

Pa. Justices Could Shift State's Consumer Litigation

By **Karl Myers**

The Supreme Court of Pennsylvania recently announced it will hear *Gregg v. Ameriprise Financial*,^[1] a dispute over the culpability standard for the “catch-all” provision of Pennsylvania’s Unfair Trade Practices and Consumer Protection Law.^[2] 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.^[3] Depending on how the Supreme Court decides the case, *Gregg* could profoundly change the field of consumer protection litigation in Pennsylvania.



Karl Myers

In *Gregg*, the plaintiffs met with a financial adviser, who persuaded them to liquidate their life insurance policies and IRAs and use the proceeds to buy new investments. The plaintiffs did so, but the adviser did not purchase all of the new investments and deposited some funds into an account that netted him significant commissions. The plaintiffs also were surprised to learn they had to pay additional funds to purchase the new investments.

Later, the plaintiffs received a class action notice, which led them to believe the adviser violated their legal rights. They sued the adviser and several involved insurance companies, claiming common law fraudulent and negligent misrepresentation, as well as violation of the catch-all provision of Pennsylvania’s consumer protection law.

The jury found in the insurance companies’ favor on the two common law misrepresentation claims, but the judge ruled for the plaintiffs on the catch-all claim. The judge explained that even if the adviser did not directly misrepresent the new investments, he failed to explain them and their attendant costs. As a result, the adviser deceived the plaintiffs, given they reasonably believed they would not have to pay more funds for the new investments. The trial judge awarded the plaintiffs actual damages, attorney fees and costs, as permitted under the consumer protection law.

On appeal, the Superior Court upheld the trial court’s decision.^[4] The court traced the history of the consumer protection law, explaining that its original formulation prohibited only “fraudulent conduct,” which the courts interpreted as requiring proof of common law fraud. Later, in 1996, the Pennsylvania Legislature changed the statute by expanding its coverage from “fraudulent conduct” to “fraudulent or deceptive conduct” — thus expanding the statute beyond just fraud.

Despite this change, the Superior Court adhered to its prior — and narrow — reading of the catch-all provision in a series of early 2000s decisions. The Commonwealth Court (Pennsylvania’s other intermediate appellate court), on the other hand, recognized the statute’s expansion and the Legislature’s intent to strengthen consumer protection.^[5]

Eventually, the Superior Court realized it had overlooked the statutory change. In its 2012 decision in *Bennett v. A.T. Masterpiece Homes*,^[6] the court reversed course, and since that time has not required proof of common law fraud for catch-all claims. To the contrary: the court now applies a strict liability standard, the statute’s use of the word “deceptive” suggests a very low standard — even lower than negligence. As a result, in *Gregg*, the jury’s finding that there was neither fraud nor negligence did not prevent a finding of a

catch-all violation.

As the Superior Court explained in *Gregg*, the current state of Pennsylvania law is that consumers do not have to prove common law fraud for their catch-all claims. Instead, any deceptive conduct creates a cause of action. It does not matter if the conduct was intentional or negligent, or even if the vendor used the utmost care. A consumer has a cause of action anytime a vendor engages in deceptive conduct if the consumer relies on that conduct to his or her detriment.

The *Gregg* panel elaborated that a catch-all violation “is not amenable to excuses” because vendors “have full volitional control over their conduct” when acting in the marketplace. They choose “where, when, and how they enter the market.” In contrast, consumers “may be especially reliant upon a vendor’s specialized skill, training, and experience in matters with which consumers have little or no experience.” As a result, the *Gregg* court explained, the Legislature decided to put consumer protection compliance duties “squarely and solely on vendors.”

The insurance companies in *Gregg* disagreed with this assessment of the catch-all provision, so they sought discretionary review by the Pennsylvania Supreme Court. In their petition for allowance of appeal, they argued that the statute’s requirement of proof of “fraudulent or deceptive conduct” is inconsistent with the Superior Court’s imposition of a strict liability standard.

In a June 27 order, the Supreme Court agreed to take the case to decide this question:

Whether the Superior Court improperly held that a strict liability standard applies to a claim under the “catch-all” provision of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-1, et seq., as amended in 1996, even though the provision expressly requires proof of “fraudulent or deceptive conduct.”

Claims under the consumer protection law are common in many different lawsuits brought by consumers. Along with the financial services at issue in *Gregg*, the consumer protection law applies in many other consumer settings, including car purchases, home improvements, health care services, landlord-tenant agreements and consumer lending. So *Gregg* could disrupt the consumer litigation landscape.

If the Supreme Court parts ways with the Superior and Commonwealth courts and holds proof of fraud is required, the number of catch-all claims could plunge. Fraud generally requires a showing of intent to mislead, which often can be difficult to prove. This could create a significant barrier to catch-all claims.

On the other hand, if the Supreme Court endorses or even strengthens the consumer-friendly approach of the intermediate appellate courts, it could embolden consumers to file more lawsuits with catch-all claims in the future. Indeed, if strict liability remains the standard, and as a result that deception is all that is required, then catch-all claims will remain easier to prove.

The briefing in *Gregg* is underway and should occupy the remainder of the summer and much of the fall. Oral argument should take place in April 2020 in Pittsburgh, with a decision likely to follow later in 2020.

Karl S. Myers is chair of the appellate practice group at Stradley Ronon Stevens & Young LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] 2019 WL 2635642 (Pa. June 27, 2019) (docket nos. 490 WAL 2018, 29 WAP 2019).

[2] 73 P.S. §§201-1, et seq.

[3] 73 P.S. §201-2(4)(xxi).

[4] 195 A.3d 930 (Pa. Super. 2019).

[5] Commonwealth v. Percudani , 825 A.2d 743 (Pa. Commw. 2003).

[6] 40 A.3d 145 (Pa. Super. 2012).