Vendors Face Strict Liability for Deceptive Conduct Under Pa. Consumer Protection Law

The imposition of strict liability requires vendors to exercise the utmost care in their dealings with Pennsylvania consumers, particularly since a successful plaintiff can recover attorney fees and treble damages under the PUTPCPL.

By **Matthew J. Rifino** | May 06, 2021

Matthew J. Rifino of McCarter & English

The Pennsylvania Supreme Court's recent decision in Gregg v. Ameriprise Financial holds vendors that provide goods and services to consumers in the commonwealth of Pennsylvania strictly liable for fraudulent or deceitful conduct under the Pennsylvania Unfair Trade Practices and Consumer Protection Law (PUTPCPL). As a result, a vendor's state of mind—and that of its employees—when engaging consumers is irrelevant. The imposition of strict liability requires vendors to exercise the utmost care in their dealings with Pennsylvania consumers, particularly since a successful plaintiff can recover attorney fees and treble damages under the PUTPCPL.

The Gregg case involved a more than decade-long dispute in which the plaintiffs filed suit related to the advice of the defendants to purchase certain financial products. The plaintiffs asserted claims for, among others, negligent misrepresentation, fraudulent misrepresentation, and violations of the PUTPCPL. The defendants obtained a favorable result on the misrepresentation claims, but the trial court found them liable under the PUTPCPL. The defendants appealed the decision, arguing that the PUTPCPL requires evidence of a misrepresentation and that the prior defense verdicts on the misrepresentation claims barred the court from finding in favor of the plaintiffs on the PUTPCPL claim. The intermediate appellate court affirmed the trial court's ruling. The Pennsylvania Supreme Court agreed in a 4–3 decision.

The PUTPCPL provides consumers with a private cause of action for 21 categories of unfair or deceptive trade practices. The last category, the catch-all provision, is the primary area of dispute before the courts. The catch-all provision attempts to hold actors liable for "engaging in any other fraudulent conduct or deceptive conduct which creates a likelihood of confusion or of misunderstanding." The language concerning fraudulent or deceptive conduct was the subject of Gregg; the Gregg defendants argued that the plaintiffs must first establish that the defendants engaged in fraudulent or deceptive conduct to prevail under the PUTPCPL. A claim for common law fraud or deceit requires evidence of intent. While a claim for negligent misrepresentation does not require this level of proof, a plaintiff must still show that a defendant should have known of the false statement underlying the claim. Under either claim for relief, the defendant's state of mind is relevant. Conversely, the defendant's state of mind is not pertinent under a strict liability theory.

In Gregg, the Pennsylvania Supreme Court interpreted the catch-all provision of the PUTPCPL under a strict liability standard. The holding reflects a focus on whether the relevant conduct "has the potential to deceive and … creates a likelihood of confusion or misunderstanding." The court noted that a vendor stands in a position to regulate its conduct and the substance of its representations, and this unique position requires the vendor to predetermine whether the conduct and/or representation is deceptive to avoid liability. Given the remedial nature of the statute and the failure of the Pennsylvania General Assembly to include a state of mind requirement in the catch-all provision, the court held that vendors are strictly liable for deceptive conduct under the PUTPCPL.

The Pennsylvania Supreme Court's treatment of the PUTPCPL catch-all provision as a strict liability offense warrants attention. The PUTPCPL has a broad reach concerning the purchase or lease of goods and services for a consumer purpose, including, but not limited to, manufacturing, finance and insurance. Under the PUTPCPL, a prevailing plaintiff may recover up to three times the amount of its actual damages as well as its attorney fees and costs. Gregg requires vendors to think carefully before they act or speak since a defendant now has one less arrow in its quiver as a result of the court's ruling. A vendor may find it beneficial to attack the private cause of action on other grounds, including, but not limited to, whether its conduct created a likelihood of confusion; whether the plaintiff relied on its conduct, and if so, whether the reliance was justified; and whether the plaintiff suffered an ascertainable loss. Given the availability of treble damages and attorney fees, the stakes have only grown higher in the wake of Gregg.

Matthew J. Rifino, *special counsel in the Philadelphia and Wilmington offices of McCarter & English, is a commercial litigator whose practice focuses on corporate bankruptcy and restructuring matters. He can be reached at mrifino@mccarter.com.*