2011 WL 11546180 (D.C.) (Appellate Brief)
District of Columbia Court of Appeals.

Joyce SAUCIER, et al.,
v.
COUNTRYWIDE HOME LOANS, et al.

No. 11-CV-646.
October 28, 2011.

Appeal from the District of Columbia Superior Court

Brief of Amicus Curiae National Consumer Law Center in Support of Appellant-Plaintiffs

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***1** I. STATEMENT OF INTEREST

The National Consumer Law Center Inc. (NCLC) is a non-profit corporation established in 1969 and incorporated in 1971, with its main office in Boston, Massachusetts, and a separate office in Washington, D.C. It is a national research and advocacy organization focusing specifically on the legal needs of low-income, **financially** distressed and **elderly** consumers. NCLC works to defend the rights of consumers, concentrating on advocating for fairness in **financial** services, asset-building and **financial** health, a stop to predatory lending and consumer fraud, and protection of basic energy and utility services for low-income families. NCLC devotes special attention to vulnerable populations including immigrants, **elders**, victims of domestic violence, military personnel, on issues including access to justice, mortgage and payday lending, predatory lending, auto fraud, bankruptcy, credit cards, debt collection **abuse**, refund anticipation loans, Social Security, and more. For over forty years, legal services and private lawyers, state and federal consumer protection officials, public policy makers, consumer and business reporters, and consumer and low-income community organizations across the nation have turned to NCLC for legal answers, policy analysis, and technical and legal support.

NCLC staff attorneys write and publish eighteen treatises on federal and state consumer protection law, including *Unfair and Deceptive Acts and Practices* (7th ed. 2008 and 2010 Supp.). NCLC also has published a comparative study of the deceptive practice statutes in the fifty states and the District of Columbia, *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes* (Feb. 2009), *available at* http://http:// www.nclc.org/images/pdf/udap/analysis-state-summaries.pdf.

All parties have consented to this filing.

***2** II. INTRODUCTION

In this case, Plaintiffs allege that Defendants Countrywide Home Loans (“Countrywide”) and Presidential Bank, F.S.B. (“Presidential”) (collectively, “Mortgage Defendants”) participated in a scheme to sell them condominium properties with inflated appraisals, and several major undisclosed problems and conditions. As part of the scheme, they sold Plaintiffs mortgage loans insured by the Federal Housing Authority (“FHA”), and they were immediately able to recognize substantial profits by re-selling those loans on the secondary market. It is hardly surprising to find such behavior on the part of Countrywide, the originator of trillions of dollars of risky loans, which was a key cause of the meltdown of the U.S. housing market. Deceptive and inflated appraisals were a central part of Countrywide's fraud. [1]

Yet the Superior Court dismissed Plaintiffs' claims against the Mortgage Defendants, including Plaintiffs' claim of material misrepresentations under Subsection 3904(f) of the Consumer Protection Procedures Act (“CPPA”). It ruled that the Mortgage Defendants' failure to disclose this highly material information is not actionable, because lenders do not have an ***3** independent duty to inform the plaintiff arising from a special, fiduciary relationship. Saucier Op. at 55-65.

Amicus NCLC submits several arguments in support of Plaintiffs' appeal to this Court, specifically concerning Subsection 3904(f) of the CPPA. First, the CPPA sets out the proper bounds of an action for failure to disclose material facts, and the Superior Court erred in importing common law "duty" requirements to restrict the reach of the statute. The court's holding directly contradicts District of Columbia's consumer protection statute, the Consumer Protection Procedures Act ("CPPA"), which explicitly covers the "trade practices" of any "merchant" selling to any "consumer." Second, the legislative history of the CPPA further supports its explicit text, which indicates a statute that is far broader than the protections offered under common law. Third, the Superior Court erred in importing a duty requirement from federal criminal securities law, which, unlike the CPPA, is silent regarding material omissions. Fourth, the Federal Trade Commission Act ("FTC Act") and related case law offer further persuasive authority that a common law duty is not a requirement for a failure to disclose claim. Fifth, Plaintiffs' argument here is supported by other states' courts that have rejected the imposition of a duty requirement. Last, the Superior Court erred in applying Maryland law concerning fiduciary duty, where District of Columbia law should govern. Its application of Maryland law leads to a particularly unjust result here, given that Maryland has refused to import a common law or fiduciary duty requirement in construing a claim for material omissions under its own state's consumer protection statute.

NCLC joins in Plaintiffs' request that the Order of the Superior Court be reversed, and the case remanded for further proceedings.

***4 III. ARGUMENT**

A. The CPPA Sets Out The Proper Requirements For A Failure To Disclose A Material Fact, And Does Not Require A Common Law Or Fiduciary Duty.

