they make to unlicensed landlords.

However, Pennsylvania has established broad consumer protections in the form of the UTPCPL. The law provides for a private right of action against entities that engage in practices tending to confuse or mislead. Engaging in a business transaction without the requisite license is exactly the type of behavior forbidden by the UTPCPL. Permitting tenants to sue under the UTPCPL to recover rent paid to an unlicensed landlord fulfills the broad mandate of the law and prevents future violations.

188. See *Gregg II*, 245 A.3d at 648 (“[T]he Supreme Court of the United States defined deceptive conduct in the context of consumer protection as conduct that has the ‘capacity to deceive.’” (quoting *Fed. Trade Comm’n v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934))).

189. See *supra* Part II.D.

190. *Gregg II*, 245 A.3d at 650.

191. See *supra* Part III.B.1 for a discussion of the harm to tenants. As the Supreme Court of Pennsylvania plainly stated, “the actor’s state of mind as to either the truth or falsity of the representation or the effect that the misrepresentation will have on the consumer is irrelevant.” *Gregg II*, 245 A.3d at 651.

192. See PHILA., PA., CODE § 9-3901(4)(e) (2020).

193. See *supra* Part II.C for an overview of the current ordinance and its absence of an adequate remedy.

194. See *supra* note 185.