STRADLEY RONON

The Scope & Standard

A Stradley Ronon Publication

WWW.STRADLEY.COM

MARCH 18, 2021

Stradley Ronon Stevens & Young, LLP
2005 Market Street
Suite 2600
Philadelphia, PA 19103-7018
215.564.8000 Telephone
215.564.8120 Facsimile
www.stradley.com

With other offices in:
Washington, D.C.
New York
New Jersey
Illinois
Delaware

www.meritas.org

Stradley Ronon is a member of Meritas, the premier global alliance of independent law firms. Meritas firms offer a full range of legal services to meet every client need.

Information contained in this publication should not be construed as legal advice or opinion or as a substitute for the advice of counsel. The enclosed materials may have been abridged from other sources. They are provided for educational and informational purposes for the use of clients and others who may be interested in the subject matter.

Copyright © 2021
Stradley Ronon Stevens & Young, LLP
All rights reserved.

Pennsylvania Supreme Court Upholds Six-Figure Attorneys' Fees Award Against State Agency in Public Records Dispute

By Karl S. Myers

The Pennsylvania Right-to-Know Law, or RTKL, is the Commonwealth's answer to the federal Freedom of Information Act, or FOIA. Like its federal counterpart, Pennsylvania's records-transparency law opens government documents to public inspection so the people can "know what their government is up to."[1]

When a Pennsylvania agency receives a request for government records, it must follow three steps before responding:

(1) promptly notify and advise each agency employee who might have responsive documents;

(2) obtain all documents from the employees; and

(3) review and assess the documents to determine what must be disclosed.

---

[1] *U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 772-73 (1989) (citation omitted).

(Continued on page 2)

Six-Figure Attorneys' Fees Award

(Continued from page 1)

After this process is complete, the agency's open records officer is ready to send the requester the agency's response and any responsive and public records.

But what if a court later finds the agency did not appropriately follow these steps? As a recent case shows, the answer is that the agency could wind up learning an expensive lesson.

In Uniontown Newspapers v. Pennsylvania Department of Corrections,[2] a newspaper asked an agency for records about illnesses suffered by prison inmates possibly exposed to fly ash from a nearby dump. The agency's open records officer forwarded the request by email to a bureau within the agency without explanation. He did not ask the bureau to search for any records. A bureau representative responded that the request related to an agency investigation – even though the newspaper's request did not say it was.

The officer did not question the bureau about this conclusion. He just took it at face value. And based on the bureau's narrow interpretation, the officer denied the request as seeking records of a government investigation (a type of record exempt from disclosure under the Right-to-Know Law).

The newspaper doubted the agency's response. So it appealed to the Office of Open Records and took the unusual step of filing an enforcement action in the Commonwealth Court. Each tribunal ruled against the agency and ordered full disclosure to the newspaper. But the agency only made a series of partial disclosures. Years had passed after the newspaper first made its request, but it still did not have all the records it had a right to receive.

The Commonwealth Court found the agency acted in bad faith. The "primary problem" was that the agency failed to give specific and separate consideration to the request. Instead, it incorrectly presumed the newspaper was asking for records of a specific investigation. That assumption led the agency to reflexively deny the request. It was not until "well into the litigation" that the agency first searched for records responsive to the newspaper's request.

The court determined that denying access without trying to obtain and evaluate any records is bad faith. And even after the agency began looking for documents, it made only a series of "piecemeal, incomplete disclosures" that did not comply with the court's full-disclosure orders. This, too, was bad faith.

As a result of these findings, the court imposed the maximum statutory penalty of $1,500 and then awarded the newspaper nearly $120,000 for its attorneys' fees.

For more information, contact
Karl S. Myers at 215.564.8193 or
kmyers@stradley.com.

The agency sought discretionary review by the Pennsylvania Supreme Court. That court took the case, but it gave the agency no relief. It affirmed both of the Commonwealth Court's bad faith and sanctions decisions.

The Supreme Court saw no reason to disturb the bad-faith finding, given the open records officer's lack of diligence and "slavish reliance" on the bureau's interpretation of the newspaper's request. The court rejected the agency's suggestion that an open records officer meets his obligations simply by parroting what agency employees tell him. The court's decision thus makes it clear: agency officers must ask questions and collect and review documents before responding to Right-to-Know requests. Rubber-stamping is not allowed – even if it means an agency will shoulder a significant administrative burden.

As for the fee award, the Supreme Court recognized the Right-to-Know Law's text suggested limits on the circumstances permitting an award of attorneys' fees. But the court found the law ambiguous, and chose to apply a broader construction – specifically, one allowing for an award of attorneys' fees whenever an agency's determination is reversed and a court finds it denied records access in bad faith. Given that is what happened in the newspaper's case, the court upheld the nearly $120,000 fee award against the agency.

