

Consumer Protection Law Ruling Could Spell Big Trouble for Pennsylvania Businesses

By Casey A. Coyle and Nicholas F. Borsuk

Last week, the Pennsylvania Supreme Court issued a 4-3 decision in *Gregg v. Amerprise Financial Inc.*, ___ A.3d ___, 2021 WL 607486 (Pa. Feb. 17, 2021), holding for the first time that a business's state of mind is irrelevant for a consumer to sustain a private cause of action under the "catch-all" provision of the Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-1 to 201-9.3 (the "UTCPL" or "Consumer Protection Law"). Now, any deceptive conduct that creates a likelihood of confusion or misunderstanding for a consumer is actionable under the provision, regardless of whether such conduct is committed intentionally (as in a fraudulent misrepresentation), carelessly (as in a negligent misrepresentation), or with the utmost care (as in strict liability).

Because the reach of the Consumer Protection Law is so vast, covering virtually every form of trade or commerce conducted with a consumer in Pennsylvania, practically all businesses across the Commonwealth will be impacted by the ruling – from manufacturers to construction companies to banks to insurance companies to healthcare providers to mortgage companies. Businesses therefore must take proactive measures to eliminate or mitigate their exposure under the new strict liability regime sanctioned by the Court.

THE "CATCH-ALL" PROVISION

The UTCPL is Pennsylvania's consumer protection law. Its purpose is to prevent "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce," as defined by the statute. "Trade" and "commerce" are broadly defined to mean "the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth."

The UTCPL authorizes the Attorney General or a District Attorney to bring an action to enforce the terms of the statute. The penalties available in a public enforcement action include a temporary injunction, permanent injunction, and fines as high as \$1,000 per violation, or \$3,000 per violation if the victim is 60 years or older. The Consumer Protection Law also provides a private cause of action for anyone who "suffers any ascertainable loss of money or property," as a result of an unlawful method, act, or practice under the statute. A court has the discretion to award "treble" or triple damages, as well as award reasonable attorney's fees and costs, upon a finding of liability.

The UTCPL lists 20 specific practices that constitute "unfair methods of competition" or "unfair or deceptive acts or practices." Such practices include: (1) "[p]assing off goods or services as those of another;" (2) "[c]ausing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;" (3) "[r]epresenting that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;" and (4) "[r]epresenting that goods or services have sponsorship, approval,

characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have.”

The UTPCPL also contains a “catch-all” provision. Actions have been initiated under the catch-all provision against businesses in a wide variety of industries, such as: (1) automobile repair shops; (2) automobile retailers; (3) banks; (4) debt collection businesses; (5) electricity supply companies; (6) health insurance providers; (7) home construction contractors; (8) investment advisors; (9) insurance companies; (10) landlords; (11) mortgage companies; (12) motor home manufacturers; (13) nursing homes; (14) rental car companies; (15) title insurance companies; and (16) tobacco manufacturers.

Prior to its amendment, the catch-all provision made it unlawful to engage in “any other fraudulent conduct which creates a likelihood of confusion or of misunderstanding.” Pennsylvania courts interpreted this provision as requiring proof of common law fraud. In 1996, however, the General Assembly amended the UTPCPL and revised the catch-all provision to add “deceptive conduct” as a prohibited practice. The amended catch-all provision makes it unlawful to engage in “fraudulent **or deceptive conduct** which creates a likelihood of confusion or of misunderstanding.” The statute, however, does not define the term “deceptive conduct.”

In the immediate wake of the amendment, the Superior Court – which is one of two intermediate appellate courts in Pennsylvania – interpreted the phrase “deceptive conduct” to require the elements of common law fraud, effectively rendering the new language superfluous. Over time, however, the Superior Court changed its view and adopted the position of its sister court that the Legislature intended the word “deceptive” in the statute to cover conduct **other than fraud**. The Superior Court thus held that “deceptive conduct” is synonymous with negligent deception, e.g., negligent misrepresentations, for purposes of the catch-all provision.

The law remained unchanged until 2018, when the Superior Court issued its decision in *Gregg v. Ameriprise Financial Inc.*, 195 A.3d 930 (Pa. Super. Ct. 2018).

THE DECISION

A husband and wife brought a lawsuit against their financial advisor and other defendants arising out of the purchase of a life insurance policy and other investment products. The couple raised various causes of action, including fraudulent misrepresentation, negligent misrepresentation, and violation of the catch-all provision of the Consumer Protection Law. The claims of fraudulent misrepresentation and negligent misrepresentation were submitted to a jury, and the jury returned a defense verdict on each count. The UTPCPL claim proceeded to a bench trial, and the trial court entered a verdict in favor of the husband and wife on the catch-all provision.

On appeal, the Superior Court affirmed. In doing so, the Court rejected the argument that a plaintiff must prove a mental state in order to sustain a private action under the catch-all provision. The Superior Court reasoned that, “[h]ad 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,’” such as prescribing only “fraudulent or negligent conduct.” By failing to do so, the Superior Court continued, “any deceptive conduct, ‘which creates a likelihood of confusion or of misunderstanding, is actionable [under the catch-all provision], whether committed intentionally (as in a fraudulent misrepresentation), carelessly (as in negligent misrepresentation), or with the utmost care (as in strict liability).”

The Pennsylvania Supreme Court affirmed on further review in a split decision. The majority relied upon a liberal interpretation of the UTPCPL to preserve what it found to be the General Assembly’s intent of eradicating unfairness and deception in consumer transactions. The majority held that “deceptive conduct” under the catch-all provision of the Consumer Protection Law “is not dependent in any respect upon proof of the actor’s state of mind.” Rather,

the relevant inquiry is whether the conduct has a “capacity to deceive” which creates a likelihood of confusion and misunderstanding. In reaching this conclusion, the majority found that “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.” The majority added that, without a state of mind requirement, the catch-all provision “fairly may be characterized as a strict liability offense.”

