

**IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT**

No. 29 WAP 2019

GARY L. GREGG and MARY E. GREGG,
Appellees

v.

**AMERIPRISE FINANCIAL, INC., AMERIPRISE FINANCIAL
SERVICES, INC., RIVERSORCE LIFE INSURANCE
COMPANY and ROBERT A. KOVALCHIK,**
Appellants

**BRIEF FOR *AMICUS CURIAE* COMMONWEALTH OF
PENNSYLVANIA IN SUPPORT OF APPELLEES
GARY L. GREGG AND MARY E. GREGG**

APPEAL FROM THE ORDER OF THE SUPERIOR COURT ENTERED ON
SEPTEMBER 12, 2018 (REARGUMENT DENIED NOVEMBER 21, 2018)
AT NO. 1504 WDA 2017, AFFIRMING THE ORDER OF THE
COURT OF COMMON PLEAS OF ALLEGHENY COUNTY
ENTERED ON DECEMBER 17, 2014 AT NO. GD 01-006611

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Statutes

The Unfair Trade Practices and Consumer Protection Law (UTPCPL), Act of
December 17, 1968, P.L. 1224, as amended, 73 P.S. §§ 201-1—201-9.3 . *passim*

Act of December 17, 1968, P.L. 1224.8

Act of December 4, 1996, P.L. 906.8

Other Authorities

40 Pa. Legis. J. – House 1231 (July 8, 1968)7

INTEREST OF THE *AMICUS*

The Unfair Trade Practices and Consumer Protection Law (UTCPL) was enacted by the General Assembly a little more than fifty years ago to protect the public from unfair and deceptive trade practices.¹ It was intended, *inter alia*, to provide statutory protections for consumers beyond what was available under the common law. Moreover, from its inception, this Court has interpreted the UTCPL “*liberally* to effect its object of preventing unfair or deceptive practices.” *Commonwealth, by Creamer v. Monumental Properties, Inc.*, 329 A.2d 812, 817 (Pa. 1974) (emphasis added).

The Attorney General, along with local District Attorneys, has been vested with the exclusive power to bring public actions under the UTCPL. *See* Section 4 of the UTCPL, 73 P.S. § 201-4. Pursuant to this authority, the Attorney General has a paramount role in enforcing the requirements of the UTCPL to protect Pennsylvania across the full spectrum of commercial transactions.

The UTCPL specifically makes it unlawful to engage in 21 enumerated types of conduct which constitute “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” Sections 2(4) and 3 of UTCPL, 73 P.S. § 201-2(4) and § 201-3. Of these enumerated

¹ Act of December 17, 1968, P.L. 1224, *as amended*, 73 P.S. §§ 201-1—201-9.3.

provisions, none is more useful to the Attorney General's efforts in combatting unlawful trade practices than the final provision, what is commonly referred to as the "catchall provision." Section 2(4)(xxi) of the UTPCPL, 73 P.S. § 201-2(4)(xxi). In the vast majority of cases initiated by the Attorney General, the catchall provision is relied upon – in whole or in part – to establish a violation of the UTPCPL.

The catchall provision provides that "[e]ngaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding" constitutes an unfair or deceptive trade practice. *Id.* Prior to the 1996 amendments to the UTPCPL, the catchall provision prohibited only "fraudulent" conduct. At that time, the General Assembly decided to broaden the scope of the catchall provision by adding the phrase "deceptive conduct" to it. This added language constitutes a material change to the UTPCPL which furthers the General Assembly's underlying purpose of protecting the public from those who would engage in deceptive conduct in the marketplace.

The present case involves a private action brought under Section 9.2 of the UTPCPL, 73 P.S. § 201-9.2. Private actions are separate and distinct from the public actions brought by the Attorney General. However, both rely on the definition of unfair and deceptive trade practices under Section 3 along with the

enumerated types of conduct which constitute such practices under Section 2(4) of the UTPCPL.

This case is important to the Commonwealth because it raises questions regarding the interpretation and application of the catchall provision. Those questions have been addressed by decisions of both the Commonwealth Court and the Superior Court. Both of these courts have correctly determined the catchall provision imposes a strict liability standard on those engaged in trade or commerce. The Appellants' position if adopted by the Court would negate the changes to the catchall provision made by the General Assembly in 1996. This, in turn, would seriously diminish the ability of the Attorney General to bring actions under the UTPCPL to protect the public from those who would engage in unfair and deceptive trade practices. Accordingly, the Attorney General has a significant interest in the outcome of this action.