The Superior Court erred in holding that in order for an omission to violate the CPPA, the merchant must have a common law "duty" to disclose material information to the consumer. The plain language of the statute makes no mention of such a duty. The CPPA requires that the omission be one by a merchant that injures a consumer, regarding a *material* fact, and that the omission have a *tendency to mislead.*[2] These are the explicit and proper considerations in construing an unlawful omission claim under the CPPA.

The imposition of a common law duty is inconsistent with the explicit text of the statute, and in particular with its protection of consumers in their transactions with merchants, regardless of whether they have any other commercial relationship. The purpose of the CPPA is to "assure that a just mechanism exists to remedy all improper trade practices and deter the continuing use of such practices[.]" D.C. Code § 28-3901 (b)(1). The statute is to be "construed and applied liberally to promote its purpose." D.C. Code § 28-3901 (c). The remedies enumerated in the statute are "cumulative and in addition to other remedies or penalties provided by law." D.C. Code § 28-3905(k)(2). The CPPA is not a codification of existing law. This Court has described the statute as providing "remedies for a broad spectrum of practices which injure consumers." *District Cablevision Ltd. P'ship v. Bassin*, 828 A.2d 714, 722-23 (D.C. 2003). Courts are to apply an objective standard to unfair trade practices: the claim "of an unfair trade practice is properly considered in terms of how the practice would be viewed and ***5** understood by a reasonable consumer." *Pearson v. Soo Chung*, 961 A.2d 1067, 1075 (D.C. 2008). The CPPA "defines its terms comprehensively so that it can provide a remedy for all improper trade practices." *Cooper v. First Gov't Mortg. & Investors Corp.*, 206 F. Supp. 2d 33, 35 (D.D.C. 2002). The CPPA recognizes a reality of modern commerce, which is that multiple "merchants" connected with a transaction can profit from and be responsible for deceptive practices, even though they may have little or no direct contact with the consumer who buys the finished product.

Materiality and Tendency to Mislead. "To establish whether a misrepresentation is material, the Court determines if... a reasonable man would attach importance to its existence or non-existence in determining his choice of action in the transaction ..."[3] The tendency to mislead requirement is an objective standard, and does not require the plaintiff to prove that she personally was deceived. *See In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984). Materiality and tendency to mislead complement each other: while a merchant could state something that was misleading to the consumer, it may be on a matter that is trivial or peripheral to the transaction, and would not create liability under the statute.

Materiality is a long-established concept in the common law, one that courts have submitted to juries for centuries. [4] Generally, the determination of materiality is a question for ***6** the factfinder, although courts may make a materiality determination as a matter of law. [5] And of course, the court can and often does instruct the jury on materiality. [6] Here, where the Mortgage Defendants were so centrally involved in the transaction and were responsible for the appraisals of the properties, they certainly would know that the information they withheld was vitally important to Plaintiffs. The statute's requirement of materiality, not duty, is sufficient to establish proper boundaries of which type of merchant omissions are actionable. Applying the standards of § 28-3904(f), a factfinder could conclude that Defendants made material omissions that create liability under the CPPA.

The Superior Court reasoned that a failure to impose a common law or fiduciary duty requirement in subsection (f) "would lead to a significant expansion of risk for any lender. If the Court did not adopt a duty analysis, then a lender could be held liable for almost any defect in collateral on which it makes a loan, as long as it met the relatively loose standard of materiality." Saucier Op. at 73. First, the Superior Court is simply incorrect that materiality is a loose standard, and the court can properly instruct the jury on how to apply it to the facts of the case. ***7** The hypothetical that the Court raised to show why materiality was an unworkable standard are not persuasive, and bear little resemblance to the facts here. [7]

In a line of cases in the Eastern District of New York, courts sustained plaintiffs' claims that failure of a lender to disclose inaccurate appraisals as part of a property-flipping scheme could constitute material omissions, both under common law and under New York's consumer protection statute. *LaBoy v. Better Homes Depot, Inc.*, 2004 U.S. Dist. LEXIS 30091 (E.D.N.Y. July 26, 2004). In another of those cases, the court stated:

> The allegedly inflated appraisal ... is perhaps the centerpiece of the complaint. It supported the allegedly inflated price plaintiffs paid for the property, and made possible the acquisition of FHA mortgage insurance, without which the defendants could not have hoped to profit from their alleged scheme. Its creation, and the inclusion of it in the FHA application with knowledge that it was false, are the most clearly fraudulent acts alleged in the complaint. Absent the fraudulent nature of the appraisal, defendants' claim that plaintiffs got "just what they bargained for" would carry much more weight. [8]

Here, the Superior Court concluded that even where a merchant withholds material, deceptive information from a consumer, the consumer should bear the loss. Such a result is directly contrary to the statute's intent.