The dissent disagreed that, when the Legislature amended the statute in 1996 and added the phrase “deceptive conduct,” it intended to impose strict liability. The dissent opined that “it would be incongruous for the General Assembly to prohibit a vendor from engaging in fraudulent conduct in [the catch-all provision], which indisputably requires an intentional state of mind on the part of the vendor to deceive, while simultaneously strictly prohibiting a vendor from engaging in deceptive acts without regard to *mens rea*, as doing so would reduce the fraud prohibition to mere surplusage.” Instead, the dissent concluded that a violation of the “deceptive conduct” language in the catch-all provision may be established by showing that the vendor “is aware or should be aware, that his statements are **capable** of being interpreted in a misleading way by a consumer, regardless of the vendor’s belief regarding the truth or falsity of the statements. This is, in essence, a negligence standard.”

THE FUTURE

The ruling is significant in a number of respects. First, *Gregg* erodes the distinction between a private action and a public enforcement action brought under the Consumer Protection Law, even though the elements are not the same and the Supreme Court previously held that public enforcement actions and private actions are distinguishable. Moreover, *Gregg* renders the fraudulent conduct language of the catch-all provision an afterthought. No rational plaintiff will subject himself/herself to the heightened burden of proof that comes with prosecuting a UTPCPL claim for such conduct. Instead, a plaintiff will almost certainly proceed under the strict liability-esque deceptive conduct language of the catch-all provision.

Further, given the lower threshold now for prosecuting a claim under the catch-all provision and the ability to recover triple damages and attorney’s fees and costs, it is highly probable that courts will see a dramatic spike in UTPCPL claims. In fact, it stands to reason that a violation of the catch-all provision will become the “cause of action *de jour*” in most, if not all, cases brought by consumers against businesses.

Additionally, the imposition of a strict liability standard for deceptive conduct exposes Pennsylvania businesses of all shapes and sizes to UTPCPL suits merely because a consumer claims confusion and can demonstrate a financial detriment. Now, any dissatisfied consumer with second thoughts on a purchase can invoke the deceptive conduct language of the catchall provision, irrespective of whether or not the business intended to deceive. The result both over-deters and over-punishes conduct that causes no material harm. It also creates a Catch-22 for small, medium, and even large companies doing business in the Commonwealth – either settle consumer protection lawsuits or divert significant resources to defend them, with few defenses at one’s disposal.

Finally, *Gregg* raises a number of unanswered questions, including the following:

- **Actionable conduct:** “Deceptive conduct” under the catch-all provision now means a “capacity to deceive.” The Supreme Court, however, did not elaborate on the type of conduct that satisfies this standard. Nor did the Court provide any factors or guidance for lower courts in undertaking this inquiry. Presumably, the conduct that amounts to a “capacity to deceive” will be determined on a case-by-case basis. Such an *ad hoc* standard, however, may not provide sufficient guidance for business to avoid liability under the catch-all provision, further exacerbating the uncertainty created by *Gregg*.

- **Objective v. subjective standard:** The Supreme Court in *Gregg* seems to suggest that the “capacity to deceive” is an objective standard, remarking at one point that “[a] subjective assertion will not suffice.” However, an objective standard would seemingly require reading into the catch-all provision the “reasonable person standard,” which is synonymous with a negligence claim. Yet, interposing a negligence concept like the reasonable person standard into the catch-all provision appears at odds with the Court’s finding that the provision “fairly may be characterized as a strict liability offense.” And if a “capacity to deceive” is a subjective standard – meaning that whatever the consumer believes controls – then how could a defendant ever raise a defense that the conduct was not deceptive?
- **Potential defenses:** Without a state of mind requirement, the only available defenses for a business facing a UTPCPL suit under the catch-all provision would seem to be justifiable reliance and causation. However, recent cases interpreting the catch-all provision have had the effect of softening or eliminating the common law reliance and causation elements implicated in actual deception. This begs the question: do justifiable reliance and causation still matter in a suit based on a violation of the catch-all provision?
- **Waiver:** Is it possible for a business to eliminate its exposure by having a consumer sign a waiver and forfeit his/her rights to bring a suit under the UTPCPL, including the expansive catch-all provision? Would a court enforce such a provision when the stated purpose of the Consumer Protection Law is to eradicate unscrupulous business practices?
- **Arbitration:** Without a state of mind requirement and the prospect of recovering triple damages and attorney’s fees, the catch-all provision appears ripe for a flood of class actions. Can a business protect against the prospect of such class actions by including arbitration clauses in their contracts or terms and conditions, and requiring consumers to arbitrate any claims brought under the Consumer Protection Law?
- **Insurance:** Without a defined standard as to what conduct qualifies as a “capacity to deceive,” will businesses be able to obtain insurance for a UTPCPL suit brought under the catch-all provision?

Gregg is only be the beginning in what is expected to be a new frontier in UTPCPL jurisprudence, as litigants and the courts attempt to navigate catch-all provision claims within the new strict liability construct. While many questions now exist, it is clear vendors will now need to be more vigilant as to how consumers perceive their conduct. The sooner vendors act to eliminate or mitigate their exposure, the better.

Editor’s note: Casey served as counsel for *Amicus Curiae* Pennsylvania Builders Association in *Gregg v. Amerprise Financial Inc.*, No. 29 WAP 2019, 2021 WL 607486 (Pa. Feb. 17, 2021).