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Two Opinions Broaden the Scope of Liability and Strip Defenses Under Pennsylvania's Unfair Trade Practices and Consumer Protection Law

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In the span of just a few weeks, both the Pennsylvania Supreme Court and the U.S. Court of Appeals for the Third Circuit issued decisions significantly expanding liability under Pennsylvania's Unfair Trade Practices and Consumer Protection Law (CPL or UTPCPL). While these decisions involved claims by private parties, the CPL also permits lawsuits by district attorneys and the commonwealth's attorney general. The Pennsylvania Supreme Court broadened the scope of the CPL by imposing a strict liability standard under which a company can be liable if it "engage[s] in conduct that has the *potential* to deceive and which creates a likelihood of confusion or misunderstanding."[1] Meanwhile, the Third Circuit set aside longstanding precedent and stripped defendants of an often-asserted defense: the economic loss doctrine. While these decisions undoubtedly create a more plaintiff-friendly landscape, their practical effect remains to be seen.

The Pennsylvania Supreme Court Decision: *Gregg v. Ameriprise Financial, Inc.*

Gregg v. Ameriprise Financial, Inc. involved a decades-old dispute that arose after Mr. and Mrs. Gregg, relying upon their life insurance agent's advice, sold their existing life insurance policies and purchased a new policy. Unbeknownst to the Greggs, the new policy required them to pay additional money on top of their initial investment. The Greggs sued, alleging fraudulent misrepresentation, negligent misrepresentation, and violation of the CPL. Although Ameriprise prevailed on the fraudulent and negligent misrepresentation claims, the trial court ruled in favor of the Greggs on their CPL claim. The Superior Court affirmed.

In a 4-3 decision, the Pennsylvania Supreme Court held that the CPL's catch-all provision — which makes unlawful any "fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding" — does not have a state of mind requirement, but instead imposes strict liability.[2] In doing so, the Court focused on a 1996 amendment, which expanded the catch-all provision from "fraudulent conduct" to "fraudulent *or deceptive* conduct," explaining that "deception" has historically been construed more broadly than common law fraud. The Court also noted the absence of the explicit state of mind requirements in the CPL's other provisions. The Court emphasized that, because the CPL is a remedial statute, it "is to be construed liberally to effect its object of preventing unfair or deceptive practices."[3] Accordingly, the Court concluded that a strict liability standard aligns with the legislative intent behind the CPL to place the burden of compliance on businesses as they are better positioned to determine whether their representations might be deceptive.

Applying that standard to the Greggs' case, the Court explained that Ameriprise violated the CPL even though the Greggs did not prove that their agent negligently or intentionally deceived them. The Court held that because

deceptive conduct under the CPL is a strict liability offense, it was sufficient that the agent's inadequate explanation of the cost and terms of the insurance investments led the Greggs to believe they would not have to pay additional costs.

The three dissenting justices favored a negligence standard — *i.e.,* that liability depends on proof that the business knew, or reasonably should have known, that its conduct was likely to cause confusion or misunderstanding. This standard, the dissent argued, not only effectuates the CPL's goal to eliminate unfairness and deception in consumer transactions but also "protects honest businesspeople from incurring unforeseen penalties for statements or acts that no consumer would have been confused or misled by."[4]

The Third Circuit Decision: *Earl v. NVR, Inc.*

In *Earl v. NVR, Inc.*, the Third Circuit examined a CPL claim arising from a real estate transaction.[5] Lisa Earl purchased a home from NVR, which was both the seller and builder. NVR's marketing promised that the home would include "quality architecture, timeless design, and beautiful finishes." The company also made representations to Earl about the quality of the construction and its compliance with building codes and standards. After closing, a dissatisfied Earl sued and included a CPL claim. As part of its defense, NVR asserted that because Earl's CPL claim — a statutory tort — arose from a sales contract, it was barred by the economic loss doctrine, which prohibits "plaintiffs from recovering in tort losses to which their entitlement flows only from a contract." NVR supported its argument with a longstanding precedent from the Third Circuit: *Werwinski v. Ford Motor Co.*[6]

Unfortunately for NVR, the Third Circuit set aside *Werwinski* and removed the economic loss doctrine as a defense to CPL claims. In doing so, the court noted how Pennsylvania appellate courts — unbound by federal precedent — had issued a series of decisions over the last 20 years undermining *Werwinski*. A Pennsylvania Supreme Court opinion held that Pennsylvania does not apply the economic loss doctrine where there is a "'statutory [as opposed to common law] basis to impose liability for economic losses,'"[7] and two Pennsylvania Superior Court decisions[8] expressly rejected the holding in *Werwinski*. Bowing to the state court interpretation of state law, the Third Circuit conceded that "*Werwinski* no longer accurately reflects the state of Pennsylvania law with regard to the economic loss doctrine and the UTPCPL."[9]

The Third Circuit also analyzed whether Earl's CPL claim was barred by the gist of the action doctrine — another doctrine that maintains the distinction between contract and tort. While the Third Circuit did not unqualifiedly remove the gist of the action doctrine as a defense to CPL claims, it did determine that the doctrine was not a defense to Earl's CPL claim because the alleged deception arose out of deceptive marketing and misrepresentations that were collateral to the contract.