***8** "Trade Practices" Between "Merchant" and "Consumer." The imposition of a common law or fiduciary duty requirement contradicts the explicit terms of the statute, which grant a "consumer" standing to recover from a "merchant," for an illegal trade practice that causes damages to the consumer. The CPPA defines a consumer as "a person who does or would purchase, lease (from), or receive consumer goods or services ... or a person who does or would provide the economic demand for a trade practice." [9] It defines a trade practice as "any act which does or would create,... make available ... or effectuate, a sale, lease or transfer, of consumer goods or services." D.C. Code § 28-3901 (a)(6). In turn, "goods and services" are "any and all parts of the economic output of society, at any stage or related or necessary point in the economic process, and includes consumer credit, franchises, business opportunities, real estate transactions, and consumer services of all types." D.C. Code § 28-3901(a)(7).

In considering plaintiffs' misrepresentation and omission claims under the CPPA, the court in *Athridge v. Aetna Cas. & Sur. Co.*, 351 F.3d 1166, 1175 (D.C. Cir. 2003) concluded that the nephew of insureds was a "consumer" under the Act, even though he did not purchase the insurance in question, because he was a person who "would ... receive consumer goods or services." This was an instance in which a defendant was liable under the CPPA, even where the law of contract or the common law may well not recognize a duty. [10]

***9** At the same time, the consumer-merchant relationship is not unbounded. Courts in multiple cases have denied relief where there was no consumer-merchant relationship. [11] Thus, the CPPA's definition of "consumer" and "merchant" represent both

a meaningful expansion of consumer protections beyond the common law, and a meaningful limitation on the relief available under the CPPA.

B. The Legislative History Indicates that the D.C. City Council Intended to Pass a Law Broader than the Common Law.

The legislative history of the CPPA also supports a broad reading of CPPA, which protects against "*all* improper trade practices," not just those between parties for which a common law or fiduciary duty can be imputed. § 28-3901(b)(1) (emphasis added). The CPPA, like other UDAP statutes, was specifically enacted to expand protections for consumers in the marketplace, where "caveat emptor" was the rule for transactions, including real estate transactions. [12] The City Council of the District of Columbia enacted the CPPA to provide ***10** remedies to consumers in a wide array of circumstances. The Committee Report regarding the bill that enacted the CPPA reflects Council members' concern that the then-existing consumer protections - presumably common law protections and protections enacted by early statute - were insufficient to protect consumers. Committee Report on Bill 1-253, The D.C. Consumer Protection and Procedures Act, March 24, 1976 (Exhibit 1). The Report notes that D.C. lacked enforcement authority regarding consumer affairs and fell short of neighboring jurisdictions' efforts, such as Montgomery County and Prince George's County. *Id.* at 4-5.

Since the CPPA's enactment in 1976, the Council of the District of Columbia has continued to expand its protections. The amendments to the CPPA in 2000 authorized the Office of the Corporation Counsel "to pursue consumer protection claims more aggressively" and provided "additional remedies and potential recovery on behalf of citizens and the District Government" Committee Report on Bill 13-679, Fiscal Year 2001 Budget Support Act of 2000, May 19, 2000, at 26 (Exhibit 2).

The legislative history also reflects the City Council's intent that the CPPA be robust, and it supports Plaintiffs' position that the protections of the statute should not limited by common law principles. Indeed, if common law protections were all that the CPPA encompassed, it would be a redundant statute. The Superior Court failed to recognize the purpose, intent, and statutory construction sections of the CPPA when it applied common law principles to the statute and required that a merchant must have a common law or fiduciary "duty" to disclose information in order to violate § 28-3904(f).

C. Criminal Federal Securities Law Is Not Instructive In Construing The CPPA.

The Superior Court based its duty analysis in large part on *Chiarella v. United States*, 445 U.S. 222 (1980), which concerns a federal securities statute that punishes violators with prison ***11** time. In that case, Mr. Chiarella obtained inside information about a pending corporate takeover in connection with his work as a **financial** printer, and used that information to trade stock for a large profit. *See id.* at 224. He was subsequently convicted under Section 10(b) of the SEC Act of 1934. [13]

The Supreme Court began its analysis by noting that the securities statute said *nothing* about whether a material omission could constitute a violation of the criminal statute. *See id.* at 226. It looked to the common law, in which failure to disclose material facts constitutes fraud only when the defendant is under a duty to do so. *See id.* at 227-28. Regarding Mr. Chiarella, the Supreme Court recognized that "a purchaser of stock who has no duty to a prospective seller because he is neither an insider nor a fiduciary has been held to have no obligation to reveal material facts." *Id.* at 229.

