

RECENT DECISION ADDS ADDITIONAL RISK FOR PA-BASED BUSINESSES

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It's never been a better time to shop, work or spend leisure time at home – the internet and television are flooded with advertisements for amazing products with the ability to improve our lives and make things easier. However, the purchase of these products is no guarantee of the lifestyle being (at least impliedly) promised. Instead, many consumers continue with life as it was, even before their purchase of these products. In light of this reality, the companies marketing these products, and indeed all companies that provide goods and services within Pennsylvania or to Pennsylvania consumers, would be wise to take heed of a recent widening of Pennsylvania's consumer protection law, which now mandates that companies may be held liable for even unintentionally misleading or deceptive consumer-related conduct.

Pennsylvania's Consumer Protection Law, Generally

The Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL") is a sharp-toothed specter for all goods- and services-based businesses, as it may be used to attack a wide variety of real or perceived consumer harms and permits the court to impose compensatory damages, treble (tripled) damages, and counsel fees against businesses that violate the statute.

The statute centers on a broad definition of conduct deemed "unfair methods of competition" and "unfair or deceptive acts or practices", pertaining to business conduct such as advertising, pyramid schemes, consumer warranties, and residential real estate sales. The statute permits suits against businesses with Pennsylvania-based consumers and even against Pennsylvania-based businesses based on transactions with out-of-state consumers. The Pennsylvania Supreme Court's recent decision even further expanded the UTPCPL's vaguest definition, a catch-all imposing liability for "any other fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding."

The Court's Recent Decision

Recently, in *Gregg v. Ameriprise Financial, Inc.*, No. 29 WAP 2019, 2021 WL 607486 (Pa. Feb. 17, 2021), the Pennsylvania Supreme Court decided that the UTPCPL's catchall provision imposes strict liability, or liability standard without fault or intent, on businesses, so the consumer need not establish that the business was negligent or acted intentionally. Instead, any deceptive conduct creating a likelihood of consumer confusion or misunderstanding gives rise to liability.

In the case, a financial advisor/insurance agent persuaded two consumers to invest in various insurance and investment products, including a new life insurance policy. The agent advised the consumers that he would invest the cash value from their old insurance policy in a new policy and certain other financial products. However, the agent, without advising the

consumers, placed the premiums the consumers paid on the policy into other funds, which both increased his commission and resulted in higher premiums and costs to the consumers. The consumers then filed a lawsuit based in part on the UTPCPL's catchall provision.

In a 4-3 holding, the Pennsylvania Supreme Court abolished the long-assumed requirement of a finding of fraud or negligence in order to find a business's practices deceptive, holding instead that "deceptive conduct under the [UTPCPL] is not dependent in any respect upon proof of the actor's state of mind." In other words, to prevail under the UTPCPL, a consumer need not show that the business had the intent to deceive or had practiced actual deception, but instead need only show that the business's acts and practices "are capable of being interpreted in a misleading way" or have "the tendency or capacity to deceive."

New Risks for Businesses

After *Gregg*, Pennsylvania joins the majority of states that do not require a showing of intent before a consumer or the attorney general can bring a lawsuit. It is far easier for consumers to prove a UTPCPL violation, as wholly innocent conduct or mistakes that may confuse or mislead consumers can now arguably result in significant liability, which includes compensatory damages as well as treble damages and counsel fees.

A business's state of mind as to either the truth or falsity of a representation or whether a representation will deceive a consumer is irrelevant. Going forward, in consumer transactions in Pennsylvania, if a business agent's representation is deemed to create a likelihood of confusion or misunderstanding in dealings with a consumer, the business may be held strictly liable for the consumer's financial losses sustained in justifiable reliance on the conduct. A business likely cannot escape liability by claiming that its agent acted reasonably or made the misrepresentation innocently. Savvy, glossy marketing tactics now create risk – a consumer could plausibly claim that this messaging was deceptive and caused damage, regardless of that messaging's intent.

Expect to see more consumer protection litigation in Pennsylvania and increased risk as a result.

Tips for Savvy Businesses

To mitigate the new risks brought by *Gregg*, a shrewd business will ensure that its practices are inherently fair and not deceptive to consumers, as the intent requirement is quickly becoming the exception to the rule across the country. In particular, businesses that sell goods or services to Pennsylvania consumers in

Pennsylvania as well as Pennsylvania-headquartered businesses that sell goods or services to non-Pennsylvania consumers would be wise to consider the following:

Marketing Makeover

Since intent is no longer relevant, focus on the content of your communications to consumers. Reevaluate and simplify, and consider an overhaul of your disclosures and disclaimers. This is particularly important for businesses with complex offerings that laypersons cannot readily understand, such as financial products, computer software, and other highly technical goods and services.

Train the Team; Appreciate the Audience

- Review and update training materials for sales and marketing team members who directly interface with consumers, to ensure those materials emphasize the importance of clear and accurate explanations of the goods or services sold.
- In training employees, focus on aligning promises with consumer expectations, to mitigate the risk of consumers credibly alleging that your team's statements are likely to cause confusion or misunderstanding.
- Consider implementation of a monitoring system to ensure team compliance with approved marketing procedures and customer disclosures.
- Still, remember that consumers may not readily comprehend the disclaimers and risks related to your products, particularly in the investment and technology arenas, and may instead rely on an agent's verbal and/or undocumented guidance and explanations. After *Gregg*, whether that advice was well-meaning is irrelevant and the key will be whether a consumer understood or was confused or misled, a determination that will often require a trial to decide. That a consumer's investment may not pan out the way he or she wished, particularly in the financial arena, compounds this risk.

We are here to help you pivot to take in stride the new challenges brought by Gregg.

PROFESSIONALS

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CAPABILITIES

Litigation