JOHN CROSSEN and JENNIFER CROSSEN, Plaintiffs	: IN THE COURT OF COMMON PLEAS OF : LYCOMING COUNTY, PENNSYLVANIA :
vs.	: : NO. 01-01,726 :
A. J. PERETZ, D.D.S., PHILLIP A. SOSLAND, D.D.S. and DENTAL CARE ASSOCIATES, Defendants	: : : PRELIMINARY OBJECTIONS :

Date: October 17, 2002

OPINION and ORDER

Before the Court are the Defendants' Preliminary Objections to the Plaintiffs' Complaint. The Complaint asserts medical malpractice and a violation of the Unfair Trade Practice and Consumer Protection Law (UTPCPL) arising out of the rendition of dental services. Plaintiff's, John Crossen, Complaint asserts that the Dr. A.J. Peretz ("Defendant Peretz") did unnecessary dental work. Specifically, Plaintiffs allege that Dr. Peretz said there was a cavity in John Crossen's ("Crossen") #19 tooth when there was not. According to Plaintiffs, Defendant Peretz then drilled and filled the tooth in question. The drilling damaged the tooth by exposing the pulp. This in turn required a root canal to remedy. Dr. Philip A. Sosland, a dentist with Dr. Peretz at Dental Care Associates, performed the root canal and informed Crossen that a review of his initial x-ray revealed that there was no tooth decay in tooth #19. Crossen alleges that root canal did not remedy the problem, which forced him to see another dentist, Dr. Adelson. Dr. Adelson referred Crossen to Dr. Donald W. Wells who performed another root canal on the same tooth and discovered that only two of the four canals had been filled.

Defendants' Preliminary Objection to Plaintiffs' Complaint was filed August 23, 2002. The Defendants contend that Count II of the Complaint is legally insufficient and should be dismissed. *See*, Defendants' Preliminary Objection to Plaintiffs' Complaint, ¶8 (Defendants' Preliminary Objection). Count II alleges that Defendant Peretz knowingly misrepresented to Crossen the need for dental care regarding Crossen's tooth #19 in violation of the UTPCPL. See, Plaintiffs' Complaint, ¶¶41-45.

In their motion, Defendants contend that the UTPCPL does not apply to the providers of medical service. *See*, Defendants' Preliminary Objection, ¶7. Defendants argue that the Superior Court has made a clear pronouncement in *Foflygen v. Zemel* and *Gatten v. Merzi*, that the UTPCPL does not apply to the services of any medical provider. Therefore, Defendants request that Count II of Plaintiffs' Complaint be dismissed.

Plaintiffs counter by arguing that the Superior Court's pronouncement was not as clear and all encompassing. Rather, the Plaintiffs argue that the inapplicability of the UTPCPL to medical service providers is determined on a case-by-case basis. *See*, Plaintiffs' Brief, 4. The cases relied upon by Defendants denied applicability of the UTPCPL because the Superior Court did not want to make medical service providers warrantors and guarantors of the treatment and results. *See*, *Id*. at 5. In those cases, plaintiffs' claims were premised on statements made regarding the success of the operation. The present case is different. Plaintiffs are not claiming that what was promised was not delivered, and thereby implicating the warrantor/guarantor concern. Instead, Plaintiffs allege that there was a misrepresentation regarding the need for dental services regarding tooth # 19. *See*, Plaintiffs' Brief, 5-6.

The Court agrees with Defendants that Count II of the Complaint shall be dismissed based on the controlling Pennsylvania Superior Court decisions *Foflygen* and *Gatten*.

It is unlawful to use "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." *See*, 73 P.S. §201-3. Trade or commerce includes the sale of services. *See*, 73 P.S. §201-2(3). A deceptive act is when one "[k]nowingly misrepresents that services, … are needed if they are not needed." *See*, 73 P.S. §201-2(4)(xv). Two cases have dealt with the applicability of the UTPCPL to medical service providers, *Foflygen v. Zemel*, 615 A.2d 135 (Pa. Super. 1992) and *Gatten v. Merzi*, 579 A.2d 974 (Pa. Super. 1990).