Inapposite does not really suffice to describe *Chiarella* here. It is puzzling why the Court felt the need to look to criminal securities law for guidance on a broad concept of "duty," which clearly means very different things in a wide range of legal relationships. While Section 10(b) may not support the incarceration of individuals because they have no recognized duty to the investing public, the CPPA very explicitly does support the compensation of consumers who are injured by merchants. The trial court more properly should look at federal statutes concerned with consumer protection, such as the FTC Act.

D. FTC Case Law Is Persuasive In Interpreting the CPPA.

This Court should give persuasive weight to case law interpreting of the Federal Trade Commission (FTC) Act, including decisions by the FTC. While the District of Columbia has yet to directly address the weight of authority that FTC decisions have, state courts in a number of ***12** other jurisdictions with consumer protection statutes similar to the CPPA have found FTC case law persuasive. [14]

Moreover, the legislative history of the CPPA suggests that the Council intended to grant the district a consumer protection scheme "along the lines and authority of a 'mini-FTC.' " Committee Report on Bill 1-253, The D.C. Consumer Protection and Procedures Act, March 24, 1976, at 1. At the time the CPPA was enacted, the Council believed that the consumer protection activities of the Office of Consumer Affairs (authorized by P.L 93-91, August 14, 1973) inadequately protected consumer rights. In discussing the intent of the CPPA to broaden consumer education and consumer protection, the Committee mentioned the authority of the Federal Trade Commission again:

> While this bill continues, on the same level, the Office's full authority to carry on a consumer education program....,it greatly expands and specifies the powers and procedures for dealing with complaints brought by consumers. The bill also provides for a shift in emphasis within the Office's consumer education work, from educating the general public to backing up the enforcement programs of the Office...., much in the manner of *Federal Trade Commission* publicity.

Committee Report on Bill 1-253, The D.C. Consumer Protection and Procedures Act, March 24, 1976, at 7. (emphasis added). The FTC Act does not impose a common law duty requirement, which would be at odds with its purpose of regulating merchants who are advertising and selling products to the general public. Courts have long recognized that the FTC's definition of unfair ***13** competition has a broader meaning than the common conception, and are not confined to activities that were illegal at common law. [15]

Generally, a marketer violates Section 5 of the FTC Act by omitting material information that would make its representations misleading to consumers. [16] Sellers violate the FTC Act where they state a "half-truth," such as making a claim without providing qualifying information to avoid giving a misleading impression. [17] An implied misrepresentation can be created from a product's physical appearance, the circumstances of the transaction, and consumer expectations as to the minimum standards of a product. *Id.* Pure omissions also may be "unfair" and therefore actionable under the FTC Act. To determine whether a practice is unfair under the FTC Act, the FTC considers whether there it is likely to cause substantial consumer injury that is not outweighed by the benefits to competition and that the consumer could not reasonably have avoided. 15 U.S.C. § 45(n). A wide range of practices that would be illegal under the FTC Act, including Mortgage Defendants' deceptive practices at issue here, should create liability under the CPPA as well.

E. Other Jurisdictions with Similar Consumer Protection Statutes Have Interpreted such Statutes to Be Broader than the Common Law.

***14** Many courts interpreting state consumer protection statutes have rejected the incorporation of a common law "duty" requirement, recognizing that modern consumer protection law is more expansive than the common law. For example, the Court of Appeals for the Fourth Circuit, construing North Carolina's consumer protection statute, held that deliberately withholding information can be an unfair and deceptive trade practice regardless of whether the party had an independent legal obligation to disclose the information. *S. Atl. P'ship of Tenn. v. Riese*, 284 F.3d 518, 537-38 (4th Cir. 2002). The obligations imposed by the North Carolina consumer protection statute "create a cause of action *broader than traditional common law actions.*" [18]

The Massachusetts Supreme Court analyzed this issue in connection with its own consumer protection statute in *Slaney v. Westwood Auto, Inc.*, 322 N.E.2d 768 (1975), and pointed out the clear distinction between the statutory cause of action for unfair and deceptive acts and practices, and the common law action for fraud and deceit, which requires a duty to disclose. It stated, "the definition of an actionable 'unfair or deceptive act or practice' goes far beyond the scope of the common law action for fraud and deceit.... [A] § 9 [or § 11] claim for relief ... is not subject to the traditional limitations of preexisting causes of action such as tort for fraud and deceit." *Id.* at 779.

