

# LITIGATION ALERT

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## Strict liability applies to “deceptive conduct” under the catch-all provision of the Pennsylvania CPL

A divided Pennsylvania Supreme Court affirmed the Superior Court and held that the 1996 amended catch-all provision of the Pennsylvania Trade Practices and Consumer Protection Law (CPL) imposes strict liability. Writing for the 4-3 majority, Justice David Wecht, based upon a professed review of the plain language of the statute, concluded the General Assembly’s addition of “or deceptive conduct” to the catch-all provision of the CPL dictated a lesser, more relaxed standard. Thus, the majority characterized that aspect of the statute as imposing strict liability.

### Factual background

Arising in the context of insurance and financial planning, the court’s decision is not so limited. On the facts before the court, the insurance/financial planning company’s agent made certain representations to consumers about how certain insurance products and investment vehicles would be funded and grow. But when it came time to actually fund and grow those policies and accounts, the agent did not follow through with his representations; opting instead to fund certain accounts that increased the agent’s commissions.

The consumers filed a multi-count complaint against the company, including claims for fraudulent misrepresentation, negligent misrepresentation and violation of the catch-all provision of the CPL. A jury trial on the common law misrepresentation claims resulted in a verdict in favor of the company. The company then relied on that verdict in opposing liability in the bench trial on the statutory claim. But, the trial court determined no intent was required and found the company to have violated the CPL. The Superior Court affirmed the bench trial decision on appeal, reasoning that the addition of “or deceptive conduct” to the

statute removed any state of mind element and “imposed strict liability on vendors who deceive consumers by creating a likelihood of confusion or misunderstanding in private, as well as public, causes of action.”

The company appealed to the Pennsylvania Supreme Court, which granted review to determine whether strict liability applies to the catch-all provision of the CPL.

### **Majority’s decision eliminates “state of mind” and imposes strict liability**

The Supreme Court rejected the company’s argument (bolstered by myriad *amici curiae*) that the “or deceptive conduct” language required an intent to mislead. Instead, the court engaged in what Justice Wecht called a review of the “plain language” of the statute and determined that not only did the addition of “or deceptive conduct” “expand that provision beyond fraudulent conduct,” but it also meant “the amended catch-all provision fairly may be characterized as a strict liability offense.”

Supporting this “plain language” analysis, Justice Wecht relied primarily upon:

- Two prior Pennsylvania court decisions,
- The interpretation of “deceptive conduct” by the Federal Trade Commission,
- Black’s Law Dictionary,
- A citation to decisions by courts in four other jurisdictions with “language similar,”
- A law review article,
- The remedial nature of the statute, and
- A 1934 U.S. Supreme Court decision that “assumedly” was in the minds of the General Assembly when it added the language in 1996.

Thus, the majority concluded that “[u]nder the catch-all provision of the CPL, the actor’s state of mind as to either the truth or falsity of the representation or the effect that the misrepresentation will have on the consumer is irrelevant.”

### **Dissent would have imposed a negligence-based “state of mind” requirement**

Writing for the three dissenting justices, Justice Debra Todd also attempted to interpret the plain language of the statute and concluded that the addition of “or deceptive conduct” did not eliminate a state of mind requirement, it simply reduced the level of that requirement. Doing otherwise, according to the dissent, would make the “fraudulent” language surplusage, which courts are not permitted to do when interpreting a statute.

In her analysis, Justice Todd looked not only to the rule against creating surplusage but also noted the lack of an express statement in the CPL supporting strict liability, which the General Assembly routinely adds to statutes when it intends to create a strict liability offense. As for the majority's reliance on one prior Pennsylvania decision, Justice Todd explained that decision was not dispositive because the issue of state of mind was not addressed. She also noted that the other Pennsylvania decision did not eliminate a state of mind requirement entirely. Instead, that decision simply eliminated certain common law requirements, but it did not define the new state of mind required under its "lesser, more relaxed standard."

Ultimately, the dissent would have held that a state of mind requirement was not eliminated by the addition of "or deceptive conduct" language. Instead, that language simply shifted the focus to a negligence-based standard as to whether the company knew or should have known the misleading or confusing effect the statement would have on a consumer. That standard would protect the consumer and "honest businesspeople from incurring unforeseen penalties for statements or acts that no consumer would have been confused or misled by."

#### **Strict liability now prevails**

However, the dissent's view did not prevail and companies operating in Pennsylvania now face a significantly changed landscape when it comes to interacting with the consumer. As a result of the majority's decision, any company that creates a likelihood of confusion or misunderstanding, even if only the result of a failure (intended or accidental) to "clearly and fully explain" something now faces strict liability under the catch-all provision of Pennsylvania's CPL.

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