



THE IMPACT OF *GREGG v. AMERIPRISE
FINANCIAL* ON STRICT LIABILITY
IN PENNSYLVANIA CONSUMER
TRANSACTIONS

VORYS

On February 17, 2021, the Supreme Court of Pennsylvania issued its long-awaited decision in *Gregg v. Ameriprise Financial*. The decision closes the final chapter of a case that has captivated business leaders from around the United States and settles a key question of Pennsylvania law that has lingered in a gray area for 25 years. The question has been whether Pennsylvania's primary consumer protection statute creates strict liability for defendants in consumer transactions, and the answer is "yes."

Statutory Overview

Pennsylvania's Unfair Trade Practices and Consumer Protection Law (the "CPL"), 73 P.S. §§ 201-1, et seq., was first enacted in December 1968. In broad terms, the CPL prohibits the use of deceptive or fraudulent statements or conduct "trade or "commerce."¹ The CPL includes twenty enumerated categories or examples of prohibited conduct. They are:

- (i) Passing off goods or services as those of another;
- (ii) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;
- (iii) Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another;
- (iv) Using deceptive representations or designations of geographic origin in connection with goods or services;
- (v) Representing 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;
- (vi) Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;
- (vii) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another;
- (viii) Disparaging the goods, services or business of another by false or misleading representation of fact;
- (ix) Advertising goods or services with intent not to sell them as advertised;
- (x) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
- (xi) Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

¹ See generally 73 P.S. § 201-2.

- (xii) Promising or offering prior to time of sale to pay, credit or allow to any buyer, any compensation or reward for the procurement of a contract for purchase of goods or services with another or others, or for the referral of the name or names of another or others for the purpose of attempting to procure or procuring such a contract of purchase with such other person or persons when such payment, credit, compensation or reward is contingent upon the occurrence of an event subsequent to the time of the signing of a contract to purchase;
- (xiii) Promoting or engaging in any plan by which goods or services are sold to a person for a consideration and upon the further consideration that the purchaser secure or attempt to secure one or more persons likewise to join the said plan; each purchaser to be given the right to secure money, goods or services depending upon the number of persons joining the plan. In addition, promoting or engaging in any plan, commonly known as or similar to the so-called "Chain-Letter Plan" or "Pyramid Club." The terms "Chain Letter Plan" or "Pyramid Club" mean any scheme for the disposal or distribution of property, services or anything of value whereby a participant pays valuable consideration, in whole or in part, for an opportunity to receive compensation for introducing or attempting to introduce one or more additional persons to participate in the scheme or for the opportunity to receive compensation when a person introduced by the participant introduces a new participant. As used in this subclause the term "consideration" means an investment of cash or the purchase of goods, other property, training or services, but does not include payments made for sales demonstration equipment and materials for use in making sales and not for resale furnished at no profit to any person in the program or to the company or corporation, nor does the term apply to a minimal initial payment of twenty-five dollars (\$25) or less;
- (xiv) Failing to comply with the terms of any written guarantee or warranty given to the buyer at, prior to or after a contract for the purchase of goods or services is made;
- (xv) Knowingly misrepresenting that services, replacements or repairs are needed if they are not needed;
- (xvi) Making repairs, improvements or replacements on tangible, real or personal property, of a nature or quality inferior to or below the standard of that agreed to in writing;
- (xvii) Making solicitations for sales of goods or services over the telephone without first clearly, affirmatively and expressly stating:
 - (A) the identity of the seller;
 - (B) that the purpose of the call is to sell goods or services;
 - (C) the nature of the goods or services; and

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- (D) that no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion;
- (xviii) Using a contract, form or any other document related to a consumer transaction which contains a confessed judgment clause that waives the consumer's right to assert a legal defense to an action;
- (xix) Soliciting any order for the sale of goods to be ordered by the buyer through the mails or by telephone unless, at the time of the solicitation, the seller has a reasonable basis to expect that it will be able to ship any ordered merchandise to the buyer:
- (A) within that time clearly and conspicuously stated in any such solicitation; or
- (B) if no time is clearly and conspicuously stated, within thirty days after receipt of a properly completed order from the buyer, provided, however, where, at the time the merchandise is ordered, the buyer applies to the seller for credit to pay for the merchandise in whole or in part, the seller shall have fifty days, rather than thirty days, to perform the actions required by this subclause;
- (xx) Failing to inform the purchaser of a new motor vehicle offered for sale at retail by a motor vehicle dealer of the following:
- (A) that any rustproofing of the new motor vehicle offered by the motor vehicle dealer is optional;
- (B) that the new motor vehicle has been rustproofed by the manufacturer and the nature and extent, if any, of the manufacturer's warranty which is applicable to that rustproofing; The requirements of this subclause shall not be applicable and a motor vehicle dealer shall have no duty to inform if the motor vehicle dealer rustproofed a new motor vehicle before offering it for sale to that purchaser, provided that the dealer shall inform the purchaser whenever dealer rustproofing has an effect on any manufacturer's warranty applicable to the - 5 - vehicle. This subclause shall not apply to any new motor vehicle which has been rustproofed by a motor vehicle dealer prior to the effective date of this subclause.²