Similarly, the District Court of Minnesota found that common law of fraud was inapposite in a case involving the state unfair and deceptive practices statute, because the statute was broader than the common law. ***15** *Minnesota v. Fleet Mortg. Corp.*, 158 F. Supp. 2d 962, 967 (D, Minn, 2001). The District Court stated, "other courts hold that while a duty to disclose may be required by common law fraud/misrepresentation, it is not required for liability under more broadly drafted consumer protection statutes." *Id.* (citing *V.H.S. Realty v. Texaco, Inc.*, 757 F.2d 411, 417 (1st Cir. 1985); *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 595 (Ill. 1996)).

Some courts construe the obligation to disclose material facts as a "duty," or an obligation to speak, arising under their state UDAP laws, but one that is broader than common law conceptions of duty. The court in *Daugherty v. American Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 835 (Cal. App. 2006), held that an action lies under the Consumer Legal Remedies Act where there was "an omission of a fact the defendant was obliged to disclose." [19] The *Daugherty* court did not require or address a fiduciary duty or other common law duty between the merchant and consumer in that case. Whether one conceives of the Mortgage Defendants' obligation here as a "duty" to disclose, or that the information withheld was material and had a tendency to mislead, the omission at issue here was a serious one, and should carry liability under the CPPA.

F. Even If A Material Omission Claim Requires A Common Law "Duty," The Court Erred In Applying Maryland Law On The Question of Duty.

The Superior Court erred in disregarding District of Columbia law, and looked only to Maryland law in order to determine whether a fiduciary or other duty existed between a borrower and a lender. The Superior Court then proceeded to find that none of the "special circumstances" ***16** that Maryland courts were "exceedingly reluctant to find" applied to the instant case. Saucier Op. at 58-59 (quoting *Parker v. Columbia Bank*, 604 A.2d 521, 532 (Md. Ct. Spec. App. 1992)).

District of Columbia courts *have* addressed fiduciary duty between borrowers and lenders, and have not construed the fiduciary duty relationship as strictly as Maryland courts have. *See High v. McLean* ***Financial*** *Corp.*, 659 F. Supp. 1561, 1568 (D.D.C. 1987) (sustaining a claim of breach of fiduciary duty by a borrower against a lender). The *High* court stated, "District of Columbia law has deliberately left the definition of 'fiduciary relationship' flexible, so that the relationship may change to fit new circumstances in which a special relationship of trust may properly be implied." [20]

Plaintiffs assert here that the Mortgage Defendants were closely involved in the development of Kings' Court, and took on responsibilities above and beyond those of a normal lender, in arranging for **financing** and ensuring that their loans met federal requirements as a "Direct Endorsement Lender." The Mortgage Defendants performed many of the functions that the FHA, a federal agency, normally would assume, such as determining that the property was acceptable for mortgage insurance, and was responsible for reviewing the property analysis, which includes any problems or defects in the property. Complaint ¶ 96, 98-99. Under HUD guidelines, the direct endorsement lender is "responsible ... for the quality, integrity, accuracy and thoroughness of the appraisal..." JA Vol. VII, Ex. 23 at JA02324. One could conclude that the Mortgage Defendants' enhanced role in the scheme created a duty on their part to disclose material facts related to the condominium sales.

In addition, the Superior Court did not look beyond Maryland in determining whether there was a common law duty to disclose. As one authority explains:

> ***17** The information might have been acquired as the result of his bringing to bear a superior knowledge, intelligence, skill or technical judgment; it might have been acquired by mere chance; or it might have been acquired by means of some tortious action on his part.... Any time information is acquired by an illegal act it would seem that there should be a duty to disclose that information." [21]

Construing New York law, a federal court in the District recently summarized the common law doctrine as follows:

> Absent a fiduciary relationship between the parties, a duty to disclose arises only where one party possesses superior knowledge of essential facts that makes a transaction inherently unfair - if those facts are not disclosed, those facts are not readily available to the other party, and the first party knows that the second party is acting on the basis of mistaken knowledge. [22]

The Superior Court failed to consider whether the Mortgage Defendants had superior knowledge of essential facts making the transactions here unfair, creating a duty to disclose. There is a surfeit of record evidence here that the Mortgage Defendants knew and should have known of all of the glaring deficiencies in the properties Plaintiffs purchased, based on their responsibilities as Direct Endorsement Lenders, and based on their extended and intimate involvement in the condominium project.