STATEMENT OF THE QUESTION PRESENTED

- I. 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.”?**

SUMMARY OF ARGUMENT

In 1968, the General Assembly enacted the UTPCPL to protect the public from unfair and deceptive business practices. 73 P.S. §§201-1 to 201-9.3. The catchall provision of the UTPCPL, as originally enacted in 1968, provided that “unfair or deceptive acts or practices” included “engaging in any other fraudulent conduct which creates a likelihood of confusion.” In 1996, the catchall provision was amended to include not just “fraudulent conduct,” but also “deceptive conduct.”

Appellants, despite the clear intent of the General Assembly in enacting the 1996 amendment, maintain that there was in fact no real change to the catchall provision and it still, to this day, requires a plaintiff to demonstrate common law fraud or its equivalent. In their view, the addition of “deceptive conduct” to the catchall definition is of no consequence and should be ignored by the courts.

Appellants further argue that “deceptive conduct” means not only conduct that is “deceptive to the ordinary consumer” but must include by definition the specific intent to deceive. Moreover, Appellants attempt to conflate “fraudulent” and “deceptive” as being the same. However, to do so, would render the General Assembly’s 1996 amendment to the catchall meaningless.

Both the Commonwealth Court and the Superior Court have repudiated the common law fraud standard advocated by Appellants and interpreted the catchall

provision as imposing strict liability for claims brought under the UTPCPL. In doing so, they have relied on the fact that (1) this Court has long held that the law should be liberally construed to further the legislative goal of consumer protection; (2) the addition of the words “or deceptive” to the statute indicates the General Assembly intended a less restrictive interpretation; and (3) maintaining the pre-1996 requirement of showing common law fraud would render the words “or deceptive conduct” redundant..

The Commonwealth, acting through the Attorney General, firmly believes that the Appellants’ proposed interpretation of the catchall provision is at odds with the General Assembly’s intent in amending the UTPCPL and contrary to public policy. Accordingly, the Commonwealth asks that the Court affirm the decision of the Superior Court.

ARGUMENT

I. AS PREVIOUSLY DETERMINED BY BOTH THE SUPERIOR AND COMMONWEALTH COURTS, THE 1996 AMENDMENT TO THE UTPCPL'S CATCHALL PROVISION ESTABLISHES A STRICT LIABILITY STANDARD FOR "FRAUDULENT AND DECEPTIVE" CONDUCT.

In 1968, the General Assembly enacted the UTPCPL to protect the public from unfair and deceptive business practices. 73 P.S. §§201-1 to 201-9.3. From its inception, the UTPCPL was intended to be liberally construed. As Representative Daniel Beren² stated prior to the final vote enacting the law, the UTPCPL "protects both the unsuspecting and innocent consumer and the legitimate businessman, both of whom are subject to fraudulent schemes by the unscrupulous profiteer." 40 Pa. Legis. J. – House 1231 (July 8, 1968) (statement of Rep. Beren).

This Court has repeatedly confirmed this liberal interpretation. In *Commonwealth, by Creamer v. Monumental Properties, Inc.*, 329 A.2d 812, 817 (Pa. 1974), it said "[s]ince the Consumer Protection Law was in relevant part designed to thwart fraud in the statutory sense, it is to be construed liberally to effect its object of preventing unfair or deceptive practices." *See also id.* at 822 ("We cannot presume that the Legislature when attempting to control unfair and

² Rep. Beren was one of three members from the House on the Committee of Conference with the Senate on the UTPCPL.

deceptive practices in the conduct of trade or commerce intended to be strictly bound by common-law formalisms.”).

The catchall provision of the UTPCPL, as originally enacted in 1968, provided that “unfair or deceptive acts or practices” included “[e]ngaging in any other **fraudulent** conduct which creates a likelihood of confusion.”³ (emphasis added). In 1996, the catchall provision was amended to include not just “fraudulent conduct,” but also “deceptive conduct.”⁴ The present case raises the question of whether the catchall provision, as amended, imposes a strict liability standard for claims based on deceptive conduct.

Prior to the 1996 Amendment to the UTPCPL, both the Commonwealth Court and the Superior Court agreed that to bring a claim under the catchall provision a consumer must establish the elements of common law fraud. *See, e.g., Prime Meats, Inc. v. Yochim*, 619 A.2d 769, 469 (Pa. Super. 1993) (pre-1996 catchall provision requires proof of common law fraud which includes misrepresentation of material fact, scienter, and justifiable reliance on the misrepresentation); *Hammer v. Nikol*, 659 A.2d 617, 619-20 (Pa. Cmwlth. 1995) (same).

³ Section 2(4)(xvii) of Act of December 17, 1968, P.L. 1224.