The 21st category of prohibited unfair competition, which has been the most controversial and impactful provision of the CPL over its history, is

² 73 P.S. §201-2(4)(i)-(xx)

commonly referred to as the "catchall provision."³ When it was enacted in 1968, the catchall provision provided liability for "fraudulent conduct which creates a likelihood of confusion or of misunderstanding."⁴ For years, Pennsylvania's courts interpreted the catchall provision as requiring proof of common law fraud.⁵

In 1996, however, the General Assembly amended the CPL, including the catchall provision. Since 1996, the catchall provision has prohibited businesses from **"[E]ngaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding."**

The CPL provides for enforcement both by the Attorney General of Pennsylvania and by private citizens. Private causes of action can be brought by "any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property..."⁶ Over time, the courts of Pennsylvania have interpreted the scope of the CPL to include rentals of residential real estate⁷ the purchase of residential real estate⁸, and many other professional services.⁹

Private claims under the CPL are subject to a six-year statute of limitations.¹⁰ In the event a private plaintiff is successful in a CPL claim they can recover actual damages or statutory damages of \$100, whichever is greater.¹¹ The statute also permits a trial judge, in his or her discretion, to award treble damages and/or attorneys' fees to a prevailing plaintiff.¹²

Judicial History of the Catchall Provision

As mentioned above, the catchall provision was one of the sections of the CPL amended in 1996. The change seemed to expand the scope of the catchall provision to cover not only "fraudulent conduct" but "fraudulent or deceptive conduct." Despite the 1996 amendment, Pennsylvania's main intermediate appellate court, the Superior Court, continued to interpret the catchall provision as requiring proof of common law fraud.¹³

³ 73 P.S. §201-2(4)(xxi).

⁴ 73 P.S. § 201-2(4)(xiii), Dec. 17, 1968, P.L. 1224, No. 387, at § 2.

⁵ See, e.g., *Hammer v. Nikol*, 659 A.2d 617, 619 (Pa. Cmwlth. 1995); *Prime Meats, Inc. v. Yochim*, 619 A.2d 769, 773 (Pa. Super. 1993)

⁶ 73 P.S. §201-9.2(a).

⁷ *Commonwealth v. Monumental Properties, Inc.*, 459 Pa. 450, 467-70, 329 A.2d 812, 820-23 (1974).

⁸ *Gabriel v. O'Hara*, 368 Pa. Super. 383, 391-92, 534 A.2d 488, 492-93 (1987).

⁹ See, e.g., *Perry v. Markman Capital Mgmt.*, No. 02-744, 2002 U.S. Dist. LEXIS 19103, at *24 (E.D. Pa. Oct. 4, 2002) (applying the CPL to "services provided by the brokerage house" as distinguished from "fraud relating to the securities themselves.")

¹⁰ *Gabriel v. O'Hara*, 368 Pa. Super. 383, 398, 534 A.2d 488, 495 (1987).

¹¹ 73 P.S. §201-9.2(a).

¹² *Id.*

¹³ See, e.g., *Ross v. Foremost Ins. Co.*, 998 A.2d 648, 654 (Pa. Super. 2010); *Skurnowicz v. Lucci*, 798 A.2d 788 (Pa. Super. 2002); *Booze v. Allstate Ins. Co.*, 750 A.2d 877 (Pa. Super. 2000); *Fay v. Erie Ins. Group*, 723 A.2d 712 (Pa. Super. 1999); *Sewak v. Lockhart*, 699 A.2d 755 (Pa. Super. 1997); *DiLucido v. Terminix Int'l, Inc.*, 676 A.2d 1237 (Pa. Super. 1996).

SINCE 1996, THE CATCHALL PROVISION HAS PROHIBITED BUSINESSES FROM "[E]NGAGING IN ANY OTHER FRAUDULENT OR MDECEPTIVE CONDUCT WHICH CREATES A LIKELIHOOD OF CONFUSION OR OF MISUNDERSTANDING."