Moreover, Maryland's highest court has held that a fiduciary duty is not a requirement to prevail on a material omission claim under the state's consumer protection statute. In *Green v. H&R Block, Inc.*, 735 A.2d 1039 (1999), plaintiff alleged that H&R Block failed to inform the class of the benefits it received from referring loan requests in connection with their tax refunds to other banks. *Id.* at 1044. The trial court dismissed plaintiff's omission claim under the ***18** Maryland Consumer Protection Act, arguing that plaintiff had no claim absent a fiduciary relationship between the parties. *Id.* at 525-26. The Maryland Court of Appeals disagreed:

We disagree with the trial court's conclusion that "absent a fiduciary relationship, any failure to disclose on the part of Defendants is not actionable." The CPA does not prohibit unfair or deceptive trade practices only between fiduciaries. Rather, it flatly prohibits the statutorily defined unfair or deceptive trade practices regardless of the relation between the consumer and the merchant. Its purpose is to address the legislature's "concern[] that public confidence in merchants offering goods, services, realty, and credit is being undermined." § 13-102(b)(2). Green's CPA claim therefore should not have been dismissed for lack of a fiduciary duty to disclose.

Id. at *1058. Moreover, in *State v. Cottman Transmissions Sys.*, 587 A.2d 1190, 1195 (Md. Ct. Spec. App. 1991), the court affirmed summary judgment for *plaintiff* that mechanic's withholding of diagnostic information was a material omission under CPA: "Failure to mention the possible total price, when that price is known to the merchant, *under the circumstances of this case, is a deceptive practice." Id.* at * 1196 (emphasis in original). Thus, it would be odd result for a District of Columbia court to look to Maryland law to reach a result directly contrary to that reached by Maryland's courts. If the D.C. courts wish to examine Maryland law for guidance on how to construe D.C. law, they should not pick and choose in this manner.

IV. CONCLUSION

Amicus NCLC respectfully requests that the Court of Appeals reverse the judgment of the Superior Court that the Mortgage Defendants violated Subsection 3904(f) of the Consumer Protection Procedures Act, and remand the case for further proceedings.

Footnotes

1 *See, e.g., SEC v. Mozilo,* 2010 U.S. Dist. LEXIS 98203 (C.D. Cal. Sept. 16, 2010) (detailing Countrywide's reckless mortgage business that originated trillions of dollars of risky home loans, and systematically misled and failed to disclose material facts to investors and the public concerning the quality of the mortgages it sold); *Johnson v. KB Home,* 720 F. Supp. 2d 1109, 1114 (D. Ariz. 2010) (sustaining RICO claim against Countrywide and nationwide developer for conspiracy to inflate appraisals; "plaintiffs assert that they overpaid for their homes and that they would not have completed their purchases at the contract prices had proper appraisals been prepared"); *In re Countrywide Fin. Corp. Derivative Litig.,* 554 F. Supp. 2d 1044, 1058, 1059 (C.D. Cal. 2008) (sustaining plaintiffs' claims based on strong allegations of scienter; "The Court finds that Plaintiffs' numerous confidential witnesses support a strong inference of a Company-wide culture that, at every level, emphasized increased loan origination volume in derogation of underwriting standards ... Mark Zachary, a vice president in Countrywide's joint venture with KB Homes, found that appraisers were inflating appraisal values, essentially raising the risk of default on loans"); *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.,* 2011 N.Y. Slip Op 5640, *4 (N.Y. App. Div. 1st, June 30, 2011) (sustaining fraud claim by insurer against Countrywide, alleging that "the appraisers were not independent but rather were affiliated with Countrywide, which led to a conflict of interest and increased the risk of inflated appraisals").

2 § 28-3904(f); *see also Athridge v. Aetna Cas. & Sur. Co.,* 351 F.3d 1166, 1175 (D.C. Cir. 2003) ("It is a violation of the Consumer Protection Act for any person to misrepresent a material fact which has a tendency to mislead or to fail to state a material fact if such failure tends to mislead, whether or not a consumer is in fact misled, deceived or damaged thereby.").

3 *C&E Servs. v. Ashland, Inc.,* 498 F. Supp. 2d 242, 258 (D.D.C. 2007); *see also Burlington Ins., Co. v. Okie Dokie, Inc. ("Burlington I "),* 368 F. Supp. 2d 83, 87-88 (D.D.C. 2005) (citing *Ward Dev. Co., Inc. v. Ingrao,* 493 A.2d 421 (Md. 1985)). *Hughes v. Abell,* 2010 U.S. Dist. LEXIS 121622, at *17 (D.D.C. Nov. 17, 2010) (sustaining material misrepresentation claim under 3904(e) where defendant "may have misled [Hughes] regarding the potential costs and risks involved in his transaction with Wells Fargo").

