

Justice Wecht Defines an Important Standard Concerning Unfair Trade Practices

Justice Wecht authored the Opinion in *Gregg vs. Ameriprise Financial, Inc., Ameriprise Financial Services, Inc. Riversource Life Insurance Company and Robert A. Kovalchik*.

In 1999, Gary and Mary Gregg sought the expertise of Robert A. Kovalchik, a financial advisor and insurance salesperson for Ameriprise Financial, Inc. Engaging in what the trial court would later conclude to be deceptive sales practices, Kovalchik made material misrepresentations to the Greggs to induce them to buy certain insurance policies. The Greggs ultimately sued Ameriprise Financial, Inc., Ameriprise Financial Services, Inc., Riversource Life Insurance Company, and Kovalchik (collectively, Ameriprise), under Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("CPL") 73 P.S. §201-2(4)(xxi). The Court distinctly described the facts of this matter:

In 1999, Kovalchik held himself out to be someone having skill, training and expertise in insurance and investment products and solicited the Greggs to become his customers. Meeting with his new clients, Kovalchik offered a review of the Greggs' financial worth, investment goals, and insurance products. Kovalchik encouraged the Greggs to rely upon his advice and counsel, and to trust him to achieve their goals. This included delegating investment decisions to Kovalchik. In the course of consulting with Kovalchik, the Greggs revealed that they owned seven Prudential Life Insurance policies with a combined value of \$121,000. Kovalchik advised the Greggs to liquidate these policies and place the assets into IDS Life Insurance, a corporation that Riversource Life Insurance later acquired.

Kovalchik advised the Greggs to purchase a new Flexible Premium Variable Insurance Policy (the "Policy") for Mr. Gregg with a spousal rider for Mrs. Gregg. In addition, Kovalchik persuaded the Greggs to surrender their existing IRA accounts and use those funds to purchase new IRAs through IDS. Finally, Kovalchik advised the Greggs that if they also gave him \$300 every month, that money would increase the savings portion of the Policy. Kovalchik's sales pitch led the Greggs to believe that, if the Greggs purchased the new Policy and made annual payments, the Policy would accrue significant cash value that they could use to fund their retirement.

The Greggs followed Kovalchik's advice. The Greggs purchased the Policy; rolled over their existing IRAs into new IRAs with IDS; surrendered the proceeds of their seven Prudential Life Insurance policies; provided Kovalchik with a check for \$300; and authorized an automatic monthly withdrawal of \$300 from their checking account to cover the savings portion of the Policy. Accordingly, Prudential sent several checks to IDS from the liquidated insurance policies.

Unbeknownst to the Greggs, Kovalchik divided their \$300 payment between the Policy and two IRAs. When Prudential sent a check for \$11,601.34 to

the Greggs, Kovalchik promised to deposit approximately \$9,500 from this check into the Policy. Instead, Kovalchik put \$1,700 into each of the new IRAs. Kovalchik put the balance of these proceeds into a new AXP Growth Fund account that he opened for the Greggs. Despite his assertions, Kovalchik did not place any of the \$9,500 into the Policy. Each IRA transaction increased Kovalchik's commission via a surcharge of 5.75%. Further, upon Kovalchik's advice, the Greggs declined to enroll Mrs. Gregg in an Air Force benefits plan that would have paid military benefits to Mrs. Gregg if Mr. Gregg died. The Greggs also began sending Kovalchik an additional monthly check, which they believed was going towards the Policy. Instead, Kovalchik placed these funds into the AXP Growth Fund, again increasing Kovalchik's commissions with a surcharge of 5.75%.

The Greggs' Complaint also asserted, *inter alia*, common law claims for negligent misrepresentation and fraudulent misrepresentation.

The case proceeded to a jury trial on the common law claims, resulting in a defense verdict. The CPL claim proceeded to a bench trial. After the trial court ruled in favor of the Greggs on that CPL claim, Ameriprise filed a motion for post-trial relief arguing (among other points) that the Greggs failed to establish that Kovalchik's misrepresentations were, at the very least, negligent, a finding that Ameriprise asserted was required to establish deceptive conduct under the CPL.

The trial court denied relief, and the Superior Court affirmed. Like the trial court, the Superior Court concluded that the Greggs were not required to prevail on the common law claims of fraudulent misrepresentation in order to succeed on their CPL claim. *Gregg vs. Ameriprise Fin.*, 2018 PA Super. 252, 195 A.3d 930, 936 (Pa. Super. 2018). Applying *Commonwealth vs. TAP Pharm. Products, Inc.*, 36 A.3d 1197 (Pa. Cmwlth. 2011), rev'd on other grounds, 626 Pa. 1, 94 A.3d 350 (Pa. 2014), the Superior Court held that the test for deceptive conduct under the CPL is whether the conduct has the tendency or capacity to deceive without regard to the actor's state of mind. *Gregg*, 195 A.3d at 939.

On appeal, the Supreme Court was tasked with determining whether, as the Superior Court held, a strict liability standard applies to the Gregg's CPL claim. A plain language analysis of the relevant statutory provisions led inexorably to the conclusion that the deceptive conduct under the CPL is not dependent in any respect upon proof of the actor's state of mind. The Superior Court's holding was consistent not only with the plain language of the CPL, but also with Supreme Court precedent holding that the CPL is a remedial statute that should be construed broadly in order to comport with the legislative will to eradicate unscrupulous business practices. See *Commonwealth by Creamer vs. Monumental Props., Inc.* 459 Pa. 450 329 A.2d 812, 817 (Pa. 1974). Accordingly, the Supreme Court affirmed.

The key takeaway points are as follows:

- Supreme Court rules that "catch-all" provision of Unfair Trade Practices and Consumer Protection Law applies to misrepresentation and fraudulent misrepresentation in connection with financial advisor and insurance salespersons.

- Jury found against the plaintiff but the CPL claim proceeded to bench trial.
- The trial court ruled in favor of the Greggs on the CPL claim.
- Superior court affirmed.
- Supreme Court affirmed the Superior Court.
- The Greggs were not required to prevail on the common law claims of fraudulent misrepresentation and negligent misrepresentation in order to succeed to their CPL claim.
- Test for deceptive conduct under the CPL is whether the conduct has tendency or capacity to deceive, without regard to the actor's state of mind.

*Clifford A. Rieders, Esquire
Rieders, Travis, Humphrey,
Waters & Dohrmann
161 West Third Street
Williamsport, PA 17701
(570) 323-8711 (telephone)
(570) 323-4192 (facsimile)*

Cliff Rieders is a Board-Certified Trial Advocate in Williamsport, is Past President of the Pennsylvania Trial Lawyers Association and a past member of the Pennsylvania Patient Safety Authority. None of the opinions expressed necessarily represent the views of these organizations.

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