⁴ Section 2(4)(xxi) of Act of December 4, 1996, P.L. 906.

Today, in light of the 1996 Amendment to the catchall, both the Commonwealth Court and the Superior Court have repudiated the common law fraud standard. In *Commonwealth v. Percudani*, 825 A.2d 743 (Pa. Cmwlth. 2003), Commonwealth Court determined that the old standard of pleading common law fraud no longer applied as the General Assembly had changed the catchall to include the words “deceptive conduct.” *Id.* at 747 (adopting liberal interpretation of catchall provision by federal Bankruptcy Courts in *Rodriguez v. Mellon Bank, N.A.*, 218 B.R. 764 (Bankr.E.D.Pa. 1998) and subsequent cases). In *Commonwealth ex. rel. Corbett v. Peoples Benefit Services, Inc.*, 923 A.2d 1230-36 (Pa. Cmwlth. 2007), it further explained the scope of the catchall provision: “Neither the intention to deceive nor actual deception must be proved; rather it need only be shown that the acts and practices are capable of being interpreted.”

At the time *Percudani* was decided, the Superior Court had continued to pay lip service to the pre-1996 catchall requirement that complainants establish common law fraud. *See, e.g., Booze v. Allstate Ins. Co.*, 750 A.2d 877 (Pa. Super. 2002); *Fay v. Erie Ins. Group*, 723 A.2d 712 (Pa. Super. 1999); *Sewak v. Lockhart*, 699 A.2d 755 (Pa. Super. 1999). However, as the Commonwealth Court noted in *Percudani*, these Superior Court cases failed to discuss the 1996 Amendment, let alone “provide any rational basis for its continuing restrictive view of the Law.” *Percudani*, 825 A.2d at 747. *See also Commonwealth v. Manson*, 903 A.2d 69, 74

(Pa. Cmwlth. 2006) (“[T]his court has rejected [the Superior Court’s restrictive] interpretation [of the catchall provision] because: (1) the statute is to be liberally construed to effectuate the legislative goal of consumer protection; (2) the legislature’s addition of the words “or deceptive” signals a less restrictive interpretation; and (3) maintaining the pre-1996 requirement would render the words “or deceptive conduct” redundant and superfluous, contrary to the rules of statutory construction.”).

In 2012, the Superior Court at last recognized its failure to acknowledge and give full effect to the 1996 amendment to the catchall provision. *Bennett v. A.T. Masterpiece Homes at Broadsprings*, 40 A.3d 145 (Pa. Super. 2012) (“The question, then, is not whether a company or corporate officer engaged in conduct that was intended to deceive consumers. Rather, the question is whether the company or corporate officer engaged in conduct that might be “deceptive to the ordinary consumer.”).

Appellants argue that “deceptive conduct” means not only conduct that is “deceptive to the ordinary consumer” but must include by definition the specific intent to deceive. Appellants’ Brief at 23-24. Moreover, Appellants attempt to conflate “fraudulent” and “deceptive” as being the same. *Id.* at 24-25. However, to do so would render the General Assembly’s 1996 amendment to the catchall meaningless. *See Bennett*, 40 A.3d at 154 (“maintaining a standard that demands

fraud even after the amendment would render the legislature's addition of "deceptive" redundant and meaningless in a manner inconsistent with well-established principles of statutory construction.").

While Appellants have cherry-picked definitions of "deceptive" in a way that supports their argument (*see* Appellants' Brief at 23-24), they fail to recognize – or simply ignore – the full scope of the word's meaning.⁵ We do not dispute that in some circumstances the word "deceptive" does connote some type of specific intent. However, this does not apply in all cases and certainly not for purposes of interpreting the meaning of "deceptive" in the post-1996 catchall provision. As an adjective, "deceptive" can mean that certain conduct has the tendency to mislead regardless of any specific intent to do so by the person engaged in the conduct. According to Merriam Webster, the meaning of "deceptive" includes: "tending or having power to cause someone to accept as true or valid what is false or invalid." merriam-webster.com/dictionary/deceptive (last visited 10/23/2019). This

⁵ While Appellants believe that the various definitions of "deceptive" included in their brief support their interpretation of the statute, they in fact undermine their position. Hidden in the weeds are definitions which do not require an intent to deceive. For example, the Merriam-Webster Dictionary (New ed. 2016) (Appellants' Brief at 24) defines "deceptive" in part as "tending to deceive." Likewise, the Oxford English Dictionary (3d ed. 2000) (Appellants' Brief at 24) defines "deceptive" as "apt or tending to deceive, having the character of deceiving." Neither of these definitions requires or includes as a necessary condition that an actor actually intends to cause deception.

definition of deceptive does not require an intent to deceive and is entirely consistent with the interpretation of the catchall provision espoused by both the Commonwealth and Superior Courts.