Both *Foflygen* and *Gatten* dealt with surgical procedures designed do facilitate weight loss. The *Foflygen* Court adopted the reasoning of *Gatten* in reaching its decision. *See*, 615 A.2d at 1354. *Foflygen* held that the UTPCPL "is inapplicable to the providers of medical services," and upheld the trial court's dismissal of a count premised on it. *See*, *Id*. at 1355. The Superior Court reasoned that the UTPCPL does not explicitly exclude the services of medical care providers, but it is clear that the Legislature did not intend "the Act to apply to physicians regarding medical services." *See*, *Id*. at 1354. The UTPCPL was intended to "prohibit unlawful practices relating to trade or commerce and of the type associated with business enterprises." *See*, *Ibid*. It was not the Legislature's intent to disturb the established common and statutory law regarding when liability for the rendition of medical services attaches to a physician."[1] *See*, *Ibid*.

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[1] According to *Fotlygen*, under the established law, liability attaches to medical service providers through "fault, lack of informed consent, or a specific contract warranting certain results." *See*, 6125 A.2d at 1354.

A plausible argument can be made that the holding of *Foflygen* is not as broad as it appears. The reasoning given in *Foflygen* to support the premis that the UTPCPL does not apply to providers of medical services was that the Superior Court did not want physicians to become warrantors and guarantors of the treatment and expected results. *See*, *Id*. at 1354. In *Foflygen*, the UTPCPL allegation was based on statements regarding the success of the stomach stapling procedure. In essence, the plaintiff was claiming that she did not get what was promised. The case *sub judice* is not making such a claim. Plaintiffs here are not trying to make Dr. Peretz a warrantor/guarantor of his work. Plaintiffs claim that Dr. Peretz committed a fraud by representing that dental work was needed when it was not. This is the type of fraud the Act was designed to protect consumers against. *See*, *Pirozzi v. Penske Olds-Cadillac-GMC, Inc.*, 605 A.2d 373, 375 (Pa. Super. 1992), *Chaflin v. Beverly Enterprises, Inc.*, 741 F. Supp. 1162, 1175 (E.D. Pa. 1989). The alleged fraud committed by Dr. Peretz could be likened to a mechanic saying that engine work is needed when it is not. Both are the type of fraudulent business practices the UTPCPL was designed to protect consumers of services against.

While the argument is logical and the acts alleged might be of the type the UTPCPL was designed to remedy, the Superior Court in *Foflygen* made a clear pronouncement of the applicability of the UTPCPL to medical services providers. The Superior Court stated, "the legislature did not intend the Act to apply to physicians regarding medical services" and the "Pa. UTPCPL is inapplicable to the providers of medical services." *See*, *Foflygen*, 615 at 1354, 1355. The language used by the Superior Court makes it clear that the inapplicability of the UTPCPL applies to *all* medical services providers. The Superior Court did not limit its

broad holding by stating that the UTPCPL did not apply "in this case" or did not apply to "those medical care providers". Nor did the Superior Court acknowledge that there could be situations in which the UTPCPL could apply to the medical profession. The Superior Court stated that the UTPCPL did not apply to medical service providers, period.

In line with the clear pronouncement of *Foflygen*, the UTPCPL does not apply to the medical services provided by a dentist. Therefore, Count II of Plaintiffs' Complaint is dismissed.

O R D E R

It is hereby ORDERED and DIRECTED that Defendants' Preliminary Objection filed August 23, 2002 is GRANTED. Count II of Plaintiffs' Complaint is DISMISSED.

BY THE COURT:

William S. Kieser, Judge

cc: Robert B. Elion, Esquire
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     Judges
     Christian J. Kalaus, Law Clerk
     Gary L. Weber, Esquire (Lycoming Reporter)