

FINANCIAL SERVICES LITIGATION

ALERT

FEBRUARY
2021

Warning for Businesses: Pennsylvania Supreme Court Rules Violations of the State’s Unfair Trade Practices and Consumer Protection Act Do Not Require Intent

By Jonathan W. Hugg and Brittany C. Wakim

In a potential blockbuster, landscape-changing decision with widespread ramifications for companies providing goods and services to Pennsylvania consumers, the Pennsylvania Supreme Court just held that Pennsylvania’s powerful consumer protection law, the Unfair Trade Practices and Consumer Protection Act (“UTPCPL”), can impose liability on businesses even for unintentional violations of the statute. Fraudulent or negligent conduct is not required for a court to find a business’s conduct misleading or deceptive, and to force the business to pay damages. Rather, according to the Supreme Court, the UTPCPL has a “strict liability” standard where unintentionally confusing or misleading conduct can form the basis of a claim.

PENNSYLVANIA’S UTPCPL

The intent of the UTPCPL is to protect consumers of goods and services and deter businesses from participating in deceptive or unfair trade practices. Courts not only interpret the UTPCPL to apply to citizens of the Commonwealth, but also permit non-Pennsylvania residents to maintain a cause of action against a Commonwealth-headquartered business based on an out-of-state transaction. Relevant here, the UTPCPL contains a “catchall” provision that prohibits anyone who advertises, sells, or distributes goods or services from “engaging in any ... fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding” during a transaction.¹ Plaintiffs that win UTPCPL claims are entitled to have the losing

business pay their counsel fees as well as triple damages. These are the two hammers that make the UTPCPL so potent.

FACTS OF THE UNDERLYING CASE

In *Gregg v. Ameriprise Fin. Inc.*, a financial advisor and insurance agent for Ameriprise Financial, Inc. advised Gary and Mary Gregg to invest in various insurance and investment products. The agent also persuaded the Greggs to liquidate their assets and invest in a new life insurance policy. Following the advice of the agent, the Greggs paid the premiums on this insurance policy, but the agent placed the payments in an accelerated growth fund resulting in higher premiums. After receiving a class action notice, the Greggs, believing the agent had misled them, filed a lawsuit against the agent and Ameriprise alleging fraudulent and negligent misrepresentation and a violation of the catchall provision of the UTPCPL. A jury found for Ameriprise on the fraud and negligence claims. However, the trial judge found for the Greggs on their UTPCPL claim and awarded the premiums they had previously paid, plus interest, and attorney’s fees. The Superior Court upheld the decision. Ameriprise appealed to the Pennsylvania Supreme Court.

ON APPEAL

In the Supreme Court, the Greggs argued that the term “deceptive” in the catchall provision has a broad meaning that should include misrepresentations that have the tendency or capacity to mislead consumers. According to the Greggs, courts should look to the

¹ 73 P.S. § 201-2(4)(xxi)

impression created by the representation when determining whether a representation is deceptive. Thus, there should be no requirement of intent under the catchall provision.

However, Ameriprise argued that “deceptive conduct,” as used in the catchall provision, is the act of intentionally giving a false impression or recklessly making a false representation with the intent that a consumer rely upon it. Therefore, according to Ameriprise, the word “deceptive” in the catchall provision depends on the business’s intent to mislead. Moreover, since the words “strict liability” do not appear in the catchall provision, lawmakers did not intend to remove the business’s intent from consideration.

Adopting a broad interpretation of the UTPCPL’s catchall provision involving “fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding,” the Supreme Court stated “the relevant statutory provision leads inexorably to the conclusion that deceptive conduct under the [consumer protection act] is not dependent in any respect upon proof of the actor’s state of mind.” Rather, the statute should be broadly construed in an effort to “eradicate unscrupulous business practices.” There is no state of mind requirement as proof of intent is not necessary in order to establish deceptive conduct.

In short, the Court held that the catchall provision of the UTPCPL imposes “strict liability.” “Strict liability” is liability without fault – *i.e.*, liability without intent.

WHAT DOES THE COURT’S DECISION MEAN?

By making it far easier to prove a violation of the UTPCPL, the Supreme Court’s decision dramatically expands the risks faced by businesses selling goods or services to Pennsylvania consumers, as well as businesses headquartered in Pennsylvania selling goods or services to non-Pennsylvania consumers. Under the Supreme Court’s ruling, wholly innocent conduct or mistakes that may confuse or mislead consumers can now result in UTPCPL liability. Especially considering that a business that loses a UTPCPL lawsuit will have to pay not only compensatory damages, but also counsel fees and triple damages, the Court’s decision virtually guarantees that there will be more litigation

of this kind in Pennsylvania, which, in turn, will be more difficult to defend.

Although the Supreme Court decision affects every business that sells goods or services to consumers, providers of financial products must be especially wary. Consumer financial literacy is often limited. The language of financial documents, including disclaimers about risk and rates of return, may seem opaque and inaccessible. As a result, consumers tend to rely heavily upon informal guidance and explanations from financial experts, sometimes at a meeting where there is no “record.” With the Supreme Court’s decision, whether that advice was well-meaning is irrelevant. The key questions now may involve whether a consumer understood or was confused or misled, and whether the consumer suffered damage. There will almost always be a factual dispute over the consumer’s state of mind, which will often require a trial to decide. Compounding this is the risk that an investment may not just fail to appreciate, or do so at a projected rate, but also result in loss of principal. Thus, the potential for damages is significantly higher in financial services than in many other sectors.

Looking forward, since intent is no longer relevant, courts are more likely to focus on the content of business communications to consumers. Corporate Pennsylvania should consider re-evaluating and simplifying its advertising and promotional materials, and overhauling disclosures of possible risks and predicted results. Training of employees should focus on aligning promises with consumer expectations, to mitigate the risk of consumers credibly alleging that statements and representations are in any way likely to cause confusion or misunderstanding. ◆

This summary of legal issues is published for informational purposes only. It does not dispense legal advice or create an attorney-client relationship with those who read it. Readers should obtain professional legal advice before taking any legal action.

For more information about the Financial Services Litigation Group or to speak with a member of the firm, please contact:

*Jonathan W. Hugg
Co-Chair, Financial Services Litigation Group
215-751-2527
jhugg@schnader.com*

*Stephen A. Fogdall
Co-Chair, Financial Services Litigation Group
215-751-2581
sfogdall@schnader.com*

*Brittany C. Wakim
Associate
215-751-2092
bwakim@schnader.com*

www.schnader.com

© 2021 Schnader Harrison Segal & Lewis LLP
All rights reserved.

* See: www.schnader.com/jakarta