On the other hand, Pennsylvania's other intermediate appellate court, the Commonwealth Court, rejected this reading of the catchall provision in 2003, creating a split of authority in Pennsylvania.¹⁴ The law was further muddied by decisions from federal courts situated in Pennsylvania, who began to reject the Superior Court's interpretation of the post-amendment language.¹⁵

Plaintiffs began invoking the decisions of the Commonwealth Court and the federal courts to argue that claims under the catchall provision did not require proof of common law fraud. Alerted to the split of authority, a panel of the Superior Court decided *Bennett v. A.T. Masterpiece Homes at Broadsprings, LLC*, on March 6, 2012.¹⁶ In *Bennett*, the Superior Court ruled that the 1996 amendment changed the standard for claims under the catchall provision, broadening liability to include "deceptive" or "misleading" conduct that did not meet the elements of common law fraud.¹⁷

Under Pennsylvania precedent, however, the Superior Court cannot overrule itself. In recognition of this fact, the *Bennett* decision went out of its way to distinguish past Superior Court precedent on the catchall provision, rather than purport to overrule it.¹⁸ As such, *Bennett* did not eliminate the gray area over the CPL's catchall provision. Perhaps more importantly, *Bennett* did not clearly articulate any new standard for what standard of proof or mental state of the defendant was necessary to meet the definition of "deceptive" or "misleading" conduct under the CPL.

Following *Bennett*, several cases touched upon the standard necessary to maintain a claim under the catchall provision. The prevailing view emerged was that deceptive conduct under the CPL could be established either by fraudulent or negligent conduct.¹⁹ However, without a direct ruling on this subject, plaintiffs continued to push for an expansive interpretation of the catchall provision.

The Gregg Case

With Pennsylvania law still unsettled on these issues, the *Gregg* case garnered attention and notoriety when it went to trial in Allegheny County in 2014. Gary and Mary Gregg hired Robert Kovalchik, a financial advisor and insurance salesperson for Ameriprise Financial, Inc., in 1999. Mr. Kovalchik convinced the Greggs to surrender various life insurance

¹⁴ See *Commonwealth v. Percudani*, 825 A.2d 743 (Pa. Cmwlth. 2003).

¹⁵ See *Flores v. Shapiro & Kreisman*, 246 F.Supp.2d 427 (E.D. Pa. 2002); *Patterson v. Chrysler Fin. Co.*, 263 B.R. 82, 92 n. 17 (Bankr. E.D. Pa.2001); *Rodriguez v. Mellon Bank, N.A.*, 218 B.R. 764, 784 (Bankr. E.D. Pa.1998).

¹⁶ 40 A.3d 145, 2012 Pa. Super. LEXIS 97, 2012 PA Super 60, 2012 WL 698132 (Pa. Super. March 6, 2012).

¹⁷ See 40 A.3d at 151-156

¹⁸ See *Id.*

¹⁹ See *Dixon v. Nw. Mut.*, 2016 PA Super 186, 146 A.3d 780, 790 (Pa. Super. 2016) ("Deceptive conduct ordinarily can only take one of two forms, either fraudulent or negligent... The broadening of the UTPCPL so as to not require fraud therefore ipso facto makes negligent deception, e.g., negligent misrepresentations, actionable under the post-1996 catchall provision."); *Kirwin v. Sussman Auto.*, 2016 PA Super 222, 149 A.3d 333, 336 (Pa. Super. 2016) (citing *Dixon*).

policies they owned and to purchase new investments and insurance policies from Ameriprise, including a Flexible Premium Variable Life Insurance Policy.

Some years later, the Greggs became aware of various proposed class action lawsuits over Flexible Premium Variable Life Insurance policies, and began to investigate the conduct of Mr. Kovalchick. Ultimately, the Greggs alleged that Mr. Kovalchik made numerous misrepresentations to them to induce them to purchase the various policies and investments he suggested. The Greggs also alleged that Mr. Kovalchik mishandled funds they gave him, applying the monies to investments and accounts against their instructions and wishes.

The Greggs and their counsel brought claims for breach of fiduciary duty, intentional and negligent misrepresentation, and claims under the catchall provision of the CPL against Mr. Kovalchik and Ameriprise.

At trial, a jury found in favor of Ameriprise and rejected the Greggs' claims that Mr. Kovalchik made either intentional or negligent misrepresentations. As a result, Ameriprise and the Greggs submitted the remaining CPL claim to the trial court based upon the evidence that had been submitted to the jury.

Ameriprise argued that the jury's verdict in its favor on the common law intentional and negligent misrepresentation claims barred any verdict in favor of the Greggs on the CPL claim under *res judicata* and collateral estoppel. The Greggs argued that the 1996 amendment to the CPL established a strict liability standard for "deceptive conduct which creates a likelihood of confusion or misunderstanding." The trial court agreed with the Greggs and entered a verdict in their favor on the CPL claim. Following post-trial motions, the trial court also granted the Gregg's request for attorneys' fees and costs, as provided by the CPL.