Uniontown Newspapers shows the Pennsylvania courts' commitment to strict enforcement of an agency's Right-to-Know Law obligations. An agency must give each request individualized attention. It must gather possibly responsive records in every case. And the agency must scrutinize them to determine what it must disclose.

Open records officers cannot simply accept what agency employees tell them. If employees say they have nothing responsive, the open records officer should follow up. Trust,

(Continued on page 3)

[2] *Uniontown Newspapers v. Pa. Dep't of Corr.*, 243 A.3d 19 (Pa. 2020), aff'g 197 A.3d 825 (Pa. Commw. 2018) & 185 A.3d 1161 (Pa. Commw. 2018).

© 2021 Stradley Ronon Stevens & Young, LLP

Six-Figure Attorneys' Fees Award

(Continued from page 2)

but verify. If there really are no responsive documents, the agency might consider including in its final response to the requester a description of the steps the agency took and search parameters it used. This may help assuage concerns and promote the requester's confidence in a "no records" response. Similarly, officers relying heavily on what employees tell them could have those employees prepare and sign written statements explaining the steps the employees took, as Justice David Wecht suggested in a concurring opinion.

Together with requiring strict enforcement of Right-to-Know Law procedures, the Uniontown Newspapers decisions show the courts are not afraid of assessing significant attorneys' fees against agencies that behave badly. Hopefully other agencies will avoid the outcome in that case by taking every Right-to-Know Law request seriously and methodically following each step required in Pennsylvania's public records law.

Intent To Deceive Is Not Required to Prove a Claim Under State Consumer Protection Law

By Craig R. Blackman

On Feb. 17, 2021, the Supreme Court of Pennsylvania issued its ruling in the Gregg v. Ameriprise Financial suit—a dispute over the culpability standard for the "catch-all" provision of the Pennsylvania Unfair Trade Practices and Consumer Protection Law. That statute allows consumers who purchase goods or services to sue vendors who engage in "fraudulent or deceptive conduct" that "creates a likelihood of confusion or of misunderstanding" during a transaction.

Before the Gregg dispute, Pennsylvania's intermediate appellate courts (the Superior and Commonwealth courts) had applied a strict liability standard to "catch-all" claims. As the Superior Court panel described in Gregg, those prior decisions did not require consumers to prove common law fraud for their "catch-all" claims.

The basis for those earlier rulings was the Pennsylvania General Assembly's inclusion of a consumer-friendly standard when it passed an amendment to the statute in 1996, purposefully expanding the unlawful conduct proscribed by the "catch-all" provision to also prohibit deceptive conduct—not just the common law fraudulent conduct prohibited before the amendment. As the Gregg trial and intermediate appellate courts explained, any deceptive conduct creates a cause of action under the Consumer Protection Law. It does not matter if the conduct was fraudulent or negligent or even if the vendor used the utmost care.

Ameriprise disagreed with the lower courts' assessment that the "catch-all" provision, as amended, was a strict liability standard, so it sought discretionary review from the Pennsylvania Supreme Court. Ameriprise pointed out that the statute required proof of "fraudulent or deceptive conduct," which Ameriprise argued was inconsistent with a strict liability standard. The Pennsylvania Supreme Court agreed to take up the case and address the dispute.

For more information, contact Craig R. Blackman at 215.564.8041 or cblackman@stradley.com.

In a sharply divided 4-3 decision, the Supreme Court found the earlier reasoning of the Superior and Commonwealth courts persuasive. The Court held that claims under the "catch-all" provision, as amended in 1996, expanded liability by barring any deceptive conduct that creates a likelihood of confusion or of misunderstanding. The Court thus held that proof of intent is unnecessary to establish deceptive conduct. The Court's majority reached this conclusion in part because the amended language of the Consumer Protection Law was based on and contained identical language to similar provisions of the Federal Trade Commission Act and the Lanham Act, which have been interpreted as not requiring proof of intent.

The Court's majority was mindful of its obligation to construe the statute liberally, in accord with the General Assembly's intent to eliminate unfairness and deception in consumer transactions. It concluded that the plain language of the amended provision eliminated the state of mind element that was required before the amendment. The Court noted that, had the General Assembly intended to limit the scope of the "catch-all" provision, it could have done so with express language. Instead, to the contrary, the language actually employed bars "deceptive conduct," which the Court majority interpreted as showing the intent of the General Assembly to eliminate consideration of state of mind.

(Continued on page 4

© 2021 Stradley Ronon Stevens & Young, LLP

State Consumer Protection Law

(Continued from page 3)

Interestingly, the dissenting justices, employing the very same plain language interpretation standard, disagreed and argued that if the General Assembly had intended a strict liability standard, it could and should have used those very words. Without that language in the amendment, the dissent argued that the majority misread and failed to give effect to the full language of the statute.