4 *See Maryland Ins. Co. v. Ruden's Adm'r,* 10 U.S. 338, 339-340 (1810) ("It is well settled that the operation of any concealment on the policy depends on its materiality to the risk, and this court has decided that this materiality is a subject for the consideration of a jury."); *Charpentier v. Los Angeles Rams,* 75 Cal.App.4th 301, 313 (1999) (stating that materiality is a jury question, and that a court can withdraw the determination from the jury "if the fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it") (internal citations omitted).

5 *See Rowan Heating-Air Conditioning-Sheet Metal, Inc. v. Williams,* 580 A.2d 583 (D.C. 1990) (affirming trial court finding that appellant had misrepresented material facts under CPPA, and warranting imposition of punitive damages); *Athridge v. Aetna Cas. & Sur. Co.,* 351 F.3d 1166, 1176 (D.C. Cir. 2003) (concluding that misrepresentations at issue could not, as a matter of law, have a tendency to mislead, because they related to statements made in court proceedings).

6 *Cf.* 1-20 Civil Jury Instructions for DC § 20.02 ("To be fraudulent, a misrepresentation must be of a material fact. A fact is material if it would influence a reasonable person to act or not to act. A fact is material if it is a fact that the maker of the representation knew would likely be important to the person to whom it is made, even if a reasonable person would not think that fact [] was important."). However, unlike a common law claim for misrepresentation or omission, the CPPA claims under subsections 3904(e) and (f) do not require proof of intent. *See Fort Lincoln Civic Ass'n v. Fort Lincoln New Town Corp.,* 944 A.2d 1055, 1073 (D.C. 2008) (citing *The Chelsea Condo. Unit Owners Ass'n v. 1815 A St. Condo. Group, LLC,* 468 F. Supp. 2d 136, 142 n.6 (D.D.C. 2007)) (distinguishing between CPPA and common law fraud requirements).

7 According to the Superior Court, the materiality standard could lead to liability for an lender on an car loan who failed to disclose that other vehicles were more "reliable." Saucier Op. at 73. That hypothetical, concerning a matter of opinion about publicly available information, is inapplicable here. A court could dispose of such a claim as a matter of law. A more analogous case would be if the lender withheld information that the car contained a defect that greatly affected its quality or resale value. The Superior Court's second hypothetical, concerning a lender's knowledge of imminent zoning changes concerning a **financed** property, might be a *closer case, and* require disposition by the factfinder. *But this is not* a justification for erecting new limits on liability for lenders, at the expense of vulnerable consumers.

8 *Vaughn v. Consumer Home Mortgage,* 2003 U.S. Dist. LEXIS 8233, 2003 WL 21241669, at *6 (E.D.N.Y. Mar. 23, 2003); *see also Banks v. Consumer Home Mortg., Inc.* 2003 U.S. Dist. LEXIS 8230 (E.D.N.Y. 2003); *M&T Mortg. Corp. v. Miller,* 323 F. Supp. 2d 405 (E.D.N.Y. 2004).

9 D.C. Code § 28-3901(a)(2). *See Adler v. Vision Lab Telcomm,* 393 F. Supp. 2d 35, 39-40 (D.D.C. 2005) (holding that plaintiff failed to state CPPA claim where merchant sending junk faxes did not sell anything to the consumer).

10 *See also Byrd v. Jackson,* 902 A.2d 778, 781-82 (D.C. 2006) (no contractual relationship necessary to create consumer-merchaut relationship under CPPA); *Ford v. ChartOne, Inc.,* 902 A.2d 72 (D.C. 2006) (plaintiff was consumer under the act even though his attorney was the purchaser of records from the defendant); *Chen v. Bell-Smith,* 2011 U.S. Dist. LEXIS 22994, *48-49 (D.D.C. Mar. 8, 2011) (genuine issue of material fact whether defendants were "merchants" under CPPA).

11 *See Shaw v. Marriott Int'l, Inc.*, 605 F.3d 1039, 1043-44 (D.C. Cir. 2010) (employer's payment for employee's hotel stay is not a consumer transaction protected under the CPPA); *Howard v. Riggs Nat'l Bank*, 432 A.2d 701, 709 (D.C. 1981) (explaining that the CPPA "was designed to police trade practices arising only out of consumer-merchant relationships"); *Mazanderan v. Independent Taxi Owners' Ass'n*, 700 F. Supp. 588, 591 (D.D.C. 1988) (holding that a taxicab operator's purchase of gasoline and supplies was not a consumer transaction within the coverage of the CPPA because it was made "in connection with his role as an independent businessman").