Ameriprise appealed the decision to the Superior Court, which affirmed the decision of the trial court in September 2018.²⁰ The Superior Court ruled that negligence was not necessary to plead a CPL claim under the catchall provision.²¹ Instead, the Superior Court held "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)."²²

The invocation of strict liability by the Superior Court sent shockwaves through the Pennsylvania legal community and beyond. On appeal to the Pennsylvania Supreme Court, the Pennsylvania Coalition for Civil Justice Reform, Pennsylvania Bankers Association, Pennsylvania Health Care Association, Pennsylvania Manufacturers' Association, UPMC, American Property Casualty Insurance Association, American Tort

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²⁰ *Gregg v. Ameriprise Fin., Inc.*, 195 A.3d 930, 2018 Pa. Super. LEXIS 1009, 2018 PA Super 252, 2018 WL 4346324 (Pa. Sup. Ct. 2018).

²¹ 195 A.3d at 936.

²² *Id.* at 939 (internal quotation omitted).

Reform Association, the National Federation of Independent Business, Pennsylvania Association of Realtors, Pennsylvania Builders Association, and the U.S. Chamber of Commerce all appeared as *amici curiae* in support of Ameriprise.

On the other side, the Pennsylvania Association of Justice, the National Consumer Law Center, National Association of Consumer Advocates, Community Legal Services, and the Commonwealth of Pennsylvania (via the office of the attorney general) appeared as *amici curiae* in support of the Greggs. On February 17, 2021, in a 4-3 decision drawn down political lines, a majority of the Pennsylvania Supreme Court affirmed the Superior Court's decision in favor of the Greggs.²³

Analyzing the language of the CPL and in particular the 1996 amendment, the Supreme Court determined that "deceptive conduct" had "acquired a peculiar and appropriate meaning prior to the 1996 amendment."²⁴ The Supreme Court opined that the CPL had borrowed heavily from the Federal Trade Commission Act ("FTCA") and the Lanham Act, both of which allow for liability for deceptive conduct without proof of negligence.²⁵ The court then went on to cite Black's Law Dictionary, which defines "deceptive act" as "...[C]onduct that is likely to deceive a consumer acting reasonably under similar circumstances."²⁶ Based upon this analysis, the Supreme Court concluded, **"[t]he plain language of the current statute imposes liability on commercial vendors who engage in conduct that has the potential to deceive and which creates a likelihood of confusion or misunderstanding."**²⁷

The Supreme Court then drove out any lingering questions about what standard of liability this represented. "[T]he amended language places the duty of compliance with the CPL on commercial vendors, without regard to their intent. Without a state of mind requirement, the amended catch-all provision fairly may be characterized as a strict liability offense."²⁸

What Does *Gregg* Mean for Pennsylvania Businesses

Given the attention the *Gregg* case garnered on appeal, and the involvement of prominent industry groups from across the United States as *amici curiae*, it should be no surprise that the Supreme Court has attracted significant commentary and analysis since it was released last month. Since the 1996 amendments, and particularly since the split of authority began in the Pennsylvania courts in 2003, the CPL has been heavily litigated. Much of this pre-*Gregg* authority will now have to be

²³ *Gregg v. Ameriprise Fin., Inc.*, No. 29 WAP 2019, 2021 Pa. LEXIS 608

²⁴ *Id.* at *20-21 (Feb. 17, 2021).

²⁵ *Id.*

²⁶ *Id.* at *24-25 (citing *Black's Law Dictionary* (11th ed. 2019)).

²⁷ *Id.* at *25 (emphasis added").

²⁸ *Id.* at *26.

reevaluated in light of the new clearly-defined strict liability standard articulated in *Gregg*, a process beyond the scope of this White Paper.

In addition, numerous industries that engage in direct-to-consumer sales have found themselves in the spotlight of CPL claims, including health insurance, life insurance and annuities, financial services, realtors, and accountants. The involvement of groups representing many of these industries as *amici curiae* in the *Gregg* case demonstrates that the *Gregg* decision is expected to have a significant impact on these sectors. All companies that engage in one-on-one sales to consumers, especially if those sales occur over the phone or in the home (two areas that the CPL specifically focuses on) would be well-advised to use the *Gregg* decision as a moment to evaluate their sales processes and sales training, as well as how they handle customer satisfaction issues.

A final issue that bears mentioning is the effect the *Gregg* decision will have on insurance and insurance carriers. Businesses will be well-advised to reevaluate their insurance coverage needs in light of the *Gregg* decision, and should carefully consider whether existing policies of insurance adequately cover any potential CPL claims they could face. Likewise, as demonstrated by the involvement of APCIA as *amicus curiae* in the *Gregg* appeal, insurance carriers will be well-served to look at their policy documents as well as their underwriting standards in Pennsylvania.

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