In addition to attempting to negate the intent of the General Assembly in adding “deceptive” to the catchall provision, Appellants fail to give proper weight to the liberal interpretation traditionally given to the UTPCPL as recognized by this Court since its 1974 decision in *Monumental Properties*. As recognized by the Superior Court in the present case, these factors support finding that “deceptive conduct” imposes strict liability for purposes of the UTPCPL. *Gregg v. Ameriprise Financial, Inc.*, 195 A.3d 930, 937-38 (Pa. Super. 2019).

We additionally note that Section 2(4) of the UTPCPL defines the catchall provision (along with 20 other types of activities) as constituting “unfair methods of competition” and “unfair or deceptive acts or practices.” However, there is no requirement under the UTPCPL that such conduct be willful or intentional to be unlawful. This is in direct contrast to Section 8(b) of the UTPCPL, 73 P.S. § 201-8(b), which specifically requires a finding of willful conduct to obtain civil penalties.⁶ If proving willful conduct were a necessary element of proving a

⁶ Section 8(b) of the UTPCPL provides as follows:

In any action brought under section 4 of this act, if the court finds that a person, firm or corporation is wilfully using or has wilfully used a method, act or practice declared unlawful by section 33 of this act, the

violation of the UTPCPL, the requirement of proving willful conduct to obtain civil penalties would be both redundant and unnecessary.

The Pennsylvania Builders Association, as an *amicus curiae*, argues that the Superior Court's decision, if upheld, will present Pennsylvania businesses with a "Hobson's choice" that may result in many businesses choosing to cease doing business in Pennsylvania altogether. Such dire predictions regarding the effect of the catchall provision on Pennsylvania businesses are misplaced and overblown. Those predications also completely ignore the public policy reasons for the change in the statutory language.

First, the position advanced by the Greggs is not novel in Pennsylvania. The Commonwealth Court has held the position that the catchall provision imposes strict liability since 2003 when it decided *Percudani*. The Superior Court adopted

Attorney General or the appropriate District Attorney, acting in the name of the Commonwealth of Pennsylvania, may recover, on behalf of the Commonwealth of Pennsylvania, a civil penalty of not exceeding one thousand dollars (\$1,000) per violation, which civil penalty shall be in addition to other relief which may be granted under sections 4 and 4.14 of this act. Where the victim of the wilful use of a method, act or practice declared unlawful by section 3 of this act is sixty years of age or older, the civil penalty shall not exceed three thousand dollars (\$3,000) per violation, which penalty shall be in addition to other relief which may be granted under sections 2 and 4.15 of this act.

73 P.S. § 201-8(b).

this same position in 2012 when it decided *Bennett*. Since those decisions, there is no evidence that Pennsylvania businesses have closed their doors due to a belief that they face greater potential liability for consumer protection actions. Contrary to the suggestion of the amicus, it seems incredulous that a business would forego entering transactions with Pennsylvania consumers if the Court were to ratify the Superior Court's interpretation of the catchall provision in this case.

Second, the General Assembly, in enacting the UTPCPL, has decided that consumers are entitled to protections beyond those provided for under the common law. To the extent there are businesses which do not believe they can continue to operate under the UTPCPL's "constraints," their decision to cease operations would be consistent with the General Assembly's policy choice to discourage businesses from engaging in activities which harm consumers. Businesses have a duty to not engage in deceptive conduct regardless of whether they have a specific intent to deceive consumers. The public good is best served by encouraging businesses to be vigilant in protecting the rights of Pennsylvania consumers under the UTPCPL. This interest is not served by the courts erecting hurdles which – inconsistent with the General Assembly's intent – make it more difficult for consumers to obtain relief under the UTPCPL. *See Danganan v. Guardian Protective Services*, 179 A.3d 9, 16 (Pa. 2018) (the purpose of the UTPCPL includes "equalizing the bargaining power of the seller and consumer, ensuring the

fairness of market transactions, and preventing deception and exploitation, all of which harmonizes with the statute's broad underlying foundation of fraud prevention.").

CONCLUSION

The Court should affirm the judgment of the Superior Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 2,897 words within the meaning of Pa. R. App. Proc. 2135. In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

I further certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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I, Howard G. Hopkirk, Senior Deputy Attorney General, do hereby certify that I have this day served the foregoing Brief For Amicus Curiae Commonwealth Of Pennsylvania In Support Of Appellees Gary L. Gregg And Mary E. Gregg via First Class Mail to the following:

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