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## Sometimes a Recommendation Is Just a Recommendation: The Pennsylvania Supreme Court Addresses the Scope of Liability for Breach of Fiduciary Duty Claims Against Financial Advisors/Insurance Producers

By William T. Mandia and Lauren A. Zychowicz

On June 20, the Pennsylvania Supreme Court ruled in *Yenchi v. Ameriprise Financial, Inc.*<sup>1</sup> that a fiduciary relationship does not arise between a financial advisor and a consumer when the consumer purchases a whole life insurance policy based on the financial advisor’s advice if the consumer retained decision-making authority over whether to purchase the policy. In so doing, the Pennsylvania Supreme Court reversed a ruling of Pennsylvania’s intermediate appellate court that had the potential to vastly broaden the fiduciary liability of financial advisors and life insurance producers.

In *Yenchi*, a financial advisor made an unsolicited telephone call to plaintiffs and offered to meet with them to discuss their financial planning. At plaintiffs’ third meeting with the advisor, they agreed to purchase a financial management proposal for \$350. The advisor subsequently presented the *Yenchis* with a written proposal, which contained a number of general recommendations aimed at helping plaintiffs prepare for retirement, some of which plaintiffs implemented. One such recommendation was to consolidate plaintiffs’ existing life insurance policies into a single whole life policy. The advisor initially suggested a particular whole life insurance policy, but plaintiffs did not accept this recommendation. A few months later, the advisor recommended a similar policy, which plaintiffs purchased, along with a deferred variable annuity. The advisor also suggested that plaintiffs increase the death benefit under their life insurance coverage, but plaintiffs rejected this advice.

Several years later, plaintiffs had the life insurance policy and annuity independently reviewed, and learned that the insurance policy was underfunded and that they would have to pay additional premiums, with increasing rates, beyond the premiums that the advisor allegedly represented to them. In addition, plaintiffs discovered that the variable annuity would not mature until they turned 84, rather than 65, as they claim the advisor represented to them. Plaintiffs filed suit, asserting various claims against the advisor, including a claim for breach of fiduciary duty.

The trial court granted summary judgment on all claims, and held that no fiduciary relationship existed between plaintiffs and the advisor. The court found that a fiduciary relationship does not exist unless the customer delegates decision-making control to the advisor,<sup>2</sup> and that in this case, plaintiffs had continued to make their own investment decisions.

<sup>1</sup>— A.3d —, No. 8 WAP 2016, 2017 WL 2644473 (Pa. June 20, 2017).

<sup>2</sup> The trial court rejected the notion that there was any material difference between an insurance producer and a financial advisor.

Plaintiffs appealed to the Pennsylvania Superior Court. The Superior Court reversed, finding the trial court's analysis of whether there had been a cession of control too rigid. Plaintiffs' evidence, consisting of testimony that they purchased "independent, financial planning advice," and depended upon the advisor because he promoted his services as a financial advisor, was sufficient to establish a prima facie case that a fiduciary relationship existed.

The Pennsylvania Supreme Court granted discretionary review to consider whether the Superior Court erred. In reversing the Superior Court's ruling, the Supreme Court held that a fiduciary duty may arise in connection with the purchase of a life insurance policy when the consumer cedes to the financial advisor decision-making authority over whether to purchase the policy. The Court rejected plaintiffs' assertion that a fiduciary relationship existed with the advisor because he held a "vastly superior" position with respect to his knowledge of insurance products and financial services. In so doing, the Court concluded that fiduciary duties do not arise merely because one party relies on and pays for the specialized skill of the other party, because if they did, "fiduciary relationships would arguably exist in virtually every consumer transaction, including with plumbers, mechanics and salespeople." Rather, the critical question in determining if a fiduciary relationship exists is whether the consumer ceded control over the decision to purchase, either explicitly or implicitly, because of "overmastering influence" on one side or "weakness, dependence, or trust justifiably reposed" on the other.

The Court found that plaintiffs' evidence established only an arm's-length consumer transaction, rather than a fiduciary relationship. In particular, the Court noted that plaintiffs accepted only some of the advisor's recommendations and rejected others, which showed that plaintiffs maintained and exercised decision-making control over their financial matters. In addition, plaintiffs' lack of postsecondary education was not indicative of weakness, dependence or trust justifiably reposed. Moreover, their reliance on the advisor's advanced training, without more, was insufficient to establish an overmastering influence. Thus, plaintiffs' evidence failed to show that they had ceded their decision-making authority to the advisor, and therefore could not establish any indicia of a fiduciary relationship.