It remains to be seen whether this precedent—now the final word under Pennsylvania law, barring another legislative amendment—disrupts the litigation landscape, emboldening consumers to file more lawsuits with "catch-all" claims in the future.

Intent To Deceive Is Not Required to Prove a Claim Under State Consumer Protection Law

By Brandon M. Riley

It is one of those nightmare scenarios for attorneys – not as bad as accidentally leaving the cat filter on for your virtual hearing, but close. There I was, arguing our preliminary objections when the judge stopped me cold: "Wait a minute, Mr. Riley. Are you saying there's currently an appeal pending in this matter?"

"Yes, Your Honor," I replied. "Plaintiffs appealed the denial of their motion for a preliminary injunction that they filed at the outset of this matter. That appeal is currently pending with the Superior Court."

"Then haven't I lost jurisdiction over this matter under Rule 1701(a)? Isn't there an automatic stay in place?"

I did not know the answer for certain and started to pretend to leaf through my notes, hoping that I somehow had the foresight to jot that down in preparing for the argument. I had not. "I don't believe there is a stay in place, Your Honor," I finally responded. "If you could get an automatic stay by appealing an order denying an injunction, that's essentially the same as if the injunction had been granted, which I don't think would make sense. But I concede that I don't have the reference to the applicable rule off the top of my head."

"I do," the judge replied, and he opened his desk reference of the Pennsylvania Rules of Appellate Procedure. "Here we are, Rule 1701(a): 'General rule. Except as otherwise prescribed by these rules, after an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may no longer proceed further in the matter.'" The judge looked up.

For more information, contact Brandon M. Riley at 215.564.8147 or briley@stradley.com.

"I tell you what: I'll let you continue with the argument. But I'm going to need a short brief from both parties as to whether there's an automatic stay in place before I dispose of – oh, I'm sorry – rule on the preliminary objections."

Even though I now knew I would lose the preliminary objections, when I returned to the office to confirm there was no automatic stay in place, I was vindicated. There is no stay during the pendency of an appeal from an order granting or denying injunctive relief. Pa. R.A.P. 311(a)(4) permits an interlocutory appeal as of right of an "order that grants or denies, modifies or refuses to modify, continues or refuses to continue, or dissolves or refuses to dissolve an injunction . . ." Rule 311(h), in turn, provides that "Pa. R.A.P. 1701(a) shall not be applicable to a matter in which an interlocutory order is appealed under subparagraphs (a)(2) or (a)(4) of this rule." Rule 311(h) therefore renders inapplicable Rule 1701(a), and there is no stay imposed while a litigant pursues an appeal from the grant or denial of a request for injunctive relief.

If this comes up again, I will be ready. I hope you will be, too.

© 2021 Stradley Ronon Stevens & Young, LLP

Court News

In 2021, Pennsylvania voters will choose four jurists for the Commonwealth's appellate courts. There is one opening on the Supreme Court, occasioned by Chief Justice Thomas G. Saylor having reached mandatory retirement this year. There is one vacancy on the Superior Court, created by President Judge Emeritus Susan P. Gantman's decision to assume senior status. As for the Commonwealth Court, there are two vacancies. Judge Robert Simpson's retirement produced the first opening. It was temporarily filled when Gov. Tom Wolf appointed Judge J. Andrew Crompton to complete Judge Simpson's term. The other Commonwealth Court vacancy arises from President Judge Emerita Mary Hannah Leavitt's decision not to seek another term. The political parties made their endorsements in February, and the candidates are working to secure their positions on the ballot. The primary election is on May 18, and the general election is on November 2.

As for the federal courts, there are no vacancies on the 14-member U.S. Court of Appeals for the Third Circuit, based in Philadelphia. Vacancies are expected in the usual course, as judges assume senior status and retire. Openings are filled by Presidential appointment and Senate confirmation. There already are a handful of vacancies on other Circuit Courts, presenting the new President with an opportunity to make appointments to those positions.

Rules Corner

During the pandemic, Pennsylvania's appellate courts have been conducting oral arguments by video over the Webex platform, with simultaneous broadcast on YouTube. When the Superior Court began doing so, it limited argument to selected cases in which there were compelling reasons to hold argument. More recently, however, the Superior Court has relaxed its policy and now allows video argument more often. The court's new approach aligns more closely with its pre-pandemic policy to allow arguments in any case when a party requested it.

Quotable

"Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

- Alexander Hamilton, in The Federalist No. 78

© 2021 Stradley Ronon Stevens & Young, LLP