Implications

These decisions impact "dozens of industries," including banking, insurance, health care, retail, and residential real estate.[10] They also touch nearly all services, including financial advisory, medical, tax, accounting, and legal.[11] They are decidedly consumer-friendly and serve as a warning to businesses in Pennsylvania that they face greater risk of CPL liability. With the strict liability standard imposed by *Gregg*, defendants can be found liable for representations even when they were not careless and did not intend to deceive anyone. Defendants can no

longer assert a state of mind defense to the CPL's catch-all provision. And with *Earl*, defendants in federal court also have lost their ability to assert the economic loss doctrine as a bar to CPL claims. With this marked shift in CPL jurisprudence — which will be felt in both public and private actions — it is important that companies understand the remaining defenses and how to mitigate their risks.

Although *Gregg* lowered the bar for liability by removing any requirement to prove the actor's state of mind, it also reinforced that the CPL imposes a causation element in private actions requiring a plaintiff to prove reliance and harm.[12] And while both *Gregg* and *Earl* involved CPL actions arising out of marketing statements, neither case questioned or purported to undermine well-established case law that has held "puffery" — slogans and lofty statements that no reasonable consumer would believe — to be inactionable.[13] In addition, these recent decisions do not change the standard for imposing treble damages — the real hammer of the CPL. Although the decision to impose treble damages remains a matter of discretion, the Pennsylvania Supreme Court has previously instructed courts to be guided in this decision by whether the wrongful conduct was intentional or reckless.[14]

Additionally, it is reasonable to anticipate more aggressive enforcement from the attorney general. Given *Gregg* removed the government's burden to prove the actor's state of mind and previous decisions removed its burden to prove reliance,[15] the attorney general may only need to show that an accused company made a statement that could create "a likelihood of confusion or misunderstanding" — not that the accused company intended to deceive any consumer or that any consumer was actually deceived.

With such a low bar to liability, it is important that companies mitigate the risk of the attorney general's actions by creating and enforcing a strong corporate compliance program that includes comprehensive protocols for ensuring that information provided to consumers — whether through marketing or otherwise — is not only technically true but also readily digestible by the average consumer. Nonetheless, although having robust processes in place will reduce the chance of disseminating information that is likely to create confusion or misunderstanding, mistakes will be made by even the best-intentioned companies. That is where a strong compliance program can be particularly beneficial. While intentions do not matter for determining liability in a strict liability framework, they may matter to attorneys general who have limited resources and ordinarily consider intentions when deciding how and whether to initiate, litigate, or settle an action. In many instances, a company's ability to demonstrate a strong corporate compliance program will deter or temper the attorney general. A strong compliance program might also be useful in private actions, particularly in convincing the court that treble damages are not warranted.

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[1] *Gregg v. Ameriprise Financial, Inc.*, No. 29 WAP 2019, 2021 WL 607486, at *9 (Pa. Feb. 17, 2021) (emphasis added).

[2] 73 Pa. Cons. Stat. § 201-2(4)(xxi). The Court appears to reinterpret the reference to "deceptive conduct" in that provision to mean "conduct that has the *potential* to deceive." The Court, however, does not define "deceive." As a result, it appears that the Court may be *sub silentio* treating "deceptive" as superfluous and finding actionable any "conduct which creates a likelihood of confusion or of misunderstanding."

[3] *Gregg*, 2021 WL 607486, at *6.

[4] *Id.* at *10 (Todd, J., dissenting).

[5] *Earl v. NVR, Inc.*, No. 20-2109, 2021 WL 833990 (3d Cir. Mar. 5, 2021).

[6] 286 F.3d 661 (3d Cir. 2002).

[7] *Earl*, 2021 WL 833990, at *2 (quoting *Excavation Techs., Inc. v. Columbia Gas Co. of Pa.*, 604 Pa. 50, 985 A.2d 840, 842-43 (2009)).

[8] *Id.* at *2 (citing *Knight v. Springfield Hyundai*, 81 A.3d 940 (Pa. Super. Ct. 2013) and *Dixon v. Nw. Mut.*, 146 A.3d 780 (Pa. Super. Ct. 2016)).

[9] *Id.* at *1.

[10] See https://paforciviljusticereform.org/wp-content/uploads/2020/11/Gregg-Amicus-Brief.pdf.

[11] *Id.*

[12] *Gregg*, 2021 WL 607486, at *9 (“Accordingly, under the plain meaning of the statute, deceptive conduct during a consumer transaction that creates a likelihood of confusion or misunderstanding *and upon which the consumer relies to his or her financial detriment* does not depend on the actor’s state of mind.”) (Emphasis added).

[13] *Commonwealth by Shapiro v. Golden Gate Nat’l Senior Care LLC*, 648 Pa. 604, 625, 194 A.3d 1010, 1023 (2018).

[14] *Compare* 73 Pa. Cons. Stat. § 201-9.2 (“The court may, in its discretion, award up to *three times the actual damages sustained*, but not less than one hundred dollars ($100), and may provide such additional relief as it deems necessary or proper.”), *with Schwartz v. Rockey*, 932 A.2d 885, 898 (Pa. 2007) (“[C]ourts of original jurisdiction should focus on the presence of intentional or reckless, wrongful conduct, as to which an award of treble damages would be consistent with, and in furtherance of, the remedial purposes of the UTPCPL.”).

[15] *Com. v. TAP Pharm. Products, Inc.*, 36 A.3d 1197, 1255 (Pa. Cmwlth. 2011) (“in an action in the public interest under the catchall provision of the CPL, either there is no reliance element, or it is softened from the common law reliance standard”), *rev’d on other grounds*, 626 Pa. 1, 94 A.3d 350 (2014).

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