Overall, *Yenchi* delivers good news for financial advisors and insurance producers by markedly limiting the circumstances where fiduciary liability could exist. Importantly, the Pennsylvania Supreme Court makes clear that a fiduciary duty does not exist merely because an advisor or producer, who by definition has superior knowledge in their field, recommends that a consumer purchase a product.

Despite this favorable outcome, the bad news is that the existence of a fiduciary duty remains a fact-intensive inquiry. *Yenchi* does not foreclose the possibility that a fiduciary relationship may exist in other contexts, such as when a



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consumer cedes decision-making control, in whole or in part, to a financial advisor or insurance producer, or where the consumer has a special vulnerability that creates a unique opportunity for another person to take advantage of them.

Indeed, given the Court's detailed analysis of the nature of plaintiffs' relationship with the advisor, including such as whether they accepted or rejected the advisor's recommendations, it is critical for financial advisors and insurance producers to minimize their liability risk through prudent actions. These include but are not limited to ensuring that the customer is in fact making his or her own informed decisions and disclosing to the customer that any recommendations or advice given is just that, with the ultimate decision to purchase (or not purchase) a consumer product resting exclusively in the hands of the consumer. Where appropriate, conversations with a customer should be memorialized in a contemporaneous writing or in the advisor's notes, which should be maintained with the customer's file. Moreover, because a fiduciary relationship can arise at any time during an advisor's dealings with a client, it is important to remain cognizant of any fluctuating expectations or changes during the course of the relationship.

Finally, as the Pennsylvania Supreme Court highlighted in *Yenchi*, there are various other avenues through which consumers can seek relief for the conduct of their financial advisors — such as the pursuit of common law claims for fraud/negligent representation or a statutory claim for deceptive sales practices under Pennsylvania's Unfair Trade Practices Act and Consumer Protection Law, which affords Pennsylvania residents a generous six-year statute of limitations in which to bring claims, as well as the potential for actual damages, treble damages and attorneys' fees. Advisors and producers continue to face significant liability risks post-*Yenchi* and must therefore act prudently to protect themselves against liability for claims brought by customers who later become disillusioned with their own investment decisions.

## People News



**Paula Shaffner** served as a panelist at SIFMA's Senior Investor Protection Regional Workshop in Philadelphia. The panel was entitled, "Protecting Your Senior Clients: Prevention, Identification and Action."



**Jeff McFadden** spoke at the American Conference Institute's 8th Annual Advanced Forum on Managed Care Disputes and Litigation in Philadelphia. His panel was entitled, "Deep-Dive into Healthcare False Claims: Analysis of Current Trends in False Claims Cases for MCOs."



**Craig Blackman** served as an organizing co-chair and panel moderator at the 2017 National Flood Insurance Conference in Washington, D.C. The panel was entitled, "Current Claims Practices."



**Pat Kingsley** moderated a panel entitled, "Avoiding Problems in Taking Assignments," at the Surety Claims Institute 42nd Annual Meeting and Seminars in Farmington, Pennsylvania.

Pat also served as both a panelist and panel moderator at the American Bar Association's Fidelity and Surety Law Committee's Spring Meeting in Naples, Florida. Pat was a panelist for "The Parties' Obligations Under the Performance Bond Relative to a Principal's Default."

Pat also moderated the panel, "The AIA A-312 Performance Bond Revisited: A panel discussion addressing key issues, potential pitfalls and practice tips for addressing adverse case law."



**Jana Landon** was selected to participate on The Sedona Conference's Law Firm Data Security Drafting Team. Also, Jana and **Adam Brown** presented at the Human Resources Council sponsored by the Chamber of Commerce of Southern New Jersey in Voorhees, N.J. Jana and Adam's panel was entitled, "Opinions, Secrets, and Security: Minimizing Employee Social Media and Cyber Risks."



**Karl Myers** was appointed to a three-year term on the Governing Council of the Pennsylvania Bar Association's Administrative Law Section at the annual meeting in Pittsburgh. Karl also moderated the Philadelphia Bar Association's Chancellor's Forum for Commonwealth Court candidates, which was co-presented by the Bar Association and Pennsylvanians for Modern Courts in Philadelphia.

Twenty Stradley Ronon attorneys were named to *Super Lawyers*' 2017 listing of the top-rated lawyers in the country, and nine firm attorneys were named to the *Super Lawyers*' 2017 Rising Stars. Click [here](http://www.stradley.com/insights/news/2017/05/stradley-attorneys-recognized-by-supers-lawyers) (<http://www.stradley.com/insights/news/2017/05/stradley-attorneys-recognized-by-supers-lawyers>) to view the full list.