12 *See, e.g.*, *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 178 F. Supp. 2d 198, 239 (E.D.N.Y. 2001) (providing general history of consumer protection statutes; explaining that they represented a change from the common law doctrine of *caveat emptor*, and recognized the reality that "the physical and cultural distance between buyers and sellers increased"); *Gaidon v. Guardian Life Ins. Co. of Am.*, 725 N.E.2d 598 (1999) (explaining that New York's consumer protection statute was designed as a broad, remedial statute to relax traditional barriers to common law fraud); *In re Smith*, 866 F.2d 576, 581 (3d Cir. 1989) (quoting *Commonwealth v. Monumental Prop., Inc.*, 329 A.2d 812, 816 (1974)) ("The objective of the UDAP and other similar state and federal statutes is to 'place on more equal terms seller and consumer.' "); *Strawn v. Canuso*, 657 A.2d 420, 427 (N.J. 1995) (overruled on other grounds) (explaining that consumer protection statutes were enacted to limit the doctrine of *caveat emptor*, including in real estate transactions).

13 *See id.* at 235 n.20 (noting that Chiarella "was sentenced to a year in prison, suspended except for one month, and a 5-year term of probation").

14 *See, e.g.*, *In re Scrimpsher*, 17 B.R. 999 (Bankr. N.D.N.Y. 1982) (New York statute followed in the steps of the Federal Trade Commission and thus liability under the FTC Act established liability under state law); *Marshall v. Miller*, 276 S.E.2d. 397 (N.C. 1981) (North Carolina statute declaring unfair or deceptive trade practices unlawful closely followed the FTC Act and therefore the court could use FTC decisions as guidance); *People ex rel. Dunbar v. Gym of America, Inc.*, 493 P.2d 660 (Colo. 1972) (analogizing the authority of the Colorado attorney general to that of the FTC).

15 *See FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394-95 (1953); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 531-33 (1935); *Luria Bros. & Co. v FTC* 389 F.2d 847, 859 (3d Cir. 1968) (explaining that "unfair methods of competition" are not confined to acts illegal at common law).

16 Federal Trade Commission, Policy Statement on Deception (1983), *set forth in Cliffdale Assocs.*, 103 F.T.C. 110, 174 (1984), http://www.ftc.gov/bcp/policystmt/ad-decept.htm.

17 *See International Harvester Co.*, 104 F.T.C. 949, 1058 (1984); *see also North Am. Philips Corp.*, 111 F.T.C. 139 (1988) (claim that filter made tap water "clean" was deceptive in light of failure to disclose that product added a suspected carcinogen to water); *Southwest Sunsites v. FTC*, 785 F.2d 1431, 1435 (9th Cir. 1986) (failure to disclose material facts as to value of land) ("The Commission will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment"); *FTC v. Pharmtech Research, Inc.*, 576 F. Supp. 294, 300-301 (D.D.C. 1983) (deceptive to omit information casting doubts on health benefits of processed vitamin product).

18 *Id.* at 537 citing *Marshal v. Miller*, 302 N.C. 539, 546, 276 S.E.2d 397, 402 (1981). *See also In re Ford Motor Co. E-350 Van Prods. Liab. Litig.*, 2008 U.S. Dist. LEXIS 73690, 82 (D.N J. 2008) (construing Illinois law) ("Without clear state authority requiring Plaintiffs to plead a fiduciary relationship with Ford under the Illinois CFA, the Court here declines to legislate an additional element from the bench.").

19 *Id.* at 835 (emphasis added); *see also Bardin v. Daimlerchrysler Corp.*, 136 Cal. App. 4th 1255 (Cal. App. 2006); *In re Ford Motor Co. E-350 Van Prods. Liab. Litig.*, 2008 U.S. Dist. LEXIS 73690, 80-82 (D.N.J. 2008) (construing the CLRA); *Wright v. Craft*, 640 S.E.2d 486, 499 (S.C. *Ct.* App. 2006) (noting that nothing in state statute suggests that a deceptive act must be based on duty to disclose, but finding that such a duty existed because dealer intended that consumer rely on its statements).

20 *Id.* at 1568 (citing *Urban Investments, Inc. v. Branham*, 464 A.2d 93, 105 (D.C. 1983) (Mack, J., dissenting)).

21 W. Page Keeton, *Fraud - Concealment and Non-Disclosure*, 15 Texas L. Rev. 1, 25-26 (1936).

22 Bain v. Jackson, 2010 U.S. Dist. LEXIS 44722, 7-8 (D.D.C. May 7, 2010) (citing *UniCredito Italiano SpA v. JPMorgan Chase Bank*, 288 F.Supp.2d 485, 497 (S.D.N.Y. 